

---

## The Fight to Globalize Labor: Understanding the Role of Activists in the Spread of International Norms

---

Andrew B. Wolf 

International relations scholars have traditionally focused on state-centered accounts of international legal norm development between nations while sociolegal scholars have focused on Weberian notions of occupational authority. This study advances a constructivist sociolegal approach emphasizing activist action as playing a unique role in shaping international norms. Specifically, this study investigates labor activists' intervention in U.S. bilateral and multilateral free trade agreements (FTAs) to examine why labor activists chose to initiate FTA disputes as a social movement tactic and how strategic interaction with international legal systems has helped them institutionalize and proliferate the International Labor Organizations' core labor standards. Through semi-structured interviews with legal, union, and government officials, alongside a content analysis of cases filed under the U.S. FTA system, this study shows the role activists played in advancing "globalized" standards in international law. This study finds that activists spread norms through a gradual mechanism of accretion, which focuses on the creation of standards and international legal standing over the individual outcomes of any given case.

**O**n November 12, 2015, the Frente Auténtico del Trabajo (FAT) in Mexico and the United Food and Commercial Workers (UFCW) Local 770 in the United States filed a labor complaint against the Mexican supermarket retail giant, Chedraui, under the North American Free Trade Agreement (NAFTA). The complaint alleged that Chedraui and the Mexican Government, through its failure to enforce, had violated Mexican workers' freedom of association rights by negotiating with company-dominated unions, illegally utilizing unpaid tipped labor, and discriminating against female employees by requiring pregnancy tests as a condition of employment. While the legal arguments presented in the case focused on violations in Mexico, the activists' public statements drew in more expansive explanations for filing the case, including references to the ongoing labor dispute between Chedraui's American subsidiary "El Super" in Southern California and the UFCW. The U.S. largest labor federation—the American

---

Please direct all correspondence to Andrew B. Wolf, Department of Sociology, University of Wisconsin, Madison, WI; e-mail: awolf2@wisc.edu

Federation of Labor and Congress of Industrial Workers (AFL-CIO)—issued a press release offering yet another explanation for filling the complaint. They asserted the case was filed to show that labor rights are not being protected under free trade agreements (FTAs), and that the case was being used to push for stronger labor rights provisions in the proposed Trans Pacific Partnership (TPP) (AFL-CIO 2015). These varied assertions as to the case’s strategic import should also be placed in the context of the labor movement’s largely oppositional stance to these free trade agreements in the first place. The disparate motivations underpinning the complaint and the labor movement’s oppositional stance to FTAs, raises the questions: why was the complaint initiated as a strategy; what goals were sought; and what gains were possible?

Labor’s engagement with FTA law, beginning with the NAFTA, is due to a desire to develop and institutionalize norms of international labor protection, what I call “globalizing labor.” Understanding activists’ goals permits a definition of movement success that would be completely absent from standard studies of the impact of FTAs on labor by legal or economic scholars. Beyond winning or losing, high profile fights within the FTA judicial system enable labor to globalize their legal standing as legitimate claims makers and provides scholars an opportunity for deeper understanding of the role of activists in the implementation and legitimation of international law and norms.

FTA disputes provide an important case for understanding international legal development because they highlight how activists can assert influence even in a system originally designed to exclude them. International labor rights norms were first included in trade law with the North American Agreement on Labor Cooperation (NAALC), a side agreement to NAFTA, which went into effect on January 1, 1994. NAALC outlined core labor rights each country agreed to maintain and created a mechanism for complaints against countries that failed to effectively enforce those rights.<sup>1</sup> NAALC was not part of the original NAFTA

---

<sup>1</sup>The complaint system for labor disputes under the U.S. Free Trade System was first established by the NAALC. Under the system countries agree to enforce their own labor standards, strive to improve them, and maintain a public and fair adjudication process for their labor laws. NAALC included eleven principles: freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, prohibitions on forced labor, child labor protections, minimum labor standard with regard to wages, hours, and conditions of employment, nondiscrimination in employment, equal pay for equal work, health and safety protections, workers’ compensation, and protection of the rights of migrant workers. Each country in the agreement had to set up a National Administration Office (NAO) in its labor department to receive and review complaints. Complaints are filed with the NAO of a country not involved in the complaint. There are three levels of review. The first level, to which violations of all eleven labor principles are subject, is a review and consultation which can result in reports and ministerial consultations. The second level, is an Evaluation Committee of

negotiated by George H. W. Bush, but was added to the package after Bill Clinton won the presidency with large support from organized labor. Still, then AFL-CIO president, Lane Kirkland, derided NAALC, exclaiming, “[it’s a] bad joke...a Rube Goldberg structure of committees all leading nowhere” (quoted in Grayson 1995: 177). Kirkland is correct that the labor rights system in the agreement is not hard law, meaning it lacks an effective enforcement mechanism, but some scholars argue it is valuable in setting norms of behavior (Compa 1993, 2001; Graubart 2008; Nolan García 2010). It also represents the first time labor rights were linked to international legal systems with the expressed threat of trade sanctions. Ultimately while failing to serve as formal “hard law,” it has become a tool for labor to develop and spread norms because of the linkage of rights to a threat of sanction. As this study shows, this linkage was only possible due to continued contestation by labor activists. To show this, I draw on original data collected from semi-structured interviews with key actors in the development of the labor trade dispute system and a content analysis of publicly available complaints filed under all U.S. free trade agreements to investigate why labor has chosen international law as a movement tactic and how this choice impacts the normative growth of international law.

The analysis shows the role of activists in spreading labor rights norms through international legal adjudication. Traditionally, both international relations and international legal theory have approached international law from a state-centered vantage point (Boyle 1980; Keohane 1993), and sociolegal tradition has focused on normative issues of authority and legitimacy particularly in relation to occupations and experts (Dezalay and Garth 1995; Haas 1997). A growing body of literature in the constructivist legal tradition has begun investigating international law from the activist point of view (Brunnee and Toope 2010; Rajagopal 2003). It asks how power is constructed from the interactive struggles of capital, labor, and governments in the creation, diffusion, and implementation of law. This study builds on this constructivist tradition, employing Evans’ (2010) typology of

---

Experts due to a trade-related matter involving a “pattern of practice” where a country is not enforcing its labor laws. This applies to only eight labor principles: forced labor, compensation in cases of occupational injuries and illnesses, protection of migrant labor, elimination of employment discrimination, equal pay, labor protections for children, minimum employment standards, and prevention of occupational injuries and illnesses. The third level is arbitration where a panel of outside experts evaluates a case not resolved by level two. The panel may issue an action plan for improving labor law in the violating country. If the plan is ignored than the violating country can be subject to fines or loss of tariff preferences to the company or sector involved in the complaint. This applies to only three principles: minimum wage, child labor, and occupations safety and health.

labor's potential global leverage (communication, ideology, economics, and politics) as an organizing principle, and finds that although activists argue that FTAs privilege the rights of global capital, labor has nonetheless found sites of leverage by utilizing the labor complaint mechanism in these agreements. They have used this leverage in a normative project of articulating and legitimizing the International Labor Organization's fundamental principles of work as norms in enforceable trade law. Through a gradual process of accretion, labor has taken advantage of the shifting opportunity structure of neoliberal globalization and participated in the construction and diffusion of international legal norms in ways unaccounted for by standard International Relations (IR) theory. Evans (2010: 360) explained how labor could use accretion noting, "Efficacious new institutional forms may emerge from innovative successful campaigns, but even a string of apparent failures may result in the gradual accretion of the institutional foundations for future success." I found labor, in their engagement with the FTA system, has used accretion to elevate its standing as a legitimated actor in trade law, raising the salience of its issues with governments and capital, and, in this sense, it has "globalized."

## **1. Why Do Social Movements Engage with International Law?**

The history of international trade law would lead one to the prediction that labor would be resistant to engaging with it as a social movement tactic. The institutions of global financial capital built around the World Trade Organization (WTO) and trade agreements were born out of the Washington Consensus era where notions of development and growth were privileged above others. Activists argue that institutions like the WTO ignore civil society groups raising labor or environmental concerns, although some disagree (Howse 2016). Furthermore, capital moved first to develop international legal protections for their interests and concerns, leaving states and civil society to respond retroactively. While capital moving first has put groups such as labor at an institutional disadvantage—leading them to largely oppose these international organizations like the WTO—the globalization of capital necessitates that labor also find avenues to respond globally.

The ability for labor to play catch-up, find standing, and globalize depends on acquiring sources of social resilience, defined as a group's capacity to "sustain and advance their well-being in the face of changes to their status" (Hall and Lamont 2013: 13). This notion of social resilience builds on a conception of neoliberal

institutional development that asks how new global institutions have reordered social relations—in this case, how NAFTA and FTAs altered the institutional and cultural position of capital, labor, and the state. While past studies have focused on the doors that FTAs closed, this study joins resilience scholarship in asking if any doors were also opened.

Others have investigated the impact of NAFTA and other FTAs on the labor movement. Two prominent studies of NAFTA's impact on the transnational labor movement have argued that its impact was incidental—an unanticipated opening of a Pandora's Box by including labor rights in U.S. FTAs. Hafner-Burton (2009) argues that NAFTA has advanced labor rights when it has triggered political mobilizations or when the United States has had the will to enforce the agreement. Similarly, Kay (2005) finds that NAFTA generated a global political opportunity structure that mirrors national opportunity structures, which resulted in the growth of the transnational labor movement. This paper builds on Kay's work, but asks the critical question of how international law can foster growth of the transnational labor movement when enforcement of international labor law is inconsistent or weak.

