

The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis

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The treaty process specified in Article II of the Constitution has been dying a slow death for decades, replaced by various forms of “executive agreements.” What is only beginning to be appreciated is the extent to which both treaties and executive agreements are increasingly being overshadowed by another form of international cooperation: nonbinding international agreements. Not only have nonbinding agreements become more prevalent, but many of the most consequential (and often controversial) U.S. international agreements in recent years have been concluded in whole or in significant part as nonbinding agreements. Despite their prevalence and importance, nonbinding agreements have not traditionally been subject to any of the domestic statutory or regulatory requirements that apply to binding agreements. As a result, they have not been centrally monitored or collected within the executive branch, and they have not been systematically reported to Congress or disclosed to the public. Recent legislation addresses this transparency gap to a degree, but substantial gaps remain.

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This Article focuses on the two most significant forms of nonbinding agreements between U.S. government representatives and their foreign counterparts: (1) joint statements and communiques; and (2) formal nonbinding agreements. After describing these categories and the history of nonbinding agreements and their domestic legal basis, the Article presents the first empirical study of U.S. nonbinding agreements, drawing on two new databases that together include more than three thousand of these agreements. Based on this study, and on a comparative assessment of the practices and reform discussions taking place in other countries, the Article considers the case for additional legal reforms.

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INTRODUCTION

The field of international *law*, as the name implies, is largely organized around legally binding sources, especially treaties and customary international law. International law casebooks and syllabi, and the bulk of scholarship related to international law, reflect this focus. On the domestic front, similarly, the statutory framework that requires publication and reporting of U.S. international agreements has historically applied only to the legally binding agreements made by the president: “treaties” made pursuant to the process specified in Article II of the Constitution, which requires the consent of two-thirds of the senators present; “congressional-executive” agreements that are authorized or approved by Congress; agreements authorized by a prior Article II treaty; and “sole” executive agreements based on the president’s independent constitutional authority.¹

The prevailing focus in teaching, scholarship, and regulation on binding international agreements reflects an assumption that these forms of agreement are the most important and consequential ones in international relations. This assumption is misleading to the point of being false. As this Article seeks to show, international relations are increasingly conducted by *nonbinding international agreements*. A nonbinding international agreement

¹ For a description of the statutory framework, see *infra* notes 76–89 and accompanying text. For more detail on the forms of binding agreements subject to this framework, see Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 638–44 (2020). We follow conventional usage in designating a “sole executive agreement” as an executive agreement made under the president’s Article II authority that is *binding under international law*, and as something quite different from a nonbinding agreement. Compare CONG. RSCH. SERV., LIBR. OF CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 87–95 (2001) [hereinafter LIBR. OF CONG.] (discussing sole executive agreements), with *id.* at 56–63 (discussing nonbinding agreements). The nonbinding agreements analyzed in this paper are also made under the president’s Article II authority, but, in contrast to sole executive agreements, are not binding under international law. For further clarification, see *infra* text at note 8, note 54, notes 69–70 and accompanying text. See also *infra* Section I.B.2.

is one between two or more sovereign states (or between a state and an international organization) that is not governed by international law—meaning it does not trigger the international law rules relating to compliance and state responsibility for breach. Yet because international law often relies on informal enforcement mechanisms such as coordination, reciprocity, and reputation, nonbinding agreements often operate in ways functionally similar to many binding agreements.

In the United States, executive branch use of binding international agreements has been declining for decades.² In 2005, amidst that decline, a lawyer in the State Department Legal Adviser's Office observed that nonbinding agreements had shown a "marked increase."³ As this Article documents, the U.S. government's reliance on nonbinding international agreements has accelerated since then. Most of the consequential (and often controversial) international agreements made by the last three presidential administrations were nonbinding.⁴ Yet as this Article shows, these high-profile agreements are the tip of the iceberg of a vast nonbinding-agreement-making practice that has been taking place mainly outside of public view.⁵

² The effect is most notable with regard to Article II treaties. See Hathaway, Bradley & Goldsmith, *supra* note 1, at 632 (noting that President Bill Clinton's administration submitted approximately twenty-three treaties per year; President George W. Bush's administration submitted around twelve per year; President Barack Obama's administration submitted around five per year; and President Donald Trump's administration submitted only five treaties in President Trump's first three and a half years in office). Through 2022, President Joe Biden's administration had submitted three treaties to the Senate for its consent. See S. TREATY DOC. NO. 117-1 (2021) (transmitting the Kigali Amendment to the Montreal Protocol); S. TREATY DOC. NO. 117-2 (2022) (transmitting the Extradition Treaty with the Republic of Albania); S. TREATY DOC. NO. 117-3 (2022) (transmitting the Protocols to the North Atlantic Treaty of 1949 on the Accession of the Republic of Finland and the Kingdom of Sweden). While executive agreements are increasingly used as substitutes for treaties, see Oona A. Hathaway, *Presidential Power over International Law*, 119 YALE L.J. 140, 149 (2009), their numbers, too, have declined in recent years. President Clinton signed an average of 257 executive agreements per year; President W. Bush signed 230 per year; and President Obama signed 148 per year. See Jeffrey S. Peake, *The Decline of Treaties? Obama, Trump, and the Politics of International Agreements* 40 tbl.1 (Apr. 6, 2018) (unpublished manuscript). The Treaties and Other International Acts (TIAS) series published by the State Department, which lists treaties and executive agreements, reports 102 executive agreements for 2016; 108 for 2017; 83 for 2018; 71 for 2019; 68 for 2020; 75 for 2021, and 62 for 2022. See Office of Treaty Affairs, *Treaties and Other International Acts Series (TIAS)*, U.S. DEPT OF STATE, <https://www.state.gov/tias/>.

³ Robert E. Dalton, *National Treaty Law and Practice: United States*, in NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH 765, 767 (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds., 2005).

⁴ See *infra* Section I.C.

⁵ See *infra* Part II.

One reason for this trend is that the executive branch has many incentives to make agreements nonbinding rather than binding. In contrast to Article II treaties and congressional-executive agreements, the executive branch can make nonbinding international agreements without congressional authorization or approval.⁶ And in contrast to sole executive agreements, which most commentators believe are limited to matters that relate to the president's independent constitutional authority, the executive branch maintains that it can make nonbinding agreements on practically any topic.⁷ Nonbinding agreements have also permitted the executive branch to avoid accountability and transparency mandates.⁸ The executive branch has long had a legal duty to report to Congress all binding agreements other than Article II treaties, and to publish the important ones.⁹ But it has skirted these duties by making nonbinding agreements, which historically it did not need to report or publish.¹⁰ In a world in which foreign policy challenges persist but Congress is gridlocked, it is no surprise that the executive branch was drawn to a form of agreement that it could make on any topic, without congressional approval or review, and without any obligation to make it public.

⁶ When asked during congressional testimony why the Obama Administration did not use the Article II treaty process when concluding an important nuclear agreement with Iran, Secretary of State John Kerry explained, "I spent quite a few years trying to get a lot of treaties through the United States Senate and frankly, it's become physically impossible. That's why. Because you can't pass a treaty anymore." *Iran Nuclear Agreement: The Administration's Case, Hearing Before the H. Foreign Affs. Comm.*, 114th Cong. 83 (2015) (statement of Secretary of State John Kerry).

⁷ Under most accounts, the president's constitutional authority to conclude binding executive agreements (a) must be tied to an independent presidential authority, (b) is narrower than the power to enter into Article II treaties and congressional-executive agreements, and (c) generally encompasses discrete issues such as the recognition of other governments and the settlement of claims. See Hathaway, Bradley & Goldsmith, *supra* note 1, at 639–41; see also, e.g., *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (referring to "[t]he Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement"). For a broader view, see Harold Hongju Koh, *Twenty-First Century International Lawmaking*, 101 GEO. L.J. ONLINE 1, 6 (2012).

⁸ The nonbinding agreements category has also allowed agencies to make international agreements without the knowledge of the State Department, since the internal executive branch process for seeking approval for binding agreements, and for notifying the State Department about the conclusion of such agreements, has historically not applied to nonbinding agreements. See *infra* Section I.B.4.

⁹ See Hathaway, Bradley & Goldsmith, *supra* note 1, at 645–51.

¹⁰ As we explain in the text accompanying notes 85–92, Congress in December 2022 enacted a law that for the first time requires the executive to report to Congress and publish a subset of nonbinding agreements, a mandate that becomes effective in September 2023. See James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 § 5947 (*amending* 1 U.S.C. § 112b (1972)).

We are not the first to highlight the growing phenomenon of nonbinding international agreements.¹¹ But none of the past studies have sought to discern the extent and nature of the U.S. practice of concluding nonbinding agreements. Such agreements have been difficult to study because the systems that track international agreements have not included nonbinding agreements. Article II treaties are published by the Senate,¹² listed in the *Treaties in Force* compilation prepared by the State Department,¹³ and registered with the United Nations;¹⁴ executive agreements are collected by the State Department and reported to Congress under the Case-Zablocki Act,¹⁵ and are published in both public and private databases.¹⁶ However, nonbinding agreements have had no central repository and have not been subject to any rules about transparency or publication.¹⁷ The relatively few nonbinding agreements that have been made available to the public are

¹¹ We have learned much from several notable contributions on this topic. *See generally, e.g.*, Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735 (2014) (analyzing nonbinding agreements concluded by administrative agencies, which the authors called “soft law agreements”); Koh, *supra* note 7, at 14 (explaining how nonbinding agreements operated in conjunction with binding instruments to effectuate “layered cooperation” in U.S. practice); Duncan B. Hollis & Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VA. J. INT’L L. 507 (2009); Kal Raustiala, *The Architecture of International Agreements*, 43 VA. J. INT’L L. 1, 22–23 (2002) (explaining how administrative agencies use non-legally binding “Memoranda of Understanding” to structure “transgovernmental cooperation”); Oscar Schachter, *Editorial Comment: The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296 (1977) (examining the uncertain place in international law of nonbinding agreements). A related literature explores the reasons why nations might conclude nonbinding agreements (sometimes characterized as “informal” or “soft” law” commitments) rather than binding ones. *See generally* Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT’L & COMP. L. Q. 787 (1986); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT’L ORG. 495 (1991); Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law: What Have We Learned?*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2012).

¹² *See About Treaty Documents*, CONGRESS.GOV, <https://www.congress.gov/help/treaty-documents>.

¹³ *Treaties in Force*, U.S. DEPT OF STATE, <https://perma.cc/A4X7-MQQ2>.

¹⁴ *United Nations Treaty Series Online*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/Content.aspx?path=DB/UNTS/pageIntro_en.xml.

¹⁵ 1 U.S.C. § 112b.

¹⁶ *See KAV Agreements*, HEINONLINE, <https://perma.cc/P745-KWCP>; *Treaties and Other International Acts Series (TIAS)*, U.S. DEPT OF STATE, <https://www.state.gov/tias>. We documented in earlier work that these databases are not complete, and we recommended reforms for improving transparency (a number of which Congress recently adopted). Still, the databases do exist. *See* Hathaway, Bradley & Goldsmith, *supra* note 1, at 667–77.

¹⁷ *See infra* Section I.B.4.

scattered across the internet based on the varying preferences of the dozens of agencies and departments that make them.

In the face of these challenges to empirical study of nonbinding agreements, we built the first-ever databases of U.S. nonbinding agreements for the two most significant forms of nonbinding agreements between U.S. government representatives and their foreign counterparts: (1) joint statements and communiques; and (2) formal nonbinding agreements.¹⁸ Joint statements and communiques are generally in the public realm. Some formal nonbinding agreements are too, but many are not. We supplemented our collection of public documents with Freedom of Information Act (FOIA) requests to more than twenty federal agencies in order to obtain their nonpublic records. Our two databases together include over three thousand nonbinding agreements that we have coded and analyzed to provide an unprecedented quantitative empirical glimpse into the U.S. nonbinding agreements practice.

We also supplemented these data collection efforts with interviews of government officials in several agencies about their experiences in connection with the drafting and conclusion of nonbinding agreements.¹⁹ These interviews provided valuable information about why agencies choose to conclude nonbinding agreements and the processes that they follow. We also reached out to experts and officials in other countries to learn more about how their legal and regulatory systems address nonbinding international agreements. The surveys of foreign experts and officials gave us a broader comparative perspective from which to view U.S. practice than prior scholarship, and they revealed that many countries have witnessed a shift from binding to nonbinding arrangements similar to the one that we document in this Article.²⁰ Although our chief focus is the United States, the transformation we describe is a global phenomenon.

¹⁸ For an explanation and definition of these categories, see *infra* Section I.C. All data used in this article are available at Oona Hathaway, Replication Data for: The Rise of Nonbinding Agreements, HARVARD DATAVERSE (2023), <https://doi.org/10.7910/DVN/CARKNO>. We denote each document in our database with a unique identifier comprised of a number and the acronym of the department in which the document originated (e.g., document “179-DOD” originated with the Department of Defense). Where possible, we’ve included those identifiers when citing documents in our database.

¹⁹ For this study, we sought and received approval from Yale University’s Human Research Protection Program Institutional Review Board. IRB Protocol ID 2000029484 (approved Nov. 30, 2020).

²⁰ As we explain in Part III, we surveyed experts and officials from more than a dozen countries, as well as publicly available materials relating to a number of other countries.

The key contribution of this Article, then, is to uncover and describe a growing practice relating to international law. Non-binding agreements, we show, are not just an important part of the international agreement landscape; they are, increasingly, the *dominant* part. The field of international law—in the United States and globally—must reorient itself to this new reality. Increasingly, international cooperation is shaped by commitments that claim not to be governed by law. This development has important ramifications for how international law is taught and studied, both in the United States and elsewhere, and it raises fundamental questions about the nature of the international legal system.

