



LEGALIZING TRANSNATIONAL ACTIVISM

The Struggle to
Gain Social Change
from NAFTA's
Citizen Petitions

**JONATHAN
GRAUBART**

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For
Marilyn Graubart
(1936–1997)
and
Alexander Graubart
(1936–2001)

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P R E F A C E

The politics of the North American Free Trade Agreement (NAFTA) have consumed much of my academic life. I first became interested in the early 1990s, when I took part in the campaign against NAFTA. I opposed the agreement not so much for its specific impact on the three member countries but for what it represented: the triumph of neoliberal economic values and the undermining of hard-fought social regulation of business activity. Despite the sophisticated grassroots campaign put together by opponents in all three member states (joined, to be fair, by more parochial, protectionist groups), NAFTA became law, thanks largely to President Bill Clinton's political skill in using his "New Democrat" credentials to bring along most Republican members of Congress and just enough Democratic members to secure its adoption.

In the post-9/11, post-Bush Doctrine world of today, it is easy to forget that the preeminent global justice issue of the 1990s concerned economic globalization, not war and peace.¹ In retrospect, the 1990s seem like a more quaint and innocent time. Yet the current preoccupation with terrorism, empire, and security does not diminish the significance of the tensions between economic globalization and social justice. I have thus continued to be drawn into the burgeoning academic debate on both transnational activism and the politics of globalization. The resistance to neoliberal economic globalization from below is of particular interest to me.

The case of NAFTA offers an illuminating window into popular challenges to the neoliberal direction of economic integration (a concrete manifestation of economic globalization) and into building social justice alternatives. In fact, the battle over economic globalization has been more

1. I do not mean to deny that even in those relatively optimistic, post-cold war days, devastating conflicts and brutal acts of military repression were taking place in the Balkans, Rwanda, the Congo, Iraq, Colombia, and elsewhere.

concentrated in North America than elsewhere. After all, as I discuss in the Introduction, negotiations over the World Trade Organization proceeded below the radar of social activists until the mid-1990s and did not really become a major focal point until the Seattle protests of 1999. Furthermore, although economic globalization helped deepen European integration in the 1990s and provoked great controversies, western European integration dates from 1950, long before the contemporary era of economic globalization. The European Union is thus far more than a neoliberal-inspired creature and consequently does not provoke the same kind of sharp battles between neoliberal and social justice visions of economic integration that NAFTA does: NAFTA stands out as a decidedly neoliberal institution. Moreover, opposition to NAFTA, even if it comes from a number of ideological perspectives, has centered on the perceived negative impact of a neoliberal system of governance not just on jobs but on a society's ability to regulate business for social ends. In addition, because NAFTA involves two prosperous northern states and one far poorer southern state, an examination of NAFTA struggles enables us to assess the prospects for meaningful North-South collaboration in countering neoliberal-style globalization.

It took me a few years to decide how best to examine North American struggles to interject values of social justice into regional integration. Initially, I doubted that an institutional approach would be productive. I shared the common view that NAFTA's so-called side agreements on labor and the environment were mere window dressing, and of no real significance. I was fortunate, however, to meet Lance Compa, a distinguished international labor attorney and scholar of international and comparative industrial relations, in 1997. Having just served on the North American Commission on Labor Cooperation, Compa was quite familiar with the citizen-petition mechanisms set up by NAFTA's parallel labor agreement, which enabled any North American individual or organization to raise a quasi-legal complaint of government noncompliance with labor laws. He argued that labor activists were using these mechanisms with some promise of success.

I was skeptical at first, given that neither the labor nor the environmental citizen-petition mechanism imposed binding obligations on the targeted government; even if the government "lost" the petition, it was not compelled to change its behavior. Eventually, however, Compa persuaded me. I realized that I had to free myself of the mentality that the only useful legal channels were those that came with clear binding obligations and were reliably enforced. The model of domestic law, in other words, was not an

appropriate one to use in this context. Long a student of international law, I reminded myself that very little of it meets the hard, binding criteria common to domestic law. Nevertheless, governments and, increasingly, nonstate actors wage intense battles about creating and influencing international law. Unless they are all acting irrationally, we can assume that they are operating under the sensible insight that international legal structures do in fact shape the behavior of state and nonstate actors in a variety of ways. The task is to understand how exactly international legal channels exert influence. This is the direction I pursued in analyzing the citizen petitions created by NAFTA's labor and environmental accords.

Indeed, I have come to appreciate that new transnational legal channels, among them NAFTA's citizen-petition mechanisms, have dramatically reshaped the face of international law and offer exciting new possibilities for a range of nonstate actors, including social activists, to advance their own international and domestic political goals. This book reflects my decade-long observation of such dynamics in action with respect to NAFTA's citizen-petition mechanisms. I offer this as my cumulative and comprehensive assessment, knowing that new political, economic, and social developments in North America and elsewhere will continue to alter the relevance of NAFTA's parallel accords in significant and perhaps unexpected ways. I hope the findings presented here will inspire others to pursue promising new developments.

I am most grateful to the friends and colleagues who helped me over the years in developing the insights that inform this book and in improving the actual writing. These include Farid Abdel-Nour, Jeffrey Ayres, Michael Barnett, Janet Byron, Lance Compa, Bruce Cronin, Naoko Kada, Guang Lei, Daniel Lipson, Brian Loveman, Ardeth Maung, Leigh Payne, Neil Richardson, Ronnee Schreiber, Greg Shaffer, and Mauricio Villegas. I also received very helpful substantive comments from an anonymous reviewer. More generally, I have benefited from conversations with my colleagues at San Diego State University's Political Science Department. Finally, I owe a great debt to staff members at NAFTA's labor and environmental agencies and to the many labor and environmental activists in the United States, Mexico, and Canada, who shared with me their experiences in using NAFTA's citizen-petition mechanisms and patiently answered my many questions.

Introduction: Transnational Activism, Soft Law, and NAFTA's Social Model

Given that the two most defining global events of the past decade are the 9/11 terror attacks of Al Qaeda upon the United States and the illegal U.S. war on Iraq, it is easy to forget the intense global debates at the end of the twentieth century over economic globalization. The most vivid expression of popular discontent with neoliberal-oriented economic integration took place at the "Battle in Seattle" during the Ministerial Conference of the World Trade Organization (WTO) in December 1999 (Kaldor 2000). There, a wide global coalition of labor unions, environmentalists, and community activists protested the lack of transparency and accountability in WTO governance and the inadequate attention to the negative social ramifications of increased global economic interdependency. These demonstrations confirmed the existence of a profound global controversy. As the lead story in *Business Week* put it in November 2000, "it would be a grave mistake to dismiss the uproar witnessed in the past few years in Seattle, Washington D.C., and Prague. Many of the radicals leading the protests may be on the political fringe. But they have helped to kick-start a profound rethinking about globalization among governments, mainstream economists, and corporations that, until recently, was carried on mostly in obscure think tanks" (Engardio and Belton 2000, 74).

It may be tempting to conclude that globalization struggles have been eclipsed by renewed fears of nonstate terrorism, on the one hand, and ag-

gressive U.S. interventionism, on the other, as reflected in National Security Strategy Document of 2002 (NSS 2002) and the subsequent U.S. war on Iraq (Gupta and Graubart 2004; Chomsky 2006). In fact, economic globalization remains a central global policy concern. In Latin America, for example, a number of populist-leftist governments have come to power based in large part on opposition to investment and trade liberalization. Even NSS 2002, which is best known for its support of “preemptive” war and the corresponding denigration of conflicting international legal norms, lists the promotion of global economic liberalization as one of the essential U.S. foreign policy goals.¹ At the global level, the WTO and regional trade-investment agreements that formed in the 1990s continue to be the focal point of debate over the direction of global economic governance. As in Seattle, there is a central divide between those who espouse a neoliberal, business-friendly vision and those who prioritize social justice values, like community control over economic policies, ecological health, and adequate wages and labor standards.²

But while the debates remain lively, the neoliberal side has the upper hand at the global level. Despite repeated protests by social activists and some politicians, the WTO has barely incorporated social values into its mandate. The major impediments have been a combination of ideological aversion, lack of elite support, and the resistance from many governments of developing countries to linking social provisions to trade agreements (O’Brien et al. 2000). The social justice camp, however, has enjoyed some success at the regional level by way of the three most developed and institutionalized regional trade-investment agreements, the European Union (EU), the South American Common Market (Mercosur), and NAFTA. Although they feature extensive and deep market liberalization, they also, to varying degrees, contain social provisions and accompanying institutional mechanisms.

To gain a more comprehensive understanding of the status of social justice values in contemporary global economic governance, we are well advised to assess the actual significance of the social provisions found in the leading regional trade-investment agreements. To date, the only one of these agreements whose social provisions have received extensive study is the EU (e.g., Leibfried and Pierson 1995; Kleinman 2002). The EU’s social model is

1. “The National Security Strategy of the United States of America,” September 2002, www.whitehouse.gov/nsc/nss.pdf, p. 1, sec. VI.

2. To be sure, parties also debate over more conventional conflicts between states, such as the dispute over agricultural subsidies and exemptions between North and South.

the most friendly to social justice values. Unfortunately for social activists, the EU's extensive institutionalization across a range of issue areas makes it a model unlikely to be implemented elsewhere. Hence, the EU's social model does not reflect the current global status of social values in trade-investment agreements.

A far better model for illustrating the current status of social justice values in trade investment is that found in NAFTA and its two parallel accords, the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC). In effect since 1994, NAFTA and the parallel accords reflect the relative global strengths of a probusiness neoliberal ideology, on the one hand, and broader social values, on the other. NAFTA privileges multinational trade and investment interests. In response to popular discontent at NAFTA's neoliberal orientation, the North American governments added the parallel social accords partially to address the concerns of social activists.

NAALC and NAAEC combine information gathering and public consultations with a set of quasi-judicial citizen-petition mechanisms. These mechanisms are the most prominent and valuable features of the parallel accords. They enable individuals and nongovernmental organizations (NGOs) to make quasi-legal allegations of a member government's failure to uphold agreed-upon labor or environmental standards. A specially created administrative body reviews the petition, conducts an investigation, and issues findings and recommendations. Owing to political compromise, the findings are nonbinding, making the petition process a form of "soft law." As argued below, such limitations are not a distinct North American phenomenon but reflect general resistance on the part of most governments to incorporate hard social provisions. Thus NAFTA's parallel accords present an innovative trade-linked social model that is acceptable to a range of governments. Accordingly, examination of their significance in practice offers a valuable global public policy window into the prospects for interjecting social values into trade-investment governance.

A number of scholars and activists have dismissed the significance of the citizen-petition mechanisms because of their soft-law nature (e.g., Anderson, Cavanagh, and Ranney et al. 1996; Economic Policy Institute et al. 1997; Wallach and Naiman 1998; Fox 2002).³ In practice, however, North American labor and environmental activists have contradicted such dismiss-

3. Shortly before NAFTA's enactment, president of the AFL-CIO Lane Kirkland dismissed NAALC as a "bad joke . . . a Rube Goldberg structure of committees all leading nowhere" (Grayson 1995, 177).

als through savvy selection and engagement of the citizen-petition process. The most successful petitions have extracted concessions from local and state governments and from private companies, including the following:

- The state of Washington increased its staffing level in enforcing health and safety regulations of migrant workers. Also, Stemilt, a large warehouse packing company, agreed to card signing in place of formal elections to determine union certification, enabling the Teamsters to gain plant representation.
- The Canadian government created a federal water-use plan with sanctioning authority to reduce damage to local fish habitat caused by hydroelectric facilities.
- The Mexican government launched a new informational campaign in the *maquiladora* zone to educate workers on laws prohibiting discrimination against pregnant workers. Also, several U.S. companies agreed to discontinue pregnancy screening.

To be sure, petitioners have not always succeeded, and the NAALC mechanism has lost some of its promise since 2000. But the mechanisms have been much more politically valuable than anticipated and thus merit far more attention than they have received to date.

This study is the first book-length review of NAFTA's citizen-petition mechanisms. I focus on the empirical record of North American activists in using them.⁴ In particular, I have developed an original framework to explain why, how, and under what circumstances citizen-petition mechanisms have yielded political value. I synthesize insights from studies on international law, legal mobilization (i.e., litigation used to advance broader political reform), and transnational activism. With respect to the "why," this book shows that activists have filed citizen petitions to advance ongoing domestic political causes, such as union-organizing drives or campaigns to preserve local habitats. In short, activists have engaged the petition process to legalize the political dispute. Legalization commits the target government to engage in a legal dialogue initiated by the activists whereby the government must articulate a legal defense of its behavior before an outside review body. Through this process legalization gains more attention and status for the petitioners' political cause.

Moving to the "how," I show how petitioners combine legal and politi-

4. As of January 2007, fifty-eight NAAEC and thirty-five NAALC petitions have been filed, most of them by environmental, labor, and human rights groups.

cal strategies to advance their petitions. Such an integrated strategy makes sense given the soft-law nature of the petition process. In order to prod a change in behavior from the government, petitioners politicize the legal process by employing political means to promote the legal action and pressure compliance. Taking the legal and political together, my framework finds that activists are most successful in the petition process when they secure a favorable finding from the quasi-judicial body and implement a complementary and sophisticated political campaign.

Through applying this conceptual framework to a close empirical examination of NAFTA's citizen petitions, this book not only sheds light on the real status of social values in today's largely neoliberal world of trade-investment governance but also advances our understanding of a prominent but little understood feature of contemporary global governance: the transnational quasi-judicial mechanism. In this way I reconceptualize the changing roles of international law and transnational activism in shaping global and domestic political trends in an increasingly global era.

Background of NAFTA's Citizen-Petition Mechanisms

Negotiations over NAFTA began in the early 1990s. All three North American governments, along with influential commercial actors, supported an accord that would expand economic liberalization and integration. Initially negotiators focused strictly on commercial issues. As negotiations gained public attention, however, labor, environmental, and other activists warned of the negative impact a neoliberal-oriented NAFTA would have on social values in the region. Such groups pressured President George H. W. Bush to address labor and environmental issues because he needed fast-track approval from Congress (Cameron and Tomlin 2000).⁵ Bush agreed to support a program of assistance for dislocated workers and an environmental plan for the Mexican-U.S. border and to include international environmental treaties in the main text of NAFTA (Cameron and Tomlin 2000).

The 1992 U.S. presidential campaign increased the status of labor and environmental issues. Bill Clinton, running as a "New Democrat," sought both to show his support for markets and liberalized trade and to accommodate the concerns of core Democratic Party constituencies about job displacement, labor rights, and environmental standards. At a campaign

5. Under fast track, Congress limits itself to a simple yes or no vote on whether to pass implementing legislation rather than consider various amendments to the agreement.

speech in Raleigh, North Carolina, he supported NAFTA, provided the United States negotiated additional agreements on labor and the environment, as well as safeguards against import surges (Cameron and Tomlin 2000). By the end of 1992 the governments had completed NAFTA negotiations and Clinton was elected president. Clinton agreed not to renegotiate NAFTA and pushed the reluctant presidents of Mexico and Canada to negotiate parallel accords on labor and the environment.

The Clinton team initially bargained for moderately strong accords on labor and environmental provisions. Clinton wanted to gain the support of enough Democrats in the House while not losing Republican votes or antagonizing his Wall Street supporters, who supported a NAFTA free of social provisions (Cameron and Tomlin 2000). He supported the creation of an independent regional body that would research and disseminate information on labor and environmental standards and practices in North America, promote the advancement of such standards, and investigate citizens' complaints of labor and environmental violations. Clinton also proposed a dispute-settlement mechanism to hear state-to-state complaints of violations and issue sanctions for persistent violations. The Mexican and Canadian governments opposed the U.S. proposals for encroaching too heavily upon state sovereignty. They sought a weaker institutional apparatus that lacked enforcement provisions or sanctions, and separate secretariats under the authority of each member government rather than under a strong regional body (Grayson 1995).

The governments agreed that NAAEC and NAALC would be overseen, respectively, by a Council of Environmental Ministers and a Council of Labor Ministers. Both accords list a broad set of substantive principles on labor or environmental standards that each member state pledges to promote, and establish secretariats to implement the agreements. As a concession to the Canadian and Mexican governments, the accords avoid regional standards. Rather, they bring enforcement of *domestic* labor and environmental standards to regional scrutiny.

Beyond these overall similarities, the institutional implementation is quite distinct between the two bodies.⁶ In NAAEC, the secretariat is autonomous and has wide authority. It conducts extensive research, disseminates information, and reviews petitions from citizens or NGOs that allege failures by a member government to enforce its domestic environmental laws. A distinctive, innovative feature is NAAEC's creation of an independent Joint Public Advisory Committee (JPAC), made up of fifteen environmental, aca-

6. The details and statutory references for both accords are covered in subsequent chapters.

demic, and business representatives. While each government appoints five members, the JPAC members act in their individual capacity. JPAC's mission is to ensure broad citizen input into the process and to facilitate citizen communication with the secretariat and the Council of Environmental Ministers. There is also a state-to-state dispute mechanism, whereby governments can complain of noncompliance by another government before an ad hoc arbitration panel. Such panels are authorized to impose fines on parties found to engage in a "persistent pattern of failure to effectively enforce an environmental law," but only after a series of efforts to reach an "action plan" have failed.

NAALC creates a much thinner institutional apparatus. Its secretariat has far fewer resources than its NAAEC counterpart and is restricted to gathering and publishing information on regional labor trends. It has no equivalent to JPAC. Investigatory authority is reserved for separate National Administrative Offices (NAOs). Each NAO is a governmental body established within the labor department of the government to which it belongs. Each reviews citizen petitions of alleged failure by another member government to enforce its own labor laws. NAALC also has a state-to-state dispute mechanism for "trade-related" persistent failures to enforce domestic labor laws. Like the environmental accord, fines can be imposed only after efforts to reach an action plan have failed. Issues subject to sanctions are limited to health and safety, minimum wages, and child labor.

The differences in the institutional structures of NAALC and NAAEC stem from domestic political concerns of the U.S. and Mexican governments in the early 1990s. The Clinton administration pushed harder for a strong regional secretariat in the environmental accord because it had more common ground with the environmental movement than with labor unions. Several environmental groups, including the World Wildlife Fund and the Environmental Defense Fund, were amenable to supporting a NAFTA that accommodated environmental concerns (Cameron and Tomlin 2000; Dreiling 2001). By contrast, labor movements were strongly opposed to NAFTA and unlikely to be won over short of strong concessions that would never be accepted by Canada, Mexico, or many Republicans in the House of Representatives (Cameron and Tomlin 2000). Accordingly, Clinton was more receptive to environmental concerns, and gave environmental groups significant input into the negotiations. Upset with the process, the AFL-CIO declined to participate in the negotiations (Grayson 1995).

Mexico's long-governing Institutional Revolutionary Party (PRI) insisted upon the separate government-controlled review bodies. It feared that an

autonomous regional body with broad investigatory authority would be more likely to interfere with the PRI's long-standing practice of institutionalizing preferential treatment for a federation of allied labor unions, led by the Confederation of Mexican Workers (CTM) (Cameron and Tomlin 2000; see Middlebrook 1995).⁷ For similar reasons, the PRI demanded that union issues, such as rights of association and collective bargaining, be exempt from the state-to-state dispute-resolution process.

Although the institutional differences have proved significant, as shown in Chapters 3 and 4, there are nevertheless striking similarities between NAAEC and NAALC. Neither, for example, gives much weight to sanctions for noncompliance. Although sanctions are envisioned in each agreement through the state-to-state dispute mechanism, the procedural obstacles in place make them a remote option. This made it possible for Mexico to give ground on its initial absolute opposition to including sanctions. As one Mexican negotiator happily observed, "The mechanisms for sanctions are extremely long—a country has to be looking for sanctions to be imposed" (Cameron and Tomlin 2000, 200). To date, no government has attempted to invoke the sanction process in either accord. What stand out in both accords are the soft-law citizen-petition mechanisms.

The Global Public Policy Significance of NAFTA's Social Model

A number of activists and scholars regard NAFTA's social accords as nothing more than a symbolic gesture by President Clinton to secure congressional approval of NAFTA's implementing legislation. They consider NAFTA's social model too undeveloped to merit serious analysis (Anderson, Cavanagh, and Ranney 1996; Economic Policy Institute et al. 1997). In this view, the social accords fail to mitigate the neoliberal bias of the core treaty, which not only liberalizes services and investment and protects intellectual property rights, but also grants foreign investors direct access to binding transnational commercial panels to protect their rights (Kibel 2001).

This study challenges the conventional neglect of NAFTA's social model and argues that the global public policy relevance for understanding the status of social values in trade-investment agreements is pronounced. Most dismissals of NAFTA's social accords suffer from an unrealistic ideal that fails to factor in the broader neoliberal trends taking place in the governance of global and regional trade investment. To redress this shortcoming, this sec-

7. President Carlos Salinas made the CTM a full consultant at the negotiations.

tion evaluates NAFTA's social model according to actual global trends in contemporary trade governance. Through a review of the relative strengths of neoliberal and social justice forces, I show that NAFTA's social model is not merely an idiosyncratic creature of domestic politics but is institutionally quite advanced and is the most viable of the existing trade-linked social regimes.

The Emergence of Neoliberalism as the Dominant Norm in Global Trade Governance

The preferential treatment NAFTA gives to commercial interests over social values reflects an overall shift toward neoliberalism as the guiding vision of international trade governance. Neoliberalism promotes market-oriented, deregulatory economic policies and increased private economic activity across state borders. To appreciate neoliberalism's popularity among influential policymakers, it is necessary to connect it to a set of dynamics known as globalization and the emergence of a powerful and assertive group of transnationally oriented private economic actors (Oman 1994; Held 1995).

Globalization conveys the notion of a qualitative deepening in cultural, political, and economic interconnections across state borders (Held 1995). Factors that further globalization include state policies, technological advancements in communication and travel across state borders, and the increased transnational activity of nonstate actors. Economic globalization refers to the rapid rise in the movement of goods, capital, and services across state borders and increasing transnationalization in the scope of activities conducted by private economic actors. Globalization has both top-down and bottom-up dimensions, which influence each other. From a top-down perspective, state policymakers effect closer interconnections by entering into new or strengthened international trade arrangements that facilitate economic interdependence. State policymakers have increasingly turned to more neoliberal visions of international trade that privilege greater economic activity across state borders over the social regulation of such activity.

Transnational private economic actors are a major bottom-up dimension of globalization. To be sure, multinational corporations have long exerted great influence.⁸ But in recent times technological and organizational improvements, coupled with greater global connections with companies and suppliers abroad, have enabled companies to internationalize their scope of

8. In some cases, MNCs played a major role in undermining an unfriendly government, such as United Fruit in Guatemala in 1954 and ITT and Anaconda in Chile in 1973 (McCormick 1989).

production rather than simply operate plants in multiple states (Oman 1994; Busch and Milner 1994, 260). They have truly become transnational corporations (TNCs).

Transnational economic actors have significantly expanded their influence on state and global public policies. To begin with, they are immensely wealthy actors able to advance their positions before governments. The top TNCs earn more in sales revenue than the gross domestic product of more than a hundred countries (Cusimano, Hensman, and Rodrigues 2000, 268). Moreover, TNCs and financial actors have greater use of the exit option. Even if they are still tied to their home states, TNCs can readily shift parts of their production abroad, especially to nearby states (Oman 1994, 11–24). Knowing that states rely upon them for needed investment and finance, TNCs and international financial actors have been able to bargain, especially with developing states, from a strong negotiating position (Stopford and Strange 1991; Oman 1994; Milner and Keohane 1996). Because of their broader scope, transnational economic actors lobby not just for specific tax breaks, subsidies, or exemptions but for neoliberal policies, such as decreased social regulation and the liberalization of foreign investment.

The combined changes pushed by neoliberal-oriented policymakers and prominent transnational private economic actors explain the fundamental restructuring of international trade governance over the past decade. While the old trading regime, focused around the General Agreement on Trade and Tariffs (GATT), enjoyed a great deal of success, transnational economic actors and governing elites came to view it as outdated, by the late 1980s, for a more globally integrated economy (Kahler 1995). GATT had, after all, taken shape in an era when international economic activity was modest and accounted for little of most states' overall GNP (Eichengreen and Kenen 1994). Its focus was on trade in manufactured goods and largely excluded foreign investment, services, and “behind-the-border” domestic policies, like subsidies to industries and regulatory policies (Kahler 1995).

The contemporary international trade and investment regime took root at the end of the 1980s. Its key components have been liberalization of foreign investment and services, enhanced intellectual property protection, reduction of subsidies, and implementation of more transparent and uniformly applied economic regulatory policies (Kahler 1995). At the global level, this agenda has been furthered by new agreements on trade in services (GATS), intellectual property rights (TRIPS), and trade-related investment measures (TRIMS), and the founding of a powerful new trade body, the World Trade Organization.

The most extensive trade governance has emerged at the regional level, led by the EU, NAFTA, and Mercosur. Although quite distinct, all three include much more extensive liberalization on investment, services, and behind-the-border issues than what is found at the WTO level (Mytelka 1994; Kahler 1995). In addition, each has been driven primarily by a desire to make it easier for transnational businesses to operate throughout the region (Kahler 1995; Taylor-Gooby 2004; Malamud 2005).

Contesting Neoliberal Trade Governance with Social Justice Norms

The emergence of a predominant neoliberal norm in the era of globalization has provoked a countermovement that seeks to make social values preeminent over market interests (Gill 1991; Cox 1996). The negotiation of comprehensive global and regional trade agreements has provided a major spark. These agreements have elicited great public attention and prompted labor organizers, environmentalists, and other social activists to confront the challenges of neoliberal economic globalization (Cook 1997; Kaldor 2000; Ayres 2002). To varying degrees, northern and southern activists have campaigned against major multilateral trade-investment initiatives (O'Brien et al. 2000). Each set of activists shares a goal of re-embedding international trade governance within broader social values, such as equality, cultural diversity, and community control (Broad 2002).

Although this countermovement has made inroads in influencing public policy discussion of global and regional trade governance, its influence remains considerably weaker than pro-neoliberal constituencies. The latter, such as TNCs and financial investors, possess many more resources for lobbying governments and promoting their agenda in influential media like the *New York Times* and *Financial Times*. Although social activists can raise a compelling alternative vision of equity and self-governance, they have far fewer overall resources and less access to elite channels (especially true of southern activists). A related disadvantage is social activists' smaller capacity to mobilize at the transnational level, recent advances notwithstanding. Only the best-endowed NGOs can devote full-time staff to international trade issues. Transnational economic actors, by contrast, have an immediate material stake in the outcome of international trade-investment governance and possess more sophisticated transnational organizing strategies.

An additional impediment for social activists is the North-South gap in perspectives and agenda, despite greater communication and collaboration in recent years. Although northern and southern social activists share an aversion to the neoliberal vision of enhanced international trade and invest-

ment, their specific concerns and goals differ considerably. Northerners have focused on the dangers to industrial and agricultural jobs and to domestic labor and environmental standards (O'Brien et al. 2000). Southern activists have been most concerned with privatization, cutbacks in state subsidies for essential services, harm to indigenous communities, depletion of natural resources, and the surrendering of autonomy to Western commercial interests (Anderson 2000; Khor 2000). Moreover, many southern activists are suspicious of the motives of northern opponents of trade agreements and fear that calls for workers' rights and environmental standards reflect disguised protectionism (Khor 2000; O'Brien et al. 2000).

Meanwhile, groups opposed to the inclusion of a social agenda have been quite strong. Almost all southern governments oppose social linkages that require higher domestic standards in labor and environmental matters, while few if any Western governments strongly endorse such linkages (O'Brien et al. 2000). Transnational economic actors, by and large, are unreceptive to the inclusion of binding social standards in trade agreements (Manley and Lauredo 2004, 85).

Given the fragmentation and relative weakness of social justice constituencies, efforts to embed global and regional trade agreements in social values have had only modest success. All such agreements, even the EU, continue to be dominated by a neoliberal agenda. Nevertheless, social activists have succeeded in changing the terms of the debate and placing social issues firmly on the agenda of trade governance. To varying degrees, they have secured institutional support for social values.

The WTO and Social Issues: A Late Start and Minimal Progress

The effort to interject social values into the WTO-led global trade regime has been an uphill fight from the outset. Initially, state negotiators at the Uruguay round mostly ignored social issues. Meanwhile, labor movements, environmentalists, and human rights activists did not seriously address trade governance issues until the 1990s, long after transnational economic actors had taken an interest (O'Brien et al. 2000). As a result, member governments did not include labor rights or environmental provisions in the substantive scope of the WTO or in the revamped GATT treaty or accompanying agreements of GATS, TRIMS, and TRIPS. Advocates of labor and environmental standards also faced widespread opposition from southern governments, which have considered such social linkages as protectionist and as intolerable encroachments upon their sovereignty. They agreed only reluctantly to behind-the-border economic initiatives to gain greater access to

industrialized markets and accommodate foreign investors (Kahler 1995). Nevertheless, as momentum has grown for moderating neoliberal-driven trade governance with a social agenda, labor and environmental issues have received greater attention at follow-up WTO ministerial summits (O'Brien et al. 2000).

Environmental issues entered the WTO agenda in the early 1990s. Helping them along was the momentum created by the 1992 UN "Earth Summit" and the backlash from a 1991 GATT dispute panel, which held that a U.S. ban on the import of Mexican tuna, to protect dolphins, was an unfair trade restriction (Kahler 1995; O'Brien et al. 2000). WTO negotiators set up a "working group on environmental measures and international trade" that culminated in the establishment of a separate WTO Committee on Trade and Environment (CTE) in 1994. The agenda of the CTE, a purely deliberative body, has in fact been focused on both the environment and trade. On the one hand, it incorporates input from environmentalists on making trade environmentally friendly. On the other hand, the CTE responds to the concerns of neoliberal constituencies by scrutinizing all international environmental agreements for any adverse impact on trade (O'Brien et al. 2000; Shaffer 2001). While the CTE has provided institutional access to environmental NGOs, then, it has by design not served as a vehicle for advancing an environmental agenda. Environmentalists have made little institutional headway elsewhere.

Labor movements have enjoyed even less success. Led by the International Confederation of Free Trade Unions (ICFTU), they made a concerted effort at the first WTO ministerial meeting in Singapore in 1996 to include core labor rights provisions.⁹ Although most independent labor unions from the South supported these efforts, the dominant push came from the West. The ICFTU secured support from a number of Western states, especially Norway, France, and the United States. Ultimately the labor rights advocates accomplished very little owing to the strong opposition of a coalition of southern states, business organizations (which substantially outnumbered labor delegates at Singapore), and some Western governments (O'Brien et al. 2000, 90–94). A number of southern activists also opposed the linkage efforts. They questioned the motives of Western labor movements and feared that any linkage would amount to further protectionism against developing countries (O'Brien et al. 2000; see Khor 2000). The end product was the inclusion in the Singapore ministerial declaration of a tentative

9. These are nondiscrimination, the right to organize and engage in collective bargaining, freedom from forced labor, and nonexploitation of child labor (Wilkinson and Hughes 2000).

statement of support for core international labor standards. More significantly, the statement identified the International Labor Organization (ILO) as the appropriate organization for addressing such issues and cautioned against “the use of labour standards for protectionist purposes.” No further progress has occurred in the ensuing years.

Overall, activists have attained no concrete social commitments at the WTO. They have, however, worked with disgruntled southern governments to hinder expansion of the WTO’s scope until a number of issues are satisfactorily addressed.¹⁰ Indeed, the dispute over social issues helped precipitate the breakdown of negotiations at the ministerial meeting in Seattle in 1999.¹¹ On a related front, labor and environmental activists were instrumental in pressing member states of the Organization for Economic Cooperation and Development (OECD) to withdraw a proposed multilateral agreement on investment rights because it did not include labor and environmental provisions.¹²

The impasse at the WTO is not surprising given its large and diverse membership in terms of geography, political, cultural, and economic traditions, and level of development. Such diversity limits the extent of governance acceptable to all. Serious tensions exist not just over social issues but over a number of behind-the-border issues. We should expect more progress at the regional level, which has seen more extensive behind-the-border international trade governance.

The EU and Social Issues: Developing a “Social Europe”

The most extensive social provisions are found in the EU; they are known collectively as “Social Europe.” The social agenda includes democracy, transparency, social equity, and citizen accessibility. The EU structure is readily accessible to nonstate actors. In fact, the European Commission has actively encouraged the direct involvement of business actors and social actors in the implementation of EU policies (Streeck and Schmitter 1991; Leibfried and Pierson 1995; Taylor-Gooby 2004). On labor standards, there are both purely aspirational provisions and binding provisions that can be

10. Most southern governments continue to oppose the inclusion of labor and environmental standards. They seek resolution on intellectual property rules (especially concerning pharmaceutical patents) and the opening of Western markets to agricultural products. They have welcomed the support of social activists in resolving these issues. BBC News, “Poor Nations Demand Fair Globalisation,” July 22, 2001, http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1451000/1451475.stm.

11. “A Global Disaster,” *Economist*, December 11, 1999.

12. “The Sinking of the MAI,” *Economist*, March 14, 1998, 81–82; Smythe (2000).

invoked before the European Court of Justice (ECJ). The former is reflected by the Community Charter of Basic Social Rights for Workers, enacted in 1989. It encompasses core workers' rights and broader economic and social rights, such as the right to social protection, a living wage, and vocational training. The Social Protocol and Agreement, adopted in 1992 as part of the Maastricht Treaty, enables the enacting of binding laws on workers' rights. The EU has adopted binding labor provisions on health and safety, equal treatment of men and women, and worker consultation for companies operating in multiple EU countries and employing more than 150 people (Harvey, Collingsworth, and Athrey 1999). Because of sovereign sensitivities and the reluctance to extend Social Europe too far, union-derived rights such as collective bargaining, freedom of association, and the right to strike are specifically excluded from the scope of Europe-wide legislation (Rhodes 1995; Taylor-Gooby 2004).

Environmental issues have been addressed separately. Like the WTO's CTE, the EU's environmental provisions serve the dual goals of preventing economic expansion from hindering environmental protection and keeping domestic environmental legislation from impeding the common market. With respect to the latter goal, the treaty prohibits all domestic regulations that hinder trade (Article 30). But it allows exceptions for policies aimed at protecting people, animals, or plants (Article 36). The ECJ has extended the exceptions to encompass domestic policies that deal with "essential requirements," including health and environmental protections (Esty and Geradin 1997, 558). Such measures, though, must be both nondiscriminatory and the least trade-restrictive means for accomplishing their objective. Moreover, the burden of proof is on the domestic government, although the ECJ has relaxed the rigor of this requirement by allowing precautionary motivations (Douma and Jacobs 1997). A more affirmative means of promoting environmental standards is the adoption of harmonized standards on certain environmental matters, such as vehicle emissions, chemical substances, and pesticides, that all member countries must follow. The degree of rigor and level of specificity of such standards has varied considerably. Some environmentalists complain that the standards merely reflect the lowest common denominator (Esty and Geradin 1997).

With the EU's inclusion of central and eastern European states, there have been some significant developments in recent years. The EU has devoted greater institutional attention to protection of the environment. Yet limitations remain. The director-general for environmental matters lacks enforcement power to compel member states to comply with EU environ-

mental directives. In addition, individuals have no legal recourse against states for noncompliance with EU environmental law (McGiffen 2005). Outside of the environment, EU social policy has been circumscribed. Since 1997 the EU has been more concerned with making social policy more “employment friendly” (Taylor-Gooby 2004, 12). Since 2001 the EU has shifted its social policy to an “open method of coordination” whereby the commission sets benchmark goals on social values and each state implements a two-year “action plan” for implementation (Atkinson 2003). This direction does not appear to have accomplished much (Rhodes 2003).

The limitations to the EU’s social regime notwithstanding, it is the most institutionally advanced of all trade-linked social regimes. Unlike other trade agreements, the EU has binding provisions on labor and environmental issues, which are implemented and enforced through the main institutions. Understandably, some social activists envision the EU’s social agenda as the desired starting point for creating a trade-linked social regime (Harvey, Collingsworth, and Athrey 1999; see Malamud 2005, 429). These hopes, though, are misguided in the contemporary global context. The EU experience is *sui generis*. Its range of substantive provisions and strong, supranational institutional bodies, like the commission and the ECJ, encroach substantially upon the sovereignty of member states. Such extensive integration builds upon a long postwar history and regional resolve not about to be replicated elsewhere in the foreseeable future. Furthermore, because most member states have long traditions of social regulation of the economy, there is general receptivity to including substantive social provisions in the body of the regional trade-governing structure. Moreover, with the EU’s recent expansion to include much poorer central and eastern European states, its receptivity to regional social provisions appears to be waning. To get a more representative view of the challenges faced by social activists in embedding social values in contemporary international trade governance, it is necessary to assess the more modest regional trade agreements.