The core finding of this study is that labor has found normative leverage in international legal disputing that, through a gradual process of accretion, allowed it to globalize and institutionalize global labor rights norms to support their international organizing efforts. The existence of an international dispute mechanism is critical to these outcomes. Most activism framed as transnational is merely nationally bound activism couched in international language (Tarrow 2005). Tarrow views activism as flowing up and down a continuum from the local (or national), to the intermediate, which is often ephemeral or temporary bursts of international activism, and true transnational activism. True transnational activism is measured by the externalization of activist issues through the "vertical" projection of formally national disputes onto international institutions or through the creation of durable transnational coalitions of cross-border networks. Thus, true international activism must be sustained and contested within international governing bodies. In the case of FTAs, labor successfully externalized their previously national disputes onto the international institution of trade law through accretion, which established its international legal standing.

## **2. How Does Activism Impact the Normative Content and Power of International Law?**

While the goal of norm development might provide the logic behind the adoption of FTA cases as a social movement tactic, it

fails to fully explain how this engagement impacts actual legal development. We must go further and understand how activist engagement with international law impacts its institutional development, legitimation, and enforcement in ways unpredicted by IR theory. Activist engagement with international legal systems can drive the diffusion of norms. Norm development is an important social phenomena, independent of instrumentalist concerns of enforcement in the realist sense. Norm diffusion occurs through discourses of justification that can grant activists rhetorical access to putatively legitimate norms. This grant is a necessary precursor to rights claiming as an actual application of international labor rights.

Traditionally, scholars in the IR tradition have been extremely skeptical that international law is “real” law, let alone has a potential normative impact. IR theorists claimed individual nations’ concerns with sovereignty undermine the development and enforcement of international law (Alter 2013). In these accounts, states are the primary actors and civil society has little impact. In legal scholarship, the realist turn similarly emphasized that law is decided by raw power and judicial decisions are applied post hoc to predetermined judicial decisions favorable to the powerful (Leiter 2005). In international relations, this argument takes the form that states, with the most power, condition the application of all supranational judicial decisions (Boyle 1980). Governments only enter these agreements, sacrificing a degree of freedom, in order to secure policy or gain power over other states (Keohane 1993). To realists, international law has no power in and of itself because it lacks enforcement power autonomous from other actors, and sovereignty allows governments to interpret and apply international agreements as they wish (Morgenthau 1985).

Still, there are many examples of powerful actors not merely enforcing their will but instead conceding to the demands of less powerful states and civil society actors. When accounting for this evidence, IR theories continue to focus on states as the primary actor. For example, rational functionalist accounts of international law argue that governments enter into international agreements due to global collective action problems (Bilder 1989). The incentives of individual states to resolve such problems contribute to the formation of international law. The compliance mechanism, according to rational functionalists, is reputation and a desire to preserve collective goods like the environment (Keohane 1993; Schachter 1991). Similarly, democratic regime theory argues that international law becomes binding because Western democracies exist in a “zone of law” due to the constraining forces of democratic culture (Slaughter 1995). Taking it a step further, constructivists argue that norms and their acceptability are built from the

discursive back and forth between states about how they justify actions (Kratochwill and Ruggie 1986). While these theories begin to introduce notions of norms, these constraints only act upon states leaving out the role of civil society or activists.

Sociologists and those working in the sociolegal tradition, in contrast to IR scholars, have tended to be much more reliant on theories of norms and cultural power to explain international law, in particular its implementation and adherence. Beyond cultural theories, such as world polity theory (Meyer et al. 1997), most sociological theories of international law have largely taken either Weberian or Bourdieusian approaches to bureaucratic or occupational legitimacy. This is most common in research that argues international law is legitimated by experts (Bourdieu 1986; Fish 1989; Haas 1997). For example, in Haas' (1992) theory of epistemic communities, international networks of experts work almost independently of state action to set norms and standards to which states then respond. Sociolegal theories, which explore legitimacy, begin to examine the construction of norms but remain focused on experts, not other actors in civil society. For example, Dezalay and Garth (1995, 1996) show how international legal expertise, and international law with it, is legitimated through the deployment of symbolic capital to harness the "force of law" by masking national legal conventions and practices as neutral "universals." Activists similarly can aid in this process through the legal conventions they deploy when making their claims for "universal" human rights.

Sociologists incorporating the constructivist tradition argue that experts construct the legitimacy of international law through the practice or discourses of disputing. Conti's (2016) theory of legitimacy chains builds on this line of thinking arguing that supranational authority is constructed by brokers (e.g., the U.S. Trade Representative) linking justification for compliance across social fields, in particular fields of domestic and international law. Conti's notion of legitimacy chains is similar to legal theories of recursivity that claim that where norms settle is dependent on how the battle over them is articulated (Halliday and Carruthers 2007) or similar theories of cyclicity that argue that norms are developed through cycles and feedback loops (Barnett and Finnemore 2004). Whereas Conti emphasizes state officials, activists can also engage in discourses of justification generating rhetorical access to these international legal institutions to legitimate and "globalize" labor rights claims, a necessary precursor for an international system of labor rights to become legible, institutionalized, and enforced.

This notion of activists engaging in a discourse of justification brings sociolegal theories of legitimacy into direct conversation

with the constructivist tradition. The constructivists argue civil society plays a role in the process of law formation by focusing on contestation. Sinclair (2017) shows that state sovereignty is itself an iterative process of state creation as national borders only exist in relation to each other meaning international law is shaped by the same forces of public discourses and contestation as states. Since international law is subject to revision and reinterpretation, one can account for how activists help shape it without losing sight of the inherent power imbalances built into the system. For instance, Baxi (2002) notes that the notion of human rights has many meanings operating at the same time. Fights over international law are, in part, discursive battles over which definition of human rights should be privileged. Similarly, Rajagopal (2003) builds on the notion that international law is a project of state formation noting that international law, in the twentieth century, was largely shaped by third world resistance to the neocolonial project of development. As such, human rights are created by praxes of resistance and struggle. He argues international law has aimed to privilege forms of resistance more consistent with the neoliberal aims of individual rights (Rajagopal 2003: 9). Similar impacts are apparent in FTA legal cases as labor demands more consistent with neoliberal notions of individual freedom find greater currency in the claims making processes.

The intersection of sociological notions of legal legitimacy and constructivist accounts of law formation highlight why labor would engage with FTAs as a project of international labor norm development. This is because, as the constructivists argue, the legitimacy of law is a discourse itself. Brunnee and Toope (2010) argue that law cannot be based on a hierarchy between law-givers and subjects, but instead is based on reciprocity or the mutual creation of legal obligation. Drawing on the legal theories of Lon Fuller (1969), they build on the idea that if there is no reciprocity law ceases to exist normatively or have authority. Law is a social interaction and those with greater power dare not risk undermining its mutual obligation lest laws' force disappear. For FTAs to create mutual obligation they must allow labor to engage in the discourse which gives law its meaning. The ability of labor to achieve its aims of promoting the core International Labor Organization (ILO) standards is only possible if labor's engagement is maintained. The need to sustain engagement also means international labor law goes through periods of deconstruction, when labor lacks leverage or allies to continue practicing its normative project.

This study builds on the constructivist approaches that bring activists to the forefront of this process. In previous studies of international law, when activists have been incorporated, they have often been narrowly defined, as lawyers and Non-

Governmental Organization (NGO) workers (Hafner-Burton 2009; Hafner-Burton et al. 2016; Keck and Sikkink 1998). Norms are not simply developed from experts imparting their authority upon a system, but also from labor, environmental, and civil society activists forcing these systems into action. In fact, Conti (2016) in explaining the limits of his theory's applicability in understanding the legitimacy of international law highlights the situations where one should look for activists to fill in the gaps. He states: "The successful construction of a legitimacy chain is likely to vary when the distinction between fields are murkier; when enclaves at the intersection of fields are less clear or nonexistent; or when the role of interlocutor is not deeply institutionalized" (Conti 2016: 155–56). The U.S. FTA regime is an example of a situation in which fields are murky; the intersection is unclear; and the role of interlocutors is not institutionalized. Not only is the field new, but powerful capital and government interests do not even want the field of international labor trade law to exist. Furthermore, it is completely unclear which government agencies are responsible for adjudicating the field (in the United States, the Department of Labor, Department of State, and U.S. Trade Representative all claim at least partial responsibility for enforcement). This confusion gives activists an opening to articulate a vision and make claims on the legitimacy of labor rights.

The utility of international law for labor activists lies in generating leverage for their conflicts with capital. It allows them to internationalize their conflicts by forcing supranational institutions to adjudicate them, which results in the generation of global norms. Globalizing, in the sense used by Evans (2010) or Tarrow (2005), is about institutionalizing international action. As Tarrow points out, even if actors claim they are acting globally, the location of the contestation may still be limited. In his typology of transnationalism, only externalization of issues to global institutions and transnational coalition formation represent truly durable transnational activism. Evans' sources of globalizing leverage (communication, ideology, politics, and economics) applied to the specific case of the U.S. free trade regime shows how labor was able to achieve this true transnational standing to make claims globally. Accretion is the mechanism that enabled labor's leverage to materialize this standing. Subsequent labor battles, over time, normalized, and legitimized labor's right to make global claims, which were institutionalized through global activism.