The growing importance of nonbinding agreements also raises the question—largely unaddressed in prior scholarship—about how such agreements should be regulated domestically.²¹ In the United States, nonbinding agreements—especially formal nonbinding agreements—often serve the role once reserved for Article II treaties and binding executive agreements. And yet until 2023, they were entirely exempt from the reporting and publication requirements that apply to binding agreements. A new law enacted in December 2022, as part of the National Defense Authorization Act for Fiscal Year 2023²² (2023 NDAA), establishes transparency mandates for nonbinding agreements for the first time, but only for a subset of these agreements.²³

Part I of this Article describes the rise of nonbinding agreements in U.S. practice and, until very recently, the lack of any legal regulation governing their transparency. Part II presents a novel empirical account of the nonbinding agreements concluded by the U.S. government over the past three decades. Part III offers a comparative analysis of how other nations are addressing the regulatory challenges presented by nonbinding agreements. Building on Parts II and III, Part IV assesses and critiques the law that was recently enacted to regulate nonbinding agreements and considers other reforms. The Article concludes with

²¹ We addressed this question briefly in prior work. See Hathaway, Bradley & Goldsmith, *supra* note 1, at 708–10; see also Ryan Harrington, *A Remedy for Congressional Exclusion from Contemporary International Agreement Making*, 118 W. VA. L. REV. 1211, 1236–42 (2016) (discussing how the Case-Zablocki Act could be construed to apply to non-binding agreements).

²² Pub. L. No. 117-263, 136 Stat. 2395.

²³ 1 U.S.C. § 112b (revisions effective Sept. 19, 2023).

reflections on the implications of the rise of nonbinding agreements for the field of international law.

I. NONBINDING INTERNATIONAL AGREEMENTS IN U.S. LAW AND PRACTICE

Nonbinding international agreements can be bilateral or multilateral and can take many forms.²⁴ A common element among all forms of these agreements is that they are not governed by international law—a characteristic that has implications for why nations make them and how they operate in practice. This Part provides background on nonbinding agreements made by the United States to set the stage for the empirical, comparative, and normative analysis that follows. It begins by defining nonbinding agreements. It then explains the historical use of these agreements by the United States and their place in the U.S. domestic legal system. Finally, it examines contemporary U.S. practice concerning nonbinding agreements and organizes the agreements into two categories for purposes of analysis.

A. What Is a Nonbinding International Agreement?

A nonbinding international agreement can best be understood by comparison to a binding international agreement, which in international law nomenclature is called a “treaty.” A treaty is “an international agreement concluded between States in written form and *governed by international law*.”²⁵ Any agreement that meets these criteria, regardless of what it is called in a state’s domestic legal system (for example, a “congressional-executive

²⁴ Different terms have been used to capture what we call nonbinding international agreements, including “political commitments,” “informal agreements,” “informal arrangements,” “nonbinding arrangements,” “nonbinding documents,” “nonbinding instruments,” “nonbinding arrangements,” “soft law agreements,” and (in an earlier era) “gentlemen’s agreements.” See, e.g., ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 18 (3d ed., 2013); Memorandum from Robert Dalton, Assistant Legal Adviser for Treaty Affs., U.S. Dep’t of State, International Documents of a Non-Legally Binding Character (Mar. 18, 1994) (on file with authors). Although some observers might think that the word “agreement” connotes bindingness, we use “nonbinding agreements” because it best reflects the role that these documents play in the international system. The term has, moreover, been used in recent international discussions of the topic. See *infra* Part III.

²⁵ Vienna Convention on the Law of Treaties, art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (emphasis added). We are focused in this Article only on agreements concluded by the U.S. federal government and its departments and agencies. Agreements concluded by state and local governments, whether binding or nonbinding, raise separate legal issues. For a study of such agreements, see Ryan Scoville, *The International Commitments of the Fifty States*, 70 UCLA L. REV. (forthcoming).

agreement”) is considered a “treaty” under international law. Important legal consequences of a legally binding treaty include *pacta sunt servanda* (a duty to observe the terms of the treaty), state responsibility for violations, and legal remedies for breach, such as reparations and countermeasures.²⁶

A nonbinding international agreement is an agreement between nations that is *not* governed by international law.²⁷ Such an agreement imposes no international legal duty to comply with its terms, and breach or noncompliance with the agreement implicates no international legal consequences. This does not mean that nonbinding agreements lack any relationship to binding international law. To the contrary, nonbinding agreements can serve as the basis for or precursor to binding instruments made later;²⁸ provide interpretive guidance for binding agreements;²⁹ clarify or expand upon the requirements of binding obligations;³⁰ be embedded or incorporated into a binding obligation or instrument;³¹ and influence the development of customary international

²⁶ See, e.g., AUST, *supra* note 24, at 315–17.

²⁷ It is also not governed by domestic law. States make contracts—for example with corporations concerning investment matters and sometimes with other states—that are governed by domestic law rather than international law. See ORG. OF AM. STATES, INTER-AM. JURID. COMM., GUIDELINES OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON BINDING AND NON-BINDING AGREEMENTS 55–56 (2020) [hereinafter OAS Guidelines]. Such contracts are not included within the category of nonbinding international agreements.

²⁸ For example, the 1988 Baltic Sea Ministerial Declaration and the 1992 Baltic Sea Declaration “paved the way for the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area,” a binding agreement. Andreas Zimmermann & Nora Jauer, Possible Indirect Legal Effects of Non-Legally Binding Instruments 6 (2021) (unpublished manuscript).

²⁹ For example, investment tribunals “rely on non-binding rules . . . to establish procedures through which to adjudicate disputes in a binding fashion,” and in legally binding decisions the tribunals sometimes use “non-binding instruments to fill gaps in international investment agreements.” Timothy Meyer, *Alternatives to Treaty-Making—Informal Agreements*, in THE OXFORD GUIDE TO TREATIES 59, 65 (Duncan Hollis ed., 1st ed. 2012).

³⁰ For example, “space-faring states have favored legally nonbinding principles and technical guidelines that are layered on top of . . . preexisting treaties” related to outer space. Koh, *supra* note 7, at 15. Similarly, in the environmental context, “decisions of treaty bodies, such as a Conference of the Parties (COP), are often non-binding but can supplement or expound on binding obligations.” Meyer, *supra* note 29, at 65.

³¹ In differing ways, this was true of both the Paris Agreement on climate change and the Iran nuclear deal. See *infra* text accompanying notes 112–16.

law.³² But nonbinding agreements do not create direct legal obligations.³³

The difference between a binding and a nonbinding agreement is easy to articulate in theory, but distinguishing between the two in practice can be challenging because there is no universally accepted test for drawing the distinction. One test looks predominantly to the intent of the parties.³⁴ However, intent is not always easy to discern. Some nonbinding agreements expressly state that they are nonbinding. But many do not, in which case intent must be inferred from the language of the agreement, the circumstances under which it was made, and other contextual factors.³⁵ A second test turns on objective factors. On this view, “the agreement’s subject-matter, text, and context determine its binding or non-binding status independent of other evidence as to one or more of its authors’ intentions.”³⁶

The intent and objective tests often lead to the same conclusion about the bindingness of an agreement. But uncertainties in the application of each test, combined with the fact that different nations follow different tests, mean that nations sometimes disagree about whether an agreement between them is binding or not. Several prominent international tribunal cases involved disputes about whether particular agreements were binding.³⁷ In the

³² See Int’l L. Comm’n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, at 133–34, 138–42 (2018) (Conclusions 6, 9, and 10). Some scholars claim that a nonbinding commitment might bind a country under the principle of estoppel, but the point is not established in national practice. See OAS Guidelines, *supra* note 27, at 126.

³³ See OAS Guidelines, *supra* note 27, at 123 (noting that nonbinding agreements do not “trigger *pacta sunt servanda* nor any of the secondary international legal effects that follow treaty-making (e.g., the law of treaties, State responsibility, specialized regimes”).

³⁴ The intent test was embraced by the International Law Commission in its important midcentury study of the law of treaties, see, for example, II Yearbook of the International Law Commission 189 (1966), and by the delegates to the Vienna Convention on the Law of Treaties, see U.N. Conf. on the Law of Treaties, 2d Sess., 8th plen. mtg. at 12–13, U.N. Doc. A/CONF.39/11/Add.1, 13 (1971). It is the approach used by other countries. See, e.g., Dalton, *supra* note 24 (United States); AUST, *supra* note 24, at 31 (United Kingdom).

³⁵ See, e.g., Dalton, *supra* note 24, at 1 (noting that the test for legal bindingness is “the intent of the parties, as reflected in the language and context of the document, the circumstances of its conclusion, and the explanations given by the parties”).

³⁶ See OAS Guidelines, *supra* note 27, at 77 and notes 138–46; Meyer, *supra* note 29, at 59.

³⁷ See, e.g., Maritime Delimitation And Territorial Questions Between Qatar And Bahrain (Qatar v. Bahrain), Judgment, 1994 I.C.J. 112, ¶¶ 20–23 (July 1); Aegean Sea Continental Shelf Case (Greece v. Turkey), 1978 I.C.J. 3, ¶¶ 97–100 (Dec. 19); Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Case No. 16, Judgment, ITLOS Rep. 4, ¶¶ 61–69 (Mar. 14, 2012).

1990s, the United States considered certain defense-related memoranda of understanding (MOUs) to be binding agreements, but its partners (Australia, Canada, and the United Kingdom) regarded them as nonbinding political commitments.³⁸ Similarly, the United States viewed the nuclear deal with Iran in 2015 as a nonbinding agreement, but Iran insisted that it was a binding agreement.³⁹ And more recently, the United States and Mexico disagreed about the bindingness of an agreement concerning migration.⁴⁰

The final definitional point is that, for our purposes, the fact that an agreement is nonbinding does not necessarily mean that it is “soft law.” The two concepts are sometimes used interchangeably, especially in scholarly discussions.⁴¹ But soft law is often used as a broader term to capture agreements and international policies that impose weak or uncertain obligations through some combination of nonbindingness, vague or hortatory terms, shallow obligations, and a lack of enforcement mechanisms.⁴² For

³⁸ See John H. McNeill, *International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding*, 88 AM. J. INT’L L. 784, 822 (1994).

³⁹ See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10134, WITHDRAWAL FROM THE IRAN NUCLEAR DEAL: LEGAL AUTHORITIES AND IMPLICATIONS 1 (2018) (stating the U.S. view); Eline Gordts, *Iran’s Foreign Minister to U.S. Senators: ‘The World Is Not the United States’*, HUFFINGTON POST (Mar. 9, 2015), <https://perma.cc/4EFH-AWDT> (explaining the Iranian view).

⁴⁰ See Joint Declaration and Supplementary Agreement Between the United States of America and Mexico, Mex.–U.S., June 7, 2019, T.I.A.S. No. 19-607; Rachel Withers, *Mexico Releases the Full Text of Trump’s Immigration “Deal”*, VOX (June 15, 2019), <https://perma.cc/9K2N-6QEX>. In response to a query from Senator Robert Menendez, the State Department declared the agreement binding. Letter from Mary Elizabeth Taylor, Assistant Sec’y, Bureau of Legis. Affs., U.S. Dep’t of State, to Robert Menendez, Ranking Member, U.S. Sen. Comm. on Foreign Rels. (Sept. 9, 2019) (on file with authors). Yet, according to a U.S. government lawyer, “the Government of Mexico considers it non-binding.” Email from U.S. Government Lawyer to Oona A. Hathaway (June 5, 2021) (on file with authors). For a study that finds—based on information obtained from freedom of information requests in Mexico—that the United States and Mexico entered into 1,832 agreements between 2000–2021, but that only sixty-seven of them were reported to Congress under the Case-Zablocki Act, see Guillermo J. Garcia Sanchez, *The Other Secret Deals with Mexico and the Expansion of Executive Bureaucracies* (2022) (unpublished manuscript). Over three hundred of these agreements were with the federal government. These agreements were apparently viewed by Mexico as binding but may have been viewed as nonbinding by the U.S. executive and thus as not subject to reporting and other regulatory requirements.

⁴¹ See, e.g., Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 201–21 (2010); see also Dinah L. Shelton, *Soft Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68 (David Armstrong ed., 2008).

⁴² See Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 590 (2005); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 444 (2000); W. Michael Reisman, *The*

purposes of this Article, a nonbinding international agreement is simply one that is not governed by international law, and it can include agreements with vague or precise terms, shallow or deep obligations, and enforcement mechanisms or no such mechanism.

B. Nonbinding International Agreements in U.S. Law

This Section reviews how nonbinding agreements fit within the framework of U.S. domestic law. It begins with a brief description of the history of such agreements in the United States, and it then turns to the president's domestic authority to make them, their status in the domestic legal system, and their lack of domestic regulation.

1. A brief history of nonbinding agreements.

The history of nonbinding international agreements in the United States is murky. Diplomatic letters and other papers effectuated informal agreements with other nations since the Founding. But a distinct category of what we today mean by nonbinding international agreements did not clearly emerge until the twentieth century.⁴³ Before then, the executive branch made hundreds of agreements on its own authority. But there appears to have been little discussion of whether these agreements were binding or nonbinding under international law.

The issue became more salient in the early twentieth century as the Senate began to complain about the executive branch's increasingly ambitious use of the executive agreement power.⁴⁴ The

Concept and Functions of Soft Law in International Politics, in 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS 135 (Emmanuel G. E & Prince Bola A. Ajibola, S.A.N. eds., 1992).

⁴³ There were concepts akin to nonbinding agreements much earlier. See, e.g., EMER DE VATTEL, *THE LAW OF NATIONS* 355 (Béla Kaposy & Richard Whatmore eds., 2012) (1797) (distinguishing a "personal alliance" or "personal treaty," which "expires with him who contracted it," from a "real alliance" or "real treaty," which "attaches to the body of the state, and subsists as long as the state, unless the period of its duration has been limited").