Mercosur and Social Issues: Focus on Consultation

Mercosur consists of five full members—Brazil, Argentina, Uruguay, Paraguay, and Venezuela. The first four have been members since Mercosur’s formation, while Venezuela joined in 2005. There are also five associate members—Chile, Bolivia, Peru, Colombia, and Ecuador. The exact legal status of associate members is ambiguous, but they possess little input into the institutional governance of Mercosur (Arieti 2006). Formed in 1991, the Mercosur treaty aspires in rhetoric to a common market vision comparable

in its ambition to that of the EU. It calls for eliminating all trade barriers, establishing common external tariffs, and harmonizing macroeconomic policies (Manzetti 1994). In practice, Mercosur's integration has been much more modest. It has proceeded unevenly and mostly in a negative form—through gradual reductions in trade and investment restrictions—rather than affirmative coordination of policies (Bernier and Roy 1999; Malamud 2005). Policies are usually developed in consultations between the heads of state at the biannual meetings of the Common Market Council (Bernier and Roy 1999). There is also an executive body, the Common Market Group (Grupo Mercado Común, or GMC), in charge of implementing policies, but unlike the European Commission it possesses little autonomy. The overwhelming emphasis of Mercosur has been on market-friendly integration (Bizzozero 1996; Malamud 2005).

Mercosur's commercial emphasis has made it difficult terrain for interjecting social values. The original treaty included no social provision apart from a statement in the preamble that integration would “accelerate . . . economic development with social justice.” Prodding from labor movements and other social activists, however, has spurred the inclusion of a social agenda over the years. This agenda has consisted of nonbinding declarations of principles and the establishment of consultative bodies. These bodies are the Joint Parliamentary Committee, made up of selected members of parliament from each country, the Economic-Social Consultative Forum, and a series of advisory subgroups and committees to the GMC. The advisory committees have been the most accessible to nonstate actors and address a range of economic, technical, and social issues. The subgroup on labor matters, employment, and social security addresses labor issues. It has a tripartite structure of labor, business, and governmental delegates. Initially the subgroup followed the neoliberal tendencies of the governmental and business delegates and featured discussions on how to keep labor costs down (del Castillo 1993; Barbosa and Veiga 1994). Over time, labor unions have been able to influence the agenda. They persuaded the subgroup to call on all states to ratify thirty-four ILO conventions considered necessary for ensuring fair labor standards in the region (Alimonda 1994; Harvey, Collingsworth, and Athrey 1999).

In 1998 the full member states signed a social-labor declaration, which has some structural similarities to NAALC. It commits each country to respect a series of labor rights but avoids the imposition of binding obligations or harmonized standards (Compa 1999b; Bülow 2003). Similarly, the declaration uncouples implementation of its principles from the institutional

process established in the main agreement on trade-investment issues. More affirmatively, it parallels NAALC in creating regional and national institutions to implement the underlying principles. Unlike NAALC, but like NAAEC, the regional body is given most prominence by way of a tripartite sociolabor commission. Its mandate is to examine how to improve working conditions in the region and to promote greater member compliance with domestic and international labor obligations. While potentially significant, implementation of this body has been slow, owing in part to an overall lag in the integration process in recent years (Bülow 2003; Grugel 2005). It therefore remains to be seen how this process will play out in practice. The central labor federations from the four countries have also long proposed inclusion of a social charter, made up of ILO provisions and other international human rights instruments (Harvey, Collingsworth, and Athrey 1999; Compa 1999b). Member governments have yet to accept this proposal.

Mercosur has been slower to address environmental issues. Although the treaty mentions harmonization of environmental policies, the language is phrased to prevent environmental regulations from hindering the development of a common market. It took two years following ratification for Mercosur to address environmental issues explicitly; it did so only when the full members set up a special advisory meeting on the environment (Blum 2000). Now a permanent subgroup made up of environmentalists, business groups, and environmental ministers, it has addressed business concerns that environmental measures not hinder the common market and environmental concerns that integration not come at the expense of environmental standards. The group also promotes the building of environmental institutions.

To date, little concrete has come out of the labor or environmental advisory bodies or of social policy more broadly. Its social policy remains largely rhetorical (Grugel 2005; Malamud 2005). Hampering progress are the resistance of economic elites in the member states and wide disparities in development among the member states (Grugel 2005). Nevertheless, labor movements and environmentalists have gained an institutional voice that could prove of cumulative value. Moreover, the three largest members, Brazil, Argentina, and Venezuela, are led by left-of-center governments critical of neoliberalism (Carranza 2004). Progress on social issues, however, is likely to take a backseat to two more immediate concerns, especially of Brazil's Workers' Party. One is to stabilize faltering economic integration (Porrata-Doria 2004). The other is to ensure Mercosur's continued viability in the face of an ambitious neoliberal hemispheric trade-investment agreement (the FTAA) being advanced by the United States (Carranza 2004).

The Relative Strength and Viability of the NAFTA Social Model

The social models of Mercosur and NAFTA may be decidedly weaker than Social Europe, but they have the virtue of being able to be broadly generalized. Neither involves the extensive scope of institutionalization found in the EU, and both are politically viable, given the relatively weak position of social values in shaping contemporary international trade governance. For both Mercosur and NAFTA, the social institutions are disconnected from the main commercial bodies and focus on consultation and nonbinding principles. Yet NAFTA's social model offers considerably more to activists in practice. Not only does the NAFTA social model have the research-gathering and consultation components found in Mercosur, it also enables individuals and NGOs to file complaints of noncompliance against a member government before an outside review body. Indeed, the scope of issues open for transnational citizen petitions extends beyond anything provided in the EU. As demonstrated in this study, this citizen-petition mechanism has proven political potency.

NAFTA's social model stands out further for its creative underlying principle, which is sensitive to sovereign concerns yet potentially demanding: enforcement of a state's own domestic laws on labor and environmental standards. At first glance, this principle appears uncontroversial and insignificant; it seems merely to commit a state to uphold normative principles agreed upon in its own internal political deliberations. In fact, however, the principle places a state's domestic enforcement practices under formal regional scrutiny. Of course, a state could choose to pass weak laws on labor and environmental standards. But this option cuts against a strong global trend. Most states have ratified the International Covenant on Civil and Political Rights and are members of the ILO, which obligates them to uphold all core labor standards (OECD 1996). Similarly, most states have ratified one or more of the major multilateral environmental treaties. In addition, the very act of negotiating to join a trade bloc with the United States or other Western states pressures a state to establish internationally acceptable labor and environmental standards (see Manley and Lauredo 2004). Many states do, however, endeavor to make such value-based laws purely rhetorical. The value of incorporating a formal international component, implemented by an accessible citizen-petition mechanism, is that it exposes the state to outside scrutiny and thereby raises the cost of willful neglect.

The involvement of the United States, the most influential state, further

increases the broader policy relevance of NAFTA's social model. At the best of the United States, NAFTA's social model has served as the template for many recent or emerging multilateral and bilateral trade agreements.¹³ The U.S. commitment to linking trade agreements with labor and environmental standards has survived into the George W. Bush administration. The 2002 Bipartisan Trade Promotion Authority Act requires the inclusion of environmental and labor standards in treaty negotiations (Manley and Laredo 2004, 92–93). Accordingly, the focus on domestic enforcement has extended to post-NAFTA U.S. trade agreements with Jordan, Singapore, and Chile.¹⁴ The latter two, executed in 2003, call upon each government to create an office in its environmental and labor departments to review “public communications.”¹⁵ The Central American Free Trade Agreement has the same provision in its labor chapter (16.4[3]) and establishes a regional secretariat to review citizen petitions on environmental issues (17.7–8). For the proposed Free Trade Area of the Americas there is much division on social issues, but the NAFTA social model is the preferred U.S. approach (Manley and Laredo 2004).

In short, the NAFTA social model is relatively advanced, potentially potent, and widely generalizeable. Thus, its empirical record informs us of the real possibilities of mitigating the harmful social consequences of increased trade-investment integration through international institutional means.

The Scholarly Significance of Examining NAFTA's Social Model

Beyond reflecting a poor global public policy perspective, much of the neglect or slighting of NAFTA's social model comes from a failure to situate NAFTA's citizen-petition mechanisms in broader trends of global governance. Although these mechanisms have their peculiarities, they do broadly reflect the evolving nature of international governance and law. First, inter-

13. In addition, the bilateral agreement between Canada and Chile adopts NAFTA's social model.

14. For the U.S. trade agreements with Chile and Singapore, the labor and environmental provisions are listed in the main text. Whether such inclusion gives them greater status than what they receive in the NAFTA “side agreements” is doubtful. For either NAALC-NAAEC or the bilateral main agreements, use of the sanctionable dispute-settlement mechanism is limited to sustained patterns of noncompliance and can be invoked only by governments. Given the NAALC and NAAEC record of nonuse, it is unlikely that the dispute-settlement mechanism will be used for labor or environmental matters elsewhere.

15. The labor and environmental provisions in the U.S.-Chile free trade agreement are set forth in chapters 18 and 19, respectively. For the U.S.-Singapore agreement, the labor and environmental provisions are set forth in chapters 17 and 18, respectively. Only the chapter on labor mentions public communications.

national law is increasingly transnational, in terms of interacting closely with domestic developments and being directly accessible to nonstate actors. Second, transnational international law regularly incorporates quasi-judicial mechanisms. Under these mechanisms, an administrative body reviews claims from a nonstate actor that a state party has failed to comply with the treaty's commitments (Chayes and Chayes 1995, 224–25). Although the administrative body interprets legal norms, it is not a formal court, and the process takes place without the formal trappings of an adversarial proceeding.

Transnational quasi-judicial mechanisms are especially prominent with respect to public interest norms like human rights and environmental standards (Weiss 1997, 3; see Romano 1999). Examples of such mechanisms include the UN Human Rights Commission, the World Bank Inspection Panel, and the ILO's Committee on Freedom of Association (Helfer and Slaughter 1997; Fox 2000; Swepston 1998).

In addition to not recognizing their prominence, current scholarship lacks the conceptual tools to understand the political significance of transnational quasi-judicial mechanisms. Of particular relevance are gaps in studies of international law and studies of transnational activism. Scholarship on international law has traditionally viewed it as a command-oriented phenomenon that orders states to adopt or discontinue specific policies. Yet transnational mechanisms, especially soft-law ones, are not designed for this purpose. Rather, as elaborated upon in Chapter 1, their point is to interject a legal process into a potentially contentious political matter. In addition, scholarship on international law has been mostly state-centric and thus has missed the growing influence of nonstate actors in shaping international legal developments. This shortcoming is costly for appreciating transnational quasi-judicial mechanisms, given that social activists are typically the party that gives significance to such mechanisms. Indeed, activists seek international codification of social values such as human rights not because they expect an international body to enforce such provisions directly but because they view codification, coupled with institutional mechanisms, as a valuable lever for advancing domestic changes.

Conversely, scholarship on transnational activism has been slow to incorporate international legal developments into its analysis. In particular, the bulk of the scholarship has not appreciated the politically sophisticated manner in which social activists use accessible international law channels for political gain.

The appeal of this book's close study of NAFTA's citizen-petition mecha-

nisms is that it provides a conceptual framework that expands upon and synthesizes insights from studies on both international law and transnational activism. Specifically, I show how a transnational quasi-judicial mechanism offers a distinctly legalized political platform by which activists can boost an ongoing domestic political cause.

I look at the interaction between transnational activism and international law as the legalization of politics and the politicization of law. In the first scenario, international law mediates and influences political contestation even where the legal channel imposes no formal policy obligations (other than participating in the legal process). I focus on both the functional qualities of law in offering explicit standards and procedures and, even more important, the legitimating qualities of law in defining appropriate behavior among state and nonstate actors. This is the focus of Chapter 1. The politicization of law explains how activists use transnational legal channels. Rather than treat them as conventional legal channels, activists employ transnational legal mechanisms as a platform for advancing a broader political goal, such as strengthening the independent labor movement. The goal is not simply to gain a favorable legal finding but to advance the broader political agenda. Activists will therefore use a mixture of legal and political strategies to get the maximum political value out of the transnational legal channel. This theme is developed in Chapter 2.

Method and Data

This study is designed to assess the conceptual framework outlined above, which finds that activists' success with transnational quasi-judicial mechanisms rests upon a combination of validation from the transnational quasi-judicial body and the incorporation of a complementary and sophisticated political strategy. My findings are based on all the citizen petitions filed by activists from 1994 through 2002. I followed each petition closely, from the time activists first considered using the citizen-petition mechanism through the actual filing, the response of the quasi-judicial bodies, and the ultimate political outcome. I carefully assessed activists' goals in filing the petition, the level of political effort employed to promote the petition, the degree of legal support given by the quasi-judicial body, and the target actor's response to the process. In this way I have been able to discern causal connections, if any, between the actions of the activists and the quasi-judicial body and those of the target actor.

I traced this process through field research and archival work. My primary

data come from in-depth interviews and analyses of documents generated by the petition process. I interviewed lead coordinators for the petitions, staff at the NAAEC secretariat, JPAC and the NAALC NAOs, and others with firsthand knowledge of the petitions. I analyzed the petitions, the reports of the quasi-judicial bodies, transcripts of public hearings, responses from governments and private firms, strategy papers of petitioners, and relevant correspondence. I also participated in meetings sponsored by JPAC and the NAAEC secretariat that evaluated NAAEC's petition mechanism. Finally, I reviewed secondary studies of the NAFTA petitions and media reports.

The time period chosen, 1994–2002, offers a rich set of case studies. It encompasses considerable variety in the degree of political sophistication applied by petitioners, the level of review body support, and the results attained. Such variety enabled me to assess carefully the relationship between each of these factors. To supplement these findings, I include an overview of recent developments through 2006. Overall, this study shows how the process works against distinct societies (with the contrast between Mexico, on the one hand, and the United States and Canada, on the other hand, being the most pronounced) in the midst of shifting political climates (for example, with new governments coming to power in Mexico and the United States in 2000–2001), and with distinct institutional structures between the labor and environmental mechanisms. Accordingly, my findings present a firm basis for shaping a robust theory of transnational quasi-judicial mechanisms.

Organization of the Book

Chapter 1 draws on international relations and international law scholarship to develop a solid understanding of the nature and influence of international law in an increasingly interdependent age. Although the scholarship has become more sophisticated in its understanding of international law, it remains undeveloped in its analysis of less traditional but increasingly popular forms of international law, like transnational soft law. I explain why transnational soft-law mechanisms, especially quasi-judicial bodies, have proliferated, and how they assume political significance. I focus on the role of international law in regulating and shaping political contestation, which I refer to as the legalization of politics. The chapter closes with a specific assessment of NAFTA's labor and environmental citizen-petition mechanisms.

Chapter 2 looks at social activists, the most crucial actor in shaping public interest-oriented transnational quasi-judicial mechanisms. It examines

how transnational activists interact with international law. I begin with a review of the growth of and literature on transnational activism. I identify promising insights into transnational political opportunity structures but fault the scholarship for its failure to address, in a sophisticated manner, the role of international law. The chapter then develops an original conceptual framework to explain how accessible international law offers a valuable and unique transnational political platform for activists. In doing so, I synthesize scholarly insights on international law, transnational activism, and legal mobilization. The chapter concludes by applying my framework to the NAFTA setting.

Chapter 3 reviews all of the activist-initiated NAFTA labor petitions in order to assess the explanatory effectiveness of this book's theoretical framework. It includes comprehensive tabular presentations and detailed histories of illustrative petitions. I focus on the level of political mobilization engaged in by petitioners, the degree of support given by the quasi-judicial body to the petition, and the results attained. The chapter also discusses the impact of important political transitions in the United States and Mexico in 2000–2001 and updates developments through 2006. I show how these important changes in domestic political settings have diminished the political value of the transnational citizen-petition mechanism.

Like Chapter 3, Chapter 4 reviews each activist-initiated environmental petition according to this book's conceptual framework. It also shows how NAAEC's stronger institutional apparatus enables it to be a more valuable political platform than the NAALC mechanism. In particular, I assess how NAAEC's institutional advantages have allowed it to withstand domestic political attacks from member governments after the political transitions of 2000–2001.

The Conclusion summarizes the major findings of this book, considers the scholarly and public policy implications, and suggests a follow-up research program that can deepen our understanding of transnational quasi-judicial mechanisms. Such a research program would allow continued advances in appreciating the evolving influence of international law and transnational activism in a more globalized and legalized world. The Conclusion also hazards some guesses about what to expect of NAFTA citizen petitions in light of contemporary political developments. I close with a recommendation that social justice advocates not write off social mechanisms like those found in NAFTA's parallel accords. Rather, they should continue to use such mechanisms where conditions are most promising for useful political gain, and lobby on other fronts for more fundamental improvements in global economic governance.



Legalizing Politics

Dismissals of NAFTA's social model reflect a broader shortcoming in the popular and scholarly understanding of international law. The popular view treats international law as a purely command-oriented phenomenon, whereby international law generates binding regulations to constrain state-to-state behavior. International legal (IL) and international relations (IR) scholarship has also held this command-oriented view of international law but has recently developed a more sophisticated understanding. Contemporary scholarship points to broader functional and legitimating qualities of law, which include the articulation of appropriate means of discourse and legitimate standards of behavior (Onuf 1989; Arend 1999; Reus-Smit 2004). The prevailing scholarship, however, suffers from its focus on more traditional forms of international law: legal arrangements exclusively between states that feature binding obligations. As a result, its understanding of nontraditional forms of international law, such as transnational quasi-judicial mechanisms, is hampered. Transnational quasi-judicial mechanisms directly incorporate nonstate actors and downplay command features in favor of legal process. Given the increased prominence of such mechanisms and their significance in practice, it is incumbent upon scholars to expand their conceptual reach.

To enable a careful appreciation of transnational quasi-judicial mechanisms, this chapter develops a multifaceted and nuanced appreciation of international law. I begin by assessing the recent growth and complexity of

international law and review the responses of IR and IL scholarship to such developments. I identify the valuable insights found in recent scholarship and the continued limitations with respect to unconventional transnational instruments such as the transnational quasi-judicial mechanism. The chapter proceeds to assess the popularity and significance of the transnationalization of international law. I emphasize the power of international law, even in unconventional forms, to mediate and shape political contestation (legalizing politics), especially at the domestic level. I close with a consideration of what to expect from NAFTA's labor and environmental citizen-petition mechanisms.

Traditional Scholarly View of International Law: Dismissive or Formalistic

To appreciate the evolution in contemporary scholarship of international law, we must first consider how most IL and IR scholars in the United States regarded international law for much of the cold war era. To begin with, both disciplines took unsatisfying approaches and had little cross-disciplinary communication. IL literature presented a formalistic analysis in which international law took the form of explicitly binding treaties or customary law that states were assumed to follow. It regarded all other international arrangements as simply political. Consistent with this formalistic understanding, the bulk of IL scholarship either provided close interpretation of international treaties and customary law, engaged in normative evaluations of existing laws, or prescribed new laws (Arend 1996; Koh 1997).¹ It rarely asked how international law takes shape or why it is followed (Franck 1990, 7).

This formalistic perspective made IL scholarship largely irrelevant to IR scholarship for many years. Influenced by the commanding presence of the realist Hans Morgenthau, most IR scholars regarded international law as having little independent influence, owing to the absence of a centralized global enforcing mechanism (Morgenthau 1960; Barker 2001). In this

1. One significant exception was the legal realist-inspired "New Haven" school, pioneered by Myres MacDougal and Harold Lasswell. This camp viewed and continues to view international law as a process interacting with political and social structures. Its emphasis, however, is prescriptive. It proposes improvements to further world order and social justice (Koh 1997; Arend 1999).

view—still held by many realists—when a conflict exists on a nontrivial issue between states' interest and compliance with international law, the former will prevail (Downs, Ročke, and Barsoom 1996). Given their conviction that law follows politics, IR scholars focused on state interests and power politics and devoted little attention to international law.

Revived Interest in International Law

While the cold war era was uninspiring for U.S. scholarship on international law, the post-cold war era has seen an impressive resurgence. The timing is not coincidental. The superpower conflict often overshadowed other global developments among IR scholars in the United States and tended to suppress interest in other legal issues.² With the end of the cold war, international organizations like the UN and the WTO, and international law, have assumed much greater prominence. States have turned to multilateral legal instruments to address a range of issues, including trade, finance, human rights, the environment, and international criminal law (see Goldstein et al. 2000). In response, scholars have devoted much more attention to international law and international organizations, which has sparked cross-fertilization between IR and IL scholarship and increased the sophistication of the work.

Unlike IR scholars, IL scholars by definition have always been interested in international law.³ But the proliferation of international law in the post-cold war era has led many IL scholars to reconceptualize their approach to international law. They have become interested in the reasons for and the significance of the growth of international law. As a result, a new generation of process-oriented IL scholars assesses how international legal arrangements emerge and how they affect state behavior (Beck 1996; Slaughter et al. 1998).⁴ They have reached out to IR scholars and helped fuel a resurgence of interest in international law among them (Slaughter et al. 1998).

In particular, the new generation of IL scholars has followed the growth

2. There were a variety of important legal-based norms to consider during the cold war, such as sovereignty and appropriate uses of force. Yet most U.S.-based IR scholars focused on power politics.

3. IL scholars did, however, face great skepticism from traditional legal scholarship about the significance of international law. The prominent legal positivist H. L. A. Hart (1994) argued that international law is a primitive system because it lacks the secondary institutions found in established domestic legal systems, such as a legislature, a true world court, or an effective police force.

4. Plenty of more traditional IL scholarship is still devoted to either textual analysis of legal obligations or normative prescriptions for desirable legal developments.

of institutionalist IR scholarship. Emerging in the 1980s as an alternative to realism and neorealism, the institutionalists have developed a strong interest in the impact of institutions (broadly understood), rules, and norms in shaping state behavior (Krasner 1983). Institutional scholars divide into two broad camps, rationalists and constructivists (Keohane 1988). Rationalists (sometimes known as “neoliberal institutionalists”) adopt a functional, interest-based view of institutions. They examine the ways in which institutions enable states to overcome the natural distrust produced by an anarchic global order and engage in mutually cooperative behavior. Rationalists identify the ways that institutions clarify mutually beneficial obligations, develop long-term relationships (to minimize opportunistic, short-term defections), and make state behavior more transparent (to deter cheating) (Axelrod and Keohane 1993).

Constructivists look beyond a rational-actor, self-interest focus and posit a mutual interaction between norms—defined as collective expectations about proper behavior (Katzenstein 1996, 54)—and interests. In this perspective, actors pursue their perceived interests but within a context of collective understandings of appropriate behavior (Wendt 1994; Katzenstein 1996). Collective norms of sovereignty, for example, influence states’ perceptions of civilized and uncivilized behavior (Wendt and Duvall 1989). Policymakers seek to abide by collective norms not simply out of self-interest, but thanks to their internalization of underlying standards of behavior. Constructivists see institutions as embodiments of collective norms and as vehicles by which states come to internalize those norms.

Remarkably, despite their focus on institutions, both rationalists and constructivists originally neglected international law and even formal international organizations (Goldstein et al. 2000, 392). Instead, they focused on implicit understandings among states, which they referred to as “regimes” (Krasner 1983; Kratochwil and Ruggie 1986). By the 1990s, the lingering historical bias of their discipline against international law had dissipated. Spurred by IL scholars, institutionalists have come to appreciate the relevance of international law in influencing global developments. This newfound respect for international law was symbolically validated when the premier IR journal in the United States, *International Organization*, devoted its 2000 summer issue to international law.

Not surprisingly, the rationalist and constructivist approaches to international law are quite distinct. Rationalists highlight the functional value of international law. For them, international law enables states to reach mutually desirable goals, such as increased security or accelerated economic

growth. International law's appeal is that it provides explicit, high-profile normative benchmarks for states to follow (Lipson 1991). Consistent with their emphasis on functionality, rationalists would attribute the surge in international law in recent years to increased interdependency among states. Thus, as economic, environmental, and security developments have become more transnational in scope, policymakers have turned to more explicit and precise international arrangements. A further functional appeal of international law is that it conveys a higher level of commitment among states to the issue in question, be it trade, global warming, or something else (Lipson 1991; Abbot and Snidal 2000). In terms of how international law matters in practice, rationalists point to its clear procedures for reducing transaction costs and minimizing uncertainty. Legal procedures monitor state compliance, resolve differences in interpretation, and establish consequences for noncompliance (Abbott and Snidal 2000).

While useful as far as it goes, the rationalist wing of institutionalism leaves important questions unexamined, especially about international law's role in conveying an added seriousness of commitment. To rationalists, this signaling of a serious commitment furthers the long-term institutionalization of mutually beneficial patterns of behavior and dissuades parties from opportunistic, short-term defection. It is not clear, however, from a purely functionalist view how international law conveys this added status. Lacking is an explanation of how international law induces a greater sense of obligation.

Constructivist studies have responded to this challenge. Following up on the work of Hedley Bull (1977) and the "English School" of IR scholarship, constructivists view law not simply as functional but as constitutive in guiding states' views of appropriate international behavior (Kratochwil 1989; Koh 1997; Arend 1999). International law has this power because of its identification with legitimacy (Arend 1999, 21). States accept the obligation to abide by established legal norms not out of self-interest but out of a shared commitment to law as a foundational framework for international interactions (Hurrell 1993). Laws on acceptable and unacceptable forms of state intervention, for example, influence broader global understandings of sovereignty. By associating international law with the legitimation of norms, constructivists give a fuller account than rationalists do of why states enter into legal arrangements. States turn to law not just for functional reasons but because law effectively constitutes interdependency. In this view, international law does not emerge simply as a response to interdependency. Rather, the law validates and strengthens interdependency for a

given issue area. For example, North American leaders entered into NAFTA not just to facilitate greater economic activity but to give formal recognition to North American integration and a neoliberal vision of political economy. Indeed, it was this integration that sparked such strong public controversy above and beyond the agreement's expected net impact on economic interaction in the region.

Constructivists have developed insightful accounts of compliance, aided by the communication between IL and IR scholars. Each discipline, using constructivist ideas, has contributed complementary strengths. IR scholarship has cogently explained the power of norms in general in shaping actors' behavior. Yet it has typically lacked precision in identifying the specific dynamics by which norms are disseminated and internalized (Katzenstein, Keohane, and Krasner 1998). IL scholarship, for its part, has not done a very good job of integrating legal rules into a broader study of norms, nor has it paid much attention to power politics or material interests. But IL scholarship has attended closely to the workings of legal dynamics. Collectively, constructivist-influenced IL and IR scholarship has combined the strengths of both disciplines to explain how legal dynamics induce states to accept legal commitments.

The constructivist account focuses on legal discourse and process. Legal discourse involves a high degree of formality and precision and a focus on principled ideas (Onuf 1989; Arend 1999). Participants justify their behavior and propose resolutions based on accepted standards of appropriate behavior (Franck 1990, 190–94; Abbott and Snidal 2002, 429). By contrast, justifications based on interest or power are regarded as illegitimate (Abbott et al. 2000, 409). The standards are derived from terms of the treaty, legal authorities, legal reasoning, and general principles of law (Chayes and Chayes 1995, 116–22; Abbott et al. 2000, 409). The legal process consists of the forum and procedures for mediating the legal discourse. It includes reviewing competing legal arguments, gathering evidence, conducting investigations, and issuing findings and recommendations (Keohane, Moravcsik, and Slaughter 2000). Overall, the legal process draws parties into a formal discourse that invokes and validates the underlying legal norms. Rather than simply provide a means for settling disputes among states, legal process enables states to accept both the legitimacy of the underlying rules and the process by which they were interpreted. As Thomas Risse and Kathryn Sikkink (1999, 17) observe, “the more actors ‘talk the talk,’ the more they entangle themselves in moral discourse from which they can’t escape in the long run.” The losing state may not be happy with a negative deci-

sion, but when the process has legitimacy it is likely to accept the process as fair and thereby change its behavior (see Franck 1990, 91–146).

Explaining the Popularity and Significance of Transnational Soft-Law Mechanisms

Although IR and IL scholars have developed a more sophisticated understanding of international law, they have made less progress in understanding nontraditional forms of international law. They offer little conceptual guidance for appreciating the recent proliferation of transnational law, that is, international legal mechanisms that give a direct voice to nonstate actors (Romano 1999; Keohane, Moravcsik, and Slaughter 2000). As a result, transnational soft-law mechanisms like NAFTA's citizen petitions receive little attention or are wrongly dismissed as insignificant. In fact, NAFTA's citizen-petition mechanisms are typical of transnational law in terms of featuring legal process and downplaying hard commitments. These transnational soft-law mechanisms indicate a greater reach and complexity of international law in contemporary global governance. Rather than slight these mechanisms, we should ask why transnational soft-law mechanisms have attained prominence and how they exert influence.

Why Has Transnational Soft Law Surged?

What explains the appeal of transnational legal mechanisms? Functional factors offer a partial answer. With greater contemporary global interdependency, interconnections have deepened not just among governments but among a great range of nonstate actors. As a result, a number of nonstate actors, including corporations, financial actors, and activists, have assumed transnational scope. State actors (i.e., governments), then, have greater incentives, in areas of high transnational involvement, to extend international legalization directly to nonstate actors. Failure to do so could undermine the expected gains from legalization in reducing uncertainty and transaction costs. By the same token, it is also in the interest of transnational nonstate actors to facilitate transparent and favorable cross-border rules on issues of concern to them, whether commercial sales, direct investment, financial transactions, or human rights standards. Such actors have thus become significant promoters of transnational legal arrangements.

But, as with international law in general, functional factors are not the only reason for the growth of transnational soft law. Law's power to legiti-

mize also drives the prominence of transnational law. As noted, the international legalization of an issue, such as trade or global warming, validates the importance of the issue as a matter of international concern. The validation is all the more pronounced where nonstate actors are incorporated directly into the legalization. Because both governments and nonstate actors view legalization as giving added status to an issue, each has pushed for transnational legal arrangements in certain areas. One reason why European policymakers, for example, extended EU and previous European Community legal structures to nonstate actors was to instill a deeper transnational European identity among individuals living in the EU states (Streeck and Schmitter 1991). Nonstate actors, for their part, lobby states for legalization of issues because they associate legalization with enhanced legitimacy. Social activists have especially been motivated by law's legitimation qualities to push for more transnational legal regimes on human rights and other value-based issues (Goldstein et al. 2000, 397).

The next question is why many transnational legal regimes feature soft-law mechanisms. By soft-law mechanism I mean a legal process that does not formally obligate the parties to conform to the underlying codified norms. In other words, soft-law mechanisms combine legalization with enhanced flexibility. Seen in this light, governments can be expected to prefer soft-law mechanisms where they desire the functional and legitimating qualities of legalization but are uncertain about the benefits of the arrangement. The soft-law aspect gives the governments an out if the arrangement turns out to be disadvantageous. Another reason to settle for a soft-law arrangement is that governments are reluctant to cede sovereignty on a given issue (Abbott and Snidal 2000, 437).

Often, however, governments settle for soft-law mechanisms even when they would prefer no legalization at all. They agree to the soft-law mechanisms in response to the demands of nonstate actors for hard legalization. This scenario is most common for public interest norms, like human rights and environmental standards. Social activists lobby for hard, legalized commitments, while governments resist for a variety of reasons, including concerns about negative consequences and the undermining of sovereign prerogatives. They may not, however, be politically able to ignore the demands of activists, especially if activists are able to mobilize significant public support. As a result, governments will turn to soft-law mechanisms as a political compromise. By agreeing to the soft-law arrangement, governments can demonstrate their support for the underlying public interest but not commit themselves to making unwanted changes in behavior (Szasz 1999; Abbott and Snidal 2000).

The transnational quasi-judicial mechanism provides an especially viable compromise between reluctant governments and activists. Governments retain flexibility and sovereign prerogatives, but activists still get something tangible. Transnational quasi-judicial mechanisms provide normative benchmarks and draw state and nonstate actors into a discussion mediated by a legal process. By bringing out the pivotal legal dynamics, transnational quasi-judicial mechanisms give the issue higher status. To be sure, that state and nonstate actors give significance in general to the creation of transnational quasi-judicial mechanisms does not mean that they will automatically have political influence in practice. That depends on what sort of legal and political dynamics are at play in a given situation. These dynamics are explored in the next section.

How Do Transnational Quasi-Judicial Mechanisms Assume Political Significance?

Those who dismiss nonbinding transnational quasi-judicial mechanisms like NAFTA's citizen petitions fail to appreciate the complex interaction between international law and state behavior. As noted, the command-oriented view, whereby international legal channels issue orders that states follow, portrays a simplistic and ultimately inaccurate picture of international law's significance. A more accurate view sees the international legalization of a given issue as the interjection of functional and legitimating qualities that influence state behavior. The task is to assess the degree to which transnational quasi-judicial mechanisms project such qualities.

As a starting point, it is useful to consider how formally binding international judicial mechanisms, like the International Court of Justice or the ad hoc international criminal tribunals, exert influence on state behavior. The temptation, based on a command-oriented view of international law, is to argue that hard international judicial bodies exert influence precisely because they have binding authority. Such a mechanistic answer is unsatisfying. After all, in the international realm, even binding judicial channels typically lack effective enforcement authority. More persuasively, one can turn to functional reasons. International judicial bodies have authority because the state parties accept that compliance with the findings of such bodies is in their long-term interest. While useful, this explanation suffers from the same shortcoming found in functionalist accounts of international law in general. In this case, how do international judicial bodies help state parties focus on long-term interests so that they will comply with rulings detrimental to short-term interests? We are back to the question of how

international legalization induces a sense of obligation among the parties to the agreed-upon arrangement.

Specifically, how do international judicial bodies induce a commitment of the state parties to the process even in the absence of direct sanctioning authority?⁵ IL scholar Thomas Franck offers a compelling analysis through an examination of international courts. He adopts a process-based definition of legitimacy whereby a “rule-making institution . . . exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process” (Franck 1990, 24). In this analysis, a court attains legitimacy when states recognize it as having authority and competence to interpret the legal norms at issue. To attain this legitimacy, courts must establish expertise in the subject, issue consistent and principled rulings, apply transparent procedures, and be readily accessible. Once they gain legitimacy, courts are able to further the legitimacy of the legal norms under review.

Although there are important distinctions between the formal international courts examined by Franck and nonbinding transnational quasi-judicial bodies, the focus on the review body’s legitimacy remains pivotal. If transnational quasi-judicial bodies can be accepted by the relevant parties as appropriate and competent actors for interpreting states’ normative commitments, they will be able to influence state and nonstate actors’ behavior—even if they cannot explicitly order the parties to conform. But one cannot simply treat transnational quasi-judicial bodies like formal international courts. The former typically have a more precarious status, in that they enjoy less support from the state parties to begin with, and less fixed procedures. A careful analysis is thus needed of whether transnational quasi-judicial bodies will be motivated to attain judicial legitimacy and how they can accomplish this goal.

Consistent with the scope of this study, I focus on transnational quasi-judicial bodies that reflect a political compromise between activists seeking hard legalization and governments that resist any legalization. A safe starting assumption is that a quasi-judicial body is like most bureaucracies in that it wishes to persist. To do so, it must satisfy its core constituencies: the governments that created it and hold the collective power to dissolve it, and the activists who seek to advance the underlying norms under the quasi-judicial

5. It is understood even within the U.S. judicial context, where courts can rely on the executive branch to enforce their rulings, that judicial authority rests upon the legitimacy of the judiciary in U.S. society.

body's scope of review. Given that the governments are generally wary of the quasi-judicial process, they are likely to resist an overly "judgmental" review body. Indeed, as discussed in Chapters 3 and 4, all the North American governments have tried to curtail the authority of the environmental quasi-judicial body, and Mexico has also targeted the labor counterpart. Activists, by contrast, expect something substantive from the review process. As observed by the deputy general counsel for Human Rights Watch, review bodies that are unreceptive to activists' concerns risk losing their interest and thereby lose practical relevance (Pokempner 1997).

To negotiate these cross interests, the quasi-judicial body needs a balanced approach that accommodates fundamental concerns of both the governments and the activists. To elicit activists' support, it helps to adopt a liberal standard of admissibility. Early dismissals go a long way toward dampening activists' enthusiasm for the process. Yet, to placate the state actors, the quasi-judicial body needs to tread carefully in its substantive evaluations. Raising too strong a challenge to state behavior, at least before the political climate is ripe, invites political backlash.

To gain lasting relevance and stability, a quasi-judicial body cannot be seen as simply a political creature. To justify its continued existence, it needs to attain respect as a competent actor qualified to mediate the process and to pass judgment upon the legal issues at stake. Like any bureaucracy, the quasi-judicial body will seek to build a reputation for expertise and principled behavior (Barnett and Finnemore 1999). As a legal bureaucracy, it needs to establish its legal competency and fairness. The quasi-judicial body can thus be expected to follow the legitimacy-enhancing measures described by Thomas Franck (1990). These include gaining expertise in the substantive matters at issue, implementing consistent and transparent procedures for review, following its own precedents, and justifying its findings and procedures according to legal mandates and provisions.

There is, then, reason to believe that a quasi-judicial body will be motivated to attain legitimacy in the eyes of activists, governments, and interested observers as a neutral and principled decision-making actor. If successful in this goal, the quasi-judicial body is in a position to validate activists' causes (see Franck 1990; Young 1994; Koh 1997). The review body can begin by allowing the process of legal discourse to gather momentum. This preliminary validation signals that the activists' cause has merit and deserves a full review. It also draws the target government into a conversation based upon a legal discourse initiated by the activist. A subsequent substantive finding in favor of the activists gives further momentum. It

presents an expert benchmark that activists can invoke in the future against the government (Koh 1991). As a result, the government is continually under pressure to justify its behavior according to the legal benchmark issued by the quasi-judicial body.