## 2.1 Data and Methods

This study relies on data from both semi-structured interviews and content analysis. Interviews were conducted with sixteen

individuals who were integral in the construction, implementation, and use of labor rights provisions included in U.S. FTAs. The interviewees included seven labor activists who were officials at their unions, four NGO activists, three international labor lawyers, and three government officials tasked with adjudicating these U.S. FTA cases. Most subjects, except the government officials and some of the lawyers, self-identified as labor activists. Job titles are based on the interviewees' most recent position. These informants were identified first from signatories to the Chedraui FTA case and then through a snowball sample. The community that has worked on the U.S. FTA legal system is a small set of key legal figures who have developed a niche for these cases. Respondents reported having held multiple positions within the system over the years and were able to explain the system from multiple perspectives. While they do not represent everyone who has interacted with the system, this small group of union activists, researchers, NGO workers, lawyers, and government officials have been crucial to the system's development. Though this small group has had an outsized impact in globalizing norms, they reported that this was only because their work was backed up by the strength, protests, and power of thousands of workers.

Respondents were recruited via snowball sampling following Miles and Huberman's (1994) advice that qualitative samples should be theoretically driven through an iterative process. When I updated my sample, I looked for informants who represented disconfirming and deviant cases from the dominant narratives I heard in my early interviews. As Small (2009: 14) explains, the point of qualitative sampling is not to eliminate bias but to understand that bias, "...rather than being 'controlled away,' should be understood, developed, and incorporated into...understanding of the cases at hand." My iterative process sought to sample the full range of individual biases brought to international labor law trade disputes. Importantly, I sought out subjects who were extremely skeptical and critical of FTA cases as a movement tactic to ensure the activists were not just overstating their own success. Not a single activist interviewed—even those most engaged with filling cases—was uncritical of the tactic.

The interview protocol consisted of broad open-ended questions asking interviewees to reflect on their experience engaging with the FTA labor dispute system. These questions inquired about the interviewee's background, legal case strategy, case goals, a subjective assessment of case utility, forward-looking questions about the future of labor rights in trade law (using the TPP as a reference point), labor's globalization strategy, the future of international labor norms, interactor relations, and an assessment of how the global labor rights network has changed subjectively and

in terms of the figures involved. Follow-up questions presented plausible alternative explanations to the respondents' answers in order to stimulate their thinking, understand why they had chosen particular strategies over alternatives, and leave open the possibility of recall error. The protocol was tailored to each respondent based on their own work history.

To supplement the interviews, I also conducted content analysis of labor rights cases filed under the various U.S. FTAs. All forty-two of the labor cases that were filed under the U.S. FTA regime and were publicly available were coded for the types of legal arguments put forward. Seven themes were identified in the arguments presented: arguments about economic leverage, health and safety concerns, ideological appeals related to violence, ideological appeals related to market access, political arguments of protectionism, arguments related to ongoing organizing, and arguments related to ongoing cross-border organizing. The two organizing legal arguments concern the right to freedom of association. These were separated to track which cases were based on attempts to build transnational unions. Cases that evoke the potential economic leverage of workers disrupting an important industry are evoked to signal that governments should take these cases seriously. Canada does not make the original submissions for their cases available, so I could only code the Canadian cases that the United States included in their records. The textual analysis investigated patterns and shifts in projected strategies over time to see if any trends in legal arguments emerged. This case analysis triangulated the findings from the interviews. By comparing the arguments used in the legal filings versus the arguments offered in the interviews I could see if the arguments for filling a case given in the interviews matched the arguments the interviewees made in their legal cases. The outcomes of the cases similarly provide a corrective check on interviewees' accounts of the system's utility in advancing international labor rights norms. Overall, the analysis of FTA cases more deeply illustrates the accretion process of labor norms over time.

## **2.2 Interview Findings**

The interviews offer a detailed reflection on the history, function, and utility of the U.S. free trade system as it pertains to labor rights. Key findings regarding the sources of labor's leverage to spread international labor rights norms found in the U.S. FTA system along with prominent case examples are summarized in Table 1. The two themes most commonly discussed in the interviews were economic power and norm development. Ideology was the least discussed, in great contrast to the legal arguments

**Table 1.** Sites of Labor's Social Resilience and Globalizing Leverage Found in the U.S. Trade Regime

Globalization Power	Source of Leverage	Prominent Case Example
Political	1. Boomerang effect	1. Bahrain
	2. Sunlight (e.g. <i>media</i> exposure)	2. Washington State Apple
	3. Elite allies	3. May 10th language
	4. Demand for common system of international law	4. The Trans Pacific Partnership
	5. Norm development	5. Colombia & Peru
Communication	1. NAALC complaint structure	1. 2, and 3 applies universally
	2. Network growth and interest convergence	1. Washington State Apple and the pregnancy testing case
Ideological	3. Cheap telecommunications	2. Bahrain, Colombia, Guatemala, and Honduras
	1. Market access (migrant labor and gender discrimination)	
Economic	2. Violence (direct and health & safety)	
	1. Structural power: link cases to economic leverage	1. Washington State Apple
	2. Associational power: link cases to labor organizing	2. NC Pickle and Chedraui

utilized in the cases themselves (see Table 2). The focus on economic power is not surprising as the labor movement was born out of industrial struggle with the forces of capital. The frequent discussion of norm development is also indicative of how union leadership and their lawyers view the system's utility. This view is most clearly illustrated by the near universal mention of norm development by interviewees. Using Evans' (2010) typology as a framework, in the following section, I discuss the political, communication, ideological, and economic sources of labor's resilience in the face of capital's neoliberal trade law project. I argue that labor has found and built these sources of resilience through accretion in the U.S. trade regime to internationalize their claims.

### 2.2.1 *Political Sources*

The political sources of resilience found by labor are perhaps both the most obvious and the most ephemeral. They are obvious because it includes labors appeals to elite allies and ephemeral because labor is also engaging in subtle projects of international labor rights norm development. This project of norm development is the process Evans (2010) calls victory through accretion. Five themes from the interviews related to political sources of labor's resilience under the system. First, the U.S. FTA labor provision represents an institutionalized form of the boomerang effect, which is when activists appeal to a country to force another country to respect international law (Keck and Sikkink 1998). Second, political resilience is generated through the sunlight effect, whereby filing cases generates media exposure that helps activists



appeal for public support and pressure. Third, when labor's elected allies in government are in power, the system can be used to advance labor rights and norms through formal institutions. Fourth, neoliberal trade creates a demand by all parties for a common system (Evans 2010; Sassen 1999; Silver 2003), as globalization demands international rules of law. Fifth, the trade regime creates political leverage for labor when it is used strategically by labor unions to advance international labor rights norms.

The boomerang effect (Keck and Sikkink 1998) was theorized as the political power that transnational social movements utilize to advance human rights. The argument is that when activists in country A are blocked by government A in their human rights demands, they appeal to their international activist network and get activists in country B to pressure government B to make country A stop abusing human rights. The U.S. labor trade regime writes this process into the agreements themselves. For example under NAFTA, to address a violation that occurs in Mexico, Mexican labor organizations must get either U.S. or Canadian allies to help them file a complaint with their respective governments. Labor activists fighting to include labor provisions in the U.S. trade regime are, in part, attempting to utilize this formally institutionalized boomerang effect. In nearly all the interviews with labor activists, they explicitly described a boomerang process as being the most useful tool for advancing their cause. The case filed due to the violent political repression in Bahrain, discussed in detail below, is a stark example of this process.

Related to the boomerang effect is the effect of exposure gained from filing cases, most commonly media exposure. In about half of the interviews, media exposure was highlighted as major motivation for filing these cases. I differentiate this from the boomerang effect discussed above because the actors need not be governments. Media exposure can move companies to act for fear of consumer backlash or, perhaps more importantly, investor backlash. Lance Compa, NAFTA's first U.S. Director of Labor Cooperation and later union FTA lawyer, argued that in several cases, such as a Mexican cases involving mandatory pregnancy

---

<sup>2</sup>The Pregnancy Testing in the Maquiladoras Case (U.S. 9701) was filed by U.S. and Mexican NGOs with the U.S. NAO in May 1997. The case alleged widespread sex discrimination against female workers in the maquiladora zone along the U.S. boarder. The complaint alleged that the Mexican government tolerated and sometimes supported the practice. The U.S. NAO issued a report in January 1998 confirming the practice was widespread and resulted in an October 1998 ministerial consultation between all three NAFTA governments. They approved a program of government official training and outreach programs. Seven U.S. companies in the zone agreed to halt pregnancy testing.

<sup>3</sup>The Washington State Apple Case (MX 9802) was filed in Mexico 1998 by independent unions in Mexico lead by the FAT. The case alleged many violations of NAALC in the Washington State apple industry including the lack of legal protections for

testing<sup>2</sup> and the Washington State Apple<sup>3</sup> case involving migrant labor rights, companies changed their behavior because they thought media exposure could affect their bottom line. Multiple interviewees described media exposure as the main reason for filing a case. While media attention was often cited as a positive effect of filing a case, many interviewees were quick to point out that media attention only goes so far. Thea Lee, the AFL-CIO's chief economist, and others highlighted that media attention only helps if it is supported by a robust labor organizing campaign. No one source of social resilience in this FTA system is an end in of itself. Using this system is a supplement—not an alternative—to organizing.