⁴⁴ For example, the Senate reacted testily to President William McKinley's use of an executive agreement to "arrange[] for the Spanish withdrawal from Puerto Rico, Cuba, and other former possessions" at the termination of the Spanish-American War, and to early-twentieth-century presidents' agreements establishing U.S. policy in the far east, including the Open Door Policy, the intervention in the Boxer Rebellion, and several agreements with Japan. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 818 (1995). See generally Michael D. Ramsey, *The Treaty and Its Rivals: Making International Agreements in U.S. Law and Practice*, in SUPREME LAW OF THE LAND? DEBATING THE CONTEMPORARY EFFECTS OF TREATIES WITHIN THE LEGAL SYSTEM

executive branch defended some agreements on the ground that they lasted only as long as the executive branch chose to enforce them and did not bind future administrations or the nation as a whole. President Theodore Roosevelt invoked this theory to justify the 1905 agreement he made with the Dominican Republic for administering customs houses in Santo Domingo.⁴⁵ President William Howard Taft made a similar argument, when he was President Roosevelt's Secretary of War, to justify an agreement that defined the relative jurisdictions in cities at both ends of the Panama Canal.⁴⁶ President Taft described the agreement as a *modus vivendi* (or temporary agreement) that was "revocable at will," but it lasted beyond the Roosevelt administration because subsequent administrations continued to observe it.⁴⁷ Similarly, Secretary of State Robert Lansing explained that the 1917 Lansing-Ishii Agreement—which resolved various U.S.–Japan issues relating to China—lacked "any binding force" on the United States, and was "simply a declaration of . . . the policy of this Government, as long as the President and the State Department want to continue that policy."⁴⁸

Despite these early precedents, commentators in the first third of the twentieth century disagreed about which of the hundreds of other agreements made by the executive branch were binding on the nation rather than simply a policy of a particular administration. Professor Quincy Wright's well-regarded 1922 book, *The Control of American Foreign Relations*, maintains that

OF THE UNITED STATES 296–97 (Paul R. Dubinsky, Gregory H. Fox & Brad R. Roth eds., 2017) (describing "enormous changes in U.S. foreign relations" by the end of the nineteenth century that led to "new forms of agreement-making," including "the rise of non-binding agreements").

⁴⁵ See THEODORE ROOSEVELT, THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 551 (1913).

⁴⁶ See WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 112 (1916).

⁴⁷ *Investigation of Panama Canal Matters: Hearing Before the S. Comm. on Interoceanic Canals*, 59th Cong. 2590 (1907) (cable of then-Secretary of War Taft to Secretary of State John Hay); see also *id.* at 2742 (statement of Senator John T. Morgan) (noting that the jurisdictional boundaries are "settled here temporarily and provisionally by a *modus vivendi*").

⁴⁸ *Treaty of Peace with Germany: Hearing Before the S. Comm. on Foreign Relations*, 66th Cong. 219 (1919) (testimony of Secretary of State Robert Lansing). President Warren Harding later described the "so-called Lansing-Ishii agreement" as an "exchange of notes [that], in the nature of things, did not constitute anything more than a declaration of Executive policy." GREEN HAYWOOD HACKWORTH, 5 DIGEST OF INT'L L. 431 (1943). President Woodrow Wilson said it was "an understanding," not an agreement. *Wilson Greets Callers*, N.Y. TIMES (July 11, 1919), <https://www.nytimes.com/1919/07/11/archives/wilson-greets-callers-holds-reception-in-capitol-room-to.html>.

executive agreements that settled claims and possibly agreements made under the commander-in-chief power were binding on the nation under international law.⁴⁹ But he suggested that other types of executive agreements—which he variously labeled protocols, *modus vivendi*, “gentlemen’s agreements,” administrative agreements, or agreements that define executive policy—might be “binding only on the President that makes them,” although he noted that this “limitation often does not apply in practice.”⁵⁰ Other commentators reached somewhat different conclusions about the extent to which executive agreements were binding.⁵¹ The wide range of positions was possible because the executive branch was rarely clear about which agreements were binding on the nation.

The meaning and scope of nonbinding international agreements within U.S. practice started to gain clarity in the middle decades of the twentieth century. The increased use and importance of executive agreements starting in the 1930s sparked a scholarly debate that highlighted the wide array of agreements made on the president’s authority alone and raised anew questions about which ones were binding.⁵² In the 1940s, Presidents

⁴⁹ See QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 230–46 (1922).

⁵⁰ *Id.* at 238; see also *id.* at 54–55, 235, 237, 243. It appears from context in these passages that Wright was not using the term “binding” to suggest that international law governed these agreements, but rather to suggest that whatever political or moral obligation they imposed applied only to the administration that made them.

⁵¹ See, e.g., GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 120–21 (1919) (distinguishing executive agreements binding on the nation from those that “constitut[e] only a moral obligation”); CHARLES HENRY BUTLER, *II TREATY-MAKING POWER OF THE UNITED STATES* § 463 (1902) (suggesting that “protocols,” Butler’s term for many executive agreements, “are binding in a moral sense upon the Executive department of the administration making them,” but do not bind the legislature, and “[i]t is doubtful if they are binding even morally upon any administration other than that which entered into them”); Harry Swain Todd, *The President’s Power to Make International Agreements*, 11 *CONST. REV.* 160, 162 (1927) (noting that the “question as to the binding force of an executive agreement is not easy to discuss” and is “not entirely settled in the minds of jurists”); Charles Cheney Hyde, *Agreements of the United States Other Than Treaties*, in 17 *GREEN BAG* 229, 234 (1905) (contending that an agreement made by or at direction of the president “is in most cases a binding one upon the nation”); John W. Foster, *The Treaty-Making Power Under the Constitution*, 11 *YALE L.J.* 69, 79 (1901) (concluding that “there are certain acts of an international character, binding the Government, which the President may perform without the interposition of the Senate”).

⁵² Compare Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 *YALE L.J.* 181, 197–99, 198 nn.15 & 17, 318–23 (1945) (maintaining that with a few exceptions, all executive agreements are presumptively binding on the United States under international law), with Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53

Franklin D. Roosevelt and Harry Truman announced the Atlantic Charter and the Yalta and Potsdam agreements (concerning aims and principles relating to World War II and its aftermath) on their own authority. The United States claimed that all three were nonbinding under international law, but some countries and scholars disagreed about the latter two.⁵³ In 1949, the International Law Commission began work on the law of treaties that would result in 1969 in the Vienna Convention on the Law of Treaties. That Convention's definition of a treaty as "an international agreement . . . governed by international law" aimed to exclude nonbinding international agreements.⁵⁴

The question of which U.S. international agreements were binding and which were nonbinding assumed new importance with the passage of the Case-Zablocki Act in 1972. That Act requires the Secretary of State to transmit to Congress "the text of any international agreement . . . other than a treaty, to which the United States is a party."⁵⁵ In 1976, the Legal Adviser to the State Department established a five-part test for determining which agreements had to be reported under the Act, the "central requirement" of which was whether the parties to the agreement intended it to be binding under international law.⁵⁶ These criteria were reflected in federal regulations beginning in 1981.⁵⁷ At least

YALE L.J. 664, 678–80 (1944) (suggesting that most executive agreements bind only the administration that makes them). This debate was also influenced by the Supreme Court's decisions in *United States v. Pink*, 315 U.S. 203 (1942), and *United States v. Belmont*, 301 U.S. 324 (1937), which made clear that some sole executive agreements could be binding and supreme federal law.

⁵³ See Schachter, *supra* note 11, at 297–98 & nn.10–11 (collecting sources).

⁵⁴ See Fritz Münch, *Comments on the 1968 Draft Convention on the Law of Treaties: Non-Binding Agreements*, 29 ZAÖRV 1–2 (1969); Schachter, *supra* note 11; Dalton, *supra* note 24.

⁵⁵ 1 U.S.C. § 112b(a).

⁵⁶ *Foreign Relations Authorization Act: Hearing on S. 1190 Before the Subcomm. on International Operations of the S. Comm. on Foreign Relations*, 95th Cong. 294 (1977) (memorandum by Department of State Legal Adviser Monroe Leigh to key department personnel). The secondary requirements were significance, specificity, two or more parties, and form. *Id.* at 293–94; see also Schachter, *supra* note 11, at 302 (1977) (quoting from a memorandum by the State Department Legal Adviser to "Key Department Personnel" dated March 12, 1976, on "Case Act Procedures and Department of State Criteria for Deciding What Constitutes an International Agreement").

⁵⁷ The regulations were promulgated pursuant to a 1979 amendment to the Case-Zablocki Act and are codified today at 22 C.F.R. § 181.2(a)(1). The regulations made clear that they applied only if the parties to an agreement "intend their undertaking to be legally binding, and not merely of political or personal effect." The regulations further state that "[d]ocuments intended to have political or moral weight, but not intended to be legally binding, are not international agreements," and they give as an example the Helsinki Accords. 22 C.F.R. § 181.2(a)(1).

since that time, party intent has been the primary touchstone in U.S. practice in determining whether an agreement is binding or nonbinding under international law.⁵⁸ The State Department has issued modest guidance about “formal, stylistic, and linguistic features” that an agreement should include and exclude to ensure that it is nonbinding.⁵⁹ But the executive branch has never explained in a comprehensive way which executive agreements are binding and which are nonbinding.

2. Domestic authority to make nonbinding agreements.

In practice, the executive branch appears to assert the authority to make nonbinding agreements with other countries on practically any topic. While few observers in modern times have questioned this practice,⁶⁰ there is no settled account of the constitutional basis for it. The text of the Constitution does not speak directly to the issue, and neither the Supreme Court nor the Justice Department’s Office of Legal Counsel has addressed it.

The chief constitutional foundation for nonbinding agreements is the president’s power to conduct the nation’s diplomatic relations and to speak on behalf of the United States in the conduct of these relations.⁶¹ This power derives in part from the president’s textual authority (notably with Senate consent) to “make Treaties” and to “appoint Ambassadors . . . and Consuls,” from the president’s power to “receive Ambassadors and other public Ministers,” from the president’s status as chief executive, and, sometimes, from the president’s duty to “take care” to faithfully

⁵⁸ See Dalton, *supra* note 24 (providing examples from the 1970s and 1980s).

⁵⁹ See *Guidance on Non-Binding Documents*, U.S. DEP’T OF STATE, <https://perma.cc/73XF-62DT> [hereinafter State Department Guidance]. To take one of several examples, the guidance states that “we advise that negotiators avoid terms such as ‘shall’, ‘agree’, or ‘undertake’” in nonbinding agreements, and “we have urged that terms such as ‘should’ or ‘intend to’ or ‘expect to’ be utilized in a non-binding document.” *Id.*

⁶⁰ Scholars Duncan Hollis and Joshua Newcomer make normative arguments against the conventional wisdom. See Hollis & Newcomer, *supra* note 11, at 575; see also Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. REV. 133, 143 (1998). But see Michael D. Ramsey, *Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements*, 11 FIU L. REV. 371, 375–76 (2016) (concluding that the “Constitution’s text and practice thus appear to allow Presidents to make nonbinding agreements,” but adding that “the President has a constitutional obligation to assure that a purportedly nonbinding agreement is clearly and unequivocally nonbinding under international law”).

⁶¹ See, e.g., *Zivotofsky v. Kerry*, 576 U.S. 1, 18 (2015) (noting that the president has “a unique role in communicating with foreign governments”); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (noting that the president is “the constitutional representative of the United States in its dealings with foreign nations”).

execute the law.⁶² The power has also been recognized in practice since the Founding and flows from what Professor Louis Henkin described as the president's "control of the foreign relations 'apparatus'"—the diplomatic machinery that includes the State Department and other executive departments, U.S. ambassadors, consuls, ministers, and the president's personal agents.⁶³ These sources of authority—the implications of constitutional text, longstanding historical practice, and control over the diplomatic machinery—provide the foundation for a number of the president's most important foreign relations powers.⁶⁴ The power to make nonbinding international agreements is probably best understood to flow from these sources as well.

A related way to view a nonbinding agreement is as a statement of U.S. foreign policy, in coordination with other governments, that any party can opt out of unilaterally. Viewed this way, the power to make such agreements falls within the president's power to announce U.S. foreign policy positions. Indeed, some nonbinding international agreements might be viewed as a form of diplomatic speech between the United States and foreign governments about how the parties intend to act on matters that they have competence to execute. Such speech occurs countless times every day in numerous contexts and in manifold forms. The president and his or her subordinates could not exercise their diplomatic powers or meet their diplomatic responsibilities without communication of this sort. This communication can be highly informal and unimportant, such as an email agreeing to meet to discuss a small matter. It can be more formal and more important, such as a joint communique stating common positions and aims on certain policy issues. And, at the opposite end of the spectrum from the casual email, it can be a formal, complicated, and important but nonetheless nonbinding agreement signed by heads of state. The entire spectrum is encompassed by the

⁶² U.S. CONST. art. II, § 1, cl. 1, § 2, cl. 2, § 3; Legislation Prohibiting Spending for Delegations to U.N. Agencies Chaired by Countries that Support International Terrorism, 33 Op. O.L.C. 221 (June 1, 2009) (describing various sources for the president's authority to conduct diplomatic relations).

⁶³ LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 41 (2d ed. 1996). A fourth possible basis is the Article II Vesting Clause. See Ramsey, *Evading the Treaty Power*, *supra* note 60.