What to Expect from NAFTA's Labor and Environmental Citizen-Petition Mechanisms

Whether, and to what degree, a quasi-judicial mechanism exerts influence in practice depends on a variety of factors, including the mechanism's institutional structure and the receptivity and vulnerability of the states under review to legal arguments. Because these two factors are of great importance in the present study, I assess them here with reference to NAFTA's labor (NAALC) and environmental (NAAEC) citizen-petition mechanisms. As we shall see, there are reasons to expect the NAAEC petition process to carry more legitimacy than the NAALC process, and to expect both processes to exert the most influence on the Mexican government.

How the Institutional Structure Affects the Quasi-Judicial Body's Legitimacy

The institutional structure substantially determines whether the transnational quasi-judicial body will have the motivation and competence to develop a high level of legitimacy. Especially important factors are the amount of support given to the review body, its level of independence from the governments, and the set of procedures employed. For each aspect, the NAAEC review process has a decided advantage over its NAALC counterpart.

Support for the review body consists of financial resources, staff, and complementary institutions that promote the review process. In the NAFTA setting, the member governments provide greater financial resources and staffing to the NAAEC citizen-petition process than to the NAALC one. NAALC mandates no set obligation of financial resources or staffing. It simply requires that each government maintain a separate agency (an NAO) within its labor department, led by a politically appointed secretary, that reviews citizen petitions and implements other NAALC commitments. NAAEC establishes a unified regional secretariat with a specified overall budget for all secretariat activities. The annual budget is \$9 million.⁶ NAAEC

6. Council Resolution 04-04, Funding of the Commission for Environmental Cooperation for the Financial Year 2005 (C/C.01/04-04/RES/04), July 19, 2004, www.cec.org/Files/pdf/COUNCIL/Final-SRo4-04_en.pdf.

does not specify a budget for review of citizen petitions, but as of 1998 the Council of Ministers has allocated two attorneys and two assistants exclusively to citizen petitions.

The NAAEC review process enjoys substantial complementary institutional support from the NAAEC-created Joint Public Advisory Committee (JPAC). Consistent with its mandate to promote robust citizen input in the activities of the secretariat, JPAC has been a strong supporter of the citizen-petition process. It is empowered to sponsor public events, workshops, and independent studies on any environmental issue relevant to North American concerns. As discussed in Chapter 4, JPAC has devoted a good deal of its efforts to encouraging greater public involvement in the citizen-petition process and to improving the autonomy and resources of the secretariat's petition review process. NAALC, by contrast, offers very little complementary institutional support for the NAO review process.

The complementary institutional support contributes as well to the NAAEC secretariat's autonomy, that is, its ability to act independently of the wishes of the member governments. To be sure, no intergovernmental organization can afford to dismiss the sensitivities of member governments, given that even those with the most independent capacity are ultimately beholden to the member governments for their continued survival. But the more an international institution has a formal mandate to act independently of the governments, the greater autonomy, and hence legitimacy, it has. Also important is the staffing of the institution. Are the top officials acting in their individual capacity or as representatives of their governments? As discussed in the Introduction, NAALC's NAOs possess significantly less autonomy than the NAAEC secretariat does. Each NAO secretary is under the direct authority of the government's secretary of labor. The NAAEC secretariat, by contrast, is independent of the member governments. Moreover, its staff members act in their individual capacities.⁷

A final institutional advantage of the NAAEC review process concerns the procedures employed. Recall that one important way a review body establishes its legitimacy as a competent and principled actor is through development of consistent, transparent, and accessible procedures. By these standards, the NAALC review process is a mixed bag. The accord leaves review procedures to the discretion of each national NAO. There is thus considerable variation between the NAOs, derived from distinct governmen-

7. As noted in Chapter 4, however, the secretariat faces significant constraints from the member governments collectively. Specifically, the Council of Ministers must give its approval before the secretariat can conduct a full investigation or disseminate its findings.

tal cultures, on the type of procedures employed and on the levels of transparency and accessibility. The U.S. NAO, especially under President Clinton, has adopted clear judicial procedures and made most petition-related documents readily available. Conversely, the Mexican NAO has adopted less formal and more opaque procedures and has not made documents easily accessible. NAAEC provides strong support at the regional institutional level for clear and transparent review procedures. The secretariat publicly articulates and applies an explicit set of procedures. Indeed, it has a mandate to be transparent to all “stakeholders,” which include private industry and environmentalists. Thus the secretariat disseminates on its Web site all petition-related documents in English, Spanish, and French. Moreover, with the assistance and prodding of JPAC, it regularly solicits wide public input on the accessibility and effectiveness of its review procedures.

Receptivity and Vulnerability of Distinct Types of States to Transnational Quasi-Judicial Processes: Challenging the Liberal View

Just as the institutional characteristics of a transnational quasi-judicial body influence the review body’s effectiveness, so too do the characteristics of the states under review, including their domestic political, economic, and legal structures. There are, of course, many differences between Mexico, the United States, and Canada. But the most pronounced distinctions are broad structural ones between the United States and Canada on the one hand and Mexico on the other. The former are economically advanced liberal democracies with strong and respected legal systems, gaps in practice notwithstanding. Mexico is best characterized as a “semi-periphery” country (Chabat 1997). Its governing elite over the past decade has endeavored to establish Mexico as a “first world” liberal democracy through such means as entering into NAFTA and opening up a formerly closed electoral system. The latter step enabled the electoral defeat of the long-ruling Institutional Revolutionary Party (PRI) in the 2000 presidential elections. Yet Mexico still contains large economically underdeveloped sectors, widespread poverty, and a legal-administrative system difficult for citizens to access (Middlebrook 2004; Magaloni and Zepeda 2004). What differences, then, should we expect in terms of relative receptivity or vulnerability to a transnational quasi-judicial review?

One way to approach this question is to consider which type of state is most likely to comply with an international legal process. A common view articulated among U.S. and other northern policymakers and held by liberal

IR scholars is that liberal democracies are most supportive of international law (Slaughter 1995; Moravcsik 1997). The reason for this greater receptivity, so the argument goes, is that liberal democracies have open political systems and a strong domestic commitment to the rule of law. Accordingly, governments of liberal democracies should be receptive to transnational legal processes because they already have a high regard for the rule of law. Moreover, in open societies there are plenty of domestic actors willing and able to mobilize domestic channels and the transnational legal process to pressure compliance on the part of governments (Risse-Kappen 1995; Cortell and Davis 1996). Thus both the political and legal elements of liberal democratic states make the governments of such states especially receptive and vulnerable to the influence of transnational legal processes such as quasi-judicial mechanisms.

While this argument has seductive appeal, there are strong empirical and theoretical reasons to question the expectation that liberal democracies are more receptive to international law. In the first place, the most powerful liberal democracy in the world, the United States, offers a poor example. It has recently and notoriously violated fundamental international legal norms on the use of force in its invasion of Iraq (Sands 2005). In the 1980s the United States refused to recognize an International Court of Justice opinion that found the country guilty of employing illegal force against Nicaragua (Gray 2004). Moreover, the United States has vigorously opposed the International Criminal Court and refused to ratify multilateral treaties on human rights, labor rights, and global warming. Although the United States may be exceptional in its degree of resistance to multilateral normative commitments (Rubinfeld 2003), the empirical evidence indicates that liberal democracies as a whole enjoy no overall superiority in international compliance. In studies by Edith Weiss (1999) comparing the compliance of different governments to international environmental agreements, she found it to be a “myth” that liberal democracies are more compliant.

The domestic characteristics of liberal democracies may in fact make them especially resistant to international compliance where there is considerable internal opposition to the underlying international norm. As Weiss suggests, the open political system of liberal democracies makes it easier for opponents of the international norm to lobby the government in favor of noncompliance.

Furthermore, when the government of a liberal democracy is uneasy with the international legal process, it has a distinct comparative advantage for resisting compliance. Consider the use of legal discourse. Activists engage

the transnational legal process to entrap governments into a legally based normative conversation. Governments in liberal democratic regimes, however, tend to be more experienced and sophisticated in legal discourse than more authoritarian governments, which are not used to open legal challenges. Accordingly, democratic governments are likely to have more success in explaining away or minimizing their legal infractions. They can thus more successfully avoid legal rhetorical entrapment. Moreover, legal discourse is most likely to entrap governments into behavioral concessions when the contradictions are strongest between stated commitments and actual practices (see Keck and Sikkink 1998). For example, while the torture of criminal defendants and the failure to provide defendants with all incriminating evidence may both violate due process, torture will be much harder to justify. Although such flagrant gaps do exist even in established liberal democracies, as seen in recent U.S. treatment of prisoners in Iraq and Guantanamo Bay (Hersh 2004), they are much more prevalent in authoritarian and semiauthoritarian regimes.

Established liberal democracies should also be better placed to withstand attacks on their international reputation. They benefit from an established reputation as upholders of values like human rights. Individual infractions are thus unlikely to prove especially costly to a state's overall image.⁸ Southern, semiauthoritarian governments, by contrast, have a more precarious reputation, which can be shaken by international exposure of normative abuses (see Keck and Sikkink 1998). Such sensitivity is all the more pronounced for transitional states like Turkey and Mexico, where the governments are eager to establish their international reputation as upholders of liberal democratic norms.

Conclusion

Contrary to prevailing popular and scholarly expectations, transnational quasi-judicial mechanisms like NAFTA's citizen petitions can exert considerable political influence even in the absence of binding authority. In particular, such judicial mechanisms can induce governments to accept the legitimacy of underlying legal norms such as labor and environmental standards. Not all transnational quasi-judicial mechanisms are alike, however.

8. The public exposure over the last several years of U.S. abuses at Abu Ghraib and Guantanamo Bay may be an important exception. In the short term, at least, the U.S. reputation has suffered a major blow. Nevertheless, its global reputation as a liberal democracy does not appear to be in danger.

Nor will all states respond in the same way. To determine whether and to what degree transnational quasi-judicial mechanisms will be politically significant in practice, it is necessary to consider the institutional structure of the quasi-judicial mechanism and the domestic characteristics of the states subject to the judicial body's review. In the NAFTA setting, I expect the NAAEC quasi-judicial mechanism to be more effective than its NAALC counterpart because of its advantages in institutional support, autonomy, and established, transparent procedures. I also expect the Mexican government to be the most vulnerable of the North American governments to the legitimation power of the transnational quasi-judicial mechanism. Nevertheless, as seen in Chapters 3 and 4, I show that citizen-petition mechanisms have enjoyed political influence with respect to all three governments.

One very important factor, not discussed in this chapter, that determines the effectiveness of a transnational quasi-judicial mechanism is the degree and type of activism employed. Social activists are the actors most likely to invoke the transnational process and most invested in its political success. Understanding their crucial role is the topic of the next chapter.



Politicizing Law

Although the functional and legitimating qualities of law are of great importance, transnational quasi-judicial mechanisms cannot attain political significance unless some party makes use of them. Governments are not likely to play that role for quasi-judicial mechanisms that review disputes over public values like human rights. After all, governments' interests are rarely directly threatened by abuses in other states, but many governments are quite sensitive about outside encroachment into their own handling of such issues (Martin and Simmons 1998, 756; Dommen 1998, 3; Mitchell 1998). Social activists, by contrast, are highly motivated to influence governments' treatment of values across the globe and are not restrained by similar concerns. Accordingly, they are indispensable in activating public interest-oriented transnational quasi-judicial mechanisms.

Those who dismiss NAFTA's labor and environmental accords as inadequate assume that the citizen petitions offer too little political opportunity for activists. This assumption reflects a limited appreciation of how activists can use transnational legal mechanisms. The valuable work done on transnational activism in the past two decades notwithstanding, the scholarly literature has devoted little attention to the role of international law in shaping transnational activism. This is a serious shortcoming given the proliferation of transnational legal mechanisms in recent years and the increased engagement of such channels by activists. This chapter provides a careful account of how activists employ transnational quasi-judicial mecha-

nisms. Drawing on studies of transnational activism, legal mobilization, and international law, I present the quasi-judicial mechanism as a legalized political opportunity structure for activists. Through this framework, I show that quasi-judicial mechanisms enable activists to advance domestic political goals such as union organizing. I look at when it is most advantageous for activists to use the quasi-judicial mechanism and which tactics are most effective. I emphasize that transnational quasi-judicial mechanisms have to be seen as both political and legal channels; that is, activists cannot rely solely on legal arguments but must in effect politicize the law and incorporate a sophisticated political strategy. I close by applying this book's conceptual framework to the interaction between North American activists and NAFTA's citizen-petition mechanisms.

Transnational Activists and Political Opportunity Structures

To understand the relationship between activism and transnational legal channels, it will be helpful to give a brief review of how transnational activism has evolved and gained political significance in recent years. Activists are actors committed to principled norms of right and wrong rather than conventional material interests (Keck and Sikkink 1998, 1–9; Abbott and Snidal 2002). Transnational activists operate beyond state borders by working on global causes, networking with activists in other countries, using international institutions, or invoking international norms. They seek to interject principled norms into the global agenda, mobilize popular support, and pressure states to comply with such norms. Transnational activists focus on human rights, the environment, peace, and global economic governance (Smith 1997; O'Brien et al. 2000).

Although transnational activism has a long history, it has rapidly expanded in the past several decades owing to advances in communication and travel, increased global interdependency, and a transformed understanding of social values such as human rights, poverty reduction, and environmental sustainability as global concerns (Keck and Sikkink 1998; Della Porter and Tarrow 2005, 7–8). The most important stimuli have been, affirmatively, the proliferation of accessible international institutions and conferences held at the United Nations, global economic bodies, and elsewhere and, negatively, the rise in contentious, globalization-related initiatives such as the WTO and NAFTA. The former offer a prominent international outlet for activists to promote their cause. The latter initiatives spark transnational grassroots efforts at resistance (Ayres 2002).

The extent of their influence is open for debate, but transnational activists have undoubtedly become significant global actors. They have strengthened local movements, pressured for changes in states' foreign policies, influenced the policies of global bodies like the World Bank, and helped draft multilateral treaties like the Rome Treaty, which established the International Criminal Court (Keck and Sikkink 1998; Welch 2001). Their most sustained achievement is the access they have gained, including consultative status at the UN's Economic and Social Commission and regular audiences with officials of states and major global bodies like the World Bank, the WTO, and the UN Security Council (O'Brien et al. 2000; Paul 2004).

Transnational activists exert influence by harnessing the power of principled norms. Although material resources are, of course, important, activists' influence rests primarily on establishing expertise and a principled commitment to a social value regarded highly by the public (Keck and Sikkink 1998, 1–9). In this way activists attain legitimacy with the public, the media, and officials of governments and global bodies. They then employ a mix of tactics to advance their causes. The most valuable tactics are networking, protesting, and information politics (Alger 1997; Keck and Sikkink 1998; Price 1998). Networking is the recruitment of domestic and international allies on behalf of one's cause. This facilitates sustained lobbying of politicians and other policymakers and generates public support for the underlying cause. Activists can further highlight the public appeal of their cause and increase pressure on the target actor through protest politics, such as staging mass demonstrations outside an international conference. Through information politics, activists disseminate factual material, such as documented human rights violations, to the media, the broader public, allies, and officials of governments and global bodies (Keck and Sikkink 1998, 16–22).

Transnational political opportunity structures greatly facilitate transnational activism (Smith 1997; Khagram, Riker, and Sikkink 2002, 17–20). Like political opportunity structures in general, they involve a confluence of elements that enable activists to gain material and normative support for their cause. A typical transnational political opportunity structure is an international institution geared to activists' concerns, for example, various UN bodies. They bring heightened attention to social value-based norms, provide grants for attending summits and conducting investigations, open access to elite actors and to the media, and allow activists to gain influential allies (Smith 1997, 57; Joachim 2003, 251–52).

Activists use a transnational forum to attach a domestic cause to an inter-

nationally recognized norm, such as the protection of human rights—what Richard Price (1998) calls “grafting.” Grafting promotes the cause and activists’ status as principled actors (McCarthy 1997; Keck and Sikkink 1998). Opponents of the death penalty in the United States, for example, have invoked the petition process of the Inter-American Commission on Human Rights, despite the organization’s lack of power to prevent executions in the United States. They use this process to attach themselves to international provisions on due process and ultimately to increase pressure on a state government to halt an execution.¹ Transnational forums also enable activists to network with other activists and with sympathetic state and international officials (Smith 1997; Keck and Sikkink 1998). Activists can best exploit political opportunity structures (domestic or transnational) where they have significant mobilization resources, such as expertise in the subject matter and a network of supporters (Klandermans and Tarrow 1988, 11–12).

Because most transnational activism is launched on behalf of a domestic political cause, the primary value of a transnational political platform is its ability to create or improve domestic political opportunity structures (Sikkink 2005). In more authoritarian political systems, for example, domestic political and legal channels are likely to be unavailing (Keck and Sikkink 1998, 12). The appeal of an accessible transnational political forum is that it can produce what Margaret Keck and Kathryn Sikkink label a “boomerang” effect. Specifically, activists use the transnational forum to bring outside pressure to bear on the home government. If successful, this boomerang dynamic opens up the closed system at home and produces domestic political opportunities for the activists. Even in more democratic societies, a transnational platform can favorably alter the domestic political opportunity structure. Consider situations in which domestic political reform efforts have stalled because of public apathy, bureaucratic inertia, or strong government resistance. In such cases activists may seize on transnational opportunities to enlist outside support and thereby invigorate the domestic political setting. Causes most ripe for transnational support are those likely to attract international attention and allies. Prisoner abuse cases in U.S.-run military prisons are obvious targets for transnational pressure, given that the prisoners are from a number of outside countries (Sands 2005, 143–73). Also promising are causes that readily transcend domestic borders, like opposition to deforestation in the Amazon and challenges to neoliberal globalization policies (see O’Brien et al. 2000; Gaventa 2001).

1. “Virginia Governor Is Asked to Stop Execution Tonight,” *New York Times*, June 12, 2002, A14.

Conversely, certain domestic political structures reduce the value to activists of a transnational political platform (Tarrow and Porter 2005, 242). Especially important is the broad domestic political setting. By this I mean both the degree of domestic political support for the values championed by the activists and the receptivity or vulnerability of the target government to the transnational forum. Where neither the target government nor its main political constituency has much ideological support for the underlying norms, the government is less likely to respond favorably to transnational campaigns. For example, a politically conservative pro-business government will be much less receptive to the cause of workers' rights than a social democratic government will be. Accordingly, where the former is in power, transnational campaigns to highlight worker abuses will have a difficult time gaining political traction at home.

Likewise, when the government in power does not support the transnational channel activists are using, their efforts are unlikely to succeed. Typically, left-of-center governments have some political stake in supporting international institutions that address social values like workers' rights and the environment. Doing so satisfies the demands of important constituencies. The Clinton administration, for example, was committed to creating and supporting NAFTA's labor and environmental institutions to placate the labor and environmental constituencies of the Democratic Party. Right-of-center pro-business governments, by contrast, have much less political investment in establishing, let alone supporting, value-based international institutions.

Transnational Activists and International Law

As seen above, the scholarship on transnational activism has been quite fertile and includes valuable work on transnational political opportunity structures. In this work we see the important relationship between transnational activism and domestic politics. Put simply, domestically rooted activists employ promising international institutions to boost political causes at home. Nevertheless, the scholarship on transnational activism, as a result of its limited attention to international law, has missed the significance of a fast-growing and valuable transnational political opportunity structure—transnationalized international law channels. At best, it has seen such legal channels as one of a variety of transnational political opportunity structures. The scholarship has not addressed the specific legal qualities of such institutions, especially their power to bestow added legitimacy on a cause.

In short, the literature on transnational activism lacks a robust vision of the interaction between activists and transnational legal channels like the quasi-judicial mechanisms found in NAFTA's labor and environmental accords. As a result, we know little about why activists use transnational legal channels that typically have few or no binding obligations. Moreover, the literature does not inform us about how activists invoke transnational legal channels, or when activists are most likely to enjoy political success with them. To answer these questions, this section develops a conceptual framework to explain how accessible international legal channels serve as a legalized transnational political opportunity structure. I draw from recent studies on international law, discussed in the previous chapter, and from sociolegal studies on the mobilization of law for political reform at the domestic level.

As a useful starting point, let us consider the rich debate about whether even hard domestic legal institutions can contribute to far-reaching political reform. Many scholars are quite skeptical about this. Marxist structuralists and critical legal scholars argue that the legal system is designed to serve the interests of elite economic sectors and cannot be seen as independent of them (Tushnet 1984; see Beirne and Quinney 1982). Many political science scholars who study law view legal channels as poor tools for effecting broader reform because they are narrowly focused on individual disputes over rights, not broader policy concerns (Horowitz 1977; Rosenberg 1991). Thus they have labeled law a "hollow hope" for political reform movements (Rosenberg 1991).

Such skepticism has been powerfully countered by a group of sociolegal scholars who focus on legal mobilization for political reform. These scholars fault the skeptics for consigning law to the purely constraining role of upholding the status quo. While acknowledging that law is often used to this end, legal mobilization scholars point to the power of legal dynamics to enhance the status of a political cause (McCann 1994). Sophisticated activists can thus employ legal channels for counterhegemonic purposes (Ewick and Silbey 1992; McCann and March 1995; Garcia-Villegas 2003). Studies of legal mobilization show that reform movements engage in litigation to mobilize current and new supporters and give cohesion and greater legitimacy to their cause (McCann 1994; Silverstein 1996). Michael McCann emphasizes three principal political benefits of litigation for activists. First, raising a legal claim enables activists to frame "a long-experienced injustice in new, more compelling and sensible terms," namely, as the deprivation of a "right" (McCann 1994, 89). Second, the legal framing carries a reso-

nance that attracts favorable publicity and new supporters. Finally, litigation puts target actors on the defensive and therefore puts the onus on them to respond favorably to restore their public image.

All these dynamics are set forth in McCann's 1994 study on the legal strategies employed by movements on behalf of gender-based pay equity in the United States during the 1970s and 1980s. These movements framed the issue as the right to be free from wage discrimination and assessed success primarily in political terms. Of course, court victories were desired. But activists understood the uneven impact of judicial victories in changing social practices and hence connected litigation with broader political campaigns, such as union organizing, lobbying, and mass demonstrations. The chief goals were to build support for the pay equity reform movement, mobilize activists, shame companies, and influence policy.

To be sure, the debate on law's power in the hard domestic context may have limited resonance in the positivist-heavy legal academy. Most legal scholars take for granted that successful domestic litigation has concrete value given the binding and enforceable nature of law. But whatever the debate's relevance for established domestic legal systems, it is quite useful in considering the value of nonbinding transnational legal channels for political activism. On the one hand, the case against employing such mechanisms would appear, on the surface, to be even stronger. After all, such mechanisms suffer from the same shortcomings attributed to domestic law (narrow focus and embedded in an elite-friendly system) and lack even a concrete short-term benefit. On the other hand, McCann's insights indicate that the principal value of law to activists is often its ability to legitimize and inspire a political cause. These insights travel well to the transnational legal context, given that the core elements of legal discourse and process are still present. As in McCann's example, activists can use transnational legal mechanisms to give added status to their cause. By framing their cause according to international legal standards, activists attach their issue to a codified international standard, such as workers' rights or environmental standards. For example, labor activists involved in a union-organizing struggle can frame their cause as an internationally recognized right to engage in collective bargaining rather than simply as a narrow political dispute over resources. This legal framing is a form of grafting one's cause onto popular, codified norms in order to attract greater support and increase pressure on governments or firms to respond (see Price 1998).

By integrating McCann's analysis of domestic legal mobilization with insights on international law and on transnational activism, we gain a rich

picture of the value of transnational quasi-judicial mechanisms. To begin with, a transnational quasi-judicial forum enables activists to engage governments directly in a legal discussion before a third party. In such a setting, governments are effectively compelled to acknowledge their commitment to abide by codified rights and to defend their actions according to the agreed-upon standards of behavior, rather than self-interest or functional reasons (Abbott et al. 2000, 409). Moreover, activists initiate the process and establish the specific terms of discourse. For example, activists who seek greater enforcement of environmental pollution laws can focus the discussion on a state's international environmental obligations rather than on the often-preferred governmental focus on budgetary discretion.

Granted, legal principles are open to multiple interpretations. But they are not infinitely elastic. Certain arguments will be more persuasive than others, particularly where there is an outside review body to assess competing arguments (see Schimmelfennig 2001). Although governments do not have to change their behavior under the soft-law arrangement of most transnational quasi-judicial mechanisms, they risk progressively undermining their credibility the more they flout formally recognized legal interpretations. The task for activists is to place the government on the defensive and force it to acknowledge the legitimacy of its legal obligations. Such actions lead to a rhetorical entrapment of state actors, which increases the pressure on the government to conform its behavior accordingly, even where such change conflicts with short-term interests (Price 1998; Schimmelfennig 2001). As noted by Risse and Sikkink (1999), "talk" is not necessarily cheap where "talking the talk" means repeatedly acknowledging normative obligations before a public body, with activists pressuring the governments to live up to their commitments in practice.

But while the invoking of the transnational quasi-judicial process can boost activists' cause, the legal process will not be sufficient. Rather, activists need to maintain a broader political strategy to take full advantage of the opportunity provided them by the process. Indeed, even in the U.S. domestic legal setting, success in using litigation to advance a cause has required a broader political strategy (McCann 1994). It is all the more incumbent upon activists in the transnational quasi-judicial setting to connect legal advocacy with a comprehensive political campaign. As soft-law channels, transnational quasi-judicial mechanisms are poorly suited as self-contained tools to advance political causes. Their shortcomings stem from both a lack of binding authority and a lesser prominence than that enjoyed by U.S. domestic courts or even formal international courts like the International

Court of Justice. While transnational quasi-judicial channels can draw governments into legal discourse, activists require extra political leverage to convert favorable legal benchmarks into behavioral changes from the government.

The best engagement of the transnational quasi-judicial process enlists political mobilization during the process and after a finding has been rendered. This entails the use of networking, protesting, lobbying, and informational politics. In this context, activists network with domestic and international allies to rally greater support for the legal action. Similarly, activists can lobby staff of the quasi-judicial body to conduct an aggressive investigation, and pressure state officials to cooperate fully with the legal process. Activists can exert stronger pressure by engaging in protest actions against governments that are trying to block the process or are not complying with the quasi-judicial body's findings. Finally, activists can profit from information politics. They can inform the media, the wider public, and sympathetic policymakers of the quasi-judicial petition they have raised, the issues involved, and the government's legal obligations. Information politics continues after a supportive finding has been issued. After all, left to its own devices, a target government is not likely to follow up on a quasi-judicial finding. It is up to the activists to give the finding greater status. Accordingly, politically sophisticated activists will disseminate the rulings to the public and to policymakers and invoke the findings to support parallel domestic campaigns (see Koh 1991).

In sum, activists invoke transnational quasi-judicial mechanisms to strengthen their position in ongoing domestic political disputes with governments and sometimes private companies as well. What they gain from the transnational quasi-judicial channel are a legal process for mediating the dispute, legitimation, especially if the quasi-judicial body validates the complaint, and added international pressure on the target actor. To take full advantage of this added legitimation, activists include a complementary political strategy.

Applying This Framework to the NAFTA Setting

After reviewing the NAFTA-inspired growth of North American transnational activism, I assess why and how North American activists use NAFTA's citizen-petition mechanisms, the type and extent of success they have attained, and the optimal conditions for success.

How the NAFTA Debate Stimulated Transnational Activism in the Region

NAFTA has guided regional transnational activism in two phases. The focus of this book is on the second, or post-NAFTA debate phase, whereby NAFTA's accessible labor and environmental institutions have affirmatively supported concrete and innovative forms of transnational activism. In the first phase, by contrast, NAFTA's relationship to transnational activism was negative. Specifically, the introduction of the politically contentious NAFTA initiative inspired a new wave of transnational grassroots activism in opposition to NAFTA's neoliberal agenda. This first phase of resistant transnational activism has enabled the present, more affirmative phase.

While there had been considerable collaboration between U.S. and Canadian activists prior to the 1990s, it rarely extended to Mexican activists. In fact, the relationship between U.S. and Mexican activists, outside of a few border areas, had been mostly frosty. U.S. labor and environmental activists displayed little positive interest in Mexico. Rather, their attention to Mexico largely took the form of worries about the ways in which Mexican immigration and poorly regulated economic activity on the border undermined U.S. labor or environmental conditions. On the Mexican side, most civil sectors of society, including organized labor, distrusted U.S. groups such as the AFL-CIO (Barry, Browne, and Sims 1994). Further impeding outreach was the long-ruling PRI's success at co-opting civil sectors, including labor. It did so by selectively doling out benefits and promoting a populist revolutionary ideology that included opposition to U.S. intervention in Mexican affairs (Hamilton 1982; Middlebrook 1995).

The mutual distrust and tension between labor movements and other civil actors continued during the debate over NAFTA. U.S. and Canadian activists warned that there would be negative consequences of increased integration with Mexico. The U.S. and Canadian labor federations based much of their opposition to NAFTA on expected job losses from U.S. and Canadian companies relocating to Mexico. By contrast, the main Mexican labor confederation, the CTM, supported NAFTA and accused the AFL-CIO of protectionism (Barry, Browne, and Sims 1994). Meanwhile, U.S. and Canadian environmentalists predicted harmful ecological consequences as U.S. and Canadian companies took advantage of Mexico's lax regulation and enforcement of environmental standards (DiMento and Doughman 1998).

Yet public debate on NAFTA also spurred labor movements, environmen-

talists, human rights organizations, and community groups in all three North American states to coalesce against the neoliberal agenda of NAFTA. Leading the way in developing a regional strategy was a broad coalition of activists from Canada. In the mid-1980s, Canadian labor, environmental, and community activists had formed the Pro-Canada Network (PCN) to oppose the Canadian-U.S. Free Trade Agreement (CUSFTA) (Ayres 1998). Having lost that battle, and facing an extension of the CUSFTA to NAFTA, the coalition changed its name to Action Canada Network (ACN) and altered its orientation. It developed an alternative, social justice vision of regional integration that featured cross-border solidarity. Accordingly, ACN members devoted considerable effort to developing close relations with independent activists in Mexico. They helped inspire Mexican activists to form their own multisectoral coalition against neoliberal trade initiatives, based on the ACN model (Ayres 1998). ACN groups also reached out to U.S. activists.² Overall, Canadian activists played a pivotal role in promoting regional solidarity among social justice activists in the three countries.

With the help of Canadian activists' intervention, the NAFTA debate dramatically transformed relations between U.S. and Mexican social activists (Barry, Browne, and Sims 1994, 322; Cook 1997, 518–19). The NAFTA proposal inspired a number of U.S. activists to think more deeply about the relationship among trade, investment, and social justice concerns (Foster 2005). Rather than simply take part in nationalistic opposition to NAFTA, a group of left-leaning U.S. activists formed an internationalist coalition called the Alliance for Responsible Trade (ART) (Dreiling 2001). Like the ACN, ART members engaged in active outreach to independent Mexican activists. They sponsored and participated in numerous cross-border visits and seminars with Mexican activists so that both could learn about each other's experiences with and perspectives on neoliberal governance (Dreiling 2001).

In Mexico, the decade-long experience with the state's shift to neoliberalism had provoked a great deal of discontent and generated a wave of independent labor activists, democracy groups, environmentalists, and indigenous movements. The Mexican government's support of NAFTA gave further momentum to these independent activists (Cook 1997, 517–21). As a result of the NAFTA debate, U.S. activists helped them gain strength and resist government crackdowns. With the encouragement of Canadian and U.S. activists, a coalition of anti-neoliberal Mexican groups formed the Red

2. The PCN had made efforts to collaborate with U.S. activists against the CUSFTA but found little interest (Foster 2005).

Mexicana Acción Frente al Libre Comercio (RMALC, the Mexican Action Network on Free Trade).

With receptivity in all three states, a loose trilateral coalition of social activists formed in opposition to NAFTA. This coalition proposed an alternative vision of regional integration that included binding labor and environmental standards, greater democratic accountability in economic policies, equitable and sustainable development, and regional funds to substantially upgrade Mexico's economic, social, and environmental infrastructure (Heredia 1994; Dreiling 2001). Although the campaign largely failed (with the exception of prodding the governments to adopt the parallel accords), it expanded the scope of many U.S., Mexican, and Canadian activists to include transnational issues and established cross-border contacts. Accordingly, a number of activists were prepared to test the new transnational citizen-petition mechanisms that had become available by 1994.

Why Do Activists Raise Citizen Petitions, and What Constitutes Success?

Their opposition to NAFTA and disappointment at the citizen-petition mechanisms' lack of teeth notwithstanding, activists from all three countries have filed labor and environmental petitions. They have done so for reasons consistent with this book's analysis of how transnational quasi-judicial mechanisms serve as a transnational political opportunity structure for activists. Specifically, North American activists have filed labor and environmental citizen petitions to boost the status of ongoing political campaigns at home, for example, eliciting greater state effort to redress damage to a region's ecosystem. I define success, then, as the effective use of the mechanism to prod change on the part of a resistant government agency, and in some circumstances private companies (e.g., agreeing to a labor union drive to represent the company's employees).

Ideally, of course, petitioners prefer that engagement of the transnational quasi-judicial process result in a complete victory for their domestic political cause. Yet most understand the modest reach of the process and that complete political victories are rare. To be sure, activists are unlikely to expend scarce resources for a purely symbolic victory. What they want is visible progress in the struggle that motivated activists to invoke the mechanism. As noted in other studies of transnational activism, success comes in degrees rather than in all-or-nothing form (Risse and Sikink 1999). More modest, but still significant, success is agenda raising, which is eliciting greater government attention to activists' underlying political cause (McCann 1994). Examples include the creation of a task force to address pollution of the

Great Lakes or abuses of migrant workers. These steps enhance the status of activists' political dispute and introduce a new domestic political platform. They therefore improve the domestic political opportunity structure. Success takes the form of concrete policy changes from the target government or firm, such as ending an ecologically harmful development project.

When Is Success Most Likely?

To use the citizen-petition mechanisms for domestic political success, two sets of actors are especially important. One is the quasi-judicial body that mediates the process and provides the legal validation. Of even greater importance are the activist-petitioners who initiate the process. It is up to them to get a favorable finding from the quasi-judicial body and leverage it for political gain. Accordingly, activists need to use strong legal advocacy and sophisticated political tactics to promote the petition, demand a full review, and pressure compliance from the target actors. Activists who wish to use the citizen-petition mechanism profitably require considerable mobilization resources, such as expertise in the subject matter, a legal staff or pro bono attorneys, a network of supporters, access to policymakers, and a good source of funding (Klandermans and Tarrow 1988; Keck and Sikkink 1998). Thus the citizen-petition mechanism will not be an available political platform for all activists but only for those with adequate resources or connections to sophisticated networks.

There is also the matter of when persuasive political advocacy and legal validation are most likely to occur. Indeed, given the considerable resources required to use the citizen-petition mechanism effectively, activists generally reserve their engagement with the process for the most propitious circumstances. Based on the type of political platform offered by a transnational quasi-judicial mechanism, activists are best advised to raise citizen petitions when the following conditions are met: first, the cause can readily be framed as a codified norm relevant to the mechanism, for example, the preservation of biodiversity. The legal process can then legitimate the cause as more worthy than a mere political dispute. Second, the cause resonates in a way that attracts international attention and opprobrium and therefore increases the political reputation costs to the target actor. The best causes include dramatic incidences of abuse, such as torture. Third, the factual circumstances indicate clear contradictions between a government's stated normative commitments and its behavior in practice. For example, where the government claims to be a strong supporter of workers' rights but is found to permit systematic discrimination against labor organizing, activists are

best able to put the government on the defensive. Activists can then more readily entrap the government into rhetorical commitments conducive to a favorable political outcome.

Against Which Type of State Do Activist-Petitioners Enjoy the Most Success?

As discussed in the prior chapter, the most salient gap between the North American states is the North-South gap between the United States and Canada, on the one hand, and Mexico, on the other. The difference lies less in the states' willingness to comply with a transnational legal process than in their relative vulnerabilities to the combined legal and political pressure mobilized against them. Mexico is especially vulnerable because of its greater concern for international reputation. As observed by Keck and Sikkink (1998), the states most susceptible to international "mobilization of shame" campaigns are transitional semiauthoritarian ones that seek to establish liberal democratic bona fides. Mexico underwent a considerable political transition in the 1990s and labored to persuade the U.S. Congress and American public of its new status (Chabat 1997). As a result, Mexico is quite sensitive to international attacks on its reputation. Adding to Mexico's vulnerabilities are sizeable gaps between its formal commitments to high labor and environmental standards and its spotty record in practice. As demonstrated in the following chapters, Mexican activists, in conjunction with U.S. and Canadian activists, have skillfully used NAFTA's citizen petitions to highlight contradictions in Mexico's actual record. Also significant is Mexico's relative lack of sophistication in legal discourse, given the traditionally weaker status of law in Mexican society. As a result, Mexican governments have had more trouble than their U.S. and Canadian counterparts in defending their position legally.