Domestic mediation was another commonly cited source of political resilience and globalizing power. Domestic mediation is dependent on what McAdam (1996) calls access to elite allies, especially from the United States in this context. A clear example of strategically placed elite allies advancing labor's cause was the power exerted by congressional Democrats during the negotiations over Bush's fast-track trade agreement authority and later during Obama's push for the Colombia and Peru FTA agreements. Describing the impact of the battle over Bush's fast track authority and the CAFTA-DR bill, ALF-CIO's Thea Lee explained:

I think that demonstrates what the political power of this trade labor battle is, that on that issue we were able to delay that vote and almost win it. That demonstrated to Congress that they needed to take these concerns seriously and that's when the May 10th deal came a couple of years later so that's part of the political calculus that happens, which is that because we can put up a credible fight on the floor of the Congress around approval of a controversial trade agreement, we have more ability to negotiate for stronger provisions next time around.

The May 10th deal strengthened the labor chapter in model trade agreements which Congress' requires the president to utilize as a base for trade negotiations. This shows how the domestic mediating force of Congress can be employed as a source of labor's political power through the U.S. trade system.

---

farmworkers to unionize, discrimination against Mexican migrant laborers, and health and safety violations. In August of 1999 the Mexican NAO issued a review of the complaint and requested a ministerial consultation which resulted in a public forum on the issues in Yakima, Washington that month. It was the first industry wide complaint in the U.S. to reach a public forum. The case was a direct challenge the United States' historical exclusion of farmer workers from labor law.

The need for a common system provides another source of labor's political resilience. The fragmented nature of the U.S. trade regime's formation results in regulatory chaos and generates demands for a common system. Attempting to focus on capital's concerns while sidelining social issues has threatened the system's overall stability and highlighted the need for international uniform law for everyone—not just corporations. The region-wide approach in the TPP attempted to address these concerns, but ultimately these issues will have to be dealt with through international bodies such as the WTO. As one AFL-CIO official explained:

You know I would love to do this at the WTO, but we haven't been successful because of how the WTO runs, which is that it runs by consensus ... and that's sort of where we're stuck because ideally that's the place for this conversation. It'll happen. It shouldn't happen piecemeal....

Perhaps the greatest political source of labor's ability to globalize in the U.S. trade system is how the labor movement and government officials have used it to develop and promote norms of international labor rights. One clear theme from the interviews was how dependent the institutional development of international labor rights protection is on the ILO. Douglas et al. (2004) describe the transnational labor activist networks as the system's "eyes and ears," the ILO as the system's "brains," and U.S. trade legislation as the system's "teeth." The ILO's international labor standards provide the terms of reference around which the debate centers. As AFL-CIO economist Thea Lee commented,

The great thing about the ILO declaration is that it is an international consensus document that involves government, workers, and employers. You know it's got plenty of weaknesses, one of the weaknesses is that the ILO has no enforcement powers. Our concept was to take the international consensus on workers' rights and embed it into a trade agreement where there could be potentially an economic consequence.

This statement encapsulates the dominant characterization of the FTA systems' utility discussed in the interviews. Labor hopes that by engaging with the system, ILO standards can be given force by connecting them to potential sanctions. International norms matter because they set the guidelines for appropriate international state behavior. As the AFL-CIO's trade and globalization policy specialist, Celeste Drake explained,

[T]he ILO has even less teeth than an FTA provision because you know the worst that can really happen is a strongly worded report. Well, in some cases some countries have shown they are susceptible to international shaming...And as weak as that tool is, the workers are going to keep using it because it's there.

Interviewees described this approach to using the system as two pronged. First, they needed to fight for stronger, more ILO-centered standards in each subsequent agreement. Second, they needed to use the complaints to “test” these new standards and push for actualization of these principles.

A particularly common use of the FTA system in norm development is to file a case to support domestic labor law reform efforts. Filing such cases is a classic example of Tarrow's (2005) notion of externalizing national dispute to international institutions. Eric Gottwald, an International Labor Rights Forum (ILRF) lawyer who wrote the 2015 Peru complaint, said they filed that complaint in large part to support Peruvian efforts in their Congress to eliminate the temporary work contract system. Similarly, many cases over the years have aimed at reforming Mexico's system of Partido Revolucionario Institucional (PRI)-dominated protection unions, which are company friendly unions politically controlled by the long ruling PRI political party and sign contracts favorable to PRI connected employers to insulate them from the independent unions. UFCW lawyer, Stan Gaceck, noted that the sunlight and pressure from the FTA system has helped pushed forward calls for labor reform in Mexico even if it has not resulted in the degree of reform labor would like. As Lance Compa summarized, “In terms of norm creation it's basically a paradigm of a soft law approach and a soft law system...[that has the] cumulative effect of establishing norms of behavior and then figuring out again indirect ways of holding actors accountable to those expectations.” Labor is frustrated because on paper the system should be hard law, but in actuality they are left with a soft law system. But, by appealing to this soft law system of formal written rights in a trade agreement, labor can institutionalize norms of behavior. That these core labor norms are accepted and expected on a global scale is the real political victory for labor in engaging with the trade regime. Labor now has a more institutionally secured seat at the table than they did before.

This understanding of norm development had a parallel reality from the perspective of the government officials charged with adjudicating the system. All the government officials interviewed at the DOL and State Department referred to this as the process of labor diplomacy. Norm development was the subject on which the union activists and government officials talked the most

similarly. The difference was that the government officials pushed norm creation through enforcement in the form of diplomacy, whereas union activists believed norm creation came from exposing issues.

The government officials described norm creation as both a process of change in bureaucratic logic and the advancement of labor rights as an issue of diplomatic engagement. Sarah Fox, Obama's Special Representative for International Labor Affairs at the State Department, explained the Department's evolution, stating that after the Cold War, economic stability and equality came to be viewed as important to democratic stability and the mission of the State Department. This understanding of economic stability is instrumental to U.S. foreign policy and gave rise to what both Sarah Fox and her counterparts described as labor diplomacy. The DOL officials I spoke to were adamant that most of their work and success goes unnoticed and must go unnoticed to succeed: it is the unglorified work of diplomacy. They explained that the issues with enforcement go beyond government willingness but are also a matter of limited capacity and expertise. They suggested that the United States has been instrumental in developing norms for addressing these problems. Mirroring the union activists, a government official noted, "A judgement doesn't result in the promotion of the labor chapter." While labor backs up filing cases with organizing, the government officials back up their judgments with labor diplomacy. The process of accretion advances labor norms not only through labor activism, but also through institutionalizing labor diplomacy in the government agencies tasked with adjudicating these labor agreements and in the diplomatic process.

### ***2.2.2 Communication Sources***

Regarding communication sources of resilience, which are the ways the FTA system has engendered greater cross border interaction in the labor movement, the interviews focused on two issues. The first was how the very structure of the FTA system itself promoted communication, interaction, and grew the international labor movement's activist network. The U.S. FTA system, beginning with NAFTA, requires that violations which take place in one country be filed with the labor department of the other country in the agreement. As Kay (2005) shows, this created a demand for new partnerships as unions in Mexico would need unions in the United States or Canada to file cases for them. This point was frequently confirmed by my interviews. Second, the interviews highlighted how the creation of an integrated market led to a confluence of interests generating greater cross-border solidarity and collaboration. Common enemies create common

friends. Building a stable network of international labor activism fulfills one of Tarrow's (2005) key requirements for activism to be considered truly transnational.

The structure of the labor complaint system in the FTAs was mentioned in most interviews as a source of the growth in the labor network. Kay (2005) argues that the system was the genesis of these relationships by creating an international political opportunity structure. My interview data instead suggested the relationships already existed and the structure of the system formalized these relationships. The structure not only forced the network's growth, but also made the relationships more equitable. Seeking help from partners in Mexico makes it harder to argue for protectionism or U.S. union domination of the system. As Cathy Feingold, the AFL-CIO's International Director, explained, "What I would say is that the traditional conveyor belt is North to South right? ... I would say what NAFTA did is change the conveyor belt so that it was like we don't just do a submission without working with our Mexican partners who say this is what we want." The agreements required solidarity between national labor movements and thus fostered collaboration and a pursuit of mutual interests.

A demand for information further encouraged growth of the international labor network. Entire NGOs have grown to facilitate the increased collaboration between North and South. As Chad Gray, researcher at Empower, a subsidiary of the Mexican labor rights NGO PODER, who provided research for the Chedraui complaint, explained organizations such as his were created to provide the "strategic node" to manage the growing relationships and flow of information between the Mexican and U.S. labor movements. The increased importance of these new NGOs shows how the labor movement was forced to think more broadly and engage with groups previously excluded from the conversation.

The creation of more integrated markets under the U.S. trade regime has encouraged greater communication between domestic labor movements to respond to the challenge of globalizing capital. As Brian Finnegan of the AFL-CIO's international department observed, being forced into fights over a proposed trade agreement introduced South American unions to a reformed AFL-CIO that was no longer collaborating with the Cold War CIA against leftist unions in the region. Beyond geopolitical history, engaging around trade helped U.S. union leadership overcome their protectionism and helped Southern countries overcome their fears of losing market access if they opposed the agreements. Globalization has forced domestic labor movements around the world to work together.