⁶⁴ These powers include the power to announce U.S. foreign policy positions; to state the U.S. interpretation of rules of customary international law; to assert rights on behalf of the nation and its citizens and to claim reparations; and to recognize foreign governments and their territories. See HENKIN, *supra* note 63, at 41–45.

president's power over diplomatic communications for the United States.⁶⁵

3. Nonbinding agreements and domestic law.

Nonbinding agreements do not have the status of domestic federal law. By definition, nonbinding agreements create no legal obligation. And they do not fit within the instruments identified in the Supremacy Clause—the Constitution, treaties, or “Laws of the United States . . . made in Pursuance” of the Constitution.⁶⁶ The Supreme Court has recognized that some “sole” executive agreements operate as federal law that preempts state law.⁶⁷ But these decisions to date have been limited to legally binding executive agreements.⁶⁸ And the Court has emphasized, in the context of the president's long-established power to settle claims via executive agreement, that the power to make binding domestic law via executive agreements is “narrow and strictly limited.”⁶⁹ The Court has also more generally emphasized that the president in our system is not a lawmaker.⁷⁰ Given that the scope of the president's power to make nonbinding agreements is practically limitless, it would be an unfathomable expansion of presidential power, and a disruption of the domestic legal system, if these instruments also had the status of domestic law. These are some of the reasons why no one has ever seriously suggested that nonbinding agreements have that status.

Nonbinding agreements can, however, influence or become part of domestic law. First, executive branch officials often implement or comply with nonbinding agreements within the executive

⁶⁵ The president has sometimes been described as the “sole organ of the federal government in the field of international relations.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). This description is now generally regarded as an overstatement. *See Zivotofsky*, 576 U.S. at 18 (noting that “[i]t is not for the President alone to determine the whole content of the Nation's foreign policy”).

⁶⁶ U.S. CONST. art. VI, cl. 2.

⁶⁷ *See Pink*, 315 U.S. at 221; *Belmont*, 301 U.S. at 331.

⁶⁸ For example, the Roosevelt–Litvinov agreement that was at issue in both the *Pink* and *Belmont* decisions, *supra* note 67, was a binding sole executive agreement. *See* LIBR. OF CONG., *supra* note 1, at 88.

⁶⁹ *Medellin v. Texas*, 552 U.S. 491, 532 (2008).

⁷⁰ *See, e.g., id.* (holding that the Constitution “allows the President to execute the laws, not make them”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (stating that “the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker”).

branch bureaucracy.⁷¹ For example, the international banking rules reflected in the nonbinding Basel Accords “are the basis for binding domestic regulations of the banking industry.”⁷² Second, Congress can incorporate nonbinding agreements into binding domestic legislation. For example, Congress in the Clean Diamond Trade Act⁷³ implemented the Kimberley Process Certification Scheme, a nonbinding agreement that aims to remove conflict diamonds from the global supply chain.⁷⁴ Third, it is conceivable that some elements of nonbinding agreements might preempt state law under the theory of executive branch foreign policy preemption suggested in *American Insurance Ass’n v. Garamendi*.⁷⁵

4. Limited domestic regulation.

Another remarkable characteristic of nonbinding international agreements is how differently they have been regulated compared to binding agreements. Congress long ago imposed transparency and accountability requirements on the executive branch with respect to binding international agreements. Under the 1972 Case-Zablocki Act, the executive was required to report to Congress “any international agreement . . . other than a treaty” within sixty days after it takes effect.⁷⁶ There was also a statutory

⁷¹ See Hollis & Newcomer, *supra* note 11, at 542 (noting that “[o]fficials regularly conform U.S. foreign policy to existing political commitments”); cf. Richard R. Baxter, *International Law in “Her Infinite Variety”*, 29 INT’L L. & COMP. L.Q. 549, 556 (1980) (“Bureaucrats follow through on what they have said that they would do through force of bureaucratic habit.”).

⁷² Meyer, *supra* note 29, at 64; see also Galbraith & Zaring, *supra* note 11.

⁷³ 19 U.S.C. §§ 3901–13.

⁷⁴ See 19 U.S.C. §§ 3901–13; Interlaken Declaration of 5 November 2022 on The Kimberley Process Certification Scheme for Rough Diamonds, Nov. 5, 2002; see also Mallory Stewart, *Are Treaties Always Necessary? How U.S. Domestic Law Can Give Teeth to Non-Binding International Commitments*, 104 AM. SOC’Y INT’L L. PROC. 189, 191 (2010).

⁷⁵ 539 U.S. 396 (2003). The Court held in *Garamendi* that the executive branch foreign policy reflected in a legally binding sole executive agreement that called for the establishment of a fund to compensate victims of Nazi persecution preempted a California state insurance recovery law. Some commentators read *Garamendi* as recognizing an independent presidential power to override state laws that interfere with executive branch foreign policy. See, e.g., Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 898–901 (2004). If so, a court might conceivably derive such a policy from a nonbinding agreement.

⁷⁶ 1 U.S.C. § 112b(a).

obligation to publish important agreements on the State Department's website within 180 days after they take effect.⁷⁷

As we have documented elsewhere, there were a number of deficiencies in this regime,⁷⁸ but it did not apply at all to nonbinding agreements. The State Department interpreted the transparency requirements to apply only to binding agreements.⁷⁹ And within the executive branch, the usual standards for approving and keeping track of executive agreements historically did not apply to nonbinding agreements.⁸⁰ The State Department's "C-175" process, named after a circular issued in 1955, is designed to "facilitate[] the application of orderly and uniform measures to the negotiation, conclusion, reporting, publication, and registration of U.S. treaties and international agreements, and facilitate[] the maintenance of complete and accurate records on such agreements."⁸¹ Pursuant to this process, before negotiating an agreement, an executive agency must obtain pre-approval from the State Department.⁸² After the agreement is negotiated, the agency must receive additional C-175 approval from the State Department to conclude the agreement. Furthermore, after conclusion of the agreement, the agency is supposed to transmit a copy to the State Department for central collection.⁸³ None of these accountability provisions that applied to binding agreements have applied to nonbinding ones.⁸⁴

⁷⁷ 1 U.S.C. § 112a(d). For additional discussion of the reporting and publication obligations, see Hathaway, Bradley & Goldsmith, *supra* note 1, at 645–54. Classified agreements are reported to congressional committees but not published.

⁷⁸ See generally Hathaway, Bradley & Goldsmith, *supra* note 1.

⁷⁹ See *supra* text accompanying notes 56–57.

⁸⁰ See *Circular 175 Procedure*, U.S. DEP'T OF STATE, <https://perma.cc/EV6L-7NTL> ("The Circular 175 procedure does not apply to documents that are not binding under international law. Thus, statements of intent or documents of a political nature not intended to be legally binding are not covered by the Circular 175 procedure."); see also 22 C.F.R. § 181.4. If there is a question about whether an agreement is binding, agencies are supposed to submit the agreement to the State Department no later than twenty days after signing it for a determination. See 22 C.F.R. § 181.3(c). But it is unclear how this obligation is enforced.

⁸¹ U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL § 721 (2006).

⁸² Congress has similarly directed in the Case-Zablocki Act that "[n]otwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State." 1 U.S.C. § 112b(c).

⁸³ See 22 C.F.R. § 181.3(b).

⁸⁴ Congress did in isolated instances regulate U.S. participation in nonbinding arrangements, at least indirectly. For example, for U.S. participation in the Codex Alimentarius—which sets nonbinding international food safety standards—Congress has required the Food and Drug Administration to give notice and an opportunity to comment

In the 2023 NDAA, Congress enacted revisions to the Case-Zablocki Act that will significantly enhance the accountability rules for binding agreements and for the first time impose transparency and related mandates on some nonbinding agreements.⁸⁵ The main reforms for binding agreements were as follows:⁸⁶ The executive branch must report binding agreements more frequently and must provide a “detailed description of the legal authority” that provides support for the agreement.⁸⁷ The executive branch must also publish a much broader array of binding agreements than before.⁸⁸ And finally, the new law establishes an internal coordination regime for binding agreements that includes a duty for agencies to provide the State Department with the text of the binding agreement, along with the legal authority for concluding it, within fifteen days after signing or concluding it.⁸⁹

The new legislation also for the first time imposes transparency requirements on the executive branch related to nonbinding agreements. The reporting, publication, and other obligations described above, including the exclusions, apply to what the legislation refers to as “qualifying non-binding instruments.”⁹⁰ The law

on U.S. negotiating objectives. See Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1693 (2017).

⁸⁵ 1 U.S.C. § 112b (revisions effective Sept. 19, 2023); see Curtis Bradley, Jack Goldsmith & Oona Hathaway, *Congress Mandates Sweeping Transparency Reforms for International Agreements*, LAWFARE (Dec. 23, 2022), <https://perma.cc/E8ZC-2SLM>.

⁸⁶ The law excluded from the new reporting and publication requirements classified information, agreements related to military matters, agreements related to assistance pursuant to the Foreign Assistance Act of 1961 (22 U.S.C. §§ 2151–52) or the Food for Peace Act (7 U.S.C. §§ 1691–1738r), agreements related to technical details implementing nonbinding agreements, and agreements separately published by a repository or other similar administrative body. 1 U.S.C. § 112b(a)(3).

⁸⁷ 1 U.S.C. § 112b(a)(1)(A)(iii). The State Department must now report every month. 1 U.S.C. § 112b(a)(1)(A)(i). And with respect to legal authority, citations to statutes, treaties, and the Constitution must include the specific provisions that are relevant, and citations to Article II of the Constitution must include an explanation for why it supports the agreement. 1 U.S.C. § 112b(a)(1)(A)(iii). This legal authority information, moreover, must now be disclosed to the public. 1 U.S.C. § 112b(b)(2).

⁸⁸ 1 U.S.C. § 112b(b)(1). Instead of limiting publication to those agreements that the State Department deems sufficiently within the public interest, almost all nonclassified executive agreements must be published on the State Department’s website within 120 days after they enter into force. 1 U.S.C. § 112b(b).

⁸⁹ 1 U.S.C. § 112b(d). Moreover, each department or agency that enters into any executive agreement must designate a “Chief International Agreements Officer” to ensure compliance with these obligations. 1 U.S.C. § 112b(e)(1). And at least every three years, the Comptroller General is directed to audit the State Department’s compliance with the reporting and publication obligations. 1 U.S.C. § 112b(h).

⁹⁰ 1 U.S.C. § 112b(a)(1)(A).

defines that category to encompass any nonbinding agreement that “could reasonably be expected to have a significant impact on the foreign policy of the United States”⁹¹ or that is the subject of a written request from the Chair or Ranking Member of the House Foreign Affairs Committee or Senate Foreign Relations Committee.⁹²

C. The Modern Forms of Nonbinding International Agreements

Nonbinding international agreements arise in a wide variety of institutional settings and come in a wide variety of forms. A major challenge to analyzing them is defining their scope. One cannot hope to be comprehensive, since nonbinding agreements can include all manner of informal diplomatic communication, including emails, phone calls, and everyday cables that foster relatively trivial forms of international cooperation and coordination, including about lunch dates and future communications.

For purposes of the analysis in this Article, we focus on the two most significant types of nonbinding agreements between U.S. government representatives and their foreign counterparts: (1) joint statements and communiques; and (2) formal nonbinding agreements. While these categories capture two distinctive types, there is significant variation within them, especially the second type, and the lines between them are not always sharp. Moreover, they exclude less significant types of nonbinding agreements, including those made orally or through exchanges of letters or other communications where there is no joint text. They also exclude nonbinding standards issued by international organizations in which the United States participates, or unilateral commitments made by the United States to meet such standards.⁹³ In short,

⁹¹ 1 U.S.C. § 112b(k)(5)(A)(ii)(I). The law exempts from the definition any agreement “that is signed or otherwise becomes operative or is implemented pursuant to the authorities relied upon by the Department of Defense, the Armed Forces of the United States, or any element of the intelligence community.” 1 U.S.C. § 112b(k)(5)(B).

⁹² 1 U.S.C. § 112b(c). For our assessment of this new law as it applies to nonbinding agreements, see *infra* Section IV.A.

⁹³ For example, the EU-U.S. Privacy Shield, which governs global digital data flows, is a nonbinding agreement but is constituted in an unusual form. The U.S. Department of Commerce unilaterally issued a policy after negotiations with the European Union and in contemplation of an agreement. See *generally* EU-U.S. PRIVACY SHIELD FRAMEWORK PRINCIPLES (2016). The European Commission issued a decision that included the Commerce principles and deemed them “adequate” under EU privacy law. See *generally* European Comm’n, Commission Implementing Decision 2016/1250, 2016 O.J. (L 207). Because there is no joint text, it is excluded from our database.

these two categories do not include all possible nonbinding agreements but aim to provide a framework for understanding two central types of nonbinding agreements concluded by the United States.

1. Joint statements and communiques.

We call the first category of nonbinding agreements “joint statements and communiques.”⁹⁴ This category is defined to include a joint text issued by representatives of at least two sovereign states after a meeting or conference that memorializes what the national representatives agreed to, their intended subsequent courses of action on matters of mutual concern, or their common positions growing out of the meeting.⁹⁵ Such a text may also be issued by an international organization that represents a group of sovereign states.⁹⁶

The joint statements and communiques included within this category do not purport to create legal obligations, but they may (indeed, often do) contain a pledge or intention to carry out future action. Nor do they typically have the trappings of binding international agreements, such as content organized by articles, entry into force and termination provisions, or dispute resolution provisions.⁹⁷ They often read more like press statements than international agreements. Joint statements and communiques are almost always specifically intended for public consumption and thus are publicly available.

A notable example of a joint statement or communique is the Atlantic Charter, the 1941 “joint declaration” about postwar aims

⁹⁴ For more on what the database of “joint statements and communiques” includes and how it was compiled, see *infra* note 150.