But while Mexico may be the most vulnerable of the three North American countries, legal and political mobilization based on citizen petitions has also enjoyed political success against the established liberal democracies of Canada and the United States. Both states have been vulnerable because of gaps between formal legal commitments and actual practices. Petitioners have highlighted U.S. deficiencies in upholding immigration rights and Canadian deficiencies in enforcing environmental standards in its provinces.

What Effect Have Changes in the Domestic Political Setting Had on the Overall Political Value of the Citizen-Petition Mechanisms?

In the time span covered by this study, the biggest shifts in domestic political settings took place in 2000, when leaders of opposing political parties

won the presidential elections in Mexico and the United States.³ Each shift reduced the domestic political value of the citizen-petition mechanisms. Especially significant was the transition in the United States in 2001 from the Clinton administration to that of George W. Bush. Clinton was invested in the success of the labor and environmental accords and eager to placate domestic labor and environmental constituencies. Bush, by contrast, has had far less interest in the parallel accords and few political debts to labor or environmental groups.

Noteworthy, as well, has been Mexico's transition in 2000. After nearly a century of PRI dominance, Vicente Fox of the National Action Party (PAN) won the presidency. Although the PRI had long resisted political and social change and repressed independent political movements, it did endeavor to improve its international image as a democratic government that upholds fundamental rights (Chabat 1997; Camp 1999). The party also had a populist, pro-worker legacy (Middlebrook 1995). Petitioners, then, had considerable means to shame the PRI government by exposing gaps between its claims to be pro-worker and democratic and its record in practice of allowing and furthering worker abuses and environmental degradation. The Fox administration was less vulnerable (at least for the first few years). As a new governing party, its democratic credentials and international image enjoyed a much higher status. Even more significantly, occasional receptivity to civil society reform notwithstanding, the administration featured a pro-business ideology. It was thus less sympathetic to environmental and labor groups, especially when their demands conflicted with neoliberal economic goals.

Why Activists Have More Success with the Environmental Citizen-Petition Mechanism

Although the negative shift in domestic political setting has reduced the value of both the labor and environmental citizen-petition mechanisms, the effect has been mitigated in the environmental setting because of its stronger institutional apparatus. By design, the government-controlled labor review bodies have followed the political agenda of the governments to which they belong. By contrast, as reviewed in Chapter 4, the autonomous environmental secretariat has maintained consistent support for the petition process. Helping the secretariat has been the Joint Public Advisory

3. The shift in political power in Canada from the Liberal Party to the Tory Party occurred after the time frame of this study. So too has Mexico's more modest political transition in 2006 and the Democratic Party's regaining of the U.S. Congress.

Committee. JPAC has pushed the secretariat to take an assertive, independent stance and pressured the governments to respect the secretariat's autonomy and adopt its recommendations. As a result, the environmental institutions have proved more potent than the labor ones in resisting countervailing pressures from governments. Such institutional differences have led to contrasting fortunes in the political value of the two sets of citizen petitions since 2000.

Conclusion

This chapter has shown how transnational quasi-judicial mechanisms offer a distinctly legalized transnational political opportunity structure for social activists to advance ongoing domestic political causes. The conceptual framework developed here explains why and how activists use nonbinding transnational quasi-judicial mechanisms, what constitutes success, and when success is most likely.

With specific reference to the NAFTA case study, this book's conceptual framework posits the interaction between the activists, the quasi-judicial body, and the target government as follows:

- *Activists*: They initiate the citizen-petition mechanisms for domestic political gain and employ a mix of political and legal advocacy measures. They raise legal arguments to elicit the support of the quasi-judicial body and to place the government on the defensive. They employ complementary political tactics to complement the legal process.
- *Quasi-Judicial Body*: It plays both a reactive and an active role. On the one hand, it is the target of persuasion from activists and the target government. On the other hand, it decides the merits of the arguments. Its validation can provide considerable legitimacy to activists' causes and increase the pressure on the government to change its behavior. The environmental quasi-judicial body will be more effective than the labor quasi-judicial bodies because of the former's institutional advantages.
- *Target Government*: Typically, it is drawn into the legal process reluctantly. It generally denies the merits of the activists' arguments and the appropriateness of continuing with the petition. The government is most vulnerable to actions that expose contradictions between stated normative commitments to values and clear failures in practice to uphold such values. The Mexican government is more vulnerable than the U.S. and Canadian governments because of its greater contradictions and its in-

vestment in improving its international image. The significant changes in governments in Mexico and the United States in 2000–2001 have reduced the value of the citizen-petition mechanisms, especially in the area of labor.

The next two chapters offer an in-depth examination of the interaction that allows for more nuanced assessments.



The Rise and Decline of NAFTA's Labor Petitions

NAALC was almost universally attacked as inadequate by U.S. and Canadian labor movements and by independent Mexican labor activists. The head of the AFL-CIO at the time, Lane Kirkland, called NAALC a “bad joke . . . a Rube Goldberg structure of committees all leading nowhere” (Grayson 1995, 177). One might expect the NAALC citizen-petition process to have been dead on arrival given the dismissive attitude taken by its most likely users. In fact, labor activists have adopted a more nuanced, dual-track approach by strategically using NAALC petitions to invigorate domestic labor campaigns while also denouncing the mechanism’s limitations.

The interest of North American labor activists in the NAALC process has varied over time. In the first few years, interest was confined to a handful of internationally oriented labor unions and labor rights groups. From 1997 through 2000, interest sharply expanded. A range of labor movements, including the AFL-CIO, the Canadian Labour Congress (CLC), and a new Mexican labor federation, the Unión Nacional de Trabajadores (National Union of Workers, or UNT), engaged in ambitious and sophisticated use of NAALC petitions to boost ongoing political struggles, such as campaigns in favor of independent union-organizing campaigns in Mexico and improving the working conditions of migrant workers in the United States. Since 2000, interest in the citizen-petition mechanism has dropped markedly.

This chapter examines the varying fortunes of North American activists in using NAALC petitions. In keeping with this book’s conceptual frame-

work, I trace how and why activists have used the petitions, the results they have attained, and the relative importance of sophisticated political mobilization from petitioners and legal validation from the National Administrative Offices (NAOs). I begin with in-depth examinations of the first petitions, including an important pair of petitions from the peak period of activity. I then provide a macroanalysis of all activist-initiated petitions. Through this analysis I show both the considerable political success enjoyed by petitioners and the conditions most conducive to success. I also use the macroanalysis to review how each of the NAOs has responded to the petitions and to consider the distinct approaches of the U.S.-controlled NAO and the Mexican-controlled NAO. Finally, I assess how and to what degree the shifting political terrain since 2000–2001 has weakened the value to activists of the NAALC citizen-petition mechanism.

Description of NAALC's Citizen-Petition Process

NAALC sets forth eleven guiding labor principles that each country is “committed to promote”:¹

1. Freedom of association and the right to organize.
2. The right to bargain collectively.
3. The right to strike.
4. Prohibition of forced labor.
5. Labor protections for children.
6. Minimum employment standards (minimum wage, maximum hours).
7. Elimination of employment discrimination.
8. Equal pay for women and men.
9. Prevention of occupational injuries and illnesses.
10. Compensation for occupational injuries and illnesses.
11. Protection of migrant workers.

These reflect shared principles each country already honors through its domestic laws. Guided by these principles, NAALC contains three general obligations: (1) to enforce the state's domestic laws on labor rights (Article 3); (2) to provide any aggrieved individual with “appropriate access to administrative . . . judicial or labor tribunals” for vindicating one's rights (Article 4); (3) to ensure “fair, equitable, and transparent” adjudicatory proceedings (Article 5).

1. The text of the treaty is available at www.dol.gov/ilab/regs/naalc.naalc.htm.

What has gained the most prominence is the citizen-petition process. Housed in each state's labor department, NAOs review petitions from any interested party about the failure of another country to enforce its labor laws or meet NAALC's procedural requirements.² Each NAO consists of a politically appointed secretary and a small staff. In its reviews, the NAO commissions legal studies, receives information from any interested party, and exchanges information with the NAO of the government against which a complaint has been filed. The review process ends with the NAO issuing findings and recommendations.

This process is remarkably comprehensive and accessible. It imposes no standing requirements and allows petitions on a broad range of issues, including freedom of association and collective bargaining, long regarded as central to any regime for protecting worker rights (Charnovitz 1997). An unintended but important effect is the mechanism's encouragement of cross-border collaboration. Under the process, petitioners have to file petitions about one member government's labor violations before another member government's NAO. Consequently, petitioners typically need cooperation and assistance from cross-border allies to produce direct evidence and testimony and to garner local insights into advocating before a government agency from an outside country.

The most favorable formal remedy an NAO can provide petitioners is a recommendation that the member governments conduct follow-up ministerial consultations to address the problems identified in the NAO's final report. The NAO's formal role in the dispute ends at this stage. It is then up to the member governments to arrange ministerial consultations, though the NAO staff helps coordinate these consultations. The ministerial consultations have involved further studies and investigations, which include public meetings of government officials, private companies, labor unions, and other interested parties. As discussed below, activists have at times managed to use these ministerial consultations to further advance their political dispute against the member government.

Development of Cross-Border Labor Solidarity in North America

As noted in Chapter 2, the NAFTA debate sparked a great deal of cross-border solidarity. Such solidarity was especially pronounced for labor movements. In the case of Canada, a number of Canadian labor unions, such as

2. On December 17, 2004, the U.S. Department of Labor changed the name of the U.S. NAO to the Office of Trade Agreement Implementation. See www.dol.gov/ilab/programs/nao/main.htm.

the Canadian Steelworkers of America, greatly expanded their exchanges with independent Mexican labor movements. By and large, however, Canadian labor movements have not shown much interest in the NAALC citizen-petition mechanism because of the mechanism's lack of binding obligations (Kay 2005). Indeed, the CLC's original attitude was not to use it at all so as to not give it any legitimacy.³ The important role of Canadian labor movements in prodding cross-border solidarity notwithstanding, they have had a relatively modest role in engagement with the citizen-petition process. Accordingly, I devote more attention in this section to the changes NAFTA provoked in the U.S. and Mexican labor movements.

The NAFTA debate profoundly altered the strategies and perspectives of U.S. and Mexican labor movements. Although the AFL-CIO's leadership pursued a mostly nationalist line of opposition, a coalition of reformist labor unions that featured grassroots activism, led by the United Electrical, Radio, and Machinist Workers (UE), the International Brotherhood of Teamsters (Teamsters), and the United Auto Workers (UAW), adopted an internationalist strategy of opposition (Dreiling 2001). These labor unions, along with leftist policy research and advocacy groups like the International Labor Rights Fund (ILRF) and the Institute for Policy Studies, became important members of the Alliance for Responsible Trade. Because of the collective prominence of these reformist labor movements and discontent with the limited vision of the AFL-CIO, the AFL-CIO elected a more reform-minded set of leaders in the mid-1990s that became more committed than their predecessors to international solidarity (Dreiling 2001).

In Mexico, NAFTA's impact on labor movements was even more far reaching. For more than half a century Mexico had a distinct type of corporatist system, whereby the PRI gave beneficial treatment in state benefits and recognition to a series of allied labor unions (sometimes known as official unions) (Middlebrook 1995). The largest official labor federation was the Confederación de Trabajadores Mexicanos (Confederation of Mexican Workers, or CTM). Because of its attachment to the PRI, the CTM supported NAFTA. Discontent, however, with Mexico's official labor unions among a number of rank-and-file workers had surged by the beginning of the 1990s as labor conditions deteriorated under a neoliberal restructuring of Mexico's economy (Barry, Browne, and Sims 1994; Moody 1997). The introduction of NAFTA, a dramatic neoliberal initiative, further energized this discontent (Heredia 1994). Notably, the NAFTA debate invigorated the status of the

3. Tim Beatty, AFL-CIO representative in Mexico City, interview by author, August 9, 1999, Mexico City.

Frente Auténtico de Trabajadores (Authentic Workers' Front, or FAT), an independent activist labor federation devoted to rank-and-file democracy and community activism (Cook 1995). The FAT became a leading member of the RMALC, which attacked the official union domination of the labor force. RMALC's influence helped prod a number of labor movements to break from the CTM and other official labor federations. The independent UNT formed in 1997.

The changes within the U.S. and Mexican labor movements led to extensive growth in cross-border collaboration in the 1990s. Previously, labor collaboration was largely restricted to contacts between the AFL-CIO and the CTM (Barry, Browne, and Sims 1994). In the 1990s a good deal of grassroots collaboration began. Leading the way were the most internationally oriented unions, such as the UE, the Teamsters, the UAW, and the FAT (Carr 1996; Dreiling 2001). The UE and the FAT formed a strategic organizing alliance in 1992 to organize plants along the Texas-Mexico border, especially those connected to UE-organized plants (Hathaway and Robles 1996). This grassroots collaboration prodded greater outreach from the AFL-CIO's central office (Barry, Browne, and Sims 1994).

As a result of all this collaboration in response to NAFTA, there is now a much higher level of cross-border labor collaboration at both the local and national levels. The AFL-CIO has significantly expanded its outreach operations in Mexico and sponsored a number of labor research and labor strategy sessions there.⁴ Although it maintains relations with the CTM, it now actively supports the growth of independent labor movements and collaborates with the UNT.⁵

Such collaboration has provided a willing constituency for the citizen-petition mechanism, which provides a concrete means for collaboration in opposition to post-NAFTA neoliberal policies. U.S. labor unions and activists have collaborated with independent labor movements and advocates to oppose Mexico's systematic discrimination against independent labor unions. They have used NAALC citizen petitions to attack the following common problems:

- Biased labor agencies. Traditionally, Mexico's state and federal labor agencies have made it very difficult for independent labor movements to attain formal registration status. Such registration is required to represent workers.

4. Ibid.

5. Ana Elsa Eviles, AFL-CIO representative in Mexico, interview by author, July 29, 2003, Mexico City.

- Worker exclusion contracts have been used in practice to dismiss workers who do not support the officially registered union for the workplace. They have been a powerful tool to dissuade workers from switching their allegiance to independent labor movements.
- “Protection” contracts. To forestall genuine labor organizing campaigns, a number of companies, especially those in the *maquiladora* zone, have entered into secret collective bargaining agreements with a compliant labor union. Such a union performs no actual representation. Companies, however, can invoke the protection contract to preempt efforts to form a genuine labor union for the plant.
- Intimidation and violence. The CTM typically employs strongmen to attack workers who support independent labor movements.

Initial Responses of Labor Activists to NAALC: From Disappointment to Cautious Engagement (1994–95)

In the first two years of NAALC’s existence, four petitions were pursued, three before the U.S. NAO against the Mexican government in 1994, and one before Mexico’s NAO against the U.S. government in 1995.⁶ Each was filed either by labor unions with substantial cross-border contacts or by internationally oriented labor rights and human rights groups. Although none of these petitions attained concrete results, all were observed closely by labor activists and prompted greater interest in the NAALC petition process. They served as valuable learning experiences in what the petition process could and could not do and in how to use the process most effectively for political gain. For a helpful illustration, let us look at the first set of petitions filed in 1994 and assess why the petitioners engaged the process, how they framed the petition, what political mobilization was used, the response of the NAO, and the results attained.

The First Petitions: Honeywell and General Electric

These first two petitions were filed by the UE and the Teamsters. Each was collaborating with the FAT to organize U.S. subsidiaries in Mexico, with the UE targeting a General Electric plant in Ciudad Juárez and the Teamsters targeting a Honeywell plant in Chihuahua.⁷ The U.S. NAO consoli-

6. As discussed below, a fourth petition was filed in 1994 but was soon withdrawn.

7. Robin Alexander, director of international labor affairs for the UE, interview by author, June 11, 1999, Pittsburgh.

dated the Honeywell and GE petitions. Little thought went into how best to use or shape this new mechanism. According to Robin Alexander, the lead coordinator of the petition for the UE, the groups saw the citizen-petition mechanism as something that could focus added public attention on “egregious” company abuses.⁸ A longtime labor activist and attorney who was and continues to be the UE’s director of international affairs, Alexander had been actively involved in outreach with the FAT in opposing NAFTA and in developing the strategic organizing alliance. She had no major expectations about what the process could accomplish but did hope to “prompt a vigorous investigation” by the NAO (Alexander 1999, 145).

Legal Framing of Petition

Although lacking in binding power, NAALC’s mechanism offered petitioners an opportunity to bypass the often inhospitable and inaccessible administrative and legal domestic channels in Mexico and secure a more equal exchange before an outside forum free of PRI influence. By initiating the process, petitioners could shape the exchange. Accordingly, the manner in which the petitions were framed was of considerable importance. The framing needed to set the terms so as to put the Mexican government on the defensive. It also needed to frame the organizing campaigns in an appealing normative perspective that would persuade the NAO to respond favorably.

Petitioners, however, had some difficulty in putting together an effective framing appropriate for this new type of hybrid judicial-political forum. They framed the petitions as a U.S.-style unfair labor practices legal complaint (Alexander 1999). This format did successfully illustrate illegal company behavior in obstructing union-organizing efforts, discharging workers for union activities, and forcing workers to resign. This manner of framing, however, did not sharply attach the petition to the underlying purpose of NAALC, which is promoting broad governmental enforcement rather than stopping individual companies’ violations of specific labor laws. The petitions mentioned governmental nonenforcement but did not develop the theme. Moreover, the petitions did too little to link the violations at the local Honeywell and GE subsidiaries to broader, systematic problems in Mexico.

The petitioners sharpened their arguments as the quasi-judicial action proceeded. Prior to the hearing, they submitted a follow-up memorandum that added allegations of biased administrative labor boards and systematic

8. Ibid.

governmental failures to uphold the rights of workers to organize and associate with independent labor unions.⁹ The memorandum called for the NAO to investigate the petitions aggressively, find that the companies engaged in labor violations, demand that Mexico take remedial action, and push for the development of codes of conduct for U.S.-based companies in Mexico.

Politicizing the Legal Action

Knowing that a good legal argument would not be sufficient given the soft-law nature of the process, petitioners developed a complementary political strategy, which began with the case selection. Petitioners targeted abuses by U.S. subsidiaries in Mexico in order to elicit sympathetic media attention in the United States and put both the U.S. and Mexican governments on the defensive.¹⁰ Beyond case selection, petitioners formed a cross-border network that featured the UE, the FAT, and the Teamsters. All signed on as co-petitioners and mobilized political support. They did further mobilization at the public hearing. To give a human face to the violations, petitioners presented testimony from workers at the two plants who suffered retaliation for union organizing or were forced to resign. To convey broader labor solidarity, the petitioners solicited supporting statements from leaders of national and international labor federations and packed the hearing with union supporters.¹¹ They emphasized Mexico's consistent repression of independent labor movements and NAALC's inadequacies. The UE's general secretary, Amy Newell, challenged the NAO to move beyond symbolism and become an effective voice for labor rights: "The North American Agreement on Labor Cooperation is the only forum we have for raising the issue of workers' rights in the context of NAFTA. . . . If you choose to do so, I believe the NAO can . . . elevate the question of respect for workers' rights far beyond the level that your actual enforcement power would lead one to expect. You have the ability to create big-time headaches for corporations and government bodies that disregard labor rights, to focus the spotlight of public attention and condemnation on their behavior."¹²

Response of the U.S. NAO: Favorable on Process, Unfavorable on Substance

The U.S. NAO was a brand-new institution at the time of these petitions. It had come into existence at the beginning of 1994 under the auspices of the

9. Brief of the United Electrical, Radio, and Machine Workers of America, September 16, 1994, available at the U.S. NAO office in Washington, D.C. Copy on file with author.

10. Alexander, interview.

11. Ibid.

12. U.S. Department of Labor, Bureau of International Labor Affairs, National Administrative

Department of Labor's Bureau of International Labor Affairs. It consists of a secretary, assistant secretary, and a small staff. With these two petitions, the U.S. NAO was tasked with reviewing the first set of petitions to be filed before any NAO. The NAO's first secretary was Irasema Garza, who was generally regarded as supportive of labor.¹³ Yet, as noted by the assistant secretary at the time, Lewis Karesh, the NAO staff was very conscious of sovereign sensitivities.¹⁴ With its first set of petitions before it, the NAO not only had to make a substantive judgment on the allegations but had to develop a generalizable set of procedures and criteria for admissibility.

As expected from a transnational quasi-judicial mechanism dealing with public interest concerns, the U.S. NAO faced conflicting demands on how to proceed. Petitioners and other labor activists, especially the ILRF, proposed a judicial, adversarial format that included public hearings, cross-examination, and power to subpoena evidence and testimony.¹⁵ GE and Honeywell representatives opposed any review, arguing that the petitions did not allege a "pattern of non-enforcement by the government of Mexico."¹⁶ The U.S. Council for International Business expressed a more far-reaching concern. It argued that petitions must be purely cooperative, meaning that they should stick to general discussion of labor standards rather than make specific allegations of misbehavior. The council opposed holding a public hearing and proposed a rule that individual company names be omitted from NAALC petitions.¹⁷ The Mexican government shared the view of the council and favored a purely cooperative approach.¹⁸ It argued that the process was not intended to review individual domestic disputes. The Mexican government has maintained this approach.

The NAO formally adopted its procedures on April 1, 1994. Its approach fell closer to what petitioners and other labor activists wanted. To be sure, it rejected a legal, adversarial approach. The NAO decided it would not demand evidence, issue subpoenas, or even allow cross-examination at hear-

Office, transcript, U.S. NAO Hearing, September 12, 1994, 17 (copy on file with U.S. NAO and with author).

13. Lance Compa, interview by author, June 7, 1999, Washington, D.C.; Jim Sauber, National Association of Postal Workers, interview by author, June 9, 1999, Washington, D.C. Sauber helped coordinate a later petition.

14. Lewis Karesh, interview by author, June 9, 1999, Washington, D.C.

15. Compa, interview.

16. U.S. NAO Public Report of Review, October 12, 1994, 11, available online as "NAO: NAALC Submission 940001 and 940002," www.dol.gov/ilab/media/reports/nao/940001.htm.

17. Edward Potter, U.S. Council for International Business, to U.S. NAO, August 31, 1994 (copy on file with U.S. NAO and with author).

18. Mara Salazar, labor attorney at Mexico's NAO, interview by author, March 18, 1999, Mexico City.

ings. It determined that hearings would be “informational rather than adversarial” and that only the NAO secretary would ask questions.¹⁹ Nevertheless, the NAO did adopt a procedure that would allow for considerable individual scrutiny of government practices and, potentially, of company practices. According to Lewis Karesh, the NAO decided that, after soliciting public commentary and reviewing the practices of other NAFTA bodies, it would allow great leeway in the framing of the petitions.²⁰ Thus petitions could target specific violations so long as they complied with the NAALC provisions of raising issues relevant to labor law enforcement matters. Specifically, the NAO adopted a U.S. administrative review format that has many legal trappings but is less formal than a courtroom setting.²¹ This format features largely accessible, transparent proceedings that include public hearings, the commissioning of independent studies, and the soliciting of information from a variety of sources. With these procedures in place, the NAO decided to review the two petitions jointly. It proceeded to solicit information from petitioners, the companies, and the Mexican government, and commissioned a report from expert consultants on Mexican labor law.

Substantively, however, the U.S. NAO took a deferential approach to the Mexican government. Robin Alexander, who directed the presentation of evidence at the hearing, sensed that the NAO staff was poorly informed of Mexico’s labor situation and was thus inclined to view the petitioners’ allegations as exaggerated.²² At any rate, the NAO largely ignored the companies’ behavior in both the hearing and the final report and effectively absolved the Mexican government in its final report of any wrongdoing: “the information available to the NAO does not establish that the Government of Mexico failed to promote compliance with or enforce the specific laws involved.”²³ The report concluded that ministerial consultations were not warranted.

Results: Failure

From the petitioners’ perspective, these petitions were failures. All observers, including the press, regarded the negative NAO ruling as a validation of the Mexican government’s behavior.²⁴ Given the continued resistance of

19. U.S. NAO Hearing, September 12, 1994, 6.

20. Karesh, interview.

21. *Ibid.*

22. Alexander, interview.

23. U.S. NAO Public Report of Review, October 12, 1994, 32.

24. See Compa (1995); Allen Myerson, “U.S. Backs Mexico Law, Vexing Labor,” *New York Times*, October 13, 1994, D1.

management and the Mexican federal and local governments, it was not surprising that the FAT ultimately lost the battle to organize at the two targeted plants. The UE lost confidence in the political value of NAALC and withdrew a follow-up petition. Its withdrawal letter stated, "We do not choose to further legitimize this process by further participation and will have no further dealing with the NAO until such time as we have reason to believe that your office is seriously prepared to effectuate its mandate of protecting workers rights."²⁵

The failure of the process to help the independent organizing campaigns can be attributed to the lack of NAO validation. The petitioners in turn hurt their cause by paying insufficient attention to NAALC's legal mandate. They initially emphasized company violations rather than government nonenforcement. Accordingly, they gave the U.S. NAO little legal justification for taking a more assertive, judgmental stance. The NAO repeatedly stated at the hearing and in its final report that its interest was in governmental enforcement rather than specific violations committed by companies. It did, however, point out the way in which petitioners could elicit greater NAO scrutiny—by making sustained connections between company abuses and government nonenforcement.

The Next Petition: Sony

The initiators for the next petition, which concerned the Sony Corporation, carefully articulated from the outset connections between company abuses at the plant level and a broader pattern of governmental collusion. The Sony petition was filed in August 1994 by the Coalition for Justice in the Maquiladoras (CJM), the ILRF, the U.S. chapter of Human Rights Watch; the American Friends Service Committee; and Mexico's Asociación Nacional de Abogados (National Association of Democratic Attorneys, or ANAD), a network of Mexican attorneys working for democracy and human rights in Mexico.²⁶

The CJM developed out of an initiative sponsored by the Texas branch of the AFL-CIO to improve working conditions across the border (Bandy 2004). It formed in 1989 and for a number of years received significant support from the national AFL-CIO. It is a trinational organization devoted to improving working conditions in the *maquiladora* zone. The CJM and

25. John Hovis, UE president, to U.S. NAO, January 19, 1994 [actually 1995] (copy on file with U.S. NAO and author).

26. U.S. Department of Labor, U.S. NAO Public Submission 940003, August 16, 1994, www.dol.gov/ilab/media/reports/nao/submissions/Sub940003.htm.

the ILRF had already developed cross-border contacts (Williams 1999). Human Rights Watch and the American Friends Service Committee are devoted to global rights and justice. Several of ANAD's attorneys, including Arturo Alcalde, Mexico's most prominent advocate for the FAT and other democratic Mexican labor movements, had developed contacts with U.S. activist groups during the campaign against NAFTA.²⁷

This petition arose out of CJM involvement in challenging the labor practices at five plants operated by Sony Electric in Nuevo Laredo, along the Texas-Mexico border.²⁸ To boost the organizing campaign of an independent labor movement, the CJM enlisted the assistance of the other three parties to file a NAALC petition, with the ILRF doing the actual drafting.²⁹

Legal Framing of the Petition

Unlike the GE-Honeywell petitioners, these petitioners were familiar with the strategy involved in filing international legal complaints. The ILRF in particular had filed complaints with the ILO's Committee on Freedom of Association.³⁰ Thus petitioners understood the need to focus on state obligations and to frame the petition in a way that maximized its political power. Like GE-Honeywell, the petition featured company abuses of workers. It accused Sony of interfering with the workers' attempts to form an independent union through manipulating the election and intimidating workers who supported the union. Unlike GE-Honeywell, this petition specified the important role of the Mexican government in facilitating such harassment and abuses of independent union-organizing drives. It also established up front that the petition met the criteria set forth by the U.S. NAO:

This submission meets the requirements of Section F of the USNAO Regulations. First, the government of Mexico has failed to comply with its obligations under Part II of the Agreement, which requires that each party "shall promote compliance with and effectively enforce its labor law through appropriate government action." . . . Second, Sony's illegal actions, including its wrongful dismissal of employees, has caused irreparable harm to its workers.

27. Arturo Alcalde, interview by author, July 22, 2003, Mexico City; Alexander, interview.

28. U.S. NAO Public Submission 940003.

29. Jerome Levinson, lead coordinator of petition for ILRF, interview by author, October 13, 2000, Madison, Wisconsin.

30. Compa, interview.

Third, the matters complained of demonstrate a pattern of non-enforcement of Mexican labor laws by the government of Mexico.³¹

The petition faulted the government for not enforcing the independent workers' rights to free association. It also accused the government-run labor board of improperly denying registration to the independent movement. The petition cited as relevant law domestic Mexican labor provisions and Mexican-ratified ILO conventions 87 and 98 on freedom of association. Petitioners requested a public hearing in Texas (close to the plants) and ministerial consultations that would require the Mexican government to address its failure to enforce its labor laws.

Petitioners elaborated upon their legal and factual arguments at the public hearing. They went beyond the specific situation with the Sony plants and pointed to a broader, systematic collusive relationship between the CTM, the Mexican labor boards, and private companies. Mexican experts testified to the practical and legal obstacles to independent union registration. They emphasized the structural bias of Mexico's tripartite system of labor boards, made up of a government representative, a business representative, and a union representative. Because the union representative is invariably drawn from the CTM or another official labor union, they argued, the government representative is allied to the official union, and the business representative generally opposes independent unions. The petitioners connected the problems at Sony to this systematic pattern through the testimony of dismissed workers and independent union organizers.

Politicizing the Legal Action

As in GE-Honeywell, the underlying factual patterns of stark abuses at a multinational company selling to a U.S. market, including harassment, intimidation, and illegal dismissal of workers, were chosen for maximum political effect. The degree of political mobilization, however, was ratcheted up a notch. The CJM facilitated considerable cross-border networking, which helped attract international press attention to the petition and subsequent ministerial consultations. The petitioners were able to increase media coverage by disseminating the results of the NAO review to the U.S. and Mexican press.³² The hearing was used for dramatic political advocacy of

31. U.S. NAO Public Submission 940003, 3.

32. See, e.g., James Harding, "Unions Accuse Sony Under NAFTA Accord," *Financial Times*, August 17, 1995, 5; Allen Myerson, "Big Labor's Raid in Mexico," *New York Times*, September 12, 1994, D1; Tim Shorrock, "US Responds Diplomatically to Mexican Labor Row," *Journal of Commerce*, April 13, 1995, 3A.

Mexican workers seeking representation by independent labor movements. Moreover, the NAO was prodded to engage in serious scrutiny of the allegations at Sony and the structural obstacles faced by independent labor movements in Mexico.

Response of the NAO: Furthering the Legal Discourse and Legitimizing the Cause

The careful, comprehensive argument assembled by the petitioners had a positive effect. The NAO demonstrated greater familiarity with the type of labor problems common in Mexico and was less deferential to the company or the government. The U.S. NAO report was very critical of Mexican practices. It effectively validated the argument that workers seeking independent association consistently suffer costly reprisals, including pressure to resign, and that they have little legal redress. The report highlighted NAALC's procedural obligations to provide access to legal tribunals for enforcing workers' rights (Article 4) and to ensure fair, impartial, and transparent judicial procedures (Article 5). This recognition was accompanied by specific criticism of Mexico's performance: "the economic realities facing these Mexican workers make it very difficult to seek redress from the proper Mexican authorities for violations of Mexican labor law. . . . More importantly, the workers repeatedly articulated their concerns about impediments to obtaining impartial legal remedies."³³ The report also criticized Sony's behavior, observing that "it appears plausible that the workers' discharges occurred for the causes alleged, namely, for participation in union organizing activities."³⁴ Finally, the NAO recommended ministerial consultations to discuss the "serious questions . . . raised herein."

Results: Failure at Sony but an Opening for Independent Labor

The NAO endorsement gave greater momentum, prominence, and legitimacy to petitioners' arguments. After all, the NAO had reached its decisions as an outside, neutral body that adopted legal procedures and reasoning and based its findings on the evidence and information obtained from a commissioned independent report. Such validation attracted the attention of the media and pressured Mexico to defend its system of industrial relations (Gacek 1999, 217). The subsequent ministerial consultations were particularly useful. They focused on the systematic problems in Mexico

33. U.S. NAO Public Report of Review, April 11, 1995, 27.

34. Ibid.

concerning the treatment of independent labor unions by the governmental labor boards. Of greatest significance, the consultations presented a rare public opportunity for independent Mexican labor activists to appear at a forum with their own governmental officials, challenge the biased labor board system in Mexico, and pressure the officials to justify the government's behavior.³⁵

There were less promising results as well. The independent organizing campaign at the Sony plants was ultimately defeated, although the independent union activists at Sony credited the momentum gained via the NAALC petition for helping sustain their movement for a substantial period (Compa 1999a, 193). In response, the AFL-CIO expressed bitter disappointment in the lack of concrete results, arguing in the fall of 1995 that the process had shown itself to be "worthless."³⁶

In the long term, however, the Sony case proved valuable to activists in assessing how to attain favorable U.S. NAO support and how to take advantage of the political opportunities and ensuing NAO support. A variety of skeptical activists, including the director of the AFL-CIO's Latin American affairs office, Stanley Gacek (1999, 217), recognized the value of the Sony petition in opening political debate in Mexico on its system of union recognition. The UE came to reassess its previous rejection and engage the NAALC process again.³⁷ Moreover, this petition helped generate new cross-border contacts, such as those between ANAD and the CJM.³⁸

Peak Period (1997–2000)

The disappointing concrete results in the Sony petition notwithstanding, the experience persuaded a broader community of labor activists that, if used strategically and with care, the process had value. One lesson of Sony was that the citizen-petition process was not a conventional legal instrument that produced rulings that translated into immediate behavioral changes. After all, the favorable NAO finding in Sony failed to stop the underlying practices. Yet observers saw a notable political boost in that the petition won greater status for the underlying dispute. Sony thus established the

35. Maria Estela Rios, attorney with ANAD involved in petition who testified at public hearing and at ministerial consultation, interview by author, August 12, 1999, Mexico City.

36. Quoted in Robert Collier, "Mexican Machine Politics Stymies NAFTA Labor Pact," *San Francisco Chronicle*, September 26, 1995, A6.

37. Alexander, interview.

38. Rios, interview.

petition mechanism as a means for prodding the Mexican government to justify its system of industrial relations before an international audience.

A subsequent NAALC petition (Sprint) also proved of some value in exposing objectionable U.S. labor practices to outside scrutiny.³⁹ Brought by the Sindicato Telefonistas de la Republica México (Mexican Telephone Workers, or STRM) and the Communication Workers of America (CWA) to the Mexican NAO, this petition addressed the weakness of U.S. enforcement with respect to a Sprint subsidiary's unlawfully relocating in response to a successful union drive. While it did not find fault, the Mexican NAO recommended subsequent ministerial consultations.⁴⁰ These consultations included a high-profile public seminar in San Francisco on the relationship of NAFTA to illegal plant relocations done to avoid unionization.⁴¹ Labor activists used this seminar to dramatize their argument that NAFTA had harmed workers. Also arising from the ministerial consultations was a study finding a marked post-NAFTA increase in illegal threats by U.S. employers to relocate to Mexico if workers voted for a union (Bronfenbrenner 1997). The AFL-CIO used the report to buttress its successful 1997 lobbying campaign to pressure Congress to reject fast-track extension.⁴²

By 1997 North American labor advocates had stepped up their engagement of NAALC's citizen-petition mechanism. A number of new labor groups and activists took part in petitions, including the AFL-CIO, the CLC, and the United Steel Workers. There was also wide trilateral strategizing, marked by two large AFL-CIO-sponsored conferences in Mexico and in the United States (Bouzas 1999). As a result, a series of legally sophisticated and well-researched petitions were filed, which involved extensive political mobilization and multiple actors. While repression of independent labor movements in Mexico remained the chief focus of the petitions, the targets extended to the treatment of migrant workers in the United States⁴³ and gaps in Canadian federal and provincial laws in protecting the rights of labor organizers.⁴⁴

39. Mexico NAO Public Submission 9501, available online as "Public Submission 9501: NAO of Mexico Conclusions and Recommendations," www.dol.gov/ilab/media/reports/nao/9501.htm.

40. Report on Review of Public Submission 9501, May 31, 1995, *ibid.*

41. See U.S. Department of Labor, Bureau of International Labor Affairs, Public Forum, February 27, 1996 (copy on file with U.S. NAO and with author).

42. Thea Lee, public policy director of AFL-CIO, interview by author, June 10, 1999, Washington, D.C.

43. These include Solec (Mex-9801), Apple Growers (Mex-9802), and Decoster Egg (Mex-9803). See Table 2 for references to petitions filed before the Mexican NAO.

44. McDonald's (US-9803) and Rural Mail Couriers (US-9804). See Table 1 for references to petitions filed before the U.S. NAO.