Evans (2010) pointed to the expansion of the internet and cheap global communication as a means of facilitating labor's

ability to globalize. The interviews offered evidence to support this point of view and highlighted how communications technology has diffused power downwards within union hierarchies. The rise of internet communication and social media has made deeper cross-border solidarity possible particularly at the rank-in-file level in ways previously unimaginable. As Ben Davis, the United Steelworkers' International Director, discussed,

We actually got a good core of rank-and-file activists who have now been many times to Mexico, and the Mexicans have been up and visited our plants and our locals and these guys all have each other on Facebook and social media. Among a small core group of activists there is really regular communication and they know each other's families.

He further explained this does not mean there are not challenges: "but, of course, that doesn't extend to the bulk of the membership ... and that is after 10 years of pretty systematic work." Nonetheless, this attempt at real cross-border organizing has generated a cadre of activists who communicate across the international labor movement.

U.S. Department of Labor officials report that the FTA system has created a parallel process of network building among government officials. These officials discussed the creation of "labor diplomacy" and observed that while often obscured from public view, they have developed deep relationships with their counterparts in other countries with whom they negotiate over complaints, as well as with the NGOs that provide the third party information needed to keep this system running. The structure of NAFTA and the subsequent trade deals not only was the genesis for the development of a global labor network, but it also created a global network of government bureaucrats working on these issues and engaging in what they call "labor diplomacy."

### **2.2.3 *Ideological Sources***

Evans (2010) argues that the rising prominence of human rights offers ideological openings for labor to globalize. He described ideology as a "double-edge sword" explaining,

Neoliberal (and classical liberal) privileging of individual agency over collective action is indeed ideologically inimical to the political culture that labor needs to counter the power of capital. Nevertheless, the global diffusion of ideological frames that assert the universal right of all human beings to being treated with dignity and to having democratic control over collective rule making is hardly a gift to capital (Evans 2010: 357–8).

The focus of neoliberalism on individual freedom, epitomized in Margaret Thatcher's contention that "there is no society," universalized the notion of individual human rights. Evans believes these universalized ideological frames, which neoliberalism purports to defend, can be used to labor's advantage if employed strategically.

In my analysis of labor cases, I found that those that dealt with individual freedoms (violence or discrimination) gained greater leverage in trade disputes than cases around collective freedoms (freedom of association). This hierarchy of human rights where issues of violence and equality are more likely to find success has been found in other scholarship as well (e.g., Keck and Sikkink 1998). Cases that interviewees flagged as "particularly successful" often dealt with either violence or discrimination issues which could be couched in neoliberal language of an individual's *market access*. While ideological sources of social resilience did come up in the interviews, they were the least discussed of Evans's predicted sources of labor's globalizing power. The interview findings contrasts greatly from the legal arguments presented in the cases themselves, where ideological themes are frequently cited (Table 2). This dissonance between the expressed interests of the labor activists interviewed and the arguments they present in their cases highlights how the ideological language of neoliberalism can be strategically powerful even if the activists' aims and focus lie elsewhere.

Market access legal arguments were present in eighteen of the forty-two cases filed under the FTA system and took two forms: either migrant labor issues or issues of gender discrimination. The migrant labor cases, filed under NAFTA, deal with temporary visa holders from Mexico who went to the United States to do seasonal work. The temporary and cross-border nature of this work has made it particularly hard for the workers to find legal redress for violations of their rights. The cases against these temporary visa programs filed under NAFTA have arguably been the most successful in terms of generating concrete changes and improvements. Two lawyers who worked on migrant labor FTA cases said that the cases were particularly powerful because they are about marginalized groups' access to work and because capital is highly dependent on the migrant labor system.

The other way issues of market access were evidenced in the interviews was in discrimination against female workers. This theme is vastly more evident in the legal arguments than in my interviews. The NAFTA labor case system was used early on to combat the practice in Mexico of pregnancy testing female workers as a condition of employment (U.S. NAO Case No. 9701). The practice was widespread in the Mexican *maquilas* in the 1990s, while not being especially known to American consumers. Lance

Compa explained in our interview about the impact of the attention brought by the campaign:

[T]here were public hearings in the U.S. cities along the border and a lot of public pressure was put on the companies to stop those practices and they did. The pressure of this exposure, this sunlight that was put on this practice under the NAFTA labor agreement, led to the companies halting this practice. And it also led to a progressive city government in Mexico City at the time, which adopted a municipal law banning pregnancy testing.

Compa described this case and the Washington State Apple case, about migrant labor, as the two most successful under the U.S. labor trade regime. These “most successful” cases addressed core promises of neoliberal ideology.

Beyond market access, it was human rights issues, such as is freedom from politically motivated violence, which gained the most traction in the FTA complaint system. This success is because these individual freedoms are most clearly able to connect to the heart of neoliberalism’s ideological promise. Interviewees claimed that filing trade cases around violence has been particularly helpful in raising labor issues. In some instances, a FTA case is often the only forum available for labor activists to demand a government response to political violence. The fights over the Colombia Labor Action Plan as well as the cases against Colombia, Guatemala, and Honduras all center on violence against trade unionists. In the interviews with U.S. Department of Labor employees they frequently referenced cases about violence and further explained that the U.S. has had the deepest and longest engagement with other countries on these cases. These cases also represent the greatest source of labor movement frustration and disillusionment as these problems persist. Beyond direct traditional forms of violence, these cases highlight other issues such as forced labor, child labor, and health and safety issues.

Cathy Feingold, AFL-CIO international department director, explained the utility of these cases in fighting violence against unionists in Bahrain who were helping to lead protests during the Arab Spring. Feingold stated that the unions called the AFL-CIO for help saying,

[T]hey are killing us. They are torturing us. They’re putting us in jail ... They came to us and said we need you to use these tools [the complaint mechanism] ... it was literally the only tool that the organization had. [The union] is one of the few nonsectarian groups in Bahrain, so what was at stake was enormous.

---

This class-based organization that was not Sunni versus Shia, which is precisely why the government wanted to break it.

She further contrasted Bahrain with their work on Colombia:

[The cases] are tools—not ends. It became part of a broader campaign for these organizations. And sometimes the only tool that groups have to say to the world is “help” and so we use them ... in Colombia where they’re part of larger campaigns for workers to get more space, about generating labor law reforms they need in the country. You don’t see them as ends unto themselves. They’re tools to support workers’ rights, but within that broader context.

Feingold’s notion of generating space gets to the heart of the findings of this study. Social resilience is about finding space under neoliberalism. To present logical coherence, neoliberalism cannot disavow its principles of individual liberty even when they present opportunities for counter narratives.

#### ***2.2.4 Economic Sources of Resilience***

Economic sources of resilience found in the neoliberal trade regime are essentially the same economic leverage labor has had since the dawn of industrial capitalism—just applied to a modern setting. Economic resilience is the means by which labor can gain leverage in the system by threatening capital’s profits. Wright (2000) argues that labor has two forms of power over capital: structural (labor’s strategic location within the production process) and associational (labor’s collective action power). First, labor has found sites of resilience when cases are linked to its positional ability to disrupt production, or what Wright calls labor’s structural power. This is most clearly seen in cases in which the violations occur in an industrial sector of one country whose main export market is the other partner to the trade agreement where the case was filed. Second, economic leverage is found when labor connects a case to an ongoing labor organizing campaign, which is an expression of Wright’s associational power. In this situation, the case is secondary and acts as ancillary support in the classic battle of labor against capital.

Strategic linkage of cases to economic leverage is a potentially powerful source of social resilience. It takes advantage of a non-diversified capitalist actor. This can either be on the demand side (e.g., where the capitalist is dependent on a single market) or on the supply side (e.g., migrant labor cases where U.S. capitalists are dependent on Mexican labor through the U.S. government’s temporary visa program). The importance of economic leverage

came up in all but one interview. The Washington State Apple case, a case alleging wide-scale labor abuses against Mexican temporary workers granted H-2A visas to work the state's apple harvest, is an example of this process. The industry was both dependent on the temporary agricultural workers and worried about backlash from the Mexican consumers who were the industry's main export market at the time.

Access to the U.S. market is an incredible incentive and threats to this access increase motivation to take action. Celeste Drake, among others, discussed the power of not just the newer FTAs but also the older Generalized System of Preferences (GSP) program in supplying this motivation. The GSP program is different from FTAs, as the program is unilateral allowing the United States to act without fear of being held accountable to the same standards. Additionally, GSP review is an automatic, periodic bureaucratic renewal process making it more insulated from claims that the government is simply doing activists' bidding (Nolan García 2010). A DOL official made the point that different employers interpret economic leverage differently. Discussing their work on the Honduras complaint, they differentiated between different types of capitalists. They noted that employer associations with the mission of expanding Honduras' market access were extremely concerned about the FTA complaint and were receptive to working to resolve the problem. In contrast, the individual employers at the factory level, who were concerned primarily with contracts and price, were often hostile. Economic incentives are always powerful, and the technique of strategically linking a case to strategic position has been used to generate social resilience for labor.