⁹⁵ As we define the category, the joint text may be issued jointly or separately, simultaneously or nonsimultaneously. There are also instances where states issue nonidentical, but coordinated, press statements. In 2015, for example, President Obama and Chinese President Xi Jinping concluded a nonbinding agreement on cybersecurity cooperation, announced by the White House in a “Fact Sheet.” *Fact Sheet: President Xi Jinping’s State Visit to the United States*, THE WHITE HOUSE: OFF. PRESS SEC’Y (Sept. 25, 2015), <https://perma.cc/WSM3-44FC>. China announced the same agreement in a readout of President Xi’s visit. We do not include such statements in this category, but the underlying Obama-Xi agreement, still undisclosed, is likely best categorized as a formal nonbinding agreement.

⁹⁶ See, e.g., *Summary of the NATO Artificial Intelligence Strategy*, N. ATL. TREATY ORG. (Oct. 22, 2021), <https://perma.cc/798V-LCJD> (agreeing on principles relating to the development and use of artificial intelligence in defense and security).

⁹⁷ Some joint statements, however, do have the trappings of more formal agreements. See, e.g., *U.S.-EU Joint Declarations and Annexes*, THE WHITE HOUSE (Nov. 3, 2009), <https://perma.cc/QK7P-9PP4> (containing three detailed annexes).

issued by President Franklin D. Roosevelt and Prime Minister Winston Churchill following a series of meetings.⁹⁸ Another famous example is the 1972 Shanghai Communique, in which the United States and China pledged to conduct relations on the principles of respect for sovereignty, nonaggression, noninterference in internal affairs, equality and mutual benefit, peaceful coexistence, and peaceful settlement of disputes.⁹⁹ This paved the way for normalization of relations between the two countries during President Jimmy Carter's administration, marked by the issuance of another joint communique.¹⁰⁰ More recently, the United States, Israel, and the United Arab Emirates (UAE) used a joint statement to announce the normalization of relations between Israel and the UAE in 2020.¹⁰¹ And in 2021, the United States and China issued a "Joint Statement Addressing the Climate Crisis," which set out a plan for the two countries to work together to address climate change.¹⁰²

Most joint statements and communiqués are not particularly momentous. It is standard practice for the White House, the State Department, and other agencies to issue a joint statement announcing points of agreement and cooperation following a meeting between the president (or a high-level State Department

⁹⁸ Atlantic Charter, U.S.–U.K., Aug. 14, 1941, 55 Stat. 1603. In 2021, the United States and the United Kingdom agreed to a "New Atlantic Charter," which also took the form of a joint statement. See *The New Atlantic Charter*, THE WHITE HOUSE (June 10, 2021), <https://perma.cc/CBH8-UEFY>.

⁹⁹ See Joint Communique, P.R.C.–U.S., Feb. 28, 1972, 66 DEP'T ST. BULL. 435, reprinted in 10 I.L.M. 443. The Communique also contained numerous unilateral pledges in addition to cooperative ones. For example, and famously, the United States also stated that it was not challenging the existence of one China and that it "reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves." *Id.*

¹⁰⁰ See *U.S.–China Joint Communiqué Establishing Diplomatic Relations*, 77 CURRENT HIST. 81, 81–86 (1979). Three years after that, during President Ronald Reagan's administration, the two countries issued another Shanghai Communique, in which the United States pledged to gradually reduce its arms sales to Taiwan. See *U.S.–PRC Joint Communiqué (1982)*, AM. INST. OF TAIWAN (Aug. 17, 1982), <https://perma.cc/8F7J-CQ7Y>.

¹⁰¹ See *Joint Statement of the United States, the State of Israel, and the United Arab Emirates*, THE WHITE HOUSE (Aug. 13, 2020), <https://perma.cc/D3LB-KCK5>.

¹⁰² U.S.–China Joint Statement Addressing the Climate Crisis (April 17, 2021), <https://www.state.gov/u-s-china-joint-statement-addressing-the-climate-crisis/>. The Joint Statement was followed shortly thereafter by the U.S.–China Joint Glasgow Declaration on Enhancing Climate Action in the 2020s (Nov. 10, 2021), <https://www.state.gov/u-s-china-joint-glasgow-declaration-on-enhancing-climate-action-in-the-2020s/>. The Conference of the Parties to the Paris Agreement on Climate Change (nearly 200 countries) also agreed to a nonbinding Glasgow Climate Pact. See https://perma.cc/5666-KUX6https://unfccc.int/sites/default/files/resource/cma2021_L16_adv.pdf.

official) and a high-level foreign official.¹⁰³ The United States is also a regular party to nonbinding joint statements or communiques following multilateral diplomatic conferences, such as the Group of Seven (G7), the Group of Twenty (G20), and the North Atlantic Council.¹⁰⁴

2. Formal nonbinding agreements.

The second category consists of what we call “formal nonbinding agreements.” In contrast to joint statements or communiques, these agreements typically have many of the trappings of binding international agreements, such as content organized by articles, entry-into-force and termination provisions, and sometimes even dispute resolution provisions. But the parties to such agreements nonetheless do not intend the agreements (or significant parts of the agreements) to be binding under international law. Formal nonbinding agreements can be either bilateral or multilateral. And they cover a wide variety of types of commitment.

Many of these agreements concern regulatory cooperation between administrative agencies of the United States and foreign administrative agencies. Such agreements typically include commitments to exchange information, cooperate on enforcement measures, consult with the other party prior to taking certain actions, and align regulatory standards.¹⁰⁵ Nonbinding agreements of this sort have grown in response to the increasing globalization of goods, services, and persons. One sign of the increased importance of these agreements is a 2012 executive order entitled “Promoting International Regulatory Cooperation,” which

¹⁰³ See, e.g., *U.S.-India Joint Leaders' Statement: A Partnership for Global Good*, WHITE HOUSE BRIEFING ROOM (Sept. 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/24/u-s-india-joint-leaders-statement-a-partnership-for-global-good/>.

¹⁰⁴ See, e.g., *G7 Foreign and Development Ministers' Meeting: Communiqué*, EU EXTERNAL ACTION (May 5, 2021), <https://perma.cc/8NQX-ZHK4>; White House: Off. Press Sec'y, *G-8 Leaders Communiqué*, THE WHITE HOUSE (June 18, 2013), <https://perma.cc/N43P-2Q2E>; *Communiqué: Second G20 Finance Ministers and Central Bank Governors Meeting*, G20 ITALIA (Apr. 7, 2021), <https://perma.cc/2DHP-Q7KC>; *London Declaration*, NATO (Dec. 4, 2019), <https://perma.cc/A3S9-KN2M>.

¹⁰⁵ Another type of nonbinding instrument increasingly used by agencies is nonbinding agency guidance. See Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REG. 165, 184 (2019) (describing the use of nonbinding guidance). Some of the transparency and rule of law issues presented by nonbinding agency guidance may overlap with the issues presented by nonbinding international agreements, although the latter are distinct in that they involve commitments to other nations rather than merely domestic directives.

through various means encouraged agencies to engage in international regulatory cooperation “consistent with domestic law and prerogatives.”¹⁰⁶

While most formal nonbinding agreements foster technical regulatory cooperation in various ways, many such agreements are more ambitious.¹⁰⁷ Recent examples include a multilateral agreement known as the Artemis Accords that concerns the conditions for the safe and peaceful exploration of space,¹⁰⁸ the Organization of Economic Cooperation and Development (OECD)/G20 agreement on global tax reform,¹⁰⁹ and the nonbinding agreement with the Taliban calling for the United States to withdraw all forces by the end of May 1, 2021 (later extended to August 31).¹¹⁰ This latter agreement underscores the practical importance of formal nonbinding agreements even though they are not enforceable under international law. President Joe Biden explained that the agreement protected U.S. persons during the withdrawal and emphasized that if the United States missed the August 31 deadline, the Taliban likely would have carried out attacks on U.S. troops.¹¹¹

Two important formal nonbinding agreements concluded during the Obama Administration—the Iran nuclear deal and the emissions reduction pledge in the Paris Agreement on climate change—warrant special mention due to the ways the administration relied on the distinction between binding and

¹⁰⁶ Exec. Ord. No. 13,609, 77 Fed. Reg. 26,413 (May 1, 2012).

¹⁰⁷ Ambitious and consequential formal nonbinding agreements are hardly new. For example, the 1975 Helsinki Accords, which tempered Cold War animosities between the West and the East and became a focal point for dissident groups in the Soviet Union and its satellite nations that many believe were an important cause of the fall of the Soviet Union, was nonbinding. See Daniel C. Thomas, *The Helsinki Accords and Political Change in Eastern Europe*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 205 (Thomas Risse et al. eds., 1999). Relatedly, the Organization for Security and Co-operation (OSCE) in Europe, “the world’s largest regional security organization,” grew out of the Helsinki Accords and is constituted by nonbinding agreements. *Who We Are*, ORG. FOR SEC. AND COOP. IN EUR., <https://perma.cc/TL3Q-SLH8>.

¹⁰⁸ See generally The Artemis Accords, Oct. 13, 2020.

¹⁰⁹ See generally ORG. FOR ECON. COOP. & DEV., STATEMENT ON A TWO-PILLAR SOLUTION TO ADDRESS THE TAX CHALLENGES ARISING FROM THE DIGITALISATION OF THE ECONOMY (2021).

¹¹⁰ See generally Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America, Taliban–U.S., Feb. 29, 2020.

¹¹¹ *Remarks by President Biden on the End of the War in Afghanistan*, THE WHITE HOUSE (Aug. 31, 2021), <https://perma.cc/PS6X-HQPL>.

nonbinding obligations.¹¹² Many commentators argued that both agreements required congressional approval because they were so consequential and because they could not be fully justified by prior congressional authorization. Congressional consent was a high hurdle to the deals, however, because there was significant Republican opposition.¹¹³ The agreements posed additional challenges because both made pledges that required domestic implementation. The United States in the Paris Agreement agreed to undertake economy-wide emission reduction targets, and in the Iran deal it agreed to eliminate certain sanctions against Iran.

The Obama Administration took two innovative steps in concluding these agreements. First, it insisted on concluding the Iran deal and the emissions pledge in the Paris Agreement as nonbinding agreements.¹¹⁴ This allowed the administration to conclude the agreements without seeking congressional approval. Second, it changed domestic law to meet the commitments in these agreements by invoking preexisting authority delegated from Congress. For the Iran deal, the administration exercised the power that Congress had given it to waive the sanctions in accordance with the national interest.¹¹⁵ And for the Paris Agreement, it

¹¹² See Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; Joint Comprehensive Plan of Action, July 14, 2015 (commonly known as the “Iran nuclear deal”).

¹¹³ Majorities in both houses of Congress voted against approval of the Iran deal but were unable to stop the agreement from taking effect under the terms of the Iran Nuclear Agreement Review Act. See Jennifer Steinhauer, *Democrats Hand Victory to Obama on Pact with Iran*, N.Y. TIMES (Sept. 10, 2015), <https://www.nytimes.com/2015/09/11/us/politics/iran-nuclear-deal-senate.html>. For evidence of congressional opposition to the Paris Agreement, see David M. Herszenhorn, *Votes in Congress Move to Undercut Climate Pledge*, N.Y. TIMES (Dec. 1, 2015), <https://www.nytimes.com/2015/12/02/us/politics/as-obama-pushes-climate-deal-republicans-move-to-block-emissions-rules.html>.

¹¹⁴ The Paris Agreement made the emission-reduction obligation in Article 4.4 non-binding by stating that this commitment “should” rather than “shall” be carried out. See U.N. Framework Convention on Climate Change Conference of the Parties, 21st Sess., U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), art. 4.4; see also Letter from Julia Frifield, Assistant Sec’y for Legis. Affs. to Senator Bob Corker, Chairman, Senate Comm. On Foreign Rels. (Mar. 16, 2016) (on file with authors) (noting that the U.S. emissions reduction contribution “will not, by the terms of the Agreement, be legally binding,” since “[n]either Article 4, which addresses emissions mitigation efforts, nor any other provision of the Agreement obligates a Party to achieve its contribution”). The Iran deal was an unsigned document that followed State Department guidance for nonbinding agreements, see *supra* note 59, and was confirmed by the State Department to be a “political commitment” only. See Letter from Julia Frifield, Assistant Sec’y for Legis. Affs., to Representative Mike Pompeo (Nov. 19, 2015) (on file with authors).

¹¹⁵ See Exec. Ord. No. 13,716, 81 C.F.R. 3693 (2016). In addition, the agreement was the basis for, and incorporated by reference into, a U.N. Security Council resolution that terminated the international sanctions against Iran. See S.C. Res. 2231 (July 20, 2015).

made new regulations pursuant to authority granted earlier in several domestic statutes.¹¹⁶

The Iran deal and the emissions pledge in the Paris Agreement were in the public realm. But many formal nonbinding agreements are not, sometimes because an agency simply fails to have a policy about publishing such agreements, and sometimes because the agency affirmatively seeks to keep the agreements nonpublic.¹¹⁷ The ones that are in the public realm are not centrally organized, making comparisons and generalizations difficult.

D. The Choice of Nonbinding Versus Binding Agreements

There is an enormous literature on why nations sometimes prefer nonbinding over binding agreements.¹¹⁸ Some explanations are general, and some are highly context dependent, based on, for example, the type of agreement at issue or a nation's particular allocation of agreement-making power under domestic law. This Section summarizes some of the primary insights of this literature as applied to the U.S. situation, and in particular to the motivations of the U.S. executive branch that makes international agreements for the United States. And, where relevant, it draws on interviews we conducted with U.S. agency officials. Precisely because the reasons for making an agreement binding or nonbinding are context-dependent, it is difficult to generalize from them, and sometimes reasons that will support one approach in one setting will lead to a different approach in another. The key point is that negotiators often perceive that there are advantages to making an agreement nonbinding rather than binding.