Most of these petitions enjoyed some success in terms of advancing an ongoing domestic campaign, typically a union-organizing drive. Moreover, three of the petitions produced the following notable concrete results:

1. The Mexican government launched a new informational campaign in the *maquiladora* zone to educate female workers on laws against pregnancy discrimination. Also, several U.S. companies agreed to discontinue pregnancy screening (Maquiladora, US-9701);
2. The Quebec government set up a special council to address ways to prevent companies like McDonald's from illegally closing plants to avoid unions (McDonald's, US-9803);
3. The state of Washington increased the amount of full-time staff enforcing health and safety regulations of migrant workers. In addition, Stemilt, a large apple-growing company, agreed to accept card signing in place of formal elections to determine union certification. The Teamsters subsequently gained registration of the plant (Mex-9803).⁴⁵

These results can be attributed to a combination of sharp legal framing, sustained political mobilizing, and NAO support. These elements increased the pressure on the target actors to justify their behavior and show some commitment to change. In the Apple Growers petition, Stemilt negotiators expressed their hope to the Teamsters negotiators that a concession on card signing would free them from further NAALC scrutiny.⁴⁶ In addition, the labor activists who lobbied at the state level for increased enforcement found that the NAALC petition significantly opened lines of communication with the Washington OSHA body.⁴⁷ Similar experiences in effecting constructive dialogue and initiatives occurred in the McDonald's and Maquiladora petitions.⁴⁸

Overall, however, petitions yielding significant concrete results were the exception even in this most promising phase. The majority of petitions produced mixed outcomes: modest concrete results but marked boosts in

45. See Tables 1 and 2 for references to petitions before the U.S. and Mexican NAOS.

46. Compa, interview. An apple industry executive had complained earlier that "NAFTA's labor side agreement is an open invitation for specific labor disputes to be raised into an international question." Evelyn Iritani, "Mexico Charges Upset Apple Cart in U.S.," *Los Angeles Times*, August 20, 1998, D1.

47. Becky Smith, National Employment Law Project and lead coordinator, telephone interview by author, August 28, 2003.

48. Sauber, interview; Betty Grdina, former attorney for the Teamsters, interview by author, June 9, 1999, Washington, D.C.; Rios, interview. Both Sauber and Grdina helped coordinate the Quebec-McDonald's petition.

the attention given by the government to the underlying cause. Such petitions should not be downplayed, because they best illustrate the limitations and most likely benefits to activists of incorporating a NAALC petition as part of a broader political campaign. Moreover, as discussed below, such benefits are of potentially great significance.

To see the merit of this approach, let us turn to a case study of two especially prominent and representative petitions of this period, Han Young and Echlin. Filed during the same time period and dealing with very similar allegations, these petitions reflect the most sustained effort by a trinational coalition of labor movements and human rights groups to confront a pre-eminent labor concern in North America: systematic repression of independent labor movements in Mexico. Han Young and Echlin illustrate the dynamics involved in using a nonbinding quasi-judicial mechanism for domestic gain. They also merit close analysis because they manifest the high hopes, considerable accomplishments, and great disappointment and frustration experienced by activists dealing with the citizen-petition process. Moreover, the postscript history offers a cautionary tale on how a deteriorating political climate diminishes the political value of quasi-judicial non-binding mechanisms.

Deciding to File Han Young and Echlin

In both Han Young and Echlin, petitioners pushed for extensive scrutiny from the U.S. NAO and a substantial follow-up commitment from the governments, through ministerial consultations and, if necessary, sanctions, to enact structural changes in Mexico's industrial relations. Both followed fiercely contested and international organizing drives by FAT affiliates.

Han Young was filed on October 28, 1997, by the Support Committee for Maquiladora Workers in collaboration with the ILRF, ANAD, and FAT affiliate, Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares (Union of Metal, Steel, Iron, and Allied Workers, or STIMAHCS). It alleged government collusion in suppressing an independent union-organizing campaign at a Han Young plant in Tijuana. Han Young was a South Korea-based company that produced tractor trailer truck parts for Hyundai Precision America. The support committee, a group based in San Diego, took the lead in arousing international attention and support for the STIMAHCS independent organizing campaign.

Echlin was filed on December 15, 1997, by the Echlin Workers' Alliance, a trinational coalition of labor movements that supported organizing drives at nonunion Echlin plants in North America. Members included the UE,

the Teamsters, the United Steel Workers, the Canadian Auto Workers, and the FAT. The petition alleged government-supported suppression of an independent organizing campaign at Itapsa, an auto parts subsidiary of the U.S.-based Echlin Company (later acquired by Dana). The Itapsa organizing campaign was the alliance's first project.

Both sets of activists filed the petitions to help the organizing campaigns by increasing outside scrutiny and pressure on the companies and on the Mexican government. Coordinating the Echlin petition was, once again, Robin Alexander. She had been impressed by subsequent U.S. NAO reviews since GE-Honeywell and believed the U.S. NAO had become much better informed about the real system of industrial relations in Mexico.⁴⁹

Legal Framing of Petitions

Benefiting from their analysis of prior petitions, activists put together well-crafted arguments. Each petition articulated dramatic labor abuses, including the intimidation and firing of FAT supporters, manipulation of union elections by biased labor boards, rampant exposure of workers to asbestos and other harmful chemicals, malfunctioning equipment, and structurally inadequate governmental inspections. Each integrated these plant-level violations to a broader pattern of structural deficiencies in Mexico's system of industrial relations and of collusion between company management, official union affiliates, and government officials. As argued in Echlin, "Through these abuses, which were perpetrated by a U.S. corporate subsidiary in conjunction with Mexico's largest government-sanctioned labor union, the independent union campaign was crushed. . . . Rather than act to prevent the abuses or deny them legal effect, Mexican authorities participated in some of the challenged conduct."⁵⁰

The petitions marked an advance over Sony by including thorough factual documentation and detailed legal analyses of Mexican obligations under statutory law, constitutional law, and international treaty commitments. Giving the petitions further sophistication was their inclusion of long-range plans of resolution for the NAO to recommend that would restructure Mexican labor practices to comply with existing Mexican legal obligations. The plans included a neutral labor board, union elections by secret ballot, public registration of unions, elimination of worker-exclusion clauses, and an effective health and safety enforcement system. Each remedy

49. Alexander, interview.

50. First Amended Petition, February 13, 1998, 2 (copy on file with U.S. NAO and with author).

was linked to Mexico's domestic and international legal commitments. The petitions also cited prior U.S. NAO findings of discrimination against independent labor movements.

In both petitions, the factual and legal arguments were further developed at the public hearings. There, workers recounted abuses suffered at the plant and physical intimidation experienced at the labor board-sponsored union-certification election. Similarly, Mexican labor attorneys testified on how Mexico's labor boards were biased against independent unions and violated statutory law. The attorneys argued that true compliance with Mexican labor laws required giving workers the right to demand a secret-ballot election to determine union certification.

These petitions stand out for featuring failures to uphold health and safety standards. At the Echlin hearing, a Mexican toxicologist reviewed the country's inadequate enforcement of health and safety regulations. Such allegations not only added a new powerful charge that the companies and Mexican government would have to explain, they also formally elevated the stakes of the petition. Unlike labor union violations, health and safety violations are subject to scrutiny beyond the NAO level, including, as a last resort, sanctions.⁵¹

Politicizing the Legal Actions

In both Han Young and Echlin, petitioners invested considerable effort to make "talking the talk" of principled obligations translate into actual gains for independent labor movements. As in Sony, the decisions to file NAALC actions were based on the political appeal of showing that a U.S. subsidiary, or a foreign company producing for the U.S. market, had engaged in flagrant abuse of workers. Similarly, petitioners considered the overall political context of the time opportune, because the Clinton administration was seeking congressional "fast-track" approval for negotiating subsequent trade agreements.⁵² It was understood that NAALC would be the basic model for follow-up trade agreements and that the administration would need to persuade some pro-union congressmen of NAALC's practical value. Accordingly, petitioners calculated that a Clinton-led NAO would be well disposed toward the petition.

Upon the filing of the petitions, petitioners engaged in networking, dis-

51. To be clear, the NAO is still limited to issuing its own report and recommending ministerial consultations. Further levels of scrutiny are determined at the intergovernmental level.

52. Alexander, interview.

seminating information, symbolic politics, protesting, and lobbying. In Han Young, networking expanded to three of the most prominent U.S. and Canadian labor unions, the United Steel Workers, the UAW, and the Canadian Auto Workers. In Echlin, the initial petitioners added as co-petitioners the central offices of the AFL-CIO, the CLC, and the UNT, and a trinational collection of human rights groups, advocacy groups, and faith-based supporters. This networking garnered a great deal of media attention for the dispute and for favorable NAO reports to the media, public officials, and supporters.⁵³ The networking also increased pressure on public officials to take action. Symbolically, the networking helped frame the petitions as more than labor-management disputes but as issues promoting the broader public interest. Petitioners reinforced these effects by packing the hearing room with workers and prominent union activists from multiple countries. Petitioners and supporters applied further pressure by having labor delegations visit the disputed plants and picket Echlin headquarters in Connecticut and at various Hyundai dealerships in the United States.⁵⁴ Lobbying took the form of soliciting support from Democratic members of Congress, Vice President Gore, and President Clinton. Gore raised the Han Young matter with Mexico's President Zedillo (Williams 2003).

Response of the NAO: Overwhelming Legal Validation

The sophisticated legal and political advocacy made a favorable impact on the U.S. NAO. Thanks to the prominent media attention in the Han Young case, the U.S. NAO sent a media representative to the public hearing and held a special "media session" at which NAO secretary Irasema Garza answered questions from U.S. and Mexican reporters. While careful not to offend the Mexican government overtly, Garza praised NAALC's sunshine value for "contribut[ing] to an unprecedented level of scrutiny of Mexican labor law" and engendering a public debate in Mexico on its labor law system.⁵⁵

Both final NAO reports validated petitioners' contentions overwhelm-

53. E.g., Nancy Cleeland, "Labor Panel Told of Problems at Tijuana Plant," *Los Angeles Times*, February 19, 1998, A3; Sam Dillon, "Bias Said to Hurt Independent Mexican Unions," *New York Times*, April 30, 1998, A8; Jose Manuel Nava, "Permite el TLC que se pisotee a los trabajadores mexicanos," *El Excelsior*, December 16, 1997; "Reiteran trabajadores de maquiladora violaciones a sus derechos," *Notimex*, March 23, 1998; Sam Dillon, "Abuses Reported in Mexico at American-Owned Plant," *New York Times*, August 5, 1998.

54. Alexander, interview.

55. U.S. NAO Public Hearing, February 18, 1998, 64 (copy on file with U.S. NAO and with author).

ingly. The first of two Han Young reports found “considerable testimonial evidence that the election was plagued with irregularities.”⁵⁶ It questioned the impartiality of the Tijuana labor board and noted that Han Young’s use of “coercion, intimidation, and other means appear well substantiated.”⁵⁷ The Echlin report found that “the testimony and other evidence [of the collusion between CTM and the labor board] is consistent, convincing, and disturbing,” and that “the exclusion clause may constitute a serious threat against the rights of workers and the principle of freedom of association.”⁵⁸ Both reports further legitimized petitioners’ arguments by stating that the present violations should be seen in the context of similar problems found in prior NAO reviews rather than as isolated incidences. With respect to health and safety issues, the second Han Young report and the Echlin report faulted both the companies and the weak and nontransparent health and safety inspection process of the state and federal governments. In both cases the NAO expressed frustration at not being able to determine whether fines ordered had actually been imposed, noting in the Han Young report that without “the certainty of the assessment of significant financial penalties against violators, the deterrent effect is lost.”⁵⁹ The NAO called for intergovernmental consultations on virtually all issues requested by both petitions.

Results: Modest at Plant Level but Significant to the Cause of Independent Labor

The Mexican government was displeased with the final reports. It accused the U.S. NAO of exceeding its authority by questioning Mexico’s system of industrial relations and intervening in its internal politics on behalf of its critics.⁶⁰ It also faulted the U.S. NAO for acting contrary to the cooperative purpose of NAALC.

Initially, the Mexican government threatened to stop cooperating in the NAALC review of the two petitions.⁶¹ Yet it was effectively forced to con-

56. U.S. NAO Public Report of Review, April 28, 1998, 23, available online as “Public Report of Review of NAO Submission No. 97021,” www.dol.gov/ilab/media/reports/nao/pubrep9702.htm (page references are to hard copy, available at U.S. NAO and on file with author).

57. *Ibid.*, 44.

58. U.S. NAO Public Report of Review, July 31, 1998, 37, 45, available online as “NAO Submission No. 9703,” www.dol.gov/ilab/media/reports/nao/pubrep9703.htm.

59. U.S. NAO Public Report of Review, August 11, 1998, iii, available online as “Public Report of Review of U.S. Submission No. 9702, Part II: Safety and Health Addendum,” www.dol.gov/ilab/media/reports/nao/9702PartII.htm.

60. Sam Dillon, “Bias Said to Hurt Independent Mexican Unions,” *New York Times*, April 30, 1998, A8.

61. *Ibid.*

tinue, given the momentum gained by petitioners' political advocacy and the U.S. NAO's legal support. As in Sony, the NAO had based its decision on a formal process of analyzing evidence. It connected its findings to a combination of documented evidence, well-researched legal analysis of Mexican law, and accumulated expertise. Activists promoted the NAO findings to the media and to government officials as an authoritative, neutral benchmark for evaluating Mexico's treatment of independent labor movements. On May 18, 2000, the Mexican government signed a joint ministerial declaration, addressing Echlin and Han Young, in support of secret-ballot union elections and public registration of collective bargaining contracts (to impede protection contracts).⁶² The declaration further committed the governments to hold trilateral public meetings on promoting the principles of freedom of association and collective bargaining, ensuring impartial labor boards, and improving health and safety enforcement.

Mexican independent labor activists give Han Young, Echlin, and the ministerial declaration much credit for boosting their cause. Alfonso Bouzas, a leading Mexican scholar and advocate of democratic labor reform, credits the ministerial declaration and activists' promotion of it with shifting the terms of the debate on how to reform Mexico's labor system.⁶³ Previously, the internal discussion in Mexico was focused on instituting neoliberal-oriented labor "flexibilization," that is, more contract workers and less job security. With the declaration in hand, democratic labor reformers secured a commitment from the government to include freedom of association and public registration of collective bargaining contracts into the policy agenda of labor reform.⁶⁴ Activists also used the declaration for leverage in persuading opposition presidential candidate Vicente Fox, of PAN, to sign on to a statement of twenty compromises produced by labor activists promoting democratic labor reforms.⁶⁵ Arturo Alcalde, the preeminent labor attorney and advocate for democratic labor reform, who has both participated in citizen petitions and been a strong critic of their limitations, argues that Echlin, Han Young, and the ministerial declaration gave crucial momentum to the campaign for secret union ballots.⁶⁶

62. U.S. Department of Labor, "Ministerial Consultations—Submission 9702 and 9703," May 18, 2000, www.dol.gov/ilab/media/reports/nao/minagreement9702-9703.htm.

63. Alfonso Bouzas, interview by author, July 22, 2003, Mexico City.

64. While less explicit in drawing a one-on-one correlation, Mexico's NAO coordinator, Claudia Anel Valencia, credits the NAALC ministerial declarations with shaping the specific content of the labor reform negotiations and the inclusive nature in which all parties, including the UNT, were invited to participate. Claudia Anel Valencia, interview by author, July 24, 2003, Mexico City.

65. Hector Barba, labor attorney negotiating for the UNT in reform talks with the government, interview by author, July 27, 2003, Mexico City.

66. Alcalde, interview. Barba shares this sentiment.

Echlin and Han Young also made U.S. companies more sensitive about their health and safety records in Mexico. The director of the U.S. NAO's information room, John Mondejar, recalled receiving six to eight inquiries in the summer of 1998, shortly after the Echlin and Han Young reports, from U.S. companies operating in Mexico about Mexico's health and safety regulations.⁶⁷

The concrete results at the plant level in Han Young and Echlin, by contrast, proved quite discouraging to petitioners and their supporters. Arguably, the petitions won some improvements in health and safety enforcement. For example, the day after the Han Young public hearing, the Mexican government imposed a \$9,000 fine on Han Young for health and safety violations. In addition, health and safety conditions improved notably at the Itapsa plant, although the causes are disputed because the plant had been acquired by another U.S.-based company, Dana.⁶⁸ There is reason to believe that the improvements were in part the result of the petition process, given Dana's subsequent concern for NAALC's shaming potential. The company vigorously defended its own behavior at a follow-up review conducted by the Canadian NAO (Can-9801) (see Table 3).

But petitioners' chief objective—advancing independent organizing drives—failed. Initially, Han Young looked quite promising in this respect. Shortly before the first NAO report, the Mexican government pressured the Tijuana labor board to reverse itself and register the STIMAHCS union. This was an extraordinary step, as, according to the U.S. NAO, STIMAHCS became only the second independent labor union ever to gain registration in the *maquiladora* zone.⁶⁹ Registration, however, never translated into actual representation of the workers at Han Young. In fact, the PAN-led state government of Baja California resisted the international pressure and allowed the Han Young management to close the plant, fire workers who supported the insurgent union, relocate the plant, and turn union representation over to a CTM affiliate (Williams 2003).⁷⁰ Meanwhile, at the Itapsa plant, the independent organizing drive ultimately collapsed.⁷¹

Overall, the results of Echlin and Han Young are mixed. The broader lessons to be derived from their experiences are explored below.

67. John Mondejar, interview by author, June 8, 1999, Washington, D.C.

68. Alexander, interview.

69. US NAO, Public Report of Review, April 28, 1998, 27 (see note 56 above).

70. As discussed below, the CTM and other official unions maintained much of their influence in Baja California Norte even under a PAN-led government.

71. Bouzas, interview.

The Overall Record of NAALC's Citizen Petitions

Looking only at concrete results, it is tempting to call Han Young and Echlin failures and proof of NAALC's impotence, as some observers have done.⁷² After all, considerable resources were expended, yet the independent union drives failed. Such a conclusion, however, fails to appreciate the nature of transnational nonbinding quasi-judicial mechanisms. By design, such forums are unlikely to be effective in producing immediate, concrete changes in behavior. The best measure of their effectiveness lies in whether they are able to boost ongoing political campaigns. By this measure, the Han Young and Echlin petitions did prove effective, albeit with mixed results (discussed below). Consistent with the conceptual framework of this book, the two petitions illustrate the mutually important roles of sustained political activism and legal validation in gaining political value from a non-binding quasi-judicial mechanism. If petitioners had not received the strong NAO validations, the shame value would have been greatly diminished, as occurred in GE-Honeywell, and there would have been no authoritative benchmark by which to elicit new commitments from the Mexican government. By the same token, failure to aggressively promote the petition and its underlying allegations to supporters, the press, and politicians would have given the NAO findings much less status and made it easier for the Mexican government to ignore them as "mere talk." Similarly, it was activists' wide dissemination of the NAO reports and joint ministerial declaration that prodded the government and opposition figures to commit to a new dialogue on labor reform.

Up to a certain point, the experiences of Han Young and Echlin are consistent with this book's framework on the roles played by political activism and legal validation in securing domestic political value from the non-binding quasi-judicial mechanism. To assess the role of these dynamics more fully, I performed process tracing of all activist-initiated petitions filed up to 2003 and followed developments on them through 2006. I have rated each petition according to the degree of political activism employed by petitioners, the level of NAO validation, and the results. The data and analysis are presented below.

Coding

Political activism and NAO validation are coded on a three-tiered scale of low, medium, and high. Petitions coded as high on political activism are

72. David Bacon, "Beating Home a Message," *LA Weekly*, June 30, 2000.

those like Han Young and Echlin, which build on ongoing, extensive domestic political efforts and employ a range of political tactics common to transnational activism, such as highlighting dramatic political facts, promoting the petition, assembling broad coalitions, and mixing in protest and symbolic politics. A low ranking conveys few petitioners and few political tactics. Medium rankings, such as in GE-Honeywell, indicate a modest range of political tactics and only light networking. Petitions rated as low for NAO validation involve an early dismissal or a rejection of the substantive allegations, as in GE-Honeywell. High validation applies to petitions like Han Young and Echlin, where the review body effectively agreed with the major substantive claims and recommended further action. Medium NAO validation applies to two situations. The first is when the NAO has deemed the petition worthy of a full review but holds back from directly criticizing the behavior of the target government, which is the standard practice of the Mexican NAO.⁷³ The second is when petitions were resolved before the review body could make a final report.

For a fuller assessment of results, I include ratings for both concrete, plant-level results and broader agenda advancing, such as promoting the cause of independent labor movements in Mexico. I have chosen the terms *none*, *modest*, and *significant* to convey the level of expectations activists should have toward nonbinding transnational quasi-judicial mechanisms. Modest concrete results refer to petitions like Han Young and Echlin, where some type of positive step resulted, such as health and safety improvements or registration of a union, but where the step did not address a central concern or was later effectively neutralized, as with union registration not leading to plant representation. Significant concrete results are more enduring and substantial, as in the Maquiladora and Apple Growers petitions. Petitions rated as modest under agenda advancing are those like Sony, where the petition provided some boost to the underlying cause but the effect was not long lasting. Significant ones are those that did have a noticeable long-term impact, as in Han Young and Echlin, for shaping debates on labor reform.

The results of all activist-initiated petitions are summarized in Tables 1–3, broken down by the separate NAOS.⁷⁴

73. With the exception of 0101 (NY), discussed below.

74. There have been only two petitions not filed by activists, US-9802 and Can-9901. Also not included in these tables is a petition withdrawn early (US-9404) and one (Can-9802) that was an exact duplicate of another petition (Mex-9804) and was therefore not reviewed.

The Rise and Decline of NAFTA's Labor Petitions

Table 1 NAALC Petitions Before the U.S. NAO

Number, name: target	Issues	Political activism	NAO support	Concrete results	Agenda advance
9401, ^a Honey- well 9402, GE: Mex	Suppressing independent organizing campaigns	med	low	none	none
9403, Sony: Mex	Suppressing independent organizing campaign	high	high	none	modest
9601, SUTSP: Mex	Limiting workers in federal agency to one union	med	low	none	modest
9602, Maxi- Switch: Mex	Suppressing independent organizing campaign	med	med	modest	modest
9701, Maquila- dora: Mex	Discriminating against pregnant workers and applicants in <i>maquiladora</i> zone	med	high	signif	signif
9702, Han Young: Mex	Suppressing independent organizing, violating health and safety	high	high	modest	signif
9703, Echlin: Mex	Same as above	high	high	modest	signif
9801, flight attendants: Mex	President's use of national security powers to stop a strike	med	low	none	none
9901, TAESA: Mex	Suppressing independent organizing, violating minimal work and health and safety standards	med	high	none	modest
0001, Auto Trim: Mex	Violating health and safety and compensation standards	high	high	none	none
0101, Duro Bag: Mex	Denying secret-ballot union election	high	low	none	none
9803, McDonald's: Can	Quebec law not prohibiting union-avoidance plant-closings	high	med	none	signif
9804, Rural carriers: Can	Canadian law denying rural mail carriers the right to unionize	high	low	none	none

^a The first two numbers indicate the year the petition was filed.

Table 2 NAALC Petitions Before the Mexican NAO

Number, name: target	Issues	Political activism	NAO support	Concrete results	Agenda advance
9501, Sprint: U.S.	Plant closing to avoid a union	high	med	none	modest
9801, Solec: U.S.	Violating health and safety and organizing standards	med	med	modest	modest
9802, Apple growers: U.S.	Violating protections for organizing, minimum employment, migrant workers, and health and safety	high	med	signif	signif
9803, Decoster: U.S.	Employment discrimination, violating protections of migrant workers, and health and safety	med	med	none	modest
9804, INS: U.S.	Unlawful collusion between INS and DOL	med	med	signif	signif
0101, NY: U.S.	Violating workers' comp and health and safety standards	med	high	? ^a	modest

^a I was unable to determine sufficient information here.

Table 3 NAALC Petitions Before the Canadian NAO

Number, name: target	Issues	Political activism	NAO support	Concrete results	Agenda advance
9801, Dana: Mex	Follow-up to US9703	high	high	modest	modest

Assessing Overall Results

In the first place, this study shows that activists have enjoyed a fair amount of success, particularly in terms of advancing their agenda. For the sake of convenience, Tables 4 and 5 break down the levels of success attained against each government.

Petitioners have attained at least modest concrete success in eight out of twenty completed petitions (NY not ascertained) and at least modest success in advancing their agenda in fifteen out of twenty-one petitions. Six peti-

Table 4 Level of Success in Concrete Results

Level of success	Mexico as target	U.S. as target	Canada as target	Total
None	8	2	2	12
Modest	4	1	0	5
Significant	1	2	0	3
Not ascertained	0	1	0	1
Total	13	6	2	21

tions have produced significant agenda-advancing results. Moreover, success has occurred against all three governments, showing the value of such mechanisms against quite distinct types of state.

Also noteworthy in overall trends has been the considerable degree of political sophistication employed by activist-petitioners and the marked receptivity of the NAOs. In none of the twenty-one petitions has there been low political activism, while ten have involved extensive political activism. This pattern reflects an understanding among interested labor activists that the petition mechanism's primary value is political. Extensive strategizing on best uses of the process has helped activists develop politically advanced campaigns. Political sophistication has also taken the form of selecting causes of action that appeal to the political concerns of the reviewing NAO. Most petitions before the U.S. NAO have thus implicated the behavior of U.S. affiliates or other multinational companies producing for the U.S. market, while most before the Mexican NAO have included abuses of migrant workers in the United States.

These political appeals show strong signs of working with the NAOs. Both the U.S. and Mexican NAOs have actively promoted their activities before their own citizens. U.S. NAO officials have boasted at hearings (especially at Han Young), in interviews, and at conferences about their role in improving the Mexican system of labor law. The Mexican NAO displayed its concern for the cause of Mexican migrant workers during its review of the high-profile Apple Growers petition by inviting a group of migrant

Table 5 Level of Success in Agenda Advancing

Level of success	Mexico as target	U.S. as target	Canada as target	Total
None	5	0	1	6
Modest	5	4	0	9
Significant	3	2	1	6
Not ascertained	0	0	0	0
Total	13	6	2	21

apple workers to Mexico City for an “informative session.”⁷⁵ Such motivation in showing their worth may partially explain petitioners’ favorable record overall with the NAOs. In fifteen of the twenty-one petitions, NAOs have given at least a medium level of validation to the petitions, while denying review only three times.

If we break down the NAOs by government, the U.S. and Mexican NAOs have displayed a mixture of political and professional concerns that reflect each government’s institutional traditions.⁷⁶ Like the international judicial bodies assessed by Thomas Franck (1990), the U.S. NAO has taken care to establish its expertise through gathering extensive information on Mexican labor laws and practices and commissioning studies from academic experts in Mexican labor law and industrial relations. It has followed consistent review procedures and effectively built up an internal body of law by referring to its own prior findings.

Although the U.S. NAO refers to its activity as “informational,” it has, to the displeasure of the Mexican government, given petitioners wide leeway to attack the practices of both the target government and specific companies in the petitions and at the public hearings. In fact, the process has come to be viewed as substantially adversarial and judicial in the public mind; the press and activists refer to the petitions as “complaints.” Moreover, while couching its language in diplomatic terms, the U.S. NAO has been strongly judgmental of the Mexican government’s behavior in a number of petitions, using such language as:

- “The testimony and other evidence is consistent, convincing, and disturbing.”⁷⁷
- “It appears plausible that the workers’ discharges occurred for the causes alleged.”⁷⁸
- “There is significant evidence that women workers lack awareness of their rights and confidence in the institutions responsible for the enforcement.”⁷⁹

75. See, e.g., Elizabeth Velasco, “Trabajadores agrícolas denuncian explotación en E.U.,” *La Jornada*, December 3, 1998, 41; Molly Moore, “Mexican Farmhands Accuse U.S. Firms,” *Washington Post*, December 3, 1998, A36. The Mexican NAO took similar steps for 0101 (NY).

76. I have not addressed the Canadian NAO because of its limited activity.

77. U.S. NAO, Public Report of Review of NAO Submission No. 9703, July 31, 1998, 37 (see note 58 above).

78. U.S. NAO, Public Report of Review (Sony), April 11, 1995, 27.

79. U.S. NAO Public Report of Review of NAO Submission No. 9701 (Maquiladora), January 12, 1998, 45.

The Mexican NAO has adopted a more closed system of review. Other than the petitions and reports, it has made very little information open to the public. It has avoided public hearings or other open forms of gathering information, viewing them as inviting an inappropriate contentious element.⁸⁰ Similarly, except for 0101 (NY), the Mexican NAO has refrained from any judgmental language in its final reports, sticking to short descriptive summaries of the allegations and laws at issue. Nevertheless, it has treated all petitions reasonably favorably by calling for follow-up ministerial consultations. It has also attended to professional concerns by issuing rules on what type of petitions it will review, and referring in all its reports to the applicable provisions of NAALC and U.S. law.

With respect to correlations between the variables of political activism, NAO validation, and results, there is no perfect linear relationship. Sometimes petitions with only medium ratings of political activism produced better results than those rated as high. There are, however, notable gaps in results between petitions on the high end of combined political activism and NAO validation and petitions on the low end. The five petitions rated as high for both political activism and NAO validation⁸¹ attained modest or greater agenda-advancing results four times (twice modest, twice significant), and modest concrete results three times. Of the five rated as high on one variable and medium on the other,⁸² modest or greater agenda advancement was achieved every time, and three times as significant. Two of those four also attained significant concrete results.⁸³ By contrast, of the six petitions rated as low on NAO validation,⁸⁴ none attained concrete results and only one attained even modest agenda-advancing results.

Overall, then, there has been considerable correlation between the independent variables of political activism and NAO validation and the dependent variable of results. This correlation is especially pronounced on the high and low ends, with petitions marked by high political activism and NAO validation generally attaining favorable results and those marked by lower levels of political activism and NAO validation attaining minimal results.

80. "This is not a conflictual process," explained Mara Salazar, a labor attorney at Mexico's NAO, interview.

81. US-9403, US-9702, US-9703, US-0001, Can-9801. See Tables 1 and 3.

82. US-9701, US-9901, US-9803, Mex-9501, Mex-9802, Mex 0101. See Tables 1 and 2.

83. US-9701 and Mex-9802. See Tables 4 and 5.

84. US-9401/9402, US-9601, US-9801, US-9804, US-0101. See Table 1.

How Political Activism and NAO Validation Matter

A close process tracing enables a more nuanced qualitative examination of how political activism and NAO validation further the successful use of NAALC petitions for domestic political gain. NAO validation legitimates petitioners' political cause and is a benchmark for drawing governments into an unwelcome legal-normative discussion. The influence of NAO validation plays out in multiple phases. The first occurs when a petition is deemed worthy of a full review, thereby legitimating petitioners' cause as meriting serious attention. With this step, a previously domestic political dispute becomes the subject of formal intergovernmental deliberations, increasing outside attention. Such validation and increased scrutiny have been particularly welcome for long marginalized and repressed Mexican labor activists.⁸⁵ Moreover, accepting the petition for review draws the target government into a legal discourse in which it attempts to justify its behavior. Thus the Mexican government has had to give an accounting of such matters as how its labor boards operate and whether its activities conform to the country's labor rights provisions, while the U.S. federal and state governments have had to explain how their administrative and judicial institutions ensure the prevention of migrant labor abuses. Private companies have also felt the need to defend their behavior to the NAO, as seen in GE-Honeywell, Sprint, Han Young, and Echlin.

In a few petitions the decision to give a full review raised enough status and attention to the underlying dispute on its own to prompt concessions. Maxi-Switch (Table 1) was jointly filed by the CWA and STRM to boost an independent organizing campaign at a *maquiladora* plant. A day before the U.S. NAO was scheduled to convene a public hearing along the border, the Mexican state governor pressed the local labor board to register the independent affiliate in exchange for withdrawal of the petition.⁸⁶ In Han Young, the Mexican government imposed a \$9,000 fine on the Han Young plant the day after a public hearing was held. In McDonald's (Table 3), a coalition of Canadian and U.S. labor unions, along with the ILRF, attacked the Quebec government for not implementing affirmative legislation to prevent companies like McDonald's from closing plants to avoid unions. Before a public hearing could be held, the Quebec government worked out a

85. This point was stressed in my interviews of Rios and Bouzas.

86. John Nagel, "NAFTA: Mexican Labor Group Calls for Action Following Victory in Maxi-Switch Campaign," *Daily Labor Report*, April 28, 1997, D12.

favorable settlement with the petitioners, whereby it set up a council that would address how to prevent antiunion-motivated plant closings.⁸⁷

The power of NAO validation continues with the issuing of a final report calling for ministerial consultations. In addition to often drawing media attention, the report extends the process of accountability and dialogue by which governments have to justify their behavior according to their legal commitments. As seen in Han Young and Echlin, activists then gain leverage to press for additional concessions. Initial threats from Mexico notwithstanding, no government has refused to engage in ministerial consultations. In the Maquiladora petition (Table 1), activists used the ongoing public studies and seminars on the status of female workers in the *maquiladora* zone to strengthen governmental commitments to educating female workers of their rights and to prompt U.S.-based companies, like General Motors, Zenith, and Motorola, to stop pregnancy screening.⁸⁸

By the same token, a negative NAO decision hurts activists' cause in two fundamental ways. First, as shown in GE-Honeywell, it conveys an impression that the petitioners' political dispute has no real merit, which implicitly validates the target actor's behavior. Second, a negative NAO finding allows governments to stop "talking the talk" of their legal commitments to an outside audience. Obviously, initial dismissals are the most harmful to activists because they cut off legal discussion at an early stage.

But while the NAO plays a crucial role, this should not obscure the fundamental role of activist-petitioners in providing the legal and political foundation for attaining success. After all, obtaining NAO validation has required petitioners to compose legally sound arguments. All the instances of strongly critical NAO reports of governmental behavior have involved legally rigorous, well-documented petitions, like those seen in Echlin and Han Young. Moreover, petitioners have established the specific legal discourse for characterizing the dispute. In a series of petitions against Mexico, petitioners have framed the right to join a union of one's choice as requiring a neutral labor board, transparency in registration of unions, secret-ballot elections, and elimination of worker-exclusion clauses. Petitioners have thus formulated the terms of the debate and at times have persuaded the NAO to adopt their interpretations.

But just getting a favorable legal ruling from the NAO has not been sufficient. Although such rulings provide openings, they need to be ex-

87. Grdina, interview; Compa, interview.

88. Rios, interview. See Farhan Haq, "NAFTA Body Gets Mixed Reviews," Inter Press Service, March 10, 1999, www.ips.org/.

ploited through sustained political activism in order to convert appealing talk into substantive change. The most politically engaged petitions have been active at multiple phases in boosting the legalized forum. At U.S. NAO hearings, petitioners have brought in union leaders from multiple countries to highlight the international solidarity behind the underlying dispute and have presented direct testimony from victims of the labor abuses to increase the moral power of their dispute. In the Apple Growers petition, the AFL-CIO worked with Mexican groups to attract U.S. and Mexican media attention to the special informative session with migrant workers convened by the Mexican NAO.⁸⁹ Although the session itself was closed, reporters interviewed the workers and the lead organizers of the petition directly following the session.⁹⁰

Similarly, as seen in Han Young and Echlin, political engagement by petitioners is needed to take advantage of legal validation from a favorable NAO report. Post-report political mobilization is all the more important for Mexican NAO petitions, given that the Mexican NAO usually avoids judgmental language in its reports. The principal value of the Mexican NAO reports is that they recommend follow-up ministerial consultations, which allow public scrutiny and legalized conversation to continue with ongoing public studies and seminars. Accordingly, petitioners in the Apple Growers petition focused at the outset on how best to use these new forums to promote their unionization drives for migrant labor.⁹¹

By contrast, inattention to political mobilization after a favorable NAO action can prove quite costly, as evidenced in the case of Maxi-Switch. The petition was initially successful in leading to a labor board registration of a STRM affiliate, but the STRM leadership neglected to follow up on this victory by helping the subsequent campaign gain collective bargaining rights. As a result, the union eventually disbanded in the face of continuing resistance from Maxi-Switch and the state government.⁹²

Reversals and Disillusionment After 2000

The results indicate that the NAALC petition process has been a moderately positive transnational political opportunity structure for North American

89. Beatty, interview; Compa, interview.

90. Compa, interview.

91. Ibid.

92. Alicia Sepulveda, an executive board member of STRM, believes the leadership was uncomfortable engaging in adversarial grassroots organizing in the *maquiladora* zone. Alicia Sepulveda, interview by author, Mexico City, August 16, 1999. See Robert Collier, "NAFTA Labor Problems Haunt New Trade Debate," *San Francisco Chronicle*, September 10, 1997, A1.

labor activists with potentially far-reaching implications for reforming Mexican industrial relations. What the overall record partially obscures, however, is the high level of disillusionment in recent years, even among once supportive participants.⁹³ This disillusionment can be explained by negative follow-up developments in Han Young and Echlin and the failure of petitions filed since 2000 to make much political headway. The recent negative turn of events merits close analysis both to explain the importance of shifting political contexts and to caution against a hasty dismissal of the process.