Instances in which cases are connected to ongoing organizing campaigns are arguably the most commonly identified site of social resilience in this system. Discussion of using these cases to support organizing came up in just over half the interviews and was mentioned in twenty-seven of the forty-two FTA cases analyzed. Often used in combination with the strategic economic leverage, these campaigns can bring sunlight as well as public and government pressure on employers fighting a unionization effort. A classic case of this technique working successfully was the North Carolina pickle case in which the Farm Labor Organizing Committee (FLOC) connected economic pressure, organizing pressure, and NAALC publicity to bring the growers to the table ultimately resulting in a collective bargaining agreement.<sup>4</sup> As

---

<sup>4</sup>The N.C. Pickle Case (MX 0301) was brought in 2003 by the U.S. NGO Farmworker Justice Fund, Inc and Mexico's Independent Agricultural Workers Central (CIOAC) alleging widespread violations of NAALC for the thousands of H-2A temporary

Lance Compa explains, "So again it wasn't just NAFTA and the NAALC that helped advance the cause, it's where it fit into a wider strategy that involved many different tactical moves." This notion, that the NAALC is a tool for advancing a larger campaign goal and is not an end in of itself, came up frequently in the interviews. This can also be found in the Chedraui case where the union was looking for some way to expose that justice was being denied. As Chad Gray described, "Having some sort of transnational mechanism where the Mexican government at least has to say it received this complaint, it has to be adjudicated in some sort of way, would help expand those sites of pressure." The NAALC system offers an international space to expose issues that were previously easier to ignore and often not addressed domestically. Ultimately, these cases can only provide a site of social resilience if used creatively in connection with traditional labor organizing.

### 3. Case Analysis and the Process of Accretion

Beyond the interviews, evaluating the actual cases these actors fought over further highlights how the system develops labor norms. Table 2 presents a summary of the types of arguments used over time. These cases highlight the importance of some of the sources of social resilience that were less discussed in the interviews but feature prominently in the legal arguments employed. Most importantly, while issues relating to neoliberalism's ideology were less frequently discussed in the interviews, they were extremely common in the legal arguments. Similarly, health and safety issues, play an outsized role in the legal arguments despite being minimized in my interviewees. The focus of cases on health and safety issues is partly a result of the three-tier structure of NAALC. Only issues related to child labor, minimum employment standards (such as minimum wage), and health and safety can go to an arbitral panel or result in fines or trade sanctions. The focus on health and safety is also indicative of the power of making normative appeals, which are in accordance with neoliberalism's core mythology of individual freedoms.

To investigate communication sources of social resilience, I examined how the composition of the parties filing cases changed over time to assess evidence of network growth. As Kay (2005) argues, NAFTA helped grow and generate the international labor

---

visa holders from Mexico brought to work in North Carolinas' agricultural sector. The case helped support the Farm Labor Organizing Committee's (FLOC) campaign to organize workers and their boycott of Mt. Olive Pickle Co the largest pickle company and agricultural employer in the state. The case helped the union win an innovative collective bargaining agreement in 2004 that included protections for the H-2A workers.

**Table 3.** Composition of Case Filers Overtime

Case	Year	# of Filers	Union	AFL-CIO	NGO	FAT
U.S. 940001 Honeywell	1994	1	×			
U.S. 940002 GE	1994	1	×			
U.S. 940003 Sony	1994	1			×	
U.S. 940004 GE	1994	1	×			
MX 9501 Sprint	1995	1	×			
U.S. 9601 SUTSP	1996	3			×	
U.S. 9602 Maxi-Switch	1996	3	×			
U.S. 9701 Gender	1997	4			×	
U.S. 9702 Han Young	1997	4	×		×	
U.S. 9703 ITAPSA	1997	38	×		×	×
CAN 9801 ITAPSA	1998	44	×	×	×	×
MX 9801 Solec	1998	4	×		×	
MX 9802 Washington State Apple	1998	4	×			×
MX 9803 Decoster	1998	1	×			
MX 9804 Yale	1998	18	×		×	
U.S. 9801 Flight Attendants	1998	1	×			
U.S. 9803 McDonalds	1998	5	×		×	
U.S. 9804 Mail Couriers	1998	21	×		×	
U.S. 9901 TAESA	1999	2	×			
U.S. 200001 Auto Trim	2000	25	×	×	×	
MX 200101 NY	2001	17			×	
U.S. 200101 DuroBag	2001	2	×	×		
CAN 200301 Puebla	2003	2			×	
MX 0301 Carolina	2003	2	×		×	
U.S. 0301 Puebla	2003	2			×	
U.S. 0502 Mex Pilots	2005	4	×			
MX 0501 H2B	2005	26	×		×	×
U.S. 0501 Labor Law Reform	2005	25	×			
U.S. 0503 Hidalgo	2005	3	×		×	
MX 0601 Carolina	2006	54	×		×	×
U.S. 0601 Coahuila	2006	1	×			
Guatemala	2008	7	×	×		
Peru 2010	2010	1	×			
Bahrain	2011	1	×	×		
Dominican Republic	2011	1				
U.S. 1101 Mex Electric Power	2011	95	×	×	×	×
MX 1101 H2B	2011	17	×	×	×	
Honduras	2012	25	×	×	×	
U.S. 1501 Chedraui	2015	4	×		×	×
Peru 2015	2015	6	×		×	
MX 1601 H2A and H2B Gender	2016	29	×	×	×	
Colombia	2016	6	×	×	×	

network. Findings about the composition of filers over time are summarized in Table 3. Only looking at who signed on as a signatory obscures a lot of information about the people who were actually involved in the campaigns. Those who provide support might decide not to formally sign the complaint, but it is still indicative of general trends. Initially the assumption was that the filer had to only be from the country where the case was filed. As a result, it does not include all the organizations involved in the dispute. For example, the first cases against Honeywell and General Electric (GE) were cross-border organizing campaigns between the United Electrical Workers (UE) in the United States and the FAT in Mexico, but only the UE signed the complaint.

Despite not always knowing all of the organizations that were involved in a given dispute, these cases do indicate trends in growth and composition of the labor network over time. Cases with a huge network of filers became more common over time. Higher profile cases tend to have more filers, indicating the importance to the movement. The AFL-CIO as a federation became a more likely signatory that actively filed these cases in the Obama era. The AFL-CIO was also the driving force in all the non-NAFTA cases, except Peru, indicating they are more central to the global labor network outside of the North American countries. The North American unions have more integration across the AFL-CIO's individual affiliated unions who drove most other cases. The data also indicated the importance of the FAT in cases filled in Mexico. Finally, throughout this entire time period, NGOs, many of which were legal defense groups, were essential to this network in filing international labor cases. The importance of groups interviewed such as PODER, Centro de los Derechos del Migrante (CDM), and ILRF in Mexico and Latin America acting as what Chad Gray called a "strategic node" highlights how the structure of the global network has changed and grown. The importance of NGO groups in connecting unions across borders generates the communication needed to globalize and generate social resilience.

Examining cases that make economic arguments, either about the workers' pure economic leverage to disrupt production or that relate to ongoing labor organizing, four of the forty-two cases explicitly alluded to economic leverage and twenty-seven mentioned the case was related to an ongoing organizing campaign. The fact that few cases make arguments about economic leverage is not surprising. As some of the lawyers explained when labor uses the law as a social movement tactic, they often try not to reveal all their intentions. If you are filing a case because you think the employer has weak economic leverage, being explicit about this point might not be strategic. Yet explicitly pointing to their economic leverage can also signal the need to take the case seriously. The relevance of cases to ongoing organizing is often also obscure as they are not mentioned in the legal filing. While twenty-seven cases mention that they explicitly relate to organizing campaigns, my interviews and analysis of press accounts indicated the number of cases actually related to ongoing organizing is higher. For example, data from the interviews as well as the union's press releases revealed that the UFCW filed the Chedraui complaint to support their ongoing organizing campaign in the Southwestern United States. Yet, the complaint never mentions this campaign and instead focuses on issues of protection unions, discrimination, and unpaid labor in Mexico. The text of a case is

not always indicative of the totality of what the case is about. This discrepancy between intent and legal argument is also a classic example of how cases are not an end in of themselves. While the complaints seek to remediate specific harms perpetrated against individuals and groups of workers, they are also attempts to create systemic change through the recalibration of costs for employers who commit labor violations, and they act as catalysts for building worker power and worker organizing. The UFCW's goal is organizing workers—not merely a favorable NAFTA ruling. The case is another tool to further broader change.

Regarding issues of violence and the related issues of health and safety, seventeen cases alleged violence and twenty-six alleged health and safety violations. As mentioned above, health and safety is one of the three principles that can go to arbitration under NAALC, so there is an extremely large incentive to self-select and only bring cases that include this issue. Health and safety issues found in NAFTA often relate to the willful neglect by employers to provide safety equipment and prevent exposure to unsafe chemicals. The issues found in the cases often relate to serious injuries including loss of limbs, brain function, death, and miscarriages. Health and safety along with explicit violence get to the heart of neoliberalism's ideological promotion of human rights resulting in greater likelihood of activist success (Keck and Sikkink 1998). According to Table 2, violence has become a more frequent subject of the labor movement's norm development project of late. The increased focus on antiviolence norm development gets to the idea of the test case, reported by several of the informants in the interviews. Cases are filed strategically to support either legal norm development or organizing. Here with the establishment of written language in the Colombia FTA, which at first appeared stronger, the AFL-CIO filed a test case to see if this stronger language resulted in stronger acceptance of norms in reality.