The main attraction of nonbinding agreements, as we have already explained, is their flexibility. The president and his or her subordinates can make a nonbinding agreement on practically any topic, without any input (much less authorization or approval) from Congress. Until the Case-Zablocki reforms in the

¹¹⁶ For an overview of the domestic regulations that supported the nonbinding commitment in the Paris Agreement, see Cass R. Sunstein, *Changing Climate Change, 2009–2016*, 42 HARV. ENV'T'L L. REV. 231, 235 (2018).

¹¹⁷ We emphasize that, as noted above, nonbinding agreements can assume countless forms, some of which are excluded from analysis. In particular, governments and their agencies engage daily in informal exchanges that may include nonbinding agreements of various sorts that are excluded from our analysis altogether because they lack a joint text.

¹¹⁸ See generally Guzman & Meyer, *supra* note 41; Hollis & Newcomer, *supra* note 11; Koh, *supra* note 7; Raustiala, *supra* note 11; Schachter, *supra* note 11; AUST, *supra* note 11; Lipson, *supra* note 11; Baxter, *supra* note 71.

2023 NDAA enter into effect in late 2023, they can also continue to make such a nonbinding agreement without any need to report it to Congress and without any need to make it public. The reforms will subject some, but far from all, nonbinding agreements to reporting and publication requirements.¹¹⁹ These elements make nonbinding agreements relatively easy to negotiate and enter into, compared to their binding counterparts.¹²⁰ Such agreements are also generally easier to exit because they implicate no international or domestic legal obligation to comply and because the reputational and other costs of exit are often perceived to be smaller compared to binding agreements.

Flexibility is aided by a less cumbersome legal and bureaucratic process. To conclude a binding executive agreement, an agency needs to request and receive approval from the State Department to initiate negotiations.¹²¹ It then must submit the concluded agreement to the State Department.¹²² At each stage, lawyers at the State Department may offer input—and the process of review may take time. The final agreement must then be reported to Congress. While it is rare for Congress to raise concerns, it could do so. None of these regulatory requirements apply to nonbinding agreements, which gives agencies considerably more flexibility. Even those agencies that voluntarily share nonbinding agreements with the State Department find that the consultation process is simpler. The Associate Director of the Office of International Affairs of the Federal Trade Commission (FTC) explained that the review process itself “is pretty simple. We send an email to [the Office of Treaty Affairs], and they sen[d] an email back saying it’s ok[ay], or maybe saying change ‘shall’ to ‘intend to,’ and we go ahead.”¹²³

Sometimes nonbinding agreements are used in conjunction with binding agreements to provide a mechanism for flexibility in *future* cooperation. For example, a Department of Defense official

¹¹⁹ See *infra* Section IV.A.1.

¹²⁰ To be more specific, nonbinding agreements are easier to enter into than treaties and ex post congressional-executive agreements, which require senatorial or congressional approval after the agreements are negotiated; and they can be made on more topics (and are in that sense easier to make) than ex ante congressional-executive agreements and sole executive agreements, which do not require ex post legislative approval but which are limited to various degrees by subject matter.

¹²¹ See *supra* note 82 and accompanying text.

¹²² See *supra* note 83 and accompanying text.

¹²³ Interview by Oona Hathaway with Russell Damtoft, Assoc. Dir., Off. of Int’l Affs., U.S. Fed. Trade Comm’n (Jan. 21, 2021).

described a practice of concluding a binding “Chapeau Agreement” that satisfies legal requirements for matters such as logistical support, liability, and property rights. Then nonbinding follow-on agreements—styled as, for example, “memoranda of understanding,” “annexes,” “amendments,” or “appendices”—can more quickly and flexibly specify particular programs or areas of cooperation without need for an extensive legal or political process.¹²⁴

These elements of flexibility can come at the cost of less credibility in the commitment to the agreement, since as a general matter nonbinding agreements “communicate less strong or less intense expectations of future behavior than do treaties.”¹²⁵ Nonbinding agreements cannot be enforced in court, whether domestic or international.¹²⁶ Nonbinding agreements are also not subject to international law limits on withdrawal and termination, and they do not implicate international law remedies for breach.¹²⁷

¹²⁴ Interview by Jack Goldsmith with U.S. Government Lawyer (Jan. 29, 2021). One such agreement is the Agreement Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, June 1, 2007, T.I.A.S. No. 19-607. *See also* McNeill, *supra* note 38, at 825. This nested structure for nonbinding agreements is common, though some agencies use nonbinding agreements for the umbrella agreement as well. At the Federal Aviation Agency (FAA), for example, the agency frequently concludes an umbrella nonbinding agreement, usually called a “Memorandum of Cooperation” (MOC). The Deputy Director of International Affairs at the FAA explained:

We do annexes underneath those MOCs. So if we wanted to do collaboration on aircraft de-icing with Canada, for example, we’ll have an annex establishing an R and D program on de-icing, and then we’ll have an appendix under that annex that says we’ll commit to spend \$200,000 and you will commit to spend \$200,000 and then we are going to share the information.

Interview by Oona Hathaway with David S. Burkholder, Deputy Director, Int’l Affs., U.S. Fed. Aviation Admin. (July 20, 2021) [hereinafter Burkholder Interview].

¹²⁵ Hollis & Newcomer, *supra* note 11, at 526; *see also* Raustiala, *supra* note 11.

¹²⁶ This is the reason that some agencies require legally binding agreements for certain kinds of agreements. At the FAA, for example, if an agreement requires an exchange of money or personnel, agency legal guidance requires that it be concluded as a binding agreement. The Deputy Director of International Affairs at the FAA explained, “If we want to go to Rwanda and do a one-week workshop on civil aviation safety, that would come under one of these [binding] agreements. It provides that we’ll do this seminar, this is what it will cost, and you can invite everyone from the region.” Burkholder Interview, *supra* note 124 (alteration in original). Such an agreement is done as a binding agreement both because the FAA want to be able to enforce the obligation of the other state to reimburse its expenses and because it requires binding liability waivers to protect FAA personnel who conduct the training. *Id.*

¹²⁷ On withdrawal and termination, *see*, for example, Vienna Convention on the Law of Treaties, *supra* note 25, art. 54 (describing international law rules on “Termination of or Withdrawal From a Treaty” under its terms or by consent); *id.* at art. 56 (describing international law rules on “Denunciation of or Withdrawal From a Treaty Containing no

To be sure, because international law often lacks formalized enforcement, the distinction between the obligations associated with binding agreements and those associated with nonbinding ones is often far from clear. Compliance with both types of agreements frequently depends on some combination of self-interest, reciprocity, reputation, and informal sanctions. Even when this is true, binding agreements often create what are regarded as stickier obligations. There are many reasons why this may be so. The process of open legislative debate and consent required for binding agreements—at least for treaties and ex post congressional-executive agreements—may convey more information to agreement partners about the breadth and intensity of U.S. domestic support for an agreement than the executive official’s word alone.¹²⁸ In addition, the perceived reputational harm done by violating a binding agreement may be greater than that for violating a nonbinding one.¹²⁹ That may be why officials generally prefer binding agreements when seeking to increase the likelihood that the other side will live up to its side of the bargain. An official at the Office of International Programs at the Nuclear Regulatory Commission (NRC) explained that her office generally prefers to conclude information-sharing arrangements as binding agreements, because that “provides greater emphasis on the commitment.”¹³⁰ A State Department lawyer similarly explained that the United States has preferred binding agreements when “they wanted the country to pay attention to the agreement.”¹³¹

Provision Regarding Termination, Denunciation or Withdrawal”); *id.* at art. 60 (describing international law rules on “Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach”). On remedies, see, for example, ILC, *Responsibility of States for Internationally Wrongful Acts* (2001), ch. II (describing permissible countermeasures under international law); MARIA XIOURI, *THE BREACH OF A TREATY: STATE RESPONSES IN INTERNATIONAL LAW* (2021). On the enforcement of treaties in U.S. courts, see Oona A. Hathaway, Sabria McElroy & Sara Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 78 (2012). On international law enforcement through “outcasting,” see Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252 (2011).

¹²⁸ See LISA L. MARTIN, *DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION* 53–80 (2000).

¹²⁹ See ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 78 (2010) (arguing that reputation, among other features, explains international law compliance).

¹³⁰ Interview by Oona Hathaway with Susan Wittick, Off. of Int’l Programs, Nuclear Reg. Comm’n (May 25, 2021) [hereinafter Wittick Interview].

¹³¹ Interview by Oona Hathaway with Former U.S. Government Lawyer (June 11, 2019).

Some agreements present less of a tradeoff between flexibility and commitment because credibility is less of a concern. This might be the case, for example, when the parties' interests converge and they are simply setting the terms of cooperation and coordination.¹³² In such cases, nonbinding agreements may be regarded as providing sufficient assurance. Similarly, for international issues that are in a state of flux, or for matters on which nations are tentative, the nonbinding agreement route might suffice for nations to evaluate their interests and gain experience with the issue. An agency may also prefer to use a nonbinding agreement if it is uncertain of its own capacity to meet its commitments. The Deputy Director of the Office of International and Tribal Affairs for the EPA noted that most of the agreements the EPA makes with foreign partners are nonbinding. She explained, "That is usually because [we] don't have dedicated funding or a legislative mandate We prefer to do it as a nonbinding because if we can't proceed because our funding is cut, for example, we aren't bound to carry it out."¹³³

Relatedly, a nonbinding agreement might be chosen as the first step in an iterative cooperative learning or negotiation process that leads to a binding agreement with more serious commitments. The Antitrust Division of the Department of Justice (DOJ), for example, sought binding agreements early on, when the Department was interested in securing the assistance of foreign law enforcement in enforcing agreements that reflected a model of antitrust law that the U.S. was actively seeking to export.¹³⁴ Later, once the U.S. approach to antitrust law had become more widespread, the United States became more cautious about entering binding antitrust agreements with foreign partners, particularly agreements that would obligate the United States to

¹³² See Andrei Marmor, *Soft Law, Authoritative Advice and Non-binding Agreements*, 39 OXFORD J. LEG. STUD. 507, 522 (2019) ("[W]hen the reason for parties to sign an international treaty (or part of it) consists in the need to solve a recurrent coordination problem that arises between them, it makes no practical difference whether the agreement is non-binding or not.").

¹³³ Interview by Oona Hathaway with Inga Barnett-Owens, Deputy Dir. of Off. of Int'l & Tribal Affs., Env'tl. Prot. Agency (Apr. 9, 2021). She further explained: "If, however, we did a joint research project where we need[ed] to know how it was done or make sure that certain procedures are followed, then we might do it as a binding." *Id.*

¹³⁴ Interview by Oona Hathaway with Randy Tritell, Dir. of the Off. of Int'l Affs., U.S. Fed. Trade Comm'n (Jan. 21, 2021). Agency officials consistently reported that if there were legal penalties of any kind specified in an agreement, then the agreement was always done as a binding agreement (though binding agreements need not necessarily include penalties or other enforcement measures).

assist in law enforcement. Such agreements were reserved for countries with which there were longer-standing connections, collaboration, and trust.¹³⁵ Agreements with other countries were concluded as nonbinding memorandums of understanding. As a DOJ Antitrust official put it, “Nonbindings can be thought of as trust-building exercises.”¹³⁶ He added, “We tend to use MOUs with China, India, Russia or other countries newer to the business of antitrust enforcement or where we have a less developed relationship. Usually you develop a relationship, trust with each other, then you might later want to memorialize that relationship with a binding agreement.”¹³⁷

Sometimes the choice of whether to make an agreement binding will be driven by the aims or preferences of the other parties. In a process that led to a 2003 weapons reduction agreement, for example, President George W. Bush initially proposed a nonbinding agreement with Russian President Vladimir Putin, but President Putin insisted on a legally binding document in part to ensure that the United States was firmly committed.¹³⁸ Often, however, foreign counterparts prefer nonbinding agreements. Indeed, for many foreign partners, binding agreements are more difficult to conclude because they cannot be made in their countries at the agency level. As an NRC official explained, “There are a lot of partners that cannot negotiate binding agreements agency-to-agency. A lot of our partners can only sign a nonbinding arrangement at the agency level. That’s true of all the common law countries—for example Canada, Australia, India.”¹³⁹ In such cases, concluding a binding agreement “means elevating it and a lot more process, which can take years.”¹⁴⁰ For an agency in Colombia to conclude a binding agreement, for example, “they have to go to the highest authority in their nation to get approval to sign it. It effectively takes an act of Congress. So with them we do it as a nonbinding.”¹⁴¹ Another interviewee agreed: “A lot of it is

¹³⁵ The United States currently has binding competition agreements with Australia, Brazil, Canada, Germany, Israel, Japan, and Mexico. *See* Email from Michael Shore, U.S. Fed. Trade Comm’n, to Oona Hathaway (Jan. 29, 2021).

¹³⁶ Interview by Oona Hathaway with Caldwell Harrop, Assistant Chief Int’l Section, Antitrust Div., Dep’t of Just. (Apr. 16, 2021) [hereinafter Harrop Interview].