The first public meeting arranged in response to the joint declaration for Han Young and Echlin set the tone for the post-2000 disillusionment. Held in Tijuana in June 2000, it ended in a disaster when a group of local independent union organizers at Han Young were physically beaten by members of the audience as they protested the forum's failure to address their experiences. The assailants belonged to an official labor federation, the Revolutionary Confederation of Workers and Campesinos, that had switched its allegiance from PRI to PAN, following the latter's victory in state elections.⁹⁴ A second public meeting, held in March 2003, also provoked great frustration. Mexico's secretary of labor changed the location from Mexico City to Monterrey one day before the meeting.⁹⁵ Leading independent labor activists Arturo Alcalde and Alfonso Bouzas managed to attend, along with a delegation of workers, but the Mexican government tightly controlled participation and refused to allow Alcalde or Bouzas to speak. Finally, through the intervention of the Canadian and U.S. participants, Bouzas was allowed to make a statement. Nevertheless, Alcalde dismissed the meeting as "una burla" (a mockery).⁹⁶

Equally frustrating was the failure to reverse the problems at the plant level, as discussed above. The hope that raising and thoroughly documenting health and safety violations would lead to a follow-up investigation beyond ministerial consultations finally fizzled out. As in every later petition addressing health and safety or other violations subject to higher scrutiny, the review stopped at ministerial consultations.⁹⁷

Furthering the overall disillusionment were the experiences of two subse-

93. Lance Compa, "Workers Continue to Be Exploited" *St. Louis Post-Dispatch*, December 23, 2003, B7.

94. Bacon, "Beating Home a Message."

95. Alcalde, interview.

96. Ibid.; Bouzas, interview. Earlier, UE president John Hovis wrote to the U.S. labor secretary, Elaine Chao, "We believe that the NAO process has deteriorated into a farce," July 24, 2002, <http://mhssn.igc.org/naftaII.htm>.

97. US-9901, US-0001, Mex-9801, Mex-9802, Mex-9803, Can-9801. See Tables 1-3.

quent petitions, filed in 2000 and 2001, that involved considerable effort from a cross-border coalition of activists. In *Auto Trim* (Table 1), filed in 2000, petitioners enlisted the input of a trinational range of labor movements and activists in alliance with insurgent workers challenging poor health and safety conditions at two plants.⁹⁸ Despite gaining strong NAO support and achieving impressive follow-up political mobilization, little was accomplished beyond some cosmetic changes enacted before an NAO inspection.⁹⁹ Petitioners' proposals that specific health and safety topics be addressed as part of ministerial consultations, and that input from *Auto Trim* workers be incorporated, were ignored. In fact, petitioners were kept uninformed of the consultations.¹⁰⁰

The AFL-CIO filed *Duro Bag* (Table 1) in 2001 in conjunction with Arturo Alcalde and FAT activists, who were conducting an independent organizing drive at a Mexican subsidiary of the U.S.-based company.¹⁰¹ It followed up on the joint declaration of Han Young-Echlin, in which the Mexican government stated its support for secret-ballot union elections. The petition faulted the state authorities for rejecting a request from union organizers for a secret ballot. To the regret of petitioners, the U.S. NAO declined to review this petition, seemingly reversing its previous position.

These reversals reflect a shift to a less favorable domestic political setting in the United States and Mexico. Consistent with the analysis in Chapter 2 on the expected impact of changes in domestic political setting, the George W. Bush administration has been more deferential to the Mexican government and U.S. business subsidiaries than its predecessor. The Clinton administration had expressed great support for opening up Mexico's system to international scrutiny, despite the notable irritation this provoked in the Mexican government. With respect to Mexico's political transition, President Fox, whose term of office ended in November 2006, showed some receptivity to democratic labor law reform, especially while he was still a candidate. Yet the more salient feature of Fox's PAN administration was support for business-friendly "flexibilization" reforms.

These domestic political changes have exerted the most significant impact upon ministerial consultations.¹⁰² With the notable exception of mi-

98. Monica Schurtman, lead coordinator, telephone interview by author, August 15, 2003.

99. *Ibid.*; Delp et al. (2004).

100. Schurtman, interview; Monica Schurtman, Martha Ojeda, Garrett Brown, and Linda Delp to U.S. Secretary of Labor Elena Chao, March 20, 2002, <http://mhssn.igc.org/nafta6.htm>.

101. Alcalde, interview.

102. In fact, Lewis Karesh served as acting NAO secretary under the Bush administration. He has continued to be reasonably supportive of the process.

grant labor issues in the United States (discussed below), neither the Bush nor the Fox administration has shown much interest in using the consultations to pressure greater compliance on the part of the other. As discussed above, the consultations have been less transparent and accessible than they were previously. Consequently, petitioners have had less success in shaping ministerial consultations or in getting the governments to call for higher levels of scrutiny on health and safety issues.

The combined domestic political changes have also stalled the momentum generated by Han Young and Echlin for enacting secret-ballot union elections and public registration of collective bargaining contracts in Mexican labor law. Although the Fox administration accepted input from a wide variety of actors, including Hector Barba and Arturo Alcalde, the latter felt shut out of substantive talks.¹⁰³ The initial proposals circulated by secretary of labor Carlos Abascal stressed flexibilization and gutted democratic labor reforms. The general consensus among independent labor activists was that the Fox administration sided with backers of the corporatist labor system in hopes of forging a neoliberal reform package.¹⁰⁴ As noted, under the Bush administration, the U.S. NAO or secretary of labor has not applied further pressure on Mexico. What will happen under the new administration of Felipe Calderón, which took office in December 2006, is uncertain. Because Calderón also belongs to the PAN, he is likely to focus on neoliberal reforms. Given, however, his narrow and disputed victory over Andrés Manuel López Obrador, of the left-of-center Partido Revolucionario Democrático (PRD), he may feel the need to be more accommodating.

Some activists following NAALC's developments over the years argue that the citizen-petition mechanism has lost its political value (Delp et al. 2004). There are strong reasons, however, not to write off the mechanism. In fact, activists have still been able to use the process for political gain even in the changed post-2000 setting. Activists working on the aftermath of the Apple Growers petition in Washington have used the forums sponsored by ministerial consultations, particularly one in the summer of 2001, to get the state of Washington to devote more staff to enforcing health and safety requirements in the migrant worker industry.¹⁰⁵ The Asociación Sindical de Subargos de Aviación (Mexican Flight Attendants' union, or ASSA) credits the TAESA petition with giving it added political leverage in a later struggle against the practices of Aerocaribe. The favorable decision and ministerial

103. Alcalde, interview; Barba, interview.

104. Ibid.; Bouzas, interview; Eviles, interview.

105. Smith, interview.

consultations pressured the company and the government to give ASSA's concerns more attention (Hermanson 2001).¹⁰⁶

Moreover, the Mexican NAO and the government in general have, since 2000, stepped up their use of the citizen-petition process to address migrant labor conditions in the United States. In 2002 the Mexican government secured a joint declaration of the U.S. and Mexican ministers whereby the U.S. Labor Department would develop and disseminate informational material on migrant workers' rights.¹⁰⁷ In 2004 the Mexican NAO produced a second report in response to NY (Mex-0101) that was very supportive of the petitioners' allegations.¹⁰⁸ Rather than its typical practice of summarizing allegations and the relevant laws, the report expressed repeated doubts about New York's effort to enforce its law as well as frustration at the delays and lack of specificity in the U.S. NAO's replies to requests for information.

Perhaps in response to these continuing positive developments, activists from all three states have continued to file NAALC petitions, three in 2003, one in 2004, five in 2005, and one in 2006. Assisted by the AFL-CIO Solidarity Center in Mexico, United Students Against Sweatshops (USAS) assembled with Mexican activists and workers a sophisticated pair of petitions in 2003 before the U.S. and Canadian NAOs, alleging a continuing pattern of labor organizing and health and safety violations.¹⁰⁹ USAS hoped to give a political boost to ongoing advocacy efforts at two Mexican plants that produce college athletic apparel and increase pressure on the NAOs to take firmer stands.¹¹⁰ It received a mostly favorable report from the U.S. NAO, which recommended ministerial consultations.¹¹¹ As of the end of 2006, consultations got under way, but it is too soon to assess the political results of this petition. Moreover, even the UE and the FAT continue to invest resources in the process. In a December 2006 letter to UE supporters, Robin Alexander praised the FAT for organizing an ambitious petition before the Mexican NAO that included a trilateral coalition of fifty-three trade

106. Arturo Aragon, secretary-general of ASSA, interview by author, July 29, 2003.

107. Joint Ministerial Declaration, June 11, 2002 (in response to Mex-9804, INS), www.dol.gov/ilab/media/reports/nao/jointdeclar061102.htm.

108. Mexican NAO Public Report of Review 0101, November 19, 2004, available online as "Public Report of Review of Mexico NAO Submission No. 2001-1," www.dol.gov/ilab/media/reports/nao/ny_mexico_sr0r.htm. In our interview in 2003, Mexican NAO secretary Claudia Anel Valencia stressed her office's interest in this petition and underlying cause.

109. "Amendment to Public Submission 2003-01," www.dol.gov/ilab/media/reports/nao/submissions/puebla_redacted_amendment.htm.

110. My familiarity stems from advising on the drafting of the complaint.

111. U.S. NAO Public Report of Review 0301, August 3, 2004, www.dol.gov/ilab/media/reports/nao/pubrep2003-1.htm.

unions. It involves violations of the collective bargaining rights of public-sector workers in North Carolina.¹¹²

Finally, recent backsliding notwithstanding, the role of the petition process in boosting democratic labor reform in Mexico should not be slighted. The cause is by no means dead. Rather, there exists an impasse between those favoring neoliberal flexibilization reforms and those favoring democratic labor reforms. Any attempt to enact labor reforms without including secret ballots and public registration of collective bargaining contracts is very unlikely to pass, thanks in large part to the momentum following the Echlin–Han Young declaration.¹¹³

Of course, one should recognize the negative contemporary political setting and the limitations in general to the NAALC petition process. Yet the NAALC citizen-petition mechanism remains a live creature and is likely to gain greater relevance when the domestic political setting improves. The relatively weak institutional support will, however, continue to be a significant problem. When political conditions are more favorable, labor activists would be well advised to advocate for significant institutional improvements to the process, using the NAAEC counterpart as a benchmark (at least for short-term reform). The next chapter looks at how effective this stronger institutionalized mechanism has been for North American environmental activists.

112. Robin Alexander to Union Sisters and Brothers, Activists and Friends, December 2006, copy on file with author.

113. Alcalde, Bouzas, and Barba, interviews. A trinational coalition of labor movements filed a petition in 2005 that challenged a neoliberal labor reform package proposed by the Mexican government (Mex-2005-1, Labor Law Reform). They filed it to help mobilize international pressure against the package. Although the petition was eventually dismissed, activists credit it as one part of a successful campaign to halt the proposals. UE International Solidarity, "Mexican Labor News & Analysis," November 2005, www.ueinternational.org/Mexico_info/mlna_articles.php?id=95.



The Importance of Institutional Support: NAFTA's Environmental-Petition Mechanism

By and large, mainstream U.S. environmentalists adopted a less hostile attitude toward NAFTA than did their labor counterparts. As a result, they enjoyed a significant role in shaping the institutional structure of the North American Agreement on Environmental Cooperation (Cameron and Tomlin 2000). Ultimately, a number of prominent U.S. environmental organizations, such as the World Wildlife Fund and the Environmental Defense Fund, supported passage of NAFTA based on the perceived strength of the parallel environmental accord. They were especially satisfied with the citizen-petition mechanism, which quickly became the most prominent institutional feature of the accord (Dimento and Doughman 1998; Bugada 1999).

Yet, like their labor counterparts, North American environmental activists have chafed at the review body's lack of binding authority. They too, however, have used the citizen-petition process in creative, sophisticated ways. While pushing for substantial structural improvements, they appreciate the added political value to be gained from filing citizen petitions. As in the NAALC scenario, activists have tested the mechanism, worked to expand its scope, and strategized over how best to engage the process.

All the same, the experiences of labor and environmental petitioners have diverged considerably since the major domestic political changes in Mexico and the United States. While the NAALC petition mechanism has lost a great

deal of appeal, the NAAEC petition mechanism continues to hold substantial appeal among a notable network of environmental activists, especially in Canada and Mexico.

This chapter examines the experiences of North American environmentalists with the citizen-petition mechanism. After reviewing the mechanism's institutional structure and the political setting faced by environmentalists in all three states, I provide an in-depth analysis of three important petitions. Each petition targets a different state and involves a sophisticated political campaign. Collectively, they illustrate the strengths and limitations of the process. I then move to a macroanalysis of all activist-initiated petitions filed between 1995 and 2002, following developments in these petitions through 2006. In so doing, I identify broad patterns and assess the explanatory power of this book's conceptual framework for transnational quasi-judicial mechanisms. Finally, I assess how declining state support for the citizen-petition mechanism since 2000 has affected the political value of the mechanism. I show that activists have been able to use NAAEC's relatively strong institutional apparatus to withstand many of the revived efforts by the governments to crack down on the process. Consequently, NAAEC's citizen-petition mechanism continues to be a valuable transnational political platform, even as resistance from member governments remains a large concern for environmentalists.

NAAEC's Citizen-Petition Process

The Institutional Actors

There are three institutional actors involved in the citizen-petition process.¹ The central actor is the secretariat of the Commission on Environmental Cooperation (CEC), which administers the review process. It has an executive director and a staff, selected by the director, that is distributed roughly equally among the three states.

A second important actor is the three-member Council of Environmental Ministers, which has ultimate executive authority over the implementation of NAAEC. It meets once a year and sets policies through resolutions. The council delegates much of its authority to the alternate representatives of each state's environmental minister. These representatives usually meet four times a year (TRAC 2004, 29). For day-to-day communication with the

1. Much of the information for this section comes from the very helpful Web site maintained by the Commission for Environmental Cooperation, www.cec.org/citizen/index.cfm?varlan=english.

secretariat, the council appoints a General Standing Committee (GSC). Each environmental minister appoints a mid-level official. The GSC enables each government to stay abreast of secretariat developments on a range of functions, including the review of citizen petitions, and to communicate concerns of the GSC official's government (TRAC 2004, 31). The council appoints the secretariat's executive director and has veto power over staff selections.

The third important actor is JPAC. It is a completely autonomous group that represents the interests of civil society. It is generally regarded as NAAEC's most innovative institutional body (TRAC 2004, 34). Its formal role is to advise the council and promote public input into the implementation of NAAEC. Although each of its members is selected by a member government, JPAC has endeavored to provide a strong collective North American citizens' voice.² It has developed close relations with the secretariat and been well regarded by environmentalists because of its vigorous promotion of environmental consciousness, including a robust citizen-petition mechanism. Such activity has led to a more contentious relationship with the council. Yet the council and the alternate representatives include JPAC at their regular meetings. Moreover, the council has delegated to JPAC important tasks in developing and modifying the citizen-petition review process (Knox 2001; Wirth 2003).

The Process

Article 14 of NAAEC allows any individual or NGO residing in a member country to file a petition alleging that a member government "is failing to effectively enforce its environmental law." No trade linkage is required, and in principle the hurdles for attaining a review are not high. The secretariat determines whether the petition merits a response from the government against which the complaint is filed. It considers the following questions:

- Does the petition assert government failure to enforce its environmental laws effectively rather than focus on legal violations by a specific company?
- Does it identify the specific statute or regulation and provide sufficient factual information and documentation to allow a meaningful review?

2. Wirth (2003); Plaut, longtime member of JPAC, appointed by the Clinton administration to represent the business sector, interview by author, July 15, 2004, New York.

- Did petitioners first pursue available domestic remedies and communicate the matter in writing to the target government?
- Does it allege present harm to the environment or to human life and health?

If the petition meets these criteria, the secretariat considers whether further study “would advance the goals of the agreement,” and whether the matter is “the subject of a pending judicial or administrative proceeding.” If satisfied, the secretariat asks the government to provide a response. The secretariat then prepares an Article 15 report, which determines whether to recommend the preparation of a factual record. It considers whether a factual record would “enhance compliance with, and enforcement of, environmental laws and regulations.” When the secretariat recommends a factual record, it is then up to the council, by majority vote, to decide whether to accept the recommendation.

If approval is granted, the secretariat gathers information from a variety of sources, including the petitioners and other interested NGOs, the government in question, and the JPAC. The secretariat also commissions independent experts on the legal and environmental matters addressed. The resulting factual record summarizes the competing claims of the disputants and the factual, legal, and technical findings of the secretariat. The goal is to present the issues coherently and comprehensively. The secretariat refrains from making its own findings of fault. The factual record is then presented to each of the governments for comment, and the council decides by majority vote whether to release the record to the public.

Overall, petitioners have four main hurdles to surmount in the process: a favorable Article 14 determination, a favorable Article 15 determination, council approval to prepare a factual record, and council approval to release the record to the public. The formal process ends with the release of the factual record. As discussed below, each phase offers political opportunities for petitioners to advance their underlying cause.

NAFTA’s Impact on Environmental Activism

Although less contentious than the labor-related debates, NAFTA has exerted considerable influence on the perspectives and strategies of environmentalists in all three North American states. Each state’s environmentalists have developed a greater transnational focus and increased interest in cross-border collaboration as a result.

NAFTA's impact on Mexican environmentalists was the most profound, given the less advanced nature of environmental activism in Mexico and the great regional concerns that NAFTA would encourage greater environmental dumping in Mexico (Dimento and Doughman 1998). An environmental movement already existed, especially along the U.S. border, which consisted of many small community groups (Kelly 2002; Cohen 2003). Sparking this activism was the surge in industrialization in this area as Mexico's economy became more integrated with the U.S. economy (Cohen 2003). Mexican environmentalists focused on the problems poorly regulated industrialization caused to the water, soil, and air (Kelly 2002; Cohen 2003). Not surprisingly, the proposal of NAFTA intensified these environmental concerns among Mexican activists. The NAFTA debate also generated much greater outside interest in the industrialization-related environmental problems. Accordingly, Mexican activists were happy to reach out to U.S. and Canadian allies. In addition, the NAFTA debate and the added outside scrutiny on Mexico's environmental conditions prodded the growth of national environmental organizations in Mexico, such as the Mexican Center of Environmental Law (discussed below). A number of Mexican activists, such as the Mexican Action Network on Free Trade (RMALC), increased their attention to environmental matters. In so doing, they benefited from the encouragement and financial and informational support of well-endowed or well-connected U.S. and Canadian environmental groups like the Sierra Club and the San Diego-based Environmental Health Coalition (Kelly 2002).

In the United States, the proposal of NAFTA prodded a number of environmentalists to pay more attention to trade and other economic issues. As noted above, the U.S. environmental movement became divided on its attitude to NAFTA after NAAEC was agreed upon. Most of the prominent groups endorsed NAFTA, with the significant exception of the Sierra Club, while the more grassroots groups generally opposed it (Dreiling 2001). Nevertheless, the NAFTA debate encouraged environmentalists on both sides of the divide to develop stronger ties with Mexican environmental groups (Kelly 2002). The outreach of national groups, with the partial exception of the Sierra Club, did not persist significantly after NAFTA's passage (Kelly 2002; Fox 2004). U.S. environmental groups on the border, by contrast, engaged in more far-reaching collaboration that has persisted in the post-NAFTA era (Bejarano 2002; Kelly 2002).

In Canada, environmentalists had already turned their attention to trade developments in response to the CUSFTA (Ayres 1998). Unlike their U.S. counterparts, Canadian environmentalists widely opposed NAFTA and con-

sidered NAAEC too weak (Dimento and Doughman 1998). Like other anti-NAFTA activists, Canadian environmentalists adopted a more international approach in response to NAFTA. Most significantly, they greatly expanded their outreach to Mexican environmentalists (Ayles 1998).

Unlike the Canadian labor movement, especially the CLC, the opposition of Canadian environmentalists to NAFTA and dissatisfaction with NAAEC did not translate into refusal to use NAAEC's institutions. Rather, they, along with U.S. and Mexican environmental activists, were receptive to engaging the institutions, especially the citizen-petition mechanism. After all, NAAEC became one of the few transnational forums that enabled environmentalists to file complaints of government noncompliance to an outside body (Dimento and Doughman 1998; Knox 2001). Environmentalists have employed the petition for a variety of political goals.

Early Experiences with NAAEC: Learning What Works

The level of activist engagement proceeded modestly in the first two years. Three petitions were filed by U.S. groups, one by Mexican environmentalists, and one by Canadian environmentalists.³ Each was filed to give added political leverage to an ongoing domestic political dispute. The experiences with the early petitions varied considerably. The Canadian petition (9603) was dismissed on procedural grounds (and revived the following year as 9706), the first two U.S. petitions (9501 and 9502) were dismissed on the merits, the third U.S. petition (9604) enjoyed modest success, and the Mexican petition (9601) was a significant success.

This section examines the unsuccessful though politically ambitious 9502, to appreciate the limitations to the process, and then the successful 9601, to appreciate the political power of the process. As in the previous chapter, I assess why the petitioners engaged the process, how they framed the petition, the degree of political mobilization they employed, the response of the secretariat, and the results attained.

9502, Logging Rider

The Seattle office of the Sierra Club Legal Defense Fund filed this petition against the U.S. government on August 30, 1995, on behalf of twenty-eight

3. A fourth petition (9602) was filed against Canada, but by an individual. Little effort was put into the petition, and it was quickly dismissed. I employ a four-digit reference number for the

U.S., Canadian, and Mexican environmental groups, including the national Sierra Club, Friends of the Earth, and the Natural Resources Defense Council. It focused on a rider attached to a disaster appropriations act that had the effect of suspending enforcement of environmental laws for logging conducted on U.S. public lands. The rider reflected a philosophy of diminished state intervention advocated by the newly Republican-controlled Congress, led by House Speaker Newt Gingrich. Shortly before Logging Rider, another U.S. environmental law group, Earthlaw, had filed a related petition that also challenged the rider.

The Sierra Club Legal Defense Fund was founded in 1971 as an offshoot of the Sierra Club. It is completely separate from the Sierra Club and litigates a variety of environmental issues.⁴ The Seattle office is one of its regional offices that focuses on environmental concerns in the western part of the United States. Patti Goldman was then and still is the office's managing attorney. Her office had already been working with other U.S. environmental groups to wage an intensive domestic political and legal campaign against this rider. She was the lead coordinator for the NAAEC petition.

According to Goldman, her office and the other environmental groups filed the NAAEC petition for three main reasons. First, they wanted to probe the value of this new and relatively unique international forum for raising environmental petitions.⁵ Second, they had exhausted domestic legal channels. Finally, they saw the petition as a way to place an "international stamp of illegitimacy" upon the United States and the Clinton administration for not resisting the rider.⁶ "At the very least," stated Goldman in a newspaper interview, "this would be profoundly embarrassing to the Clinton Administration."⁷

Legal Framing of Petition

Petitioners framed the petition for maximum moral and legal effect to push the secretariat into substantively scrutinizing a broad range of governmental policies. "You need to pressure the secretariat to take an aggressive role,"

petitions. The first two numbers indicate the year in which the petition was filed and the last two indicate the order in which the petition was filed. Thus, 9502 indicates that the petition was the second one filed in 1995. To track individual submissions cited in subsequent notes, see www.ccc.org/citizen/submissions/details/index.CFM?varlan=english.

4. See its Web site, www.earthjustice.org/. In 1997 it changed its name to Earthjustice.

5. Patti Goldman, telephone interview by author, May 25, 2001.

6. *Ibid.*

7. John Maggs, "Logging Flap Spotlights NAFTA Agency," *Journal of Commerce*, April 17, 1995, 1A.

explained Goldman, rather than settling for it to be a “passive body releasing boring papers.”⁸ Morally, the petition presented a dramatic narrative that highlighted the value of public administrative enforcement of environmental laws on logging and the deliberate damage the rider inflicted on such efforts: “The logging rider to the Rescissions Act is a far-reaching assault on U.S. public forests and environmental laws” because “it simply eviscerates effective enforcement” and “eliminates opportunities for the public to participate in and comment on the sales of their environmental effects.”⁹ The petition also warned of a race-to-the-bottom effect whereby reduced environmental oversight of timber production in the United States would lead to a corresponding reduction in Canada, given the strong trade between the two countries, a “development [that] threatens the fundamental underpinnings of the NAAEC.”¹⁰

Legally, the petition offered a detailed and well-documented set of factual allegations, which it connected carefully to NAAEC’s mandate of promoting effective enforcement of environmental laws. The petition observed that the logging rider did not change federal environmental laws but “eviscerate[d] effective enforcement” and “eliminate[d] opportunities for the public to participate in and comment on the [timber] sales and their environmental effects.”¹¹ The petition provided examples of how the legal and public-input avenues suspended by the congressional rider had previously promoted environmental causes, such as preserving the habitat of the northern spotted owl. Petitioners further justified their claim by referring to the specific obligations of NAAEC under various articles, such as Article 5(2), which requires all governments to provide “judicial, quasi-judicial or administrative enforcement proceedings . . . to sanction or remedy violations of its environmental laws and regulations.” Petitioners asked the secretariat to prepare a factual record and “to facilitate a dialogue and thorough analysis of the current move to suspend and defund environmental enforcement and implementation.”¹²

Politicizing the Legal Action

Petitioners put a great deal of energy into boosting the petition’s political power. To begin with, they engaged in wide networking. The Sierra Club

8. Goldman, interview.

9. Submission Pursuant to Article 14 of the North American Agreement on Environmental Cooperation on the U.S. Logging Rider, August 30, 1995, 2, 9.

10. *Ibid.*, 2

11. *Ibid.*, 4.

12. *Ibid.*, 13.

Legal Defense Fund assembled numerous co-petitioners from all three North American countries. Such networking helped disseminate the petition and underlying factual dispute to the public. The Sierra Club Legal Defense Fund and many of the co-petitioners issued press releases advertising the petition, while Goldman wrote an opinion article on the petition for the *Legal Times*, a trade journal disseminated by the American Lawyer Newspapers Group.¹³ The petition drew press coverage, particularly in specialized publications.¹⁴ Petitioners also successfully lobbied the U.S. National Advisory Committee to the secretariat to push the secretariat to conduct a review.¹⁵

Response of the Secretariat: Declining to Validate Argument

The secretariat at this point was a new agency. Although it was formed in 1994, it took until 1995 for it to develop procedures and a standard of review for the citizen-petition process (Knox 2001). The reason for the delay was primarily the political sensitivity of the member governments, especially Canada and Mexico, to the mechanism (Knox 2001; Wirth 2003). The secretariat was probably not pleased to have as its first two petitions a subject of great domestic political controversy. In effect, it was being asked to intervene in a political dispute between the Republican-controlled U.S. Congress and the Democratic Clinton administration. Moreover, neither party appeared to welcome the secretariat's intervention.

Thus the secretariat was faced with quite strong cross-cutting pressures. On the one hand, a trinational group of prominent environmental activists, including the national office of the Sierra Club, urged the secretariat to conduct a thorough investigation. JPAC also asked the secretariat to act independently of pressure from the U.S. government.¹⁶ On the other hand, the Clinton administration, despite its general support for the process, did not want a secretariat review. According to information relayed to Gold-

13. Goldman, interview; Patti Goldman, "At Loggerheads: Timber Law Frustrates NAFTA," *Legal Times*, October 9, 1995, 24.

14. E.g., Maggs, "Logging Flap Spotlights NAFTA Agency"; William DiBenedetto, "US Faces NAFTA Challenge over Logging Program," *Journal of Commerce*, September 6, 1995 1A; Stephen Dale, "Trade-Environment: NAFTA Environmental Commission Disappoints," Inter Press Service, December 15, 1995, www.ips.org; "Green Activists' Fury at Logging Ruling; Environment Watchdog Bares 'Blunt' Teeth," *Latin American Regional Reports*, January 18, 1996, 3.

15. NAAEC authorizes each member state to set up a national advisory committee made up of business leaders, environmentalists, and legal experts. I have not discussed them because of their limited role in the petitions.

16. Plaut, interview.

man, the U.S. government pressed the secretariat to dismiss the petition so as not to intervene in a domestic U.S. political dispute.¹⁷

The secretariat chose a cautious approach that largely deferred to the U.S. government. It labored to develop legal expertise on its mandate and on the nature of environmental laws in the United States. To this end, the secretariat consulted a special committee of legal experts, made up of three law professors from each state, to help it reach an Article 14 decision on whether to review the petition (Knox 2001, 77). It produced a carefully constructed Article 14 report that dismissed the petition. The report concluded that the legislative rider was, in effect, a change of environmental law and that therefore the petition was attacking U.S. environmental law rather than failure to enforce such law.¹⁸ The secretariat further established that petitions must focus on failure at the executive-branch level rather than at the legislative level.¹⁹

Results: Failure

The negative and early secretariat decision prevented the petition from injecting any political momentum into the broader domestic political campaign against the logging rider. At best, according to Goldman, the petition offered “a little shot of adrenaline,” but nothing more.²⁰ Like the UE in the first NAALC petitions, petitioners had hoped for a much more receptive attitude from the secretariat. Instead, they felt that the secretariat had resorted to a highly technical view of its mandate, giving in to political pressures and showing itself unable to deal with race-to-the-bottom concerns.²¹ Yet, as John Knox argues (2001, 99), this early caution may have been wise in forestalling an early governmental crackdown. Antagonizing the U.S. government at that point would have cost the secretariat its biggest supporter. Moreover, the secretariat clarified that executive behavior was an appropriate target.

9601, Cozumel

On January 18, 1996, the Centro Mexicano de Derecho Ambiental (Mexican Center of Environmental Law, or CEMDA) filed a petition on behalf of

17. Goldman, interview. Her information is consistent with Plaut’s recollection.

18. Determination Pursuant to Articles 14 and 15, 9502, December 8, 1995.

19. The secretariat followed this same logic on petition 9501. See Article 14 Report, 9501, September 21, 1995.

20. Goldman, interview.

21. Dale, “Trade-Environment: NAFTA Environmental Commission Disappoints.”

itself and two other Mexican environmental groups, the *Comité para la Protección de los Recursos Naturales* (Committee for the Protection of Natural Resources), and the *Grupo de los Cien Internacional* (International Group of One Hundred). The petition accused the Mexican government of failing to require an environmental impact assessment before allowing construction of a tourist pier and related resort village project on the island of Cozumel, a popular tourist spot near Cancún. The petitioners had campaigned unsuccessfully for several years through domestic channels against the project for fear of the harm it would inflict upon the coral reefs, known as Paradise Reef, a protected marine refuge.²²

CEMDA was one of the new Mexican national environmental groups that formed during the NAFTA era. It was founded in August 1993 to employ the recently enacted Mexican environmental legislation to improve environmental conditions in Mexico.²³ CEMDA quickly developed extensive contacts with Mexican environmentalists and other activists and international contacts. By 1996 it had become the Mexican contact for the hemisphere-wide Interamerican Association for the Defense of the Environment (known as AIDA in Spanish). Through AIDA and other activities, CEMDA developed a working relationship with the Sierra Club Legal Defense Fund and the Canadian-based Sierra Legal Defence Fund. Gustavo Alanis was, and remains, CEMDA's executive director. He is a well-respected environmentalist who was later appointed to serve on the JPAC and then selected by his fellow JPAC members as president in 2003. Alanis coordinated the NAAEC petition.

Petitioners considered filing a legal case in Mexico but chose not to because it would have been very difficult to prove legal standing (showing direct harm) to raise the complaint.²⁴ Having no satisfying domestic avenue to pursue, petitioners decided to test the value of the NAAEC petition mechanism. After all, in contrast to the disadvantageous position environmentalists faced in domestic political disputes with the PRI-led Mexican government, the NAAEC's legal forum enabled the petitioners to secure a more equal exchange. Before the secretariat, they could engage the government in a legal discourse that focused on codified norms of behavior. Although the Logging Rider and prior petition had been summarily dismissed, CEMDA was eager to perform another test. It was a co-petitioner

22. Ibid.; Gustavo Alanis, president of CEMDA and lead petitioner, interview by author, July 21, 2003, Mexico City.

23. See <http://cemda.org.mx/somos.php>.

24. Alanis, interview.

in Logging Rider and gained insights on how to use this process. Most important, the dispute rested squarely on poor executive enforcement of an environmental law.

Legal Framing of the Petition

As in Logging Rider, petitioners combined a legally sound argument with a powerful normative argument in favor of their broader cause. The petition connected the Cozumel project to a broader ecological threat to the region's marine life. It described the natural beauty of Paradise Reef and argued that the proposed tourist project "represents an imminent danger for the survival and development not just of Paradise Reef" but of a chain of reefs extending from Florida to Honduras.²⁵ The petition charged the government with failing to fulfill Mexico's law requiring an environmental impact assessment prior to embarking on a developmental project. The argument was complemented by a detailed analysis of Mexican statutory law and documented allegations of specific state failures to enforce these requirements. The petition also faulted the government for failing to provide fair, accessible, and effective domestic legal and administrative measures for enforcing environmental law, as required by NAAEC. Specifically, it detailed the failure of PROFEPA (Mexico's attorney general for environmental protection) to conduct a meaningful investigation of the petitioners' prior *denuncia popular* (citizen complaint).²⁶ The citizen complaint is meant under Mexican law to be the primary way in which citizens can obtain enforcement of environmental law.

Politicizing the Legal Action

The CEMDA-led coalition understood that a good legal framing would not be sufficient given the "soft-law" nature of the process.²⁷ Thus it actively networked, disseminated information, and lobbied. CEMDA and the Grupo de los Cien took advantage of their membership in an electronic network known as the Global Alliance of Environmental Law to enlist considerable international political support and to disseminate their cause broadly.²⁸ Co-

25. Petición ciudadana sobre aplicación de la legislación ambiental 9601, January 18, 1996, 5.

26. Ibid., 3.

27. Alanis, interview.

28. Ibid.; Flavia Irene Rodríguez, "Acusan a la secofi de obstruir la acción de ONG en temas ambientales," *Crónica* February 12, 1997.

zumel drew generous press attention from both Mexican and international media.²⁹

The networking and favorable press attention facilitated petitioners' subsequent lobbying after the secretariat issued a favorable Article 15 report recommending a factual record. Knowing that the Mexican government would resist, petitioners and their network lobbied the U.S. and Canadian governments vigorously.³⁰ CEMDA's allies wrote letters and made direct appeals to officials in their environmental departments.

Response of the Secretariat: Furthering the Legal Discourse and Legitimizing the Cause

The strength of petitioners' legal argument paid off in consistent secretariat support. In August 1996 the secretariat issued a favorable Article 14 ruling, requiring a formal response from the Mexican government. This action signaled that petitioners' cause merited serious attention and put the Mexican government on the defensive. Committed to engaging in the process, the government had to make normative legal arguments rather than simply reject petitioners' arguments (as it was used to doing) or focus on the economic value of the Cozumel project. The government was forced to justify its actions according to legal provisions of environmental impact assessments and the prior conduct of PROFEPA in investigating the *denuncia popular*.

In its formal response, the Mexican government tried to halt the legal process. Invoking what has become a common response from each target government, it proclaimed formal support for the process while rejecting the procedural and substantive appropriateness of proceeding with the petition at hand.³¹ It argued that further review would undermine the legitimacy of the secretariat before the member governments. Procedurally, the government pointed to the approval of the project predating NAAEC and the failures of petitioners to allege direct harm to themselves or to exhaust domestic legal and administrative channels. Substantively, it provided a detailed justification of its behavior with respect to the Cozumel project, based on a standard of "reasonable discretion" in exercising its oversight and enforcement powers.

29. Angélica Enciso, "México, contra la fiscalización ambiental en el TLC," *La Jornada*, August 2, 1996; Bernard Simon, "Making the Most of Moral Power," *Financial Times*, September 3, 1996; Karen Brandon, "A Vision Unfulfilled," *Chicago Tribune*, November 29, 1998, 1.

30. Alanís, interview.

31. Respuesta del gobierno de México, March 22, 1996.

The secretariat rejected the government's arguments and issued a favorable Article 15 report recommending a factual record. It adopted a liberal attitude on procedural issues and a careful reliance on its mandate. Invoking the Vienna Convention on the Law of Treaties, the secretariat rejected the retroactivity objection, noting that the allegations addressed ongoing, not just past, enforcement obligations of the government.³² It also credited petitioners for first pursuing local channels and for raising allegations that concerned harm to public resources. Finally, while acknowledging the Mexican government's substantive defense, the secretariat concluded that a factual record would shed light on the controversy as to whether the government had adequately met its enforcement obligations. Specifically, it remarked "upon the importance and character of the resources in question" and "the especially public nature of marine resources."³³ In short, the secretariat kept the process going and focused on the normative issue of proper enforcement of laws on environmental impact.

Probably aided by the political efforts of petitioners and their allies, the secretariat gained council approval in August 1996 to prepare an investigation for a factual record. Even Mexico's environmental minister, Julia Carabias, voted for a factual record in order to avoid a confrontation with the U.S. and Canadian governments.³⁴ Following its procedural mandate, the secretariat gathered evidence from the petitioners, the Mexican government, the JPAC, and all other persons and NGOs that had expressed an interest in the matter.³⁵ The factual record, after being approved by the council, was released on October 24, 1997. True to the secretariat's policy, the record included no explicit factual or legal findings. Rather, it adopted a neutral tone, summarizing the competing arguments of the petitioners and the Mexican government as well as the diverging technical assessments of the projects. The record also assembled a coherent history of the evolution of the project and of the ensuing controversies.