The final three legal arguments I commonly found in the cases are issues of market access, protectionism, and cross-borderer organizing. The market access issue relates largely to issues of migrant laborers and equality for women and was addressed above in the discussion of ideological resilience found in the interviews. What is surprising about explicit arguments of protectionism is how infrequent they are, with only five cases, most of which, as seen in Table 2, were in the first few years. When the language was used, it was couched in terms of violations of labor standards resulting in unfair competition, which was ultimately the original argument for including these standards. Further highlighting the solidarity between national labor movements that characterizes the FTA labor dispute system, the early cases

that included protectionist arguments often related to cases about explicit attempts to create cross-border unionism. Right after the passage of NAFTA, many unions, such as the United Steelworkers, aimed to establish true international unions with international collective bargaining. Some of these efforts resulted in NAALC complaints, again highlighting how such complaints are tools for achieving broader goals. The general solidarity associated with labor's engagement with the U.S. FTA labor rights complaint system is in marked contrast to initial concerns raised in NAALC debates by labor's detractors that the system would simply become a tool of U.S. labor protectionism.

### ***3.1.1. Accretion: Can You be Winning Even If You Are Losing?***

Labor has found social resilience in the U.S. trade system through norm development. In his theory of labor's ability to globalize, Evans (2010: 360) refers to norm development as a process of accretion, explaining, "Efficacious new institutional forms may emerge from innovative successful campaigns, but even a string of apparent failures may result in the gradual accretion of the institutional foundations for future success." Another way to phrase this is to ask, can you be winning even if you are losing? Celeste Drake of the AFL-CIO expertly summarized how labor approaches this process through the fight over trade agreements:

...our attention to using these tools, as weak as they are, has gotten sort of incremental changes. So we went from NAFTA where Clinton was forced to do the labor and environment side agreements ... And then you go to Jordan where the issues are brought into the text of the agreement ... And then there's a lot of hortatory language about, "we respect the ILO rights" ... Then you get the May 10th [language], which says you "shall" [enforce] with respect to the rights ... and not waive or derogate. It starts looking more powerful, but it is still attached to this petition, wait-and-bake situation. And that got Peru through because it was an improvement and the AFL-CIO took essentially a neutral stand on Peru ... But even at the time of taking a neutral position on Peru, the AFL-CIO said this is not good enough for Colombia. So, the next step for Colombia was this labor action plan.<sup>5</sup> Well there was a lot of problems with the labor action plan, again it's something, it was a step, it's a result of us making [demands] ... I think again the U.S. administration heard us on the Colombia labor action plan, like thanks for doing it, it's not adequate and [so they] came up with these

---

<sup>5</sup>The Colombia labor action plan was included at the insistence of labor allies in congress as a precondition to the agreement going into effect. The plan included concrete changes and improvements Colombia had to make to their labor laws and enforcement of these laws. The Action Plan entered into effect on April 7, 2011.

consistency plans for the TPP.<sup>6</sup> The consistency plans are better in quality than the Colombia labor action plan, and so it's better than the Colombia action, better, better, better ... and because of our pressure. Absent our existence, and those of our allies and affiliates, and others folks in Congress pressuring.

As Celeste highlights here, labor failed to get what they wanted with each step, but they always moved the standards forward a little.

Based on the interviews, case text analysis, and general research on news coverage of this process, I summarize some important moments in the accretion process over the years (Table 4). The important events outlined here include the increased labor rights standards in FTAs mentioned by Celeste Drake, as well also case arguments, government rulings, government enforcement actions, and other innovations. Much as in a common law legal system, these events set precedent that further establishes international labor norms. In the beginning, they had to fight for labor-trade linkage and then they had to fight for the right to file cases. They had to test each standard in each country and demand action when governments derogated in their duties. While some of the steps outlined in Table 4 are failures and include setbacks, such as those during the Bush years, impressively the trend has largely been upward toward greater acceptance of labor rights norms. Following pressure from the AFL-CIO and their allies in congress, the Trump administration has largely adopted the Obama labor approach from the TPP, and the renegotiation of NAFTA has largely strengthened the language of the labor provisions—not weakened them—leading the AFL-CIO to endorse the new agreement (AFL-CIO 2019). Despite these labor victories over the language of the agreements it is unlikely that the Trump administration will enforce these labor provisions with the same energy as Democratic administrations have. Overall, the space for labor to make claims has grown in both legal language and engagement, there is an increased expectation by government that labor should be included in the discussion, and the ball is inching forward toward stricter, more established standards for labor rights in these arguments. This is how norm development creates a mechanism for labor's social resilience under a neoliberal institution through a process of accretion.

---

<sup>6</sup>The consistence plans in the TPP were the updated versions of the Labor Action Plan, which was negotiated as part of the Colombia FTA. These plans were negotiated with Vietnam, Malaysia, and Brunei.

**Table 4.** Events in the Labor Globalization Accretion Process Found in the U.S. Trade System

Event	Year	Normative Impact
NAALC side agreement to NAFTA	1994	Established "linkage" between labor rights and trade law. First NAALC cases accepted for review. Established the dispute system setting a precedent for having hearings and naming cases after the offending employer. Cases provoked employer response. Recommended and established precedent for ministerial consultations.
GE and Honeywell cases	1994	First NAALC case against the U.S. showing all countries are accountable.
Sprint case	1995	First case alleging a country's domestic law violates the NAALC.
SUTSP case	1996	First case citing past ministerial declarations and NAO reports as legal precedent.
ITAPSA case	1997	First case against Canada.
McDonald's case	1998	First case susceptible to arbitration due to health and safety issues presented.
Amended Han Young case	1998	Mexican government agrees to use secret ballot elections in the future for interunion disputes. Represents first major change in government policy in response to NAALC complaint.
Han Young Ministerial Consolations	1998	ILO adopts the Declaration on Fundamental Principles and Rights at Work setting the standards, which labor demands in U.S. FTAs going forward.
ILO declaration	1998	First time labor rights are in the main body of an agreement and conform to ILO standards.
Jordan FTA	2001	Bush administration refused to review the case in 2002 halting the process during his administration.
DuroBag case	2001	First case that incorporates issues related to private corporate codes of conduct indicating how the NAALC system intersects with other international mechanisms.
Puebla-USAS case	2003	Bush passes seven FTAs with weaker standards than NAFTA or Jordan.
The seven Bush FTAs	2004–2006	Despite this, labor rights are still included. Congressional Democrats almost block passage of the CAFTA-DR FTA. Bush decides to negotiate and work with them on their labor demands going forward.
CAFTA-DR congressional debate	2005	The negotiations with Bush result in an agreement to include ILO standards in future FTAs and a higher standard than previously required that countries must "adopt and maintain" these standards.
May 10th language	2007	

*(Continues)*

**Table 4.** Continued

Event	Year	Normative Impact
Guatemala case	2011	Guatemala's refusal to address the AFL-CIO's complaint through consultations results in the case being the first ever to go to an arbitration panel. Resulted in a 2012 enforcement plan developing "labor diplomacy" as the two governments continue to work on the situation.
Colombia Labor Action Plan	2011	Democrats in Congress force Obama to negotiate a pre-conditional labor action plan of improvements to labor rights, which the Colombia government must undertake before the FTA would be voted on.
Honduras Tripartite Monitoring and Action Plan	2015	The Honduran and U.S. government negotiate an innovative tripartite enforced monitoring and action plan. In addition to requiring legal and enforcement reforms, it established an ongoing tripartite body to address labor issues.
TPP Consistency Plans	2015	Obama negotiates Colombia style action plans with Vietnam, Malaysia, and Brunei. The plans more clearly threatened loss of trade benefits than the Colombia plan although it is still dependent on political will.
U.S.–Mexico–Canada Agreement	2018	Congressional Democrats push Trump administration to strengthen labor standards in renegotiation of NAFTA. New USMCA agreement includes protections for migrant laborers for the first time, brings the labor provisions into the main agreement, demands Mexico make union reforms, and sets a minimum wage for the auto industry.

#### 4. Conclusions

The global labor movement's interaction with the U.S. free trade regime represents an internationalization of social movements using law as a tactic. This subject is difficult to study because the aims and motivations of the labor movement can be obscured by the language of legal argumentation. This study focused on the U.S. free trade regime as one example of labor's attempts to gain global standing to match capital's massive globalization over recent decades. The trade regime was chosen given its historical hostility to labor's inclusion and its status, in the eyes of activists, as the embodiment of neoliberalism's strength. This highlights how social resilience can be found even in situations of extreme duress. As Hall and Lamont (2013) explain, neoliberalism reorders social

relations requiring us to re-map the benefits and challenges social actors face. Examining possible sources of social resilience under the U.S. FTA system, I find they track with Evans' (2010) theory of how labor could globalize: through increased communication, through new ideological innovations, through economic leverage, and through political pressure. Globalizing labor follows Tarrow's (2005) notion of transnational activism, which requires externalization of issues beyond the sphere of nations to international institutions and through the institutionalization of formal global activist coalitions. The process of accretion using Evans' sources of globalization leverage helps labor establish the true transnationalism described by Tarrow.

By examining labor's strategic interaction with the U.S. Trade legal mechanisms, we can understand the role activists play in the formation, development, and implementation of international law. While international relations scholars often focus on state actors and sociolegal approaches often focus on theories of professions, this study aimed to bring activists into the discussion. Building on constructivist and sociolegal theories of legal power and norms, the study calls for considering third party actors, such as labor, as strategic actors in the codification of international law. While this study focuses on the labor movement, there is no reason not to consider other third-party actors such as capital, NGOs, or other civil society groups. This examination of labor's legal claims made through U.S. FTAs highlights the role third-party actors can play in solidifying legitimacy claims through the performance of law in situations or fields Conti (2016) describes as "murkier." When fields are unclear and the interlocutors between local and international fields are poorly defined, it appears the growth of the legal system is dependent on legal entrepreneurs, such as labor, to make the system legible. In taking labor's point of view to understanding U.S. trade law, we can see how activists can gain their own international legitimacy through strategic legal engagement. It also highlights that international law is a constructive process and labor's gains here could easily be deconstructed by the action of capital or hostile governments. To maintain these gains labor must engage in continued legal performance.