¹³⁷ *Id.*

¹³⁸ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 91 (2001). The Senate also insisted that it be a treaty. *Id.*

¹³⁹ Wittick Interview, *supra* note 130.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

driven by what our partner wants.”¹⁴² According to several agency employees with whom we spoke, this is more true now than ever. As the NRC official explained, “[T]he preference for nonbinding agreements seems to be broadening around Europe.”¹⁴³

U.S. domestic political constraints also can play a significant role in the decision. In the United States, a president may choose a nonbinding agreement because the agreement is important but he cannot secure consent from Congress or the Senate, and the Constitution precludes him from making a binding sole executive agreement. These were the main reasons why the Obama administration insisted that both the Iran deal and the emission reduction provision in the Paris Agreement be made nonbinding; otherwise, the United States likely would not have been able to join either agreement.¹⁴⁴

The general reasons we have sketched so far apply primarily to the category of formal nonbinding agreements. The choice of a nonbinding form for joint statements and communiques is driven primarily by the context. Since they memorialize what was informally agreed to in international meetings—including future commitments to cooperate—and since they typically are issued during or at the end of the meeting, there is no time for formal domestic ratification processes that might be needed to make the agreements binding.¹⁴⁵ There is also typically no need, because the commitments made in joint statements and communiques tend to be general ones that do not raise questions of enforcement or compliance.¹⁴⁶ Basically, the informal form of a joint statement or communique reflects the informal nature of the agreements embedded in them.

II. U.S. NONBINDING AGREEMENTS: AN EMPIRICAL ANALYSIS

The executive branch has a duty to report to Congress all binding executive agreements, and to publish all important

¹⁴² Interview by Oona Hathaway with Stacey Nathanson, Att’y-Advisor, Nat’l Oceanic and Atmospheric Admin. Off. of the Gen. Couns., Fisheries and Protected Res. Section (July 14, 2021).

¹⁴³ Wittick Interview, *supra* note 130.

¹⁴⁴ See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1219–20, 1252 & n.235 (2018).

¹⁴⁵ In the United States, the president alone could ratify if the agreement fell within his Article II power or was authorized in advance by Congress. See *supra* text accompanying notes 7–9.

¹⁴⁶ Two counterexamples here are the Shanghai communiques, see *supra* notes 99–100, and the Obama-Xi cybersecurity agreement, see *supra* note 95.

executive agreements in the Treaties and Other International Acts Series.¹⁴⁷ Prior to the recent changes to the Case-Zablocki Act, no legal regime governed the reporting or publication of nonbinding agreements. Indeed, because the new law has not yet entered into force, there still is no repository of nonbinding agreements—in the public, or even within the government. (And, as we explain further in Part IV, it is as yet unclear how comprehensive the reporting of nonbinding agreements will be under the new law.) The result is a huge gap in our understanding of how this important element of U.S. foreign relations operates.

This Part reveals the fruits of our efforts to fill this gap. We built two databases: one for joint statements and communiques, and another for formal nonbinding agreements. As we explain below, the agreements in the first database are mostly publicly available but have never been collected together in one place, much less analyzed. The task of excavating formal nonbinding agreements was harder, because while some are publicly available (though often hard to find), many are not public. For formal nonbinding agreements, therefore, we supplemented our collection of publicly available nonbinding agreements with ones we received through FOIA requests to twenty-three federal agencies or departments.

These two databases together do not purport to present a comprehensive picture of U.S. nonbinding agreements. In part this is because, as noted above, nonbinding agreements include an untold number of very informal diplomatic communications that one could not possibly hope to collect comprehensively. And in part this is because, as we explain below, we had to limit our collections in various ways to make them manageable and meaningful. Even with these qualifications, these databases together constitute a first-ever, broad repository of U.S. nonbinding agreements. This Part describes the databases and some of the insights they reveal about U.S. practice related to nonbinding agreements.¹⁴⁸ Moreover, by providing insights into the use of nonbinding agreements by the U.S. government over the last three decades, it offers a baseline for evaluating the comprehensiveness of the U.S. government's reporting of nonbinding agreements under the new transparency regime.

¹⁴⁷ For a detailed description of this regime, see Hathaway, Bradley & Goldsmith, *supra* note 2, at 645–56. For an analysis of its flaws, see *id.* at 657–91.

¹⁴⁸ The analyses in this Part are based on data gathered as of May 2023. All data are available at Hathaway, *supra* note 18.

A. Joint Statements and Communiques

Joint statements and communiques are statements issued in connection with high-level international meetings that memorialize what the national representatives agreed to, their intended courses of action on matters of mutual concern, or their common positions growing out of the meeting.¹⁴⁹ Given their ubiquity, we did not attempt to develop a complete database of such agreements. To capture a large swath of the most important such agreements, we focused on joint statements and communiques issued by the White House and the State Department, eventually gathering more than eight hundred such agreements.¹⁵⁰ With a team of research assistants, we coded these agreements to identify a range of characteristics. Unless otherwise noted, the data below are based on this coding.

1. Content of the commitment.

We found that the joint statements and communiques vary widely in terms of length, tone, specificity, and significance of the commitments. Some merely state a shared understanding of a situation, shared values, or general goals,¹⁵¹ whereas others contain concrete and measurable pledges, including pledges about how the parties will implement obligations under prior binding agreements, or a framework to continue to ensure mutual

¹⁴⁹ See *supra* text accompanying notes 94–95.

¹⁵⁰ We searched the Public Papers of the Presidents for news releases from 1993 through the present. See *Public Papers of the President of the United States*, U.S. PUBL'G OFF., <https://perma.cc/C465-4FNM>. We also searched the State Department's news releases on their archived websites from 1997 to 2020, see *U.S. Department of State Archive Websites*, U.S. DEPT OF STATE, <https://perma.cc/NT3Z-RP3Y>, and the State Department's Digest of International Law from 1989 to 2020, see Office of the Legal Adviser, *Digest of United States Practice in International Law*, U.S. DEPT OF STATE, <https://perma.cc/T384-GN8W>. We also obtained some joint statements and communiques through our FOIA requests to the agencies. For clarity, we limited the database of joint statements and communiques to documents with the term “statement” or “communique” in the title. Documents with “declaration” in the title sometimes have similar characteristics to joint statements, but they are significantly more variable—some are similar to press statements and others much more detailed. For this reason, we included declarations in the formal-nonbinding-agreements database. We also placed “statement(s) of intent” in the formal-nonbinding-agreements database rather than the joint statements and communiques database, because the majority had characteristics much closer to formal nonbinding agreements. As we have earlier noted, however, the lines between these categories are not always perfectly sharp, and others might choose to categorize these edge cases differently. For more on how we define joint statements and communiques, see Section I.C.1.

¹⁵¹ See *generally, e.g.*, G8/AFRICA JOINT DECLARATION: SHARED VALUES, SHARED RESPONSIBILITIES, May 26–27, 2011.

compliance (for example, an action plan at the ministerial level or a follow-up meeting to assess progress).¹⁵² In some of the statements, the U.S. executive branch pledges to seek congressional action, such as appropriations.¹⁵³ Strikingly, some of these statements entail bold new commitments to future action.¹⁵⁴

2. Clarity of nonbinding intent.

We found, as Table 1 shows, that joint statements and communiqués often use language that the State Department recommends *against* for nonbinding agreements—terms that it warns could lead to uncertainty about the parties’ intent.¹⁵⁵ For instance, 84% use “will” and 46% use “agreement.” It is possible that the informality of the format frees the parties to make bold

¹⁵² See, e.g., *U.S.-China Joint Statement Addressing the Climate Crisis*, U.S. DEP’T OF STATE (Apr. 17, 2021), <https://perma.cc/F8U2-3QCR>.

¹⁵³ *Russia-United States Joint Statement Concerning Management and Disposition of Excess Weapon-Grade Plutonium and Related Cooperation*, U.S. GOV. PUBL’G OFF. (June 4, 2000), <https://perma.cc/KES3-TJDG> (“This Agreement will enable new cooperation to go forward between the United States and the Russian Federation. We note that the United States Congress has appropriated 200 million USD for this cooperation and the U.S. Administration intends to seek additional appropriations.”).

¹⁵⁴ See, e.g., *Japan-U.S. Joint Leaders’ Statement: Strengthening the Free and Open International Order*, THE WHITE HOUSE (May 23, 2022), <https://perma.cc/6CWZ-SVRZ>:

Prime Minister [Fumio] Kishida expressed his resolve to examine all options necessary for national defense, including capabilities to counter missile threats. Prime Minister Kishida stated his determination to fundamentally reinforce Japan’s defense capabilities and secure substantial increase of its defense budget needed to effect it President Biden reiterated the U.S. commitment to the defense of Japan under the Treaty of Mutual Cooperation and Security, backed by the full range of capabilities, including nuclear.

Joint Statement by the United States and Mexico on Section 232 Duties on Steel and Aluminum, THE WHITE HOUSE, <https://perma.cc/TQ67-LUTB> (agreeing to lift retaliatory tariffs, in coordination with Canada, which simultaneously issued similar Joint Statement with the United States); *U.S.-India Joint Statement*, THE WHITE HOUSE (Sept. 27, 2013), <https://perma.cc/5TU6-8FW5> (“The Leaders called for expanding security cooperation between the United States and India to address 21st century challenges in the areas of counter-terrorism, cyber, space, and global health security.”); *Joint Statement by President Clinton and Prime Minister Ehud Barak*, THE WHITE HOUSE (July 19, 1999), <https://perma.cc/KP65-GAPL> (“[T]he two leaders agreed on the components of the \$1.2 billion military aid package for Israel that the Administration has already requested from Congress.”).

¹⁵⁵ See *Guidance on Non-Binding Documents*, *supra* note 59; see generally, e.g., U.S. GOV. PUBL’G OFF., JOINT STATEMENT BY PRESIDENT GEORGE W. BUSH AND PRIME MINISTER JUNICHIRO KOIZUMI: PARTNERSHIP FOR SECURITY AND PROSPERITY (2001) (announcing a “new bilateral economic initiative” for trade engagement, noting that the governments “will engage in cooperative efforts to address other key issues”).

declarations of intent and use terms that might otherwise signal a binding agreement.¹⁵⁶

TABLE 1: USE OF TERMS IN JOINT STATEMENTS RECOMMENDED AGAINST BY THE DEPARTMENT OF STATE¹⁵⁷

Terms	Total Agreements	Percentage of All Agreements (%)
will	687	84%
agreement	376	46%
parties	239	30%
undertake	139	18%
agree	131	16%
party	112	15%
shall	97	12%
entry into force	50	6%
concluded	47	6%
undertaking	48	6%
enter into force	20	3%
agreeing	13	2%
done in	13	2%
done at	19	2%

3. Subject areas.

The joint statements and communiques in our database are used in a variety of subject areas, but, as Table 2 shows, they are

¹⁵⁶ Occasionally, documents labeled as joint statements are intended to be binding. For example, the executive branch treated a 2012 joint statement with Afghanistan as a binding agreement and reported it under the Case-Zablocki Act. *See generally* U.S. GOV. PUBL'G OFF., JOINT STATEMENT—ENDURING STRATEGIC PARTNERSHIP AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE ISLAMIC REPUBLIC OF AFGHANISTAN (2012), <https://perma.cc/35X3-KBT7>; Off. of the Press Sec'y, *Fact Sheet—The U.S.-Afghanistan Strategic Partnership Agreement*, THE WHITE HOUSE (May 1, 2012), <https://perma.cc/T5GF-92GX>. However, this is exceptional. Generally speaking, joint statements and communiques are considered nonbinding.

¹⁵⁷ All analyses of the words and phrases in nonbinding agreements, here and elsewhere in the Article, are based on agreements for which we have the full text. That includes all but roughly fifty agreements.

particularly concentrated in the areas of defense; finance, trade, and investment; environment, conservation, and energy; science, space, and technology; and humanitarian (generally meaning foreign aid).¹⁵⁸ Overall, the ordering of subject areas for joint statements largely mirrors the ordering for binding executive agreements.¹⁵⁹

TABLE 2: PRIMARY SUBJECT AREAS

Primary Subject Area	Joint Statements (%)	Binding Executive Agreements (%)
Defense	28%	25%
Finance, Trade, and Investment	19%	14%
Environment, Conservation, and Energy	11%	9%
Science, Space, and Technology	13%	9%
Humanitarian	11%	9%
Nonproliferation	7%	4%
Diplomacy and Consular Affairs	6%	2%
Law Enforcement	2%	8%
Educational Exchanges and Cultural Cooperation	2%	3%
Transportation and Aviation	1%	6%
Maritime	<1%	2%
Taxation	<1%	3%
Miscellaneous	0%	4%

¹⁵⁸ These data are based on the primary subject area.

¹⁵⁹ For data on binding arrangements, we rely on the database we compiled for Hathaway, Bradley & Goldsmith, *supra* note 1. Links to the data can be found at *The Failed Transparency Regime for Executive Agreements: Data Visualizations*, HARV. L. REV. (Dec. 2020), <https://perma.cc/Z3AE-FGJQ>.

B. Formal Nonbinding Agreements

The second database consists of formal nonbinding agreements. Unlike joint statements and communiques, formal nonbinding agreements are often not made public. Hence building the database of such agreements was more challenging. We began by examining eighty-two government agencies or offices of agencies that we thought might conclude nonbinding agreements. We found that eleven agencies had substantial online collections of their nonbinding agreements.¹⁶⁰ Not every agency is so transparent, however. For several agencies, we found indications that they conclude nonbinding agreements, but few or none were publicly available. We filed twenty-three FOIA requests with agencies likely to conclude significant numbers of nonbinding agreements. These requests were filed between December 2020 and April 2021.¹⁶¹ We sued three of the least responsive agencies—the U.S.