The absence of explicit opinions notwithstanding, petitioners and their allies were pleased that the report provided considerable support for their allegations.³⁶ It reiterated Mexico's commitment to require a full environ-

32. See Notificación del Secretariado al Consejo (Artículo 15[1]), 9601, June 7, 1996.

33. *Ibid.*, 4.

34. Tatiana Adalid, "México pide cautela a la CCA en la aplicación de castigos comerciales por incumplimiento de la ley ambiental," *Crónica*, August 2, 1996; Adriana Castillo Román, "No podemos encubrir intereses económicos en nombre de cuestiones ambientales," *El Nacional*, August 2, 1996.

35. Secretariat, Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo, October 24, 1997, 2.

36. Brandon, "Vision Unfulfilled"; Susan Ferriss, "Environment Lost in NAFTA Translations," *New Orleans Times-Picayune*, August 2, 1998.

mental impact assessment for any new development project and reported on contradictory statements issued by Mexican officials concerning its environmental obligations on the Cozumel project (Bugeda 1999; Kibel 2001). The report also suggested that a proper environmental impact assessment would uncover credible scientific evidence that the project would damage the coral reefs.

Results: Advancement of Both the Immediate and the Long-Term Political Agenda

Did the favorable record, and the petition process more generally, help the underlying cause? One co-petitioner, Dora Uribe, expressed skepticism in 1998, lamenting that the Mexican government still went ahead and completed construction of the Cozumel pier and tourist development project: "The only conclusion you can make is that this is another bureaucracy with no power."³⁷ This observation, however, reflects a misunderstanding of the nature of the opportunity offered by secretariat support. As Alanis pointed out, the government would do nothing on its own in reaction to the record. Accordingly, petitioners actively disseminated the record's favorable findings to the public and to the press for maximum political effect, while leveraging the record's findings in their ongoing political dispute with the government.³⁸

This political mobilization of the record, on top of a sustained political campaign, yielded fruit. The Mexican government initially resisted. It condemned the Article 15 ruling and accused the secretariat of violating Mexico's sovereignty and of improperly singling out Mexico for opprobrium.³⁹ Eventually, however, the government was forced to cooperate with the process. Environmental minister Julia Carabias reluctantly voted to accept the secretariat's recommendation for a factual record and suspended the Cozumel tourist project pending the results of the secretariat's investigation.⁴⁰ In response to the release of the factual record, the government promised to improve its laws on protecting endangered coral reefs and to develop a new environmental plan for Cozumel.⁴¹ Although the govern-

37. Quoted in Ferriss, "Environment Lost in NAFTA Translations."

38. Alanis, interview.

39. Angelica Enciso, "México, contra la fiscalización ambiental en el TLC: Carabias," *La Jornada*, August 2, 1996; "Carabias intromisión ecología," *Servicio Universal de Noticias*, June 11, 1996; Kevin Hall, "Dock Probe Tests NAFTA's 'Green' Panel," *Journal of Commerce*, September 17, 1996.

40. "NAFTA and the Environment," *Latin American Regional Reports*, September 26, 1996. According to JPAC founding member Jonathan Plaut, Carabias was personally sympathetic to the Cozumel petition. Plaut, interview.

41. Ferriss, "Environment Lost in NAFTA Translations."

ment proceeded with the tourist project, the scope was greatly reduced; plans were scrapped to include a golf course, shopping center, hotels, restaurants, and bars.⁴²

CEMDA and its co-petitioners took full advantage of Mexico's stated commitments. They pushed the government to declare Cozumel a natural protected area and to include CEMDA in a management plan of the coral reefs. There is now ecological zoning of the area to restrict commercial activity.⁴³ More broadly, as Alanis and knowledgeable U.S. environmentalists across the border observed, the petition raised general awareness of faulty environmental practices in Mexico, legitimized the concerns of independent environmental activists, and forced Mexico to improve and make more transparent its oversight procedures with respect to future developmental projects.⁴⁴

A Period of High Interest (1997–present)

Subsequent Favorable Developments in Engaging the Process

In contrast to the stalled domestic campaign to preserve the ecological health of Cozumel, the engagement of the NAAEC petition did prod the Mexican government to take action it had previously resisted. Cozumel signaled to the environmental community that the petition process had political bite, when gaining secretariat support and used with sophistication. Lending further encouragement was a subsequent petition filed in 1996 (9604) that showed that the process could be effective in U.S. environmental causes as well. Brought by Earthlaw, an environmental law group located at the University of Denver Law School, this petition targeted the failure of U.S. enforcement to prevent an army base at Fort Huachuca from threatening the survival of the San Pedro River in Arizona. Earthlaw had been working with local environmental activists to compel the army to conduct a comprehensive environmental impact assessment of the expanded activities of Fort Huachuca, especially its extensive water pumping. Petitioners filed the NAAEC petition, according to Earthlaw attorney and lead coordinator Jay Tutchton, in the hope of bringing “flat-out embarrassment” to the U.S. government.⁴⁵

42. Alanis, interview; Ten-Year Review and Assessment Committee (TRAC) (2004), 46.

43. Ibid.

44. Brian Feagans, “Cozumel Piers Bring Tourism, Controversy,” *The News*, March 13, 1997; Brandon, “Vision Unfulfilled”; Kass and McCarroll (1999).

45. Jay Tutchton, telephone interview by author, May 11, 2001. Tutchton and Earthlaw had been the lead petitioners as well in the first NAAEC petition (9501). Earthlaw has subsequently become part of Earthjustice and is still based at the University of Denver Law School.

Petitioners' hopes were apparently fulfilled. Following the secretariat's favorable Article 14 ruling finding merit in the petition, Tutchton and others, including CEC staff and a former JPAC member, believe that the U.S. government worked out an informal deal with the secretariat and Earthlaw. If Earthlaw would withdraw its petition, the U.S. government would recommend that the secretariat conduct a less adversarial Article 13 report on the army's operations at Fort Huachuca.⁴⁶ According to Tutchton, this arrangement enabled the secretariat to reconcile conflicting demands. Many environmentalists wanted a full investigation of U.S. behavior, while the U.S. government opposed such an action for fear of the harmful consequences it might have on securing renewal of fast-track authority.⁴⁷ As Article 13 of NAAEC simply refers to cooperative informational activity and avoids addressing controversies over enforcement, it served as an effective compromise that both parties could live with.⁴⁸

Earthlaw was quite pleased with this deal, characterizing it as "spectacular news."⁴⁹ The Article 13 report produced an official environmental assessment—albeit less formal than that required under U.S. law—of the army base's impact on the San Pedro River. While avoiding any judgmental language, the report did confirm significant threats to the survival of the San Pedro River attributed to a variety of sources, including water-pumping activities at Fort Huachuca. Earthlaw and its clients used the Article 13 report as documentary support for their ongoing domestic litigation.⁵⁰

Having shown its political value, the citizen-petition mechanism became more frequently invoked by North American environmentalists starting in 1997. Seven petitions were filed that year, and another seven were filed the following year. Among sophisticated petitioners, a consistent strategy emerged. This involved crafting petitions to connect specific instances of dramatic environmental harm to structural problems in governmental enforcement, such as Mexico's problematic administrative mechanism for reviewing citizens' environmental complaints or the increasing tendency of

46. This deal was relayed informally to Tutchton. While lacking direct knowledge, two secretariat staff members in charge of the citizen-petition unit, along with longtime JPAC member Jonathan Plaut, understood as well that such an informal deal was made. Geoffrey Garver, secretariat staff member, telephone interview by author, June 11, 2001; Carla Sbert, secretariat staff member, telephone interview by author, June 11, 2001; Plaut, interview.

47. Tutchton, interview.

48. Article 13 reviews are not initiated by citizens. Although environmental groups have requested several Article 13 reviews, the secretariat is under no obligation to respond.

49. "Earthlaw Wins First U.S. NAFTA Petition: International Commission to Investigate Harm to Southwest's Last Real River," *Earthlaw Newsletter*, May 26, 1997, www.hugheshome.net/users/earthlaw/Newslett/letter5.htm.

50. Tutchton, interview.

the Canadian government to cede federal environmental enforcement to the provinces. Sophisticated petitioners thoroughly documented their allegations, usually with ample references to academic and governmental findings. They also vigorously promoted their petitions to the domestic and international press and to policymakers and law professors. Most petitions involved multiple co-petitioners, and sometimes prominent, well-connected national environmental organizations like the U.S. and Canadian Sierra Clubs and CEMDA.

Let us turn now to an especially illustrative petition. It was filed in 1997 by the most frequent petitioner to date, Canada's Sierra Legal Defence Fund. This petition effectively established a prototype that a number of subsequent petitioners have adopted.

9701, BC Hydro

The Vancouver office of the Sierra Legal Defence Fund filed this petition on April 2, 1997, with the assistance of the Seattle office of the Sierra Club Legal Defense Fund, on behalf of the Sierra Club and seven western Canadian and U.S. environmental groups. The petition focused on the operations of BC Hydro, a state-owned operator of hydroelectric dams in the province of British Columbia that had caused repeated environmental damage to the local rivers and an ensuing massive depletion in native fish stock. Petitioners charged the federal government of Canada with not enforcing the Fisheries Act.

The Sierra Legal Defence Fund was founded in Vancouver in 1990 to advance Canadian environmental law.⁵¹ In addition to contacts with U.S. environmental groups, the Sierra Legal Defence Fund is a member of AIDA and has ties to CEMDA. Randy Christensen was and continues to be the managing attorney of the Vancouver office. He served as lead coordinator in BC Hydro.

This petition followed a series of attempts by the Sierra Legal Defence Fund and several other environmental groups based in British Columbia to prevent BC Hydro from further damaging the local rivers and to prod the federal government to take enforcement action. Christensen was already familiar with the NAAEC mechanism through ongoing contacts with the Seattle office of the Sierra Club Legal Defense Fund. He saw the BC Hydro controversy as an ideal topic for an NAAEC petition. It was already a high-profile issue in British Columbia, there was unequivocal evidence that the

51. See <http://sierralegal.org>. The organization now has multiple branches throughout Canada.

dams were damaging the fish habitat, and neither the British Columbia government nor the federal government had shown much receptivity to the issue.⁵² In addition, petitioners could show a trade-distortion angle, as BC Hydro had increased its exports of power to the U.S. market. Christensen filed the NAAEC petition to provide a formal vehicle for focusing public attention on the unresponsiveness of Canada's federal government.⁵³

Legal Framing of Petition

The Sierra Legal Defence Fund formulated a well-crafted petition, accompanied by more than four hundred pages of evidence of governmental non-enforcement of the Fisheries Act. The petition detailed six specific instances of fish habitats damaged by BC Hydro activity, with no federal response, and connected these occurrences to a broader pattern of federal inattention to systematic problems with BC Hydro.⁵⁴ The petition identified the specific federal statutes being violated and focused on a pattern of nonenforcement by the federal government. Finally, the petitioners connected their case to the explicit goals set forth in Article 1 of the NAAEC, including "cooperation between governments, regulatory agencies and industry groups in Canada and the U.S." and "identif[y]ing] and seek[ing] to avoid a trade distortion caused by the differential enforcement of environmental laws."⁵⁵

Politicizing the Legal Action

As in the Logging Rider and Cozumel petitions, petitioners combined their framing of the petition itself with sustained political mobilization. The petition narrated dramatic instances of salmon and other fish having gone extinct and noted that each stock "possesses unique genetic information" and that the depletion "has had a significant impact on communities and individuals who depend on fisheries for their livelihoods and cultural identities."⁵⁶ With the help of research by Patti Goldman, the petition played up the U.S. angle in the hope of attracting U.S. attention.⁵⁷ Specifically, the petition noted the much better enforcement record of the U.S. government in regulating hydropower production and warned that the lax Canadian

52. Randy Christensen, telephone interview by author, May 16, 2001.

53. *Ibid.*

54. Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, 9701, April 2, 1997.

55. *Ibid.*, 12.

56. *Ibid.*, 4.

57. Christensen, interview; Goldman, interview.

record could undermine U.S. protections. This favorable reference to the U.S. environmental record, no doubt, was meant to further embarrass the Canadian government.

Petitioners networked extensively with Canadian and U.S. environmental groups. The Sierra Legal Defence Club recruited several U.S. groups, including the national Sierra Club, as co-petitioners in the hope of attracting greater international attention.⁵⁸ Such networking facilitated wide dissemination of the petition to the public, as the Sierra Legal Defence Club and other Canadian environmental groups held press conferences and kept a few reporters updated.⁵⁹

Response of the Secretariat: Strong Legal Validation

Influencing the secretariat's strong substantive support was its appreciation of the petition's systematic, detailed, and well-documented allegations. The secretariat denied all procedural and substantive arguments the Canadian government made in a vain attempt to halt the review. Procedurally, the Canadian government invoked Article 14(3), which calls for automatic suspension of NAAEC reviews where the government is involved in parallel judicial or administrative proceedings. The government pointed to two administrative studies on how to integrate environmental objectives with water-use planning in British Columbia. The secretariat responded that simply commissioning an informative study on the underlying issue of dispute did not constitute a parallel domestic proceeding under Article 14(3). "It is important to construe narrowly the definition of 'judicial or administrative proceeding' . . . in the context of Article 14(3)," observed the secretariat, to prevent governments from easily "shield[ing] nonenforcement of its environmental laws from scrutiny."⁶⁰

Substantively, the Canadian government hoped that providing a detailed justification in its formal response would be sufficient to discourage further review.⁶¹ It sought to shape the definition of enforcement to include a more consensual, voluntarist approach:

58. Christensen, interview.

59. The petition did attract a fair amount of coverage in Canada but, to the disappointment of Christensen, little in the United States. Christensen, interview. See Wendy Cox, "Environmentalists Take Fish Cause to NAFTA Panel," Canadian Press Newswire, April 2, 1997, www.journalismnet.com/fastnewscan.htm#cp.

60. Recommendation of the Secretariat to the Council for the Development of a Factual Record in Accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Submission 9701, April 27, 1998, 7.

61. Response from the Party Under Article 14(3), Authored by Canada, July 21, 1997.

Canada takes a comprehensive view of enforcement, and submits that submitters' limited view only encompasses one component of a much wider system of compliance-seeking activities which collectively constitute the proper enforcement of environmental law in a modern and complex society. . . . As such, compliance activities clearly form part of the continuum that has been identified as "enforcement" under Article 5, and this continuum explicitly extends beyond the more limited view of enforcement that simply equates enforcement with legal and judicial action.⁶²

The government asked the secretariat not to focus on sanctions levied but on cooperative efforts taken to promote provincial and industrial compliance with environmental laws. To the government's disappointment, the secretariat recommended a full factual record. Although it accepted that enforcement could constitute more than prosecutions and sanctions, it concluded that further investigation was warranted into the specific range of actions being taken by the Canadian government and the adequacy of such steps.

Unanimous council approval notwithstanding, tension persisted between the secretariat and the Canadian government on how far-reaching the investigation would be. Overall, notes Christensen, the secretariat held firm in conducting a reasonably comprehensive investigation. In fact, thanks to the encouragement of JPAC, the investigation was more extensive than it had been in Cozumel, and the petitioners were given a more active role.⁶³ In addition to requesting written information from all "stakeholders" (petitioners, Canadian federal government, BC government, and BC Hydro) and JPAC, the secretariat commissioned an expert group, which consisted of independent specialists with expertise in hydroelectric operations, Canadian regulatory and compliance matters, and fish habitat-related issues.⁶⁴ The expert group arranged individual meetings with each stakeholder and allowed all to observe any of these meetings. Moreover, petitioners were given multiple opportunities to file written responses to the arguments of the other stakeholders.

The council released the factual record on May 30, 2000. While the record avoided explicit findings of fault, it offered support for most of the petitioners' allegations. Comparing evidence acquired from multiple

62. *Ibid.*, 11.

63. Christensen, interview.

64. Final Factual Record, 9701, June 11, 2000.

sources, for example, the record affirmed that “it is undisputed that many of BC Hydro’s hydroelectric operations cause harm to fish habitat.”⁶⁵ The record also included implicit criticism of the Canadian government’s cooperation in this process by characterizing the information provided on Canada’s enforcement activity as insufficient and unclear and noting that the secretariat had tried in vain several times to schedule meetings with Canadian officials. Substantively, the record addressed the adequacy of Canada’s voluntaristic, less prosecution-oriented means of enforcement. A major focus was on a new water-use plan (WUP) initiative jointly run by the federal and British Columbian governments that took effect in 1999. The WUP was designed to develop water-use plans for each of the hydropower facilities in British Columbia, with the goal of resolving the fish-impact problems. Quoting extensively from the expert group report, the record described the WUP as promising but noted that “little information exists concerning the extent to which the WUP process will prove to be an effective enforcement strategy.”⁶⁶ The secretariat also noted serious questions about relying upon the WUP alone for adequate enforcement of the Canadian Fisheries Act.

Results: Advancement of the Ongoing Political Agenda

Although petitioners would have preferred explicit findings of fault, they were reasonably happy with the factual record. According to Christensen, it helped focus the attention of the public and of people in the government on the severity of the environmental problems caused by the BC Hydro facilities.⁶⁷ Further evidence that the record had teeth is seen in the formal responses of each member government. All three criticized the secretariat for including implicit criticisms of governmental behavior and implicit recommendations for improving enforcement. The Mexican government’s criticism went further. It charged the secretariat with overreaching in its investigation, allowing the petitioners too much input, and being too quick to make documents public.⁶⁸ Meanwhile, the deputy premier of British Columbia denounced the very filing of the petition as “outrageous,” taking particular offense at enlisting U.S. groups as co-petitioners to complain of environmental problems in Canada.⁶⁹

As to results, there were limitations. The petition did not push the Cana-

65. *Ibid.*, 40.

66. *Ibid.*, 29, 31, 82.

67. Christensen, interview.

68. Observations of Mexico on the Draft Factual Record for Submission 9701, May 8, 2000.

69. Cox, “Environmentalists Take Fish Cause to NAFTA Panel.”

dian government to demand full compliance of BC Hydro with the Fisheries Act. Yet the petition noticeably improved the underlying political cause of increased federal enforcement of environmental standards. Christensen credited the process with generating public momentum to spur the government into instituting the WUP process and in giving it more sanctioning authority.⁷⁰ Although Christensen and other environmentalists regarded the WUP as inadequate, they saw it as a marked improvement over the status quo.

The Overall Record of NAAEC Petitions

With some concrete limitations, BC Hydro was politically valuable and encouraged the Sierra Legal Defence Fund to continue to engage the process.⁷¹ As with Cozumel, the petition prodded the Canadian government to take action it had avoided taking when faced only with petitioners' domestic campaign. Moreover, as with Cozumel, neither the political mobilization nor the secretariat's legal validation would have been sufficient by itself. Failure to persuade the secretariat to support the petition would have confined the battle to the domestic front, while the petitioners' failure to disseminate the secretariat's findings and turn up the heat on the Canadian government would have allowed the government to avoid any consequences.

To assess the roles of political mobilization and legal validation in general, I performed process tracing of all activist-initiated petitions filed through 2002 and followed their developments up through 2006.

Coding

Political effort and secretariat support are coded on the familiar scale of low, medium, and high. Those rated as low under political activism include cases in which petitioners made no attempt to mobilize support but relied solely on the petition to promote their cause. Those rated as high include cases in which petitioners expended considerable effort to promote their cause, substantiate their allegations, mobilize supporters, and lobby governments. A rating of medium was given to petitions pushed by only a few

70. Christensen, interview. His impressions are shared by an independent trinational assessment committee of NAAEC's record (TRAC 2004, 46).

71. The Sierra Legal Defence Fund filed petitions 9804, 0004, 0201, and 0203.

local activists rather than a wide network of supporters, and petitions that involved little lobbying or dissemination beyond the local level. Ratings of secretariat support are based on how far the secretariat allowed the petition to proceed. Those with an early Article 14 dismissal are rated as low. Those that survived Article 14 but were dismissed at Article 15 receive a medium. The high instances are petitions the secretariat deemed deserving of a full factual record.

As in the previous chapter, I categorize success along a continuum of none, modest, and significant. Modest means formal advancement of the cause onto the government's agenda and significant means actual policy changes. Modest ratings include the following:

- The Canadian federal government assumed more responsibility for protecting the waters in the prairie provinces (9706).
- The U.S. Environmental Protection Agency accelerated the implementation of programs to control airborne emissions of dioxin and mercury (9803).
- Mexican and U.S. officials devoted more attention to the environmental hazards caused by abandoned factories along the border (9807).

Because the petitions have not generally focused on practices at specific companies, I do not include a category of concrete, plant-level successes, as I did for NAALC petitions. The results are summarized in Table 6.

Assessing Overall Results

As in NAALC, activists have enjoyed a good deal of success in utilizing the NAAEC petitions for domestic political gain, as seen in Table 7. Putting aside the pending status of 0203 and the undetermined status of 9703 and 0005, activist-initiated petitions have attained at least modest success a majority of the time (fourteen out of twenty-five) with success occurring against all three governments. Beyond these overall results, a close look at the petitions indicates a rich picture on the type of political mobilization typically employed, the reactions of the secretariat, and the impact political mobilization and secretariat findings have had on success.

Political Mobilization

With respect to political mobilization, most petitioners (nineteen out of twenty-seven) have put at least a medium degree of resources into politiciz-

The Importance of Institutional Support

Table 6 Summarizing Political Effort, CEC Support, and Results

Case, Country	Issue	Political effort	CEC support	Results
9501, U.S.	Rider suspending enforcement of Endangered Species Act	medium	low	none
9502, U.S.	Rider suspending oversight of logging	high	low	none
9601, Mex	Impact of tourist project on coral reefs	high	high	signif
9603, Can	Harm to fisheries habitat in provinces	medium	medium	none
9604, U.S.	Harm to San Pedro River	medium	medium	modest
9701, Can	Damage caused by hydropower to BC fish habitat	high	high	signif
9702, Mex	Harm of untreated waste water to local rivers	high	high	signif
9703, Can	Pollution from hog production	high	high ^a	? ^b
9704, Can	Harm to fish habitat in Atlantic Ocean	?	low	none
9705, Can	Failure to implement treaty on endangered species	high	low	none
9706, Can	Revision of 9603	high	high	modest
9707, Mex	Pollution of local river	low	medium	none
9801, Mex	Lack of enforcement leading to explosion	low	low	none
9803, U.S.	Toxic airborne emissions	medium	medium	modest
9804, Can	Harm caused by mining to fish habitat in BC	high	high	signif
9805, Mex	Presence of hazardous waste landfill	low	medium	none
9806, Mex	Environmental harm caused by shrimp farm	medium	high	signif
9807, Mex	Abandoned lead smelter	high	high	signif
9902, U.S.	Nonenforcement of MBTA ^c for logging activity.	high	high	modest
0001, Mex	Air pollution caused by local plant	low	low	none
0003, U.S.	Threat of proposed bicycle path to MBTA	low/low	none	
0004, Can	Harm caused by logging to BC fish habitat	high	high	modest
0005, Mex	Same as 0001	low	high	? ^d
0006, Mex	Denying indigenous groups access to raise environmental complaints	medium	high	modest
0101, Mex	Revision of 9805	low	high ^e	none
0201, Can	Nonenforcement of migratory bird regulations against logging	high	high	modest
0202, Mex	Violation of noise emissions from Mexico City airport	low	medium	none
0203, Can	Nonenforcement of Fisheries Act on pulp mills	high	high	pending
0204, Mex	Nonenforcement of hazardous waste and mining law regulations	?	high	signif

NOTE: I have not included petitions filed by individuals.

^a Council rejected secretariat's request for a factual record.

^b I was unable to gain sufficient information.

^c Migratory Bird Treaty Act.

^d In a phone interview on August 15, 2003, I learned that the lead petitioner, Domingo Gutierrez, had not observed any favorable results from the petition. I was not able to learn whether the release of a factual record helped.

^e Council rejected secretariat recommendation for a factual record.

Table 7 Level of Success

Level of success	Mexico as target	U.S. as target	Canada as target	Total
None	5	3	3	11
Modest	1	3	3	7
Significant	5	0	2	7
Not ascertained	2	0	1	3
Total	13	6	9	28

ing their petitions.⁷² Numerous environmental groups from all three countries have in fact consulted on the nature of the process and how best to use it. Helping this communication has been the formal evaluation meetings and Web site forums set up by JPAC with the cooperation of the secretariat.⁷³ In general, environmentalists have filed petitions when there is a substantial environmental issue at stake, where local and national governments have been unresponsive, and where international scrutiny is likely to make a difference.

Rough distinctions have developed between Mexico, on the one hand, and the United States and Canada, on the other, in the political motivations of activist-petitioners. Petitions against the Mexican government have targeted deep-rooted problems in Mexico's rule of law. On paper, Mexico has extensive statutory provisions protecting the environment and allowing any citizen to file a *denuncia popular* of environmental violations that triggers a formal administrative review of allegations. Like the labor rights situation, however, wide gaps exist in implementation. Deficiencies persist in lack of transparency and in accessibility to this administrative mechanism. Accordingly, Mexican environmentalists have submitted NAAEC petitions to highlight such problems and circumvent the absence of effective legal recourses at home. They have hoped that the secretariat will serve as an outside moral force and counterweight, which will force the government to confront its failure to provide effective legal channels.⁷⁴ With respect to the United States and Canada, petitioners have filed petitions not as an end around but to focus international pressure on an ongoing legal and political cam-

72. It is doubtful that any of the petitions filed by individuals involved even medium political effort.

73. This observation is based on multiple interviews of petitioners and secretariat staff, frequent visits to the secretariat and JPAC Web sites (accessed at www.ccc.org) and attendance of two JPAC-sponsored meetings, in 2003 and 2004.

74. This hope was emphasized by both Gustavo Alanis of CEMDA with respect to the Cozumel case (Brian Feagans, "Cozumel Piers Bring Tourism, Controversy," *The News*, March 13, 1997, <http://w3.nexis.com/sources/scripts/info.pl?244488>) and Luis Felipe Ayala, a lead petitioner in 9702 (Rio Magdalena).

paign—to add an “exclamation point,” in the words of Patti Goldman.⁷⁵ The goal has been to draw attention to deliberate policy decisions by the U.S. or Canadian governments to deemphasize environmental enforcement resources in favor of promoting commercial development.

It is true, however, that a number of Mexican activist-petitioners have not included much of a political strategy, apparently hoping that the petition itself would be sufficient (9707, 9801, 9805, 0001, 0005, 0101).⁷⁶ Such relative inattention from Mexican activists to the political dimension is probably the result of inexperience in cause-based litigation due to Mexico’s historically inaccessible legal system. It is likely that such relative inattention to political mobilization for NAAEC petitions will decline with experience, especially given the weak results gained by such petitions.

Secretariat Support

As in the NAALC petitions, the success of petitioners has been helped by a supportive review body. The secretariat has walked a fine line in seriously addressing environmentalists’ concerns while respecting governments’ political sensitivities.⁷⁷ The secretariat has followed a principled and professional standard of review, which includes gaining legal expertise and justifying decisions according to legal provisions. One way of establishing legal expertise has been to appoint a legal consultant from each country who gives advice on substantive matters, particularly ones of first impression. Similarly, as discussed in the review of Cozumel and BC Hydro, the preparation of the factual record includes the commissioning of an “expert group” selected on the basis of technical knowledge rather than for political reasons. The secretariat has also built up a publicly available internal body of law to use as precedents for resolving legal disputes, such as what constitutes having pursued available domestic remedies or retroactivity.⁷⁸

Procedurally, the secretariat has established a consistent set of practices, disseminated on its Web site, to emphasize accessibility, consistency, fairness, and transparency. It solicits input from the petitioners, the target government, JPAC, national advisory committees, and any other interested actors. To prevent a perception of bias, staff members retain a formal and insular approach when communicating with the petitioners or target gov-

75. Goldman, interview.

76. Domingo Gutierrez, lead petitioner for 0005, expressed this opinion in a follow-up e-mail message to author, September 28, 2003.

77. “Environment: Weak Institutional Performance by NAFTA,” Inter Press Service, November 18, 1997, www.ips.org/; Dimento and Doughman (1998).

78. Garver, interview; Sbert, interview.

ernment. They avoid initiating *ex-parte* communication (one-sided contacts outside the formal legal process) and, in response to inquiries, provide the same substantive updates to each side. The staff also issues periodic updates on an e-mail list server to all actors with a strong interest in the process. To ward off periodic efforts by individual governments to influence the review, the staff has invoked Article 11(4), which prohibits the secretariat from taking direction from any individual government.⁷⁹

Most significantly, the secretariat has, to the chagrin of governments, adopted a liberal standard of review. This is not to say that the secretariat has been a rubber stamp. It has dismissed at the Article 14 phase seven of twenty-nine activist-initiated petitions through 2002. But it has held that sixteen others merit a factual record and would probably have done so for San Pedro River (9604) had not an informal deal been reached to prepare an Article 13 report.

The secretariat's substantive reasoning indicates an even higher degree of receptivity than revealed in the raw numbers and gives a better sense of how secretariat validation matters. In its Article 14 reports, the secretariat has repeatedly rebuffed procedural objections from governments and has not required petitioners to allege personal, individual harm or to engage in an exhaustive pursuit of domestic remedies. Indeed, in several petitions the secretariat explicitly recognized the problems in Mexico's system of administrative review by noting that further domestic action by the petitioners would probably be futile (9805 and 9807). The secretariat employs some substantive analysis to ensure that the petition addresses all the criteria set forth in the agreement. Yet most of the petitions rejected under such analysis have been poorly crafted, lacking adequate information or explicit references to the Article 14 criteria.

At the same time, the secretariat has shown caution in not overreaching. It has resisted a few ambitious attempts to stretch the definition of what constitutes a problem with environmental law enforcement. Despite two well-argued petitions (9501, 9502) showing how a legislative action amounts to deliberate nonenforcement rather than a change in law, the secretariat insisted that allegations focus exclusively on the executive branch. It also rejected two efforts to extend the definition of domestic environmental law to international treaty commitments (9705, 9803).

Once satisfied on Article 14 matters, the secretariat has been favorably disposed to petitioners, recommending factual records on most of its Article 15 reviews. Several Article 15 reports have commended petitions for the qual-

79. Ibid.

ity of information provided and the important public issues raised therein. Of the five Article 15 denials, the secretariat has effectively sided with the government only twice (9803, 0202). The three other Article 15 denials commended the petitions for raising serious issues but dismissed them on technical grounds (9603, 9707, and 9805). In two of these three denials (9707 and 9805), the secretariat criticized the responses of the Mexican government, took note of serious problems raised in Mexico's system of administrative and legal review of environmental complaints, and indicated that it was dismissing the petitions only reluctantly. It observed in both cases that it would have liked to request clarifications from the petitioners on the nature of the problem in order to proceed with the review but that NAAEC does not provide for such an "ad-hoc mechanism."⁸⁰

Having assessed the degree of political mobilization employed and the responses of the secretariat, I next consider what impact these two factors have had on attaining success.

Why Political Activism and Secretariat Validation Matter

Table 6 indicates a strong correlation between the degree of political effort and secretariat validation, on the one hand, and results, on the other. No petition weak in either of these factors attained even modest success. By contrast, of the seven significant success petitions, all had high secretariat validation, while five also involved high political effort. This correlation is not coincidental. As we saw in the case of Logging Rider, an early secretariat dismissal is damaging because it closes off transnational scrutiny. By contrast, petitioners have been able to leverage favorable Article 14 decisions for positive effect, such as prompting the Mexican government to install a wastewater treatment facility (9702), the Canadian government to investigate allegations of damage to fish habitat from mining activities (9804), and the U.S. government to accelerate negotiations with Canada on a mercury coastal agreement (9803).⁸¹

What makes secretariat support conducive to advancing petitioners' goals is that it validates the underlying domestic cause. Such validation confirms the merits of petitioners' concerns by an international body generally regarded as neutral and professionally competent. The secretariat signals

80. Article 15(1) Determination of Secretariat 9707, July 14, 2000, 14.

81. Luis Felipe Ayala, lead petitioner for 9702, telephone interview by author, August 11, 2003; Christensen, interview; Erik Jansson, lead petitioner for 9803, e-mail to author, May 10, 2001. Recall also the secretariat's favorable Article 14 ruling in the Fort Huachuca petition (9604), which resulted in a compromise Article 13 report.

to the government and the interested public that the underlying concerns deserve serious attention.⁸² Validation has been especially welcome for Mexican activists frustrated with the limited channels historically available. Cesar Luna, a cross-border activist involved in a petition on an abandoned lead smelter site in Tijuana (9807), observes that the favorable secretariat findings gave local residents “a new sense of hope that the site will ultimately be cleaned.”⁸³

The symbolic validation also increases pressure on the target government to justify its behavior in light of the secretariat finding. Such “legal talk,” in which the government articulates its environmental policies, offers activists a formal target. In Cozumel, for example, the Mexican government was thrust into a public dialogue with long-marginalized environmental activists. Activists can both address the substantive inadequacies of the government’s environmental policies and use the stated government policies as a benchmark for evaluating government failures to meet stated commitments. Such criticisms of government behavior and policies have gained all the more legitimacy in the Article 15 determinations and factual records, where the secretariat has frequently included implicit criticisms of the government’s stated enforcement policies. In Cozumel the factual record brought out contradictions in the government’s claims, while the factual record in BC Hydro treated the Canadian government’s promotion of more voluntaristic enforcement with some scrutiny and skepticism.

A concrete benefit of favorable secretariat treatment is that it uncovers added information. Although the secretariat has no authority to require governments to change their behavior, there is a strong expectation that governments will formally cooperate in the process. Hence governments have always, albeit reluctantly, provided responses upon request, often lengthy, substantive ones. Follow-up inquiries from the secretariat, especially when culminating in a factual record, have further expanded the information uncovered. David Markell (2001, 42), former director of the secretariat’s petitions on enforcement matters, observes that “at a minimum, the process yields considerable information on enforcement practices that might not be developed otherwise and that, even if it did exist, would not be easily accessible to citizens in a way that addresses their particular

82. Geoffrey Garver and Carla Sbert observed that the trade press, especially the *BNA Daily Environment Report*, regularly follows secretariat activities.

83. Comments of Cesar Luna to the JPAC Public Review, January 31, 2001, www.cec.org/who_we_are/jpac/comments/EHC2.pdf. Luis Felipe Ayala of the Committee to Clean Up the Magdalena River (e-mail to author, May 21, 2001) and Gustavo Alanis have also referred to the added moral boost given their cause by the secretariat’s validation. In the case of 9807, clean-up efforts finally proceeded.

concerns.” Several petitioners have observed that this information gathering from a perceived neutral and credible source is the most valuable aspect of the process.⁸⁴

But while legal validation is necessary, so too is political mobilization. After all, the symbolic validation, eliciting of normative government justifications, and added information are all just opportunities. They require political mobilization from activists to be of use. The prior networking and public promulgation of the petition advance a momentum to the review process, which enhances the status of favorable secretariat reports. Moreover, as petitioners in Cozumel appreciated, it is up to petitioners and other interested activists to leverage the secretariat reports by disseminating them and favorably interpreting their findings. Similarly, activists need to take advantage of the legal conversation by mobilizing political pressure on the governments to act according to their claimed legal principles, as the petitioners in BC Hydro did when they used the government’s promotion of its water-use plan to elicit a commitment to direct enforcement.

The most politically sophisticated petitioners have used the information elicited from the secretariat investigations, such as government enforcement policies and practices, as evidence to further an ongoing political campaign. Recall that in 9604 Earthlaw used the environmental impact study in subsequent domestic litigation against Fort Huachuca.

By contrast, petitioners who have relied solely on the secretariat’s determination to change governmental behavior have been sorely disappointed when neither a favorable Article 14 ruling (9707, 9805) nor a favorable Article 15 ruling (0101) accomplished anything. Lead petitioner for 9707 Raquel Gutierrez, an experienced environmental attorney and law professor in Guadalajara, cited the failure to mobilize political activism as a key factor in hampering the effectiveness of the petition. She had thought a tight legal argument would be sufficient. Learning from her mistake, when Gutierrez relaunched the petition in 2003, she did so with a network of Mexican and international supporters (0303).⁸⁵

Post-2000 Trends: Support for Process Combined with Wariness of Government Encroachment

Unlike the NAAEC petition mechanism, there has been no marked decline in either activist interest in the process or in level of success attained in

84. Tutchton, interview; Liz White, Animal Alliance of Canada, coordinator of 9705, telephone interview by author, June 6, 2001.

85. Raquel Gutierrez, NAAEC petitioner, telephone interview by author, August 7, 2003.

recent years. From 2003 through 2006, activists filed another twenty-two petitions.⁸⁶ Yet environmentalists and other supporters of the process are wary of post-2000 efforts by the member governments to gut the power of the citizen-petition mechanism. Government discontent with the process has been considerable since the late 1990s, when the secretariat began issuing a series of favorable Article 15 rulings (Knox 2001, 70). The Mexican government, owing to Cozumel, was the most vocal of the three at the outset, accusing the secretariat of exceeding its scope and the process of being tilted against Mexico (Kibel 2001). Since then, successive Mexican governments have opposed including a similar mechanism in the proposed Free Trade Area of the Americas.⁸⁷ All three governments have usually expressed disapproval of secretariat behavior when they have been the target of a full investigation. More significantly, the governments have not been afraid to use their collective power, through the council, to attempt to weaken the reach of citizen petitions. Such proactive efforts by the council date to before the change in government in the United States and Mexico in 2000–2001, and have since grown in intensity.