The mechanism behind labor norm development in the U.S. trade system is the process of accretion, which represents the slow march forward and the often hidden victories behind factual legal losses. The first Honeywell and GE cases filed under NAFTA did not resolve the problems in Mexico and did not result in trade sanctions, thus representing, on its face, a loss. In terms of accretion, these cases established that labor had a right to make claims under international trade law, began developing a legal process to adjudicate this law, and set in motion the development of

intergovernment labor diplomacy. Even when labor did not have an ally in the White House they were able, by working with Congress, to force Bush to adopt the May 10th Language. This, of course, does not preclude the possibility of deaccretion. The Bush administration failed to aggressively enforce the NAFTA labor provisions and labor has expressed the likelihood that Trump will do the same. While much of the norm development has been in terms of legal changes, these FTAs have resulted in real changes in government and corporate action, as seen in Mexico where the government has taken steps to eliminate pregnancy testing and in the United States where federal and state governments have taken greater enforcement action against migrant labor abuses. This paper found that over time labor was able to advance norms of international labor rights through the practice of disputing trade cases. However, it remains unclear if this process will continue. The advancement of international labor norms has not reversed the decades' long decline in labor's fortunes, nor are the advancements of international labor rights safe from continued contestation. The Trump administration's threats to withdraw from international systems is sewing doubt and confusion for activists, capital, and state officials about the stability of international legal systems and threatening to breakdown international normative orders. Regardless of the direction the future takes, this investigation has shown that both normative construction and deconstruction processes are discursive contests in which civil society and activists play a crucial role. When NAFTA was first negotiated, labor rights and labor's global legal standing were excluded. Through a process of accretion, labor was able to find communication, ideological, economic, and political sources of social resilience within an archetypical neoliberal institution designed to undermine its power.

## References

- AFL-CIO. 2015. "What a New NAFTA Complaint Call Tell Us About the TPP." *AFL-CIO Press Release*. <http://www.aflcio.org/Blog/Political-Action-Legislation/What-a-New-NAFTA-Complaint-Can-Tell-Us-About-the-TPP> accessed 22 December 2015.
- . (2019). "Letter Supporting U.S. Mexico Canada Agreement (USMCA)." *AFL-CIO Legislative Alert*. <https://aflcio.org/about/advocacy/legislative-alerts/letter-supporting-us-mexico-canada-agreement-usmca> accessed 14 July 2020.
- Alter, Karen J. 2013. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton, NJ: Princeton University Press.
- Barnett, Michael N. and M. Finnemore. 2004. *Rules for the World: International Organization in Global Politics*. Ithaca, NY: Cornell University Press.
- Baxi, Upendra. 2002. *The Future of Human Rights*. Oxford: Oxford University Press.
- Bilder, R. B. 1989. "International Third Party Dispute Settlement." *Denver J. International Law Policy* 17: 471-503.

- Bourdieu, Pierre. 1986. "Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law J.* 38: 805.
- Boyle, F. A. 1980. "The Irrelevance of International Law." *California Western International Law J.*
- Brunnee, Jutta and Stephen Toope. 2010. *Legitimacy and Legality in International Law*. New York: Cambridge University Press.
- Compa, Lance. 1993. "International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies." *American University J. of International Law and Policy* 117-36.
- . (2001. "NAFTA's Side Labor Agreement and International Labor Solidarity." *Antipode* 33: 451-67.
- Conti, Joseph A. 2016. "Legitimacy Chains: Legitimation of Compliance with International Courts Across Social Fields." *Law & Society Rev.* 50: 154-88.
- Dezalay, Yves and Bryant Garth. 1995. "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes." *Law & Society Rev.* 29: 27-64.
- Douglas, William A., John-Paul Ferguson, and Erin Klett. 2004. "An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions, and NGOs." *Human Rights Quarterly* 26: 273-99.
- Evans, Peter. 2010. "Is it Labor's Turn to Globalize? Twenty-First Century Opportunities and Strategic Responses." *Global Labour J.* 352-79.
- Fish, Stanley. 1989. *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary & Legal Studies*. Oxford: Clarendon.
- Fuller, Lon. 1969. *The Morality of Law*. New Haven, CT: Yale University Press.
- Graubart, Jonathan. 2008. *Legalizing Transnational Activism: The Struggle to Gain Social Change Form NAFTA's Citizen Petitions*. University Park, PA: The Pennsylvania State University Press.
- Grayson, George. 1995. *The North American Free Trade Agreement: Regional Community and the New World Order*. Lanham, MD: University Press of America.
- Haas, Peter M. 1992. "Introduction: Epistemic Communities and International Policy Coordination." *International Organization* 46: 1-37.
- Haas, Peter M., ed.. 1997. *Knowledge, Power and International Policy Co-ordination*. Columbia, SC: Univ. of South Carolina Press.
- Hafner-Burton, E. M. 2009. *Forced to be Good: Why Trade Agreements Boost Human Rights*. Ithaca: Cornell University Press.
- Hafner-Burton, E. M., Brad L. LeVeck, and David G. Victor. 2016. "How Activists Perceive the Utility of International Law." *The J. of Politics* 78: 167-80.
- Hall, Peter A. and Michèle Lamont. 2013. *Social Resilience in the Neoliberal Era*. New York, NY: Cambridge University Press.
- Halliday, Terrence C. and Bruce G. Carruthers. 2007. "The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes." *American J. of Sociology* 112: 1135-202.
- Howse, Robert. 2016. "The World Trade Organization 20 Years On: Global Governance by Judiciary." *European J. of International Law* 27: 9-77.
- Kay, Tamara. 2005. "Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America." *American J. of Sociology* 111: 716-56.
- Keck, Margaret E. and Kathryn Sikkink. 1998. *Activists beyond Borders: Advocacy Networks in International Politics*. Ithaca, NY: Cornell Univ. Press.
- Keohane, R. O. 1993. "Sovereignty, Interdependence, and International Institutions." In *Ideas and Ideals: Essays on Politics in Honor of Stanley Hoffmann*, edited by L. B. Miller and M. J. Smith. Westview: Boulder, CO.
- Kratochwill, F. V. and J. G. Ruggie. 1986. "International Organization: A State of the Art on an Art of the State." *International Organization* 40: 743-75.

- Leiter, Brian. 2005. "American Legal Realism." In *The Blackwell Guide to Philosophy of Law and Legal Theory*, edited by M. P. Golding and W. A. Edmundson. Malden, MA: Blackwell.
- McAdam, Doug. 1996. "Conceptual Origins, Current Problems, Future Directions." In *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, edited by Doug McAdam, John D. McCarthy, and Mayer N. Zald. Cambridge: Cambridge University Press.
- Meyer, John W., John Boli, George M. Thomas, and Francisco O. Ramirez. 1997. "World Society and the Nation-State." *American Journal of Sociology* 103: 144-81.
- Miles, Matthew B. and A. Michael Huberman. 1994. "Sampling: Bounding the Collection of Data." In *Qualitative Data Analysis: An Expanded Sourcebook*, 2nd ed., . Thousand Oaks, CA: Sage.
- Morgenthau, H. J. 1985. *Politics Among Nations: The Struggle for Power and Peace*, 6th ed.. New York: Knopf.
- Nolan García, K. A. 2010. "Enforcement by Design: The Legalization of Labor Rights Mechanism in US Trade Policy, No. 207." In *Centro de Investigación y Docencia Económicas*. México, DF.
- Rajagopal, Balakrishnan. 2003. *International Law from Below: Development, Social Movements and Third World Resistance*. New York: Cambridge University Press.
- Sassen, Saskia. 1999. "Embedding the Global in the National: Implications for the Role of the State." In *States and Sovereignty in the Global Economy*, edited by David Alden Smith, Dorothy J. Solinger, Steven C. Topik, and Steven Topik. London: Routledge.
- Schachter, O. 1991. *International Law in Theory and Practice*. Dordrecht, Netherlands: Marinus Nijhoff.
- Silver, Beverly J. 2003. *Forces of Labor: Workers' Movements and Globalization Since 1870*. Cambridge: Cambridge Univ. Press.
- Sinclair, Guy Fiti. 2017. *To Reform the World: International Organizations and the Making of Modern States*. New York: Oxford Univ. Press.
- Slaughter, AM (1995) "International Law in a World of Liberal States," 6 *Er J. International Law* 503-38, 6.
- Small, Mario. 2009. "'How Many Cases Do I Need?' On Science and the Logic of Case Selection in Field-Based Research." *Ethnography* 10: 5-38.
- Tarrow, Sidney G. 2005. *The New Transnational Activism*. New York: Cambridge Univ. Press.
- Wright, Erik O. 2000. "Working-Class Power, Capitalist-Class Interests, and Class Compromise." *American J. of Sociology* 105: 957-1002.

*Andrew Wolf is PhD Candidate in the Department of Sociology at the University of Wisconsin-Madison. He researches the intersection of law, work, and social movements. In particular, he studies how labor movements and governments are responding to emerging phenomena like international trade and the gig-economy.*