In response to council offensives, activists and JPAC have engaged in a vigorous mobilization campaign to maintain the autonomy and reach of the review process. The result has been a tenuous standoff; activists still find the process valuable but are wary of increasing council interventions to restrict investigations. Reviewing the political conflicts generated by these council attacks is instructive for revealing the high stakes perceived by governments and environmentalists in the citizen-petition mechanism and the importance of sustained activist mobilization coupled with institutionalized support (especially from JPAC) in maintaining the autonomy of the process.

The first wave of council offensives against the process took place in 1999–2000. In 1999 the council decreed delays in the public release of favorable Article 15 reports until it had ruled on whether to accept the recommendation. John Knox, a law professor who was then the chair of the U.S. National Advisory Committee, observed that “the goal appears to be to shield the Parties from potentially embarrassing political scrutiny until the possibility of public pressure being brought to bear on the council has passed.”⁸⁸ In 2000 the council effectively overruled the secretariat by reject-

86. But only two have targeted U.S. practices.

87. Ethel Riquelme, “Considerable, la desventaja representativa de México en materia ambiental,” *El Excelsior*, June 25, 1998; Yadira Mena, “Herminio Blanco incluir medio ambiente y laboral en el ALCA eliminaría los logros del TLC,” *El Economista*, March 23, 1998; Wirth (2003).

88. Comments from John Knox to the JPAC, September 22, 2000, www.ccc.org/who_we_are/jpac/comments/knox.pdf.

ing one recommendation to conduct a factual record (9703) and delaying for several years a decision on another recommendation (9706). That same year the council called for revising the guidelines in a manner most observers believed was intended to further restrict the secretariat's autonomy (Knox 2001, 70–73). The proposed revisions included creating a permanent subgroup of governmental officials from each country to oversee the work of the secretariat in reviewing petitions.

The council's efforts at structural revision provoked a spirited challenge from a trinational coalition of environmental activists formed to oppose proposed revisions and to alert the public to the governments' efforts.⁸⁹ JPAC held meetings to gauge citizens' views in all three countries and recommended against any revisions that limited public input into the process.⁹⁰ This mobilization persuaded the council to back off from further revisions. Instead, the council asked JPAC in 2000 to prepare a thorough evaluation of the citizen-petition mechanism. After eliciting public comments from environmentalists, business groups, academics, and governmental officials, JPAC released a report titled *Lessons Learned: Citizen Submissions Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*.⁹¹ The report called for a commitment to an independent secretariat with "adequate resources to attract and retain consistently high-quality staff and, where needed, specialized consultants," expedited review of petitions, the inclusion by the council of publicly available substantive justifications for rejecting a secretariat Article 15 recommendation, and a formal follow-up to factual records. In response, the council agreed to release Article 15 determinations five working days after notification, to accelerate its review process, and to provide a public explanation when it rejected secretariat recommendations.⁹²

Perhaps motivated by the transition from the Clinton administration (whose EPA secretary, Carol Browner, had been a strong proponent of the process) to the Bush administration, the council launched a more subtle

89. Anne Perrault, Center for International Environmental Law, telephone interview by author, August 2, 2001; Randy Christensen, telephone interview by author, September 17, 2003. For a list of the numerous participants in this coalition, see Statement of Concerned Environmental Organizations Regarding Articles 14 and 15, April 27, 2000, submitted to the CEC Council (copy on file with the author); editorial, "How to Wreck Trade," *Washington Post*, June 10, 2000, A22; Elizabeth Malkin, "A Green Thumb in NAFTA's Eye?" *Business Week*, June 12, 2000, 12.

90. See Environmental Law Institute (2003, 28); comments of Randy Christensen to JPAC, September 22, 2000, www.cec.org/who_we_are/jpac/comments/512foi.pdf.

91. See www.cec.org/files/pdf/jpac/rept11-e-final_en.pdf.

92. Council Resolution 01-06, June 29, 2001, www.cec.org/pubs_docs/documents/index.CFM?varlan=englishCID=523.

effort in late 2001 to restrict the reach of the citizen-petition process. Rather than revise the process, the council chose to interpret its authority to approve or deny secretariat recommendations for a factual record to include the right to modify substantially the scope of the investigation. The council exercised this scoping power in November 2001 in response to four favorable Article 15 reports (9706, 9804, 9902, and 0004). Each of these petitions alleged widespread, systematic problems in government enforcement, buttressed by detailed references to a few specific instances, a type of petition that had been consistently endorsed by the secretariat. The council's scoping entailed restricting the secretariat investigation to the few detailed instances and ignoring allegations of widespread problems.

For example, in 0004, petitioners alleged widespread failure by the Canadian government to enforce the Canadian Fisheries Act with respect to all public and private logging operations in British Columbia. Rather than approve a full investigation into Canada's policies for systematic enforcement of the Fisheries Act, the council modified the terms of the factual record investigation to focus only on two alleged instances of nonenforcement. This scoping, according to lead petitioner Randy Christensen, undermined the petition's value. Rather than highlight a problem that cumulatively amounted to very costly environmental damage, the investigation focused on two violations that, by themselves, had caused relatively little environmental harm.⁹³

The scoping in 0004 and elsewhere effectively reframed the dispute in terms much more favorable to the target government by substantially limiting the degree of scrutiny (see Environmental Law Institute 2003, 12–15). In 2002 the Toronto office of the Sierra Legal Defence Fund tried to preempt an anticipated scoping response by including extensive statistical analyses to establish a case for widespread, systematic enforcement failures of Canada's Migratory Birds Regulations (0201). The council nevertheless rejected the secretariat's favorable Article 15 recommendation, on the grounds that statistical formulas did not meet NAAEC's requirement of providing "sufficient information."⁹⁴ Lead petitioner Albert Koehl believes that it was only because of political mobilization and protests that the council allowed petitioners an additional 120 days to provide further information.⁹⁵

Once again, a trinational coalition of environmental activists joined with

93. Christensen, interview, September 17, 2003.

94. Council Resolution 03-05, April 22, 2003, www.cec.org/files/pdf/COUNCIL/Res-Ontario-Logging_en.pdf.

95. Albert Koehl, telephone interview by author, August 14, 2003.

JPAC in mobilizing opposition to this scoping trend. Shortly after the council's scoping decisions in November 2001, JPAC requested that the council authorize a public review of scoping.⁹⁶ After gaining the council's approval—but only after the factual records for the four scoped petitions had been completed—JPAC convened a public meeting in Montreal in October 2003 that included activists and academics from all three countries.⁹⁷ This meeting resulted in a report by the Environmental Law Institute (2003) that strongly criticized the practice of scoping as contrary to the NAAEC's spirit of public access, and in a formal JPAC recommendation that the council refrain from scoping in the future and accept the secretariat's determination of what constitutes "sufficient information."⁹⁸

In response, the council refrained from making any commitments against scoping or invoking lack of "sufficient information" as a reason for rejecting factual record recommendations.⁹⁹ It did, however, accept, without qualification, the recommendation for a factual record for 0201 after the Sierra Legal Defence Fund submitted additional information.¹⁰⁰ Similarly, the council accepted a secretariat factual record recommendation for a petition from Mexican environmentalists on widespread failure of the Mexican government to protect forest resources in indigenous communities (0006).

In spite of these hopeful signs, environmentalists and JPAC remain concerned that the council exerts too much influence in the process and may fundamentally weaken the appeal of the citizen-petition mechanism (Environmental Law Institute 2003, 36–39).¹⁰¹ In 2004 JPAC solicited public comments on the perception of a conflict of interest with respect to member governments being both the target of citizen petitions and, through the council, overseers of the process.¹⁰² As of this writing, it remains unclear what results this effort has had. In the meantime, new concerns have arisen.

96. JPAC, Advice to Council NO: 01-09, J/01-04/ADV/01-09, www.cec.org/files/pdf/jpac/advico3-05_en.pdf.

97. I attended this meeting as an invited academic participant.

98. JPAC, Advice to Council NO: 03-05, December 17, 2003.

99. José Manuel Bulas Montorro, alternate representative for Mexico on the council, to Donna Tingley, JPAC chair, "Re: JPAC Advice 03-05," June 3, 2004, www.cec.org/files/pdf/jpac/response_council-03-05-3-June-2004_en.pdf.

100. Koehl believes that this reversal was also the product of the public pressure brought to bear in 2003. Albert Koehl, telephone interview by author, January 5, 2007.

101. This impression was expressed in interviews with Gustavo Alanis of CEMDA, who served as JPAC chair in 2003, and with Randy Christensen (September 17, 2003).

102. Commission for Environmental Cooperation, "JPAC Calls for Comments on the Perception of an Inherent Conflict of Interest in the North American Agreement on Environmental Cooperation," November 5, 2004, www.cec.org/news/details/index.cfm?varlan=english&ID=2639.

First, the council waited seven months before finally voting to release factual records for petitions 0201 and 0203.¹⁰³ According to Albert Koehl, lead petitioner on 0201, the Canadian environmental minister was probably the main source of the delay.¹⁰⁴ Second, there is strong evidence that the Bush administration has been blocking a council decision to accept a secretariat recommendation for a factual record that would investigate the U.S. record in enforcing Clean Water Act provisions on mercury emissions (0405).¹⁰⁵ The secretariat recommended preparation of a factual record on December 5, 2005. As of June 15, 2007, the council has still not decided whether or not to accept the recommendation. Ominously, U.S. officials may be negotiating with officials in the Mexican environmental ministry to mutually agree to vote against factual record investigations for 0405 and against a petition that challenges Mexico's water pollution laws (0303).

Conclusion

Although the recent efforts of the three governments to constrain the power of the secretariat's investigatory authority are extremely worrisome to environmentalists, the government offensive is also a backhanded tribute to activists' success in using the citizen-petition process effectively. Each petition followed consistent governmental refusal to change its policies, while most triggered objections from the target government as being inappropriate subjects for review.

Whether the process will continue to hold value is an open question. Indeed, judging from their very limited use of the process in recent years, U.S. environmentalists may already have lost faith in the process (see Table 6). What is significant so far, however, is the value of strong institutional support for the process, as reflected in the professional autonomy of the secretariat and the vigorous support of the JPAC. It is this institutional support that best explains the diverging fortunes of NAAEC and NAAEC citizen petitions in recent years.

Of course, it is important not to idealize NAAEC's citizen-petition mechanism, even if it survives undiminished by continuing attacks from member

103. The secretariat submitted the final draft for factual record 0201 on June 20, 2006, and for factual record 0203 on June 28, 2006. After causing great frustration among the petitioners with its delay, the council voted on January 31, 2007, to release the records to the public. See www.ccc.org/citizen/index.cfm?varlan=english.

104. Koehl, interview, January 5, 2007.

105. "Blocked NAFTA Panel Inquiry on EPA Mercury Rule Stymies Water Suits," *Inside EPA Weekly Report*, January 5, 2007.

governments. Petitioners have expressed considerable frustration with the process over the years, especially with respect to council intervention. And, as with the NAALC record, even the most successful petitions come with notable qualifications, such as in Cozumel, where the tourist development proceeded in spite of the petition. But, while pushing for changes and lamenting the limitations, a number of activists remain amenable to using the process as a complementary mechanism to boost parallel political and legal efforts that have temporarily stalled. As Patti Goldman observes, the process remains “one of the very few international environmental mechanisms” available to activists.¹⁰⁶

106. Goldman, interview.

Conclusion: Lessons Learned

Through 2006, activists have filed thirty-one NAAEC petitions and forty-seven NAAEC ones. Although the numbers are not high in an absolute sense, they compare favorably to those of more global transnational quasi-judicial mechanisms. The UN Human Rights Commission, for example, which includes many more states, received only five to ten petitions annually during its first decade of operation (Knox 2001, 78). Similarly, the World Bank Inspection Panel has received thirty-seven petitions from its inception in 1994 through 2005.¹ More important, for all the fluctuations in the political fortunes of the NAAEC and NAAEC citizen-petition mechanisms and the present concerns about government crackdowns, this study has demonstrated a crucial overarching finding. NAFTA's nonbinding citizen-petition mechanisms have proved politically valuable to labor and environmental activists in all three member states. This finding contradicts popular, and many scholarly, expectations, which have dismissed soft-law mechanisms like NAFTA's citizen petition as ineffective. Accordingly, this study has great empirical and theoretical interest. Empirically, it demonstrates that NAFTA's social model is substantive. Conceptually, it shows that transnational quasi-judicial mechanisms offer a valuable political platform for social activists by virtue of the legal process and legal discourse they interject into an ongoing

1. See <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TabletSummaryofInspectionPanelCases.pdf>.

political dispute with a state actor. Indeed, given the general resistance of target governments to each petition, the NAALC and NAAEC findings roundly answer the challenge posed by Downs, Rocke, and Barsoom (1996) to show that the legal process can lead governments to act in ways they otherwise would not. Moreover, the legal process invigorates ongoing domestic political causes in a variety of ways discussed in the previous two chapters and again here in this conclusion.

In summary, this study yields five far-reaching observations:

1. The lack of binding authority does not render a transnational quasi-judicial mechanism ineffective. Rather, the mechanism enables activists to *legalize an ongoing political dispute* with a government in a way that gives their cause greater status.
2. Legalization of the dispute by way of a favorable review finding is not sufficient. To gain positive political results, activists need to *politicize the legal process* by mobilizing wider support for their cause and disseminating the legal decision. Such politicization increases pressure on the target government to comply with the soft-law process.
3. Shifts in the domestic political climate affect the political value of a transnational quasi-judicial mechanism. Activists enjoy the best prospects for using the mechanisms effectively when the governments support the general process and/or the underlying values at issue.
4. The institutional structure affects the political value of the transnational quasi-judicial mechanism. Of particular importance are the level of support given to the quasi-judicial body, its degree of autonomy, and the procedures applied.
5. Activists are able to use the transnational quasi-judicial forum effectively against a variety of states even if relative vulnerabilities differ. Both established liberal democracies and transitional, less developed states are vulnerable to well-crafted uses of the citizen-petition mechanism.

This conclusion elaborates upon the conceptual implications of this study's findings. I show how appreciation of transnational quasi-judicial mechanisms enables us to make a more nuanced assessment of the value of NAFTA's citizen-petition mechanism. Such a lesson is especially valuable for supporters of social justice in global and regional economic governance. Rather than uncritically laud or condemn NAFTA's citizen-petition mechanism, we should understand its political value even as we strive for fundamental institutional improvements.

Lessons Learned

North American social activists have not only demonstrated the political value of NAFTA's citizen-petition mechanism, but also the broader significance of value-based transnational quasi-judicial mechanisms. Their experiences convey important conceptual lessons, given that the transnational quasi-judicial mechanism is an increasingly prominent institutional feature in global governance for value-based norms. We thus gain insights into this thinly explored institutional mechanism through reviewing the empirical record of NAALC and NAAEC. More generally, the findings of this study shed light on a complex dynamic of great interest to legal scholars, IR scholars, and scholars of social activism: the evolving relationship between international legal dynamics, transnational activism, and domestic politics and law.

To assess the lessons to be drawn for other value-based transnational quasi-judicial mechanisms, I return to the categories listed above.

Who Will Use the Mechanism, and How?

In the cases of the NAALC and NAAEC citizen-petition mechanism, activists (i.e., labor movements, environmental organizations, and human rights groups) have made up the overwhelming majority of participants. This is also likely to be true for other transnational quasi-judicial mechanisms that address public interest norms. For obvious reasons, the mechanism is a valuable tool for groups with a powerful normative cause but much less so for conventional interest groups, like private companies. Although companies can construct strong legal arguments, they possess little credibility to make effective moral or political arguments, given their obvious economic motivation. One may argue that labor unions behave as interest groups, but in the case of NAALC they can plausibly promote a broader social value. Gaining the right to register a union based on a democratic process, for example, may lead to better wages and benefits for workers, but such goals are far less tainted by self-interest than the goals of a corporation seeking a looser regulatory climate.

Given the lack of binding obligations in such mechanisms, activists in other settings will reach the same conclusion that North American labor and environmental activists have reached on how to use the process—namely, as a means for achieving greater status for an existing political cause. They, too, over time and repeated engagements, will become more skilled and more comfortable with effectively exploiting the political oppor-

tunities of the transnational quasi-judicial mechanism and at integrating a range of domestic and transnational strategies.

It follows that a pool of independent cause-motivated activists is helpful for giving transnational quasi-judicial mechanisms significance. This logic may suggest that the bulk of the users will come from liberal democratic societies, where there are many independent activists and a legal rights-based culture. The Mexican experience, however, indicates that this is not a prerequisite for success. In fact, the Mexican record conforms to recent studies that show a legal rights culture developing in many southern states where activists are increasingly engaged in legal advocacy (Ellmann 1998; Risse and Sikkink 1999). In addition, the NAFTA experiences suggest that activists in less liberal societies will be aided by cross-border fertilization. The first Mexican activists to use the NAAEC process, for example, had participated in earlier petitions brought by U.S. and Canadian activists. Moreover, most Mexican NAALC and NAAEC petitioners have had extensive contacts with U.S. and Canadian petitioners and benefited from their experiences.²

How Other Transnational Quasi-Judicial Bodies Will Act

The commonalities between the NAAEC secretariat and the U.S. NAO—the most active of the three NAOS—in legal and political behavior indicate that even across very different institutional structures, shared patterns of behavior prevail. It is reasonable, then, to expect other value-based transnational quasi-judicial bodies to behave similarly. They too will begin with a tenuous status and will have to develop sophisticated legal and political strategies in order to gain legitimacy. To establish judicial credentials, they will need to acquire legal expertise and behave in a principled, consistent, and transparent manner. Politically, we can expect other value-based transnational quasi-judicial mechanisms to face cross-cutting pressures from social activists and governments. Like the NAFTA review bodies, they will need to demonstrate receptivity to social activists through a liberal standard of admissibility and a reasonably thorough substantive review. Such review bodies will also, however, see the need to exhibit the cautious sovereign-based sensitivities of the NAAEC secretariat and the NAALC NAOS. Such sensitivity will make them wary of activist attempts to interpret their mandate too broadly or to intervene in sensitive areas of policy formation.

2. The exchange has been two-sided. Mexican activists have offered valuable assistance to U.S. and Canadian activists on engaging the mechanisms.

How the Citizen-Petition Process Will Play Out Against Different Types of States

Overall, the pattern of political success in the North American setting yields two important insights for value-based transnational quasi-judicial mechanisms elsewhere. The first is that such mechanisms will be used more frequently against governments of relatively closed societies, provided that there is a sufficient number of independent activists in the society. As in the case of Mexico, the paucity of accessible and trustworthy domestic legal and political channels will increase the incentive to use a transnational channel as a “boomerang.”³ Second, and more broadly, transnational quasi-judicial mechanisms will provide a valuable political opportunity for activists in a broad range of political systems, in that gaps between a government’s formal commitment to labor rights, human rights, and environmental standards and its practical implementation are prevalent throughout the world. It may be, of course, that certain systems, such as extremely authoritarian ones or those that lack a strong rights-based culture, will prove especially resistant. Yet the very fact that so many governments, on all continents, have made a point of ratifying core labor rights conventions, the International Covenant on Civil and Political Rights, and other major treaties and agreements, suggests a widespread concern for international image that can be used for political effect by committed activists.

The Relationship Between Domestic Political Shifts and the Level of Institutional Support for the Transnational Quasi-Judicial Mechanism

As with the NAALC and NAAEC experiences, marked domestic political shifts regularly occur over time. Such changes are bound to affect overall government support for and vulnerability to a transnational quasi-judicial mechanism. But what the recent divergent experiences of the NAALC and NAAEC citizen petitions strongly indicate is that the level of institutional support for the mechanism will mitigate the effect of a deteriorating domestic political climate. Quasi-judicial bodies with a reasonable degree of autonomy, resources, and institutional support will be better able to maintain political significance than those who lack these prerequisites. Moreover, such relatively well endowed review bodies give activists a better chance to use politi-

3. Referring to Cozumel, a Canadian environmentalist remarked, “The Mexicans are so lacking a forum to raise issues that such consultations at the NAAEC could be useful to them.” Paul Weinberg, “Trade-Environment: Green Groups Challenge NAFTA Environmental Panel,” Inter Press Service, August 2, 1996, www.ips.org/.

cal pressure against government attempts to circumvent or undermine the process. This lesson should not be lost on those who seek to shape the direction of social institutions in other regional initiatives, such as the Free Trade Area of the Americas.

Building on This Study's Conceptual Findings

This study fills a gaping conceptual and empirical void in the scholarship on value-based transnational quasi-judicial mechanisms. Yet there is much room to build upon its contribution. Further studies of other value-based transnational quasi-judicial mechanisms that consider the interaction of legal and political dynamics would be especially useful. Such studies will allow for a sharpening of this study's conceptual framework by collectively offering variation on such important factors as the type of quasi-judicial body, the type of state, the level of governmental receptivity and vulnerability, and the type of norms involved.

One interesting subject in need of further attention is the World Bank Inspection Panel. After sustained complaints from southern and northern NGOs about the World Bank's failure to follow its social and environmental policies in funding development projects, the board of directors created the panel in 1993 (Clark 1999; Fox 2000). The panel consists of three experts in international development appointed by the World Bank's board of directors. Structurally, the panel is autonomous and has its own secretariat. Claims can be filed by any group of two or more persons, or by NGOs on their behalf, alleging direct harm from violations of World Bank policies. After hearing the response from the managing parties of the World Bank, the panel decides whether to recommend an investigation, and the board of directors decides upon approval. While the immediate target of the petitions is the World Bank, the behavior of the host state of the development project is also often at issue.

The panel's review process has played out in ways similar to the NAALC and NAAEC process, according to early studies (Fox 2000). Thus activists have filed claims, while the management parties have generally opposed further investigation. In addition, southern governments on the board, especially those from India and Brazil, have sought with some success to limit the panel's mandate and scope of review (Fox 2000). Petitioners have gained only modest concrete results in changing specific development projects, but they have achieved noticeable agenda-advancing results, such as

added prominence and increased attention from World Bank officials to social concerns and transparency (Clark 1999; Fox 2000). It would be useful to follow up on the early studies to assess how distinct types of states have responded to the process and whether changing political contexts in recent years have affected the panel's influence.

Another transnational quasi-judicial body that merits more examination is the International Labor Organization's Committee on Freedom of Association (CFA). The ILO created the CFA in the 1950s as an autonomous body to review complaints from workers about government failure to uphold workers' rights to associate with the labor union of their choice. If the CFA finds violations, it makes recommendations to the target government to correct its behavior and may call for follow-up monitoring. As the CFA process applies to all member governments of the ILO, it can review petitions against most states in the world (OECD 1996, 155–56). Since its inception, the CFA has reviewed more than two thousand complaints from workers (Swepston 1998). Studies show that governments generally cooperate in the reviews and often improve their behavior in response (Haas 1970; Donnelly 1986; Potobsky 1998; Swepston 1998). The CFA's success is attributed to the credibility it has attained over the years as a principled, expert body (Potobsky 1998; Maupain 2000). Despite the volume of material on the CFA, there is little that comprehensively assesses the CFA procedure as a transnational political opportunity structure. A study that did so would be quite valuable, given that global and regional political settings have changed a great deal over the course of the CFA's history and that the CFA has reviewed petitions pertaining to a wide range of political systems.

In the area of human rights lie numerous global and regional quasi-judicial human rights bodies, such as the UN Human Rights Commission (replaced in 2006 by the Human Rights Council), the European Human Rights Commission (now defunct), and the Inter-American Commission of Human Rights. Each reviews petitions from victims or their NGO representatives complaining of human rights abuses. These bodies have been established by human rights treaties or subsequent protocols (Steiner and Alston 2000). Collectively, these organizations offer a rich source of material for enhancing our conceptual understanding on the political influence of transnational quasi-judicial bodies. They offer a vast diversity of petitions that vary in a number of theoretically interesting respects, including institutional structure, type of target government, region, type of issue, and overall political setting.

Broader Conceptual Lessons: Enriching Scholarly Understanding of Transnational Activism and International Law

This study has demonstrated that transnational activism remains fertile conceptual terrain for scholars. One contribution of this study is its analysis of the way international law, by way of transnational quasi-judicial channels, provides a valuable transnational political opportunity structure for activists. Yet this study also offers insights into the relationship between transnational activism and domestic activism, and into the role of transnational legal channels in generating transnational solidarity.

The NAALC-NAAEC record highlights the domestic grounding of most transnational activism. Labor, human rights, and environmental activists have engaged NAFTA's citizen-petition mechanism not so much to promote transnational solidarity in the abstract but to further a tangible domestic political cause. They have shown that transnational activism generally rests on the same motivation that drives domestic activism and does not require an extraordinary preexisting transnational identity. We can therefore expect a variety of domestic activists to use transnational channels strategically to advance domestic goals.

A related lesson concerns the overall status of transnational activism with respect to activism in general. Most NAFTA petitions followed extensive political activism and domestic litigation. This study confirms that activists use transnational channels judiciously, as supplements to domestic legal and political campaigns that have generally either stalled or proved insufficient. Much transnational activity complements domestic political and legal activity. We can, however, expect transnational activism to become a more prominent aspect of activism in general as more transnational channels emerge and activists develop more familiarity with them.

Moreover, as transnational channels increase, especially legal ones, transnational consciousness is likely to expand. NAFTA's quasi-judicial mechanisms have inspired extensive collaboration between activists in multiple countries. This more than confirms other studies' findings that formal transnational channels inspire transnational collaboration among activists (e.g., Keck and Sikkink 1998). In fact, the NAALC-NAAEC record indicates that quasi-judicial transnational channels themselves generate and deepen transnational collaboration. As Tim Beatty, the former AFL-CIO representative in Mexico, observed, the act of framing NAALC petitions and developing an accompanying political strategy requires an extensive and detailed degree of collaboration.⁴ Such activity forces participants to assess common

4. Beatty, interview.

challenges, learn of the specific legal and political situation facing their counterparts, and advocate mutually desired goals. The citizen petitions have thus enabled activists to form and enhance transnational solidarity and forge a shared social vision.

Selective Engagement Does Not Legitimate Neoliberalism

Having set forth a close examination of NAFTA's citizen petitions and explained their theoretical and policy significance, I close this book with a final set of reflections on the political value of NAFTA's citizen-petition mechanism. First I would like to make clear what I am not arguing. Most generally, I am not arguing that NAFTA, even combined with the social accords, has been a positive development in the pursuit of social justice. Although it is not the purpose of this book to present an overall evaluation of NAFTA, I agree with many critics who see NAFTA as primarily a neoliberal tool that has been harmful to a whole range of social justice causes. More specifically, I am not arguing that NAFTA's parallel accords are admirable institutions that ought to be replicated elsewhere. Indeed, I see significant deficiencies with both, especially with the NAALC, as I set forth in Chapter 3.⁵

Where I depart from many critics of the NAFTA-NAALC-NAAEC package is in their assertion that the parallel accords are worthless. I have shown that they offer much more value than commonly credited to them. This judgment is most plainly supported by the return of even skeptical activist-petitioners, like Robin Alexander, to the petition mechanism. I also argue that NAFTA's citizen-petition mechanism merits serious attention because it reflects the relative influence of social justice norms not just in North America but also in global trade-investment governance. It is not helpful, then, to summarily dismiss the North American social model and advance the EU's social model as the proper benchmark of comparison. As discussed in the Introduction, it is simply implausible to expect the EU's social model to be replicated elsewhere in the foreseeable future. It was derived from a long history and a very distinct regional mix of socioeconomic and political traditions. Moreover, given the EU's recent expansion to a number of much poorer central and eastern European states, its social model could very well

5. In my interview with Robin Alexander, the director of international affairs for the UE and the lead coordinator of two NAALC petitions, she expressed the hope that I would not become an "apologist" for the citizen-petition mechanism. "The deficiencies of NAALC far outweigh its positive features" she remarked.

regress. Whatever one thinks of its intrinsic merits, it behooves us to understand the strengths and limitations of NAFTA's much more generalizable social model.

I further argue that activists should continue to use NAFTA's citizen-petition mechanism despite its limitations. My position differs from the view taken by a number of North American activists, including some past petitioners. Many are understandably frustrated by the shortcomings of both the NAALC and the NAAEC mechanisms, including delays in government responses; lack of resources in investigating petitions; narrow interpretations of the quasi-judicial body's mandate; excessive deference to governments' sensitivities; lack of transparency; and lack of follow-up mechanisms to review government responses to the quasi-judicial body's findings (see, for example, Dimento and Doughman 1998, 697; JPAC 2001). Frustration is more intense with the NAALC process (Human Rights Watch 2001; Weiss 2003). In response, opponents of continued use of NAFTA's citizen-petition mechanism argue that the benefits gained are not worth the time and resources invested or the cost of effectively legitimating an inadequate institution.⁶

Opponents' concerns should be taken seriously. But we must also balance both the full costs and the full benefits of using the petition process. I believe that such a calculation justifies its continued use, though the case is weaker for the NAALC mechanism under political circumstances at present.

One cost that does not hold up under scrutiny is the fear of legitimating NAFTA and its petition mechanism by using the process. This fear can be seductive given the considerable limitations to NAFTA's citizen-petition mechanism and the strong neoliberal bias of the main NAFTA accord. The problem is that the antilegitimation argument leaves social movements few tools with which to challenge the status quo and underestimates the potential political use of institutional mechanisms.

According to the antilegitimation logic, the use of any neoliberal institution is ultimately self-defeating for social activists because any short-term political victory comes at the unacceptable expense of validating the prevailing neoliberal governing structure. Hence, it would be misguided for activists to invoke not only NAFTA's citizen-petition mechanism but that of any other trade-linked institution that operated in a neoliberal context. This attitude would preclude the use of most, if not all, existing trade-linked institutions, along with those likely to emerge anytime soon. The restrictive implications are more extreme if one carries the antilegitimation argument

6. E.g. Alexander, interview; Delp et al. (2004).

to its logical conclusion. The pro-business orientation of most domestic and international governing systems is obvious. Thus, according to this argument, existing institutional channels are politically compromised by their nature and hence counterproductive to activists' goals. To accept such an antilegitimation argument is to effectively strip activists of most of their concrete tools of change.

In addition, the antilegitimation argument fails to acknowledge that activists can engage formal institutions in a manner that furthers both an immediate political cause and a long-term agenda of social justice. Chapter 2, in fact, reviewed findings that showed the ability of U.S. movements to engage the court system to mobilize broader political reform. So too have labor, human rights, and environmental activists managed to use NAFTA's citizen petition for broader political goals.

One such benefit of NAFTA's citizen petition is its role in promoting transnational solidarity. Almost all of the NAALC petitions have involved extensive cross-border sharing of information and strategies, as have a significant number of NAAEC petitions. The deepening of solidarity has been especially important for U.S. and Mexican activists, given the paucity of contacts, especially outside the border areas, in place prior to the initial NAFTA negotiations in the early 1990s.⁷

Another result of the petitions has been to reframe the public discussion of trade governance and social values in a more favorable light. Most media voices and a sizeable segment of scholarly literature portray the trade and social values debate as a contest between northern environmentalists and labor unions, on the one side, and southern states, on the other.⁸ This effectively frames proponents of trade-linked social values as protectionists insensitive to the global South. In addition, it lets state officials become the only voice for the global South. NAFTA's citizen-petition mechanism has enabled U.S., Mexican, and Canadian activists to challenge this common depiction and present trade-linked social values as a widely desired public value. Mexican groups that promote social justice, such as the FAT and CEMDA, have collaborated with U.S. and Canadian groups in filing high-profile NAALC and NAAEC petitions against the Mexican government. In this way they have given a voice to a sizeable anti-neoliberal population in

7. E.g., Beatty, Compa, and Rios, interviews. Even petitioners who express skepticism about the citizen-petition mechanism give the process credit for enhancing cross-border solidarity. Alexander, interview; Bertha Lujon, FAT member and longtime labor activist, interview by author, March 16, 1999, Mexico City.

8. See, e.g., "The Real Losers," *Economist*, December 11, 1999; Drezner (2000); Bhagwati (2004).

Mexico and have challenged the premise that the government represents the popular will.

Similarly, U.S. and Canadian labor and environmental activists have used NAFTA's citizen petition to demonstrate their commitment to high labor and environmental standards in the region. Notably, they have collaborated with Mexican activists in their reform efforts, especially in the case of NAALC petitions. Indeed, none of the petitions filed against Mexico could be plausibly characterized as motivated by protectionism, given that the desired change in policy had to do with recognizing the rights of independent labor movements in Mexico and improving occupational health and safety. Another way of showing a genuine public interest commitment is to target widespread labor or environmental abuses in the United States or Canada and solicit support from Mexican activists. Such two-way solidarity undermines claims that the championing of trade and social standards is merely a ruse for attacking Mexican interests.

In short, activists have used the NAALC and NAAEC citizen petition in ways that challenge the underlying neoliberal terms of NAFTA. Indeed, most petitioners have been strongly critical of the preeminence NAFTA gives to transnational commercial interests. As a result, they have used petitions both to assist an immediate political campaign and to articulate in the actual petitions, at public hearings, and in communication with the media and the public the unwelcome consequences of a neoliberal vision of economic integration. Activists have connected the individual violations to a broader deregulatory business-friendly climate. They have targeted privatization, federal failures to enforce environmental standards, and the adoption of voluntarist regulatory relationships with private businesses. In addition, petitioners have put a spotlight on problems with the petition process itself.

The wider political uses to which activists have put the citizen petition undermine the antilegitimation argument and the broader argument against continued engagement of the petition process. The benefits include progress in a specific political dispute, cumulative structural improvements (e.g., assisting the cause of independent labor unions in Mexico), promotion of transnational solidarity, and favorable reframing of the debate over trade governance. The costs primarily consist of the time and money invested in giving political effect to the petitions. Broader costs, such as unwanted legitimation, look questionable upon close analysis.

To be sure, the domestic political setting in recent years has been less than ideal, especially for NAALC petitions. There are, however, some prom-

ising domestic political developments. In the United States, the Democratic Party regained control of Congress in 2007 and is likely to win the 2008 presidential election. In Mexico, the left-of-center PRD has established itself as a potent political party that can pressure political compromises from the governing PAN administration, whose re-election in 2006 was very narrow and hotly disputed. In Canada, recent polls indicate that the environment is the top priority of Canadian voters, which could prod the minority Tory government of Stephen Harper to be more receptive to environmental issues.⁹ These developments may make the citizen-petition mechanism a good deal more valuable to activists in the near future.

Conclusion

Of course, regardless of the domestic political setting, activists would prefer labor and environmental mechanisms with sharper teeth. But such mechanisms are unlikely to emerge in the present global climate, given the relative strength of neoliberal constituencies in international trade-investment governance. For the near term, then, the NAFTA citizen-petition mechanism offers a transnational political platform of proven value, under certain circumstances, for promoting social causes. Clearly, activists should not settle for trade-investment regimes that offer no more than the NAFTA social model. On the contrary, they should continue to demand trade-investment regimes that give much greater prominence to social justice and community accountability.

Yet there is no contradiction between using the available, if imperfect, institutions in the present while campaigning for new types of governance freer of neoliberal constraints. Activists have long recognized that progress in social justice rarely occurs abruptly but requires a long and sustained struggle that incorporates a variety of strategies. In fact, most activist-petitioners have displayed this sophisticated understanding in their engagement of the NAFTA's citizen-petition mechanism. On the one hand, they have filed petitions to advance immediate causes. On the other hand, they have strongly criticized the limited institutional protections offered by NAALC and NAAEC and have proposed fundamental changes geared to prioritizing social justice values. Granted, to succeed in the long-term goals, activists will need to adopt a wide range of strategies that go well beyond the use of NAALC and NAAEC. Crucially, however, activist-petitioners have creatively

9. "Environment Leads Health as Issue: Poll," *Canadian Press*, January 4, 2007.

demonstrated how to use the citizen-petition mechanism so that it advances both immediate causes and long-term domestic and global reforms. Accordingly, activists who favor a social justice vision of global integration are well advised to continue with selective strategic engagement of the citizen petition. Scholars, for their part, should pay far more attention to these developments. After all, the degree of success activists enjoy with NAALC, NAAEC, and analogous institutions in other parts of the world is likely to influence the broader battle between social justice and neoliberal constituencies in shaping the evolution of global trade governance. It would be a pity if scholars missed the action.

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“A welcome contribution to the study of NAFTA, providing original insights into the operation and political significance of the agreement’s ‘side accords’ on labor and the environment, and a rich empirical appreciation of how transnational social-justice actors have struggled to leverage these controversial institutions. Graubart’s ability to weave together the legal and the political, and the domestic and the transnational, brings to life a story of contentious politics that will be of keen interest to political scientists, legal scholars, and engaged citizens trying to understand NAFTA beyond the polemics.”

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