¹⁶⁰ In this Article, we follow the definition in Title 18 in using the term “agency” to include executive departments such as the Department of Defense or the Department of State. See 18 U.S.C. § 6. Those agencies with significant online collections are Alcohol and Tobacco Tax and Trade Bureau, see *Memorandum of Understanding*, U.S. DEPT OF THE TREASURY, <https://perma.cc/25WT-G92L>; Commodity Futures Trading Commission, see *Memoranda of Understanding*, COMMODITY FUTURES TRADING COMM’N, <https://perma.cc/TMQ3-DH63>; Department of Energy, see *International Energy Commitments (IEC)*, U.S. DEPT OF ENERGY, <https://perma.cc/4JPK-HD8V>; Department of the Interior, see Off. of Int’l Affs., *DOI International Instruments*, U.S. DEPT OF INTERIOR, <https://perma.cc/T5Q4-9362>; Department of Justice, Antitrust Division, see *Antitrust Cooperation Agreements*, U.S. DEPT OF JUST., <https://perma.cc/2RNE-5V79>; Department of Transportation, Federal Aviation Administration, see *International Affairs*, U.S. DEPT OF TRANSP., <https://perma.cc/652Z-D8KG>; Equal Employment Opportunity Commission, see *Memoranda of Understanding*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://perma.cc/A46G-KCJR>; Federal Communications Commission, see *International Agreements*, U.S. FED. COMM’NS COMM’N, <https://perma.cc/9MJ8-S5GL>; Food and Drug Administration, see *International Arrangements*, U.S. FOOD & DRUG ADMIN., <https://perma.cc/3ATF-2KQW>; Federal Trade Commission, see *International Cooperation Agreements*, U.S. FED. TRADE COMM’N, <https://perma.cc/Q6KR-957T>; and the Securities and Exchange Commission, see *Cooperative Arrangements with Foreign Regulators*, U.S. SECS. & EXCH. COMM’N, <https://perma.cc/XJ9R-PQPC>.

¹⁶¹ We made FOIA requests to the Department of the Treasury; Federal Trade Commission; Department of Justice (Antitrust Division, Civil Division, Civil Rights Division, Tax Division, and Criminal Division); Department of Transportation (FAA); Department of Labor; Department of Commerce (National Oceanic and Atmospheric Administration); Department of Agriculture; Environmental Protection Agency; the Export-Import Bank; the Food and Drug Administration; National Aeronautics and Space Administration; Nuclear Regulatory Commission; Department of Commerce; Department of Defense, Department of Homeland Security; Office of Management and Budget (OIRA); State Department (Office of Information Programs and Services & Legal Adviser’s Office); and U.S. Agency for International Development. The requests sought all unclassified nonbinding agreements and any internal agency guidance relating to such agreements from January 1, 1989, to December 31, 2019.

Department of State, the Department of Defense, and the Department of Homeland Security. We settled with the first two of these departments, and they have both produced significant numbers of documents, though some are still outstanding. Although we have not formally settled with the Department of Homeland Security, it has also produced documents. By May 2023, when this Article was finalized, all three agencies had responded with many of the requested documents, along with a number of additional agencies that received referrals. In total, the database includes more than 2,400 formal nonbinding agreements.

With a team of research assistants, we coded the agreements to identify a range of characteristics. Unless otherwise noted, the data below are based on this coding. Although our database is the first and most complete of its kind, it is important to emphasize that it is not comprehensive. We cannot be certain that we have identified all the agencies that conclude nonbinding agreements, and even those agencies that responded to our requests may have incomplete records. Indeed, it was notable that most agencies did not have a central depository for nonbinding agreements. While we requested agreements back to 1989 in order to allow comparisons to the database of binding agreements that we built for earlier work,¹⁶² agency records are less accessible and comprehensive the further back in time we go. Among other things, older agreements are less likely to be digitized, which may affect their availability. At the time this Article was completed, moreover, the Departments of Defense, State, and Homeland Security had not produced all of the agreements they had identified as potentially responsive to our FOIA request. Nevertheless, this database is not only the most comprehensive non-governmental database of nonbinding agreements in the United States, but, based on our research, it is also the most comprehensive such database even when compared with governmental sources. Given the variety of agencies represented—thirty-four agencies in total across fifty separate units (for example, four separate units within the Department of the Interior concluded nonbinding agreements that are in our databases)¹⁶³—it is reasonable to infer that the information derived from this database is generally indicative of the patterns and trends in the U.S. government's use of formal nonbinding agreements, even if the data are far from complete.

¹⁶² See Hathaway, Bradley & Goldsmith, *supra* note 1.

¹⁶³ See *infra* Table 6 for details.

1. Content of the commitment.

We identified ten types of transsubstantive commitments that appear in formal nonbinding agreements.¹⁶⁴ The results appear in Table 3. The most common substantive commitments—(1) regulatory cooperation and coordination and (2) information exchange—are often intertwined. For many agencies, formal nonbinding agreements serve as a vehicle for working with foreign partners to gather information required to carry out their regulatory missions. Many of these agreements, moreover, include confidentiality requirements. These formal nonbinding agreements allow for information to be shared between agencies to help them perform their regulatory tasks, and the agreement provides assurances that shared information will not be divulged. (Most agreements included more than one type of commitment, hence the total sums to well over 100%.)

¹⁶⁴ For each type of commitment, we identified common terms of reference. We then searched the text of all of the agreements and identified the number of unique agreements with at least one of the relevant terms. For information exchange, for example, the terms were: information exchange; information exchanges; provide information; providing access to information; exchange of technical information; providing the information; transmit the information; provide technical information; information sharing; information-sharing; requests for information; sharing information; sharing relevant nonproprietary information; sharing of information; transfers of personal data; share knowledge; knowledge exchange; provision of information; information shall be provided; information is shared in confidence; collect and share information; exchanging information; exchange technical, commercial and financial information; exchanging knowledge; exchange of ideas and information; exchange of publicly available scientific and technical information; exchange of data and information; exchange of information; exchanges of information; exchange of scientific and technical information; exchange information.

TABLE 3: SUBSTANTIVE COMMITMENTS ACROSS FORMAL NONBINDING AGREEMENTS

Substantive Commitment	All Agreements (%)
Regulatory cooperation and coordination	57%
Information exchange	53%
Defense and reconstruction	29%
Future meetings, communications, and consultations	27%
Assistance and development	25%
Confidentiality of information	20%
Inspections	20%
Research and technical cooperation	20%
Securing or encouraging compliance with laws or regulations	12%
Training and education	5%
None of the above	9%

The information in Table 3 offers two insights. First, non-binding agreements are used for a wide variety of purposes. In this respect, they are much like binding executive agreements, which are used by agencies to achieve a range of different foreign policy goals. Second, formal nonbinding agreements often provide for ongoing cooperative activity, most prominently regulatory cooperation and coordination, as well as information exchange. In many such cases, neither side is required to make a large investment that is lost if the other side fails to perform. For example, Canada and the United States concluded an MOU in which they agreed to “establish a consultative and collaborative process to strengthen cooperation in the prevention of counterfeiting and smuggling of alcohol and tobacco products, and in the administration of alcohol and tobacco product regulations within their fields of competence.”¹⁶⁵ In this case, as in many others like it, each state can simply cease cooperating if the other side fails to live up to its commitments. Similarly, research and technical agreements commonly establish a joint research program in which each side

¹⁶⁵ *Memorandum of Understanding Between the Alcohol and Tobacco Tax and Trade Bureau of the United States Department of the Treasury and the Canada Border Services Agency*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <https://perma.cc/L64A-DPQV> (Mar. 23, 2011).

promises to invest in research into a particular topic and then share the information the research program produces. For example, an MOU between the United States and China provides for a joint program of research into energy efficient buildings and communities.¹⁶⁶ If one side fails to live up to its commitment—by failing to invest or failing to share the resulting information—the other side can respond by doing the same or by refusing to cooperate in new programs going forward. By contrast, where performance is staged—for example, one side gives a large sum of money and then the other side performs an agreed task—it may be preferable for the agreement to be binding.¹⁶⁷ However, where such arrangements are limited in duration and iterative—as they commonly are for agreements dealing with defense or reconstruction¹⁶⁸—a nonbinding agreement may be equally effective.

2. Clarity of nonbinding intent.

An initial question is the clarity about the intent to conclude a formal nonbinding agreement. Many formal nonbinding agreements either specifically state that they are nonbinding or have language that makes clear the intent not to create a binding agreement (for example, “This Memorandum of Understanding does not impose any legally binding obligation on the Authorities or supersede domestic law”). Figure 1 shows that formal

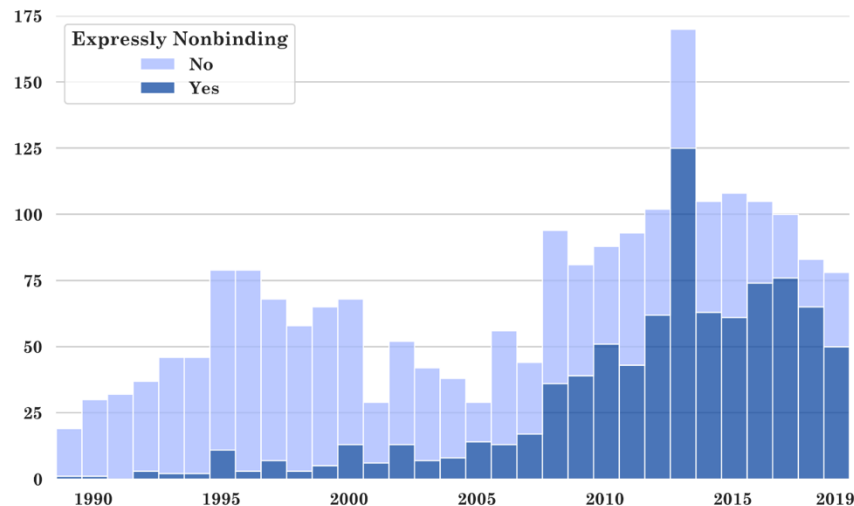
¹⁶⁶ See *Memorandum of Understanding between the Department of Energy of the United States of America and the Ministry of Housing and Urban-Rural Development of the People's Republic of China for Cooperation in Energy Efficient Buildings and Communities*, U.S. DEP'T OF ENERGY, <https://perma.cc/37QG-Y6SK> (July 14, 2009).

¹⁶⁷ Interview by Oona Hathaway with Former U.S. Government Lawyer, *supra* note 131.

¹⁶⁸ For example, in the Agreement Between the Department of Defense of the United States of America and the Ministry of the Russian Federation for Atomic Energy Concerning the Modification of the Operating Seversk (Tomsk Region) and Zheleznogorsk (Krasnoyarsk Region) Plutonium Production Reactors, Russ.–U.S., Sept. 23, 1997 [179-DOD], the United States pledged to provide \$10 million over four years to support the modification of Russian plutonium-production reactors. That agreement was followed a year later by an amendment increasing the amount to \$51 million and by an amendment a year and a half after that increasing the amount to \$80.8 million. Amendment to the Agreement Between the Department of Defense of the United States of America and the Ministry of the Russian Federation for Atomic Energy Concerning the Modification of the Operating Seversk (Tomsk Region) and Zheleznogorsk (Krasnoyarsk Region) Plutonium Production Reactors, Russ.–U.S., June 10, 1998, Doc. No. 04-379 [182-DOD]; Amendment to the Agreement Between the Department of Defense of the United States of America and the Ministry of the Russian Federation for Atomic Energy Concerning the Modification of the Operating Seversk (Tomsk Region) and Zheleznogorsk (Krasnoyarsk Region) Plutonium Production Reactors, Russ.–U.S., Jan. 21, 2000 [180-DOD].

nonbinding agreements are commonly, but not always, expressly nonbinding.

FIGURE 1: IS IT EXPRESSLY NONBINDING?



Nonetheless, as can be seen in Table 4, most of the formal nonbinding agreements also use terms commonly associated with binding agreements, terms that the Department of State’s Guidance specifically cautions against.¹⁶⁹ For instance, 69% use “will” and 64% use “agreement.” Even though interviewees who mentioned the Guidance indicated that they sought to abide by its recommendations,¹⁷⁰ it is clear that the Guidance is frequently ignored. This is likely not a significant concern for agreements that are expressly nonbinding, but it could lead to misunderstandings with foreign partners for those that are not. It also indicates that coordination within the U.S. government is imperfect, at best. Some of the agencies with which we spoke indicated that they consulted with the State Department’s Office of Treaty Affairs, but the failure of so many agreements to comply with the Department’s Guidance suggests either that this practice is not universal or that the State Department is not screening for these terms, despite its own Guidance recommending against their use in nonbinding agreements. The revisions to the Case-Zablocki Act in the

¹⁶⁹ State Department Guidance, *supra* note 59.

¹⁷⁰ A negotiator in the Antitrust Division of DOJ, for example, noted that nonbinding agreements must say “‘intend to’ not ‘shall,’ ‘will,’ [or] ‘agree.’” Harrop Interview, *supra* note 136.

2023 NDAA specify that each department must identify at least one person responsible for compliance with the new transparency requirements.¹⁷¹ That reform could go some distance toward curbing these problems, though how effective it will be is still to be seen.

TABLE 4: USE OF TERMS IN FORMAL NONBINDING AGREEMENTS
RECOMMENDED AGAINST BY THE DEPARTMENT OF STATE

Terms	Total Agree- ments	All Agree- ments (%)	Expressly Nonbind- ing Agree- ments (%)	Not Ex- pressly Non- binding Agree- ments (%)
will	1641	69%	66%	71%
agreement	1520	64%	55%	70%
shall	1078	45%	31%	56%
parties	1062	44%	36%	50%
party	1011	42%	38%	46%
agree	764	32%	20%	41%
enter into force	451	19%	2%	31%
done at	370	16%	3%	24%
entry into force	331	14%	6%	19%
undertake	288	12%	9%	14%
treaty	261	11%	4%	16%
undertak- ing	157	7%	10%	4%
done in	140	7%	3%	8%
concluded	176	7%	4%	9%

¹⁷¹ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 § 5947 (*amending* 1 U.S.C. § 112b (1972)). (“Each department or agency of the United States Government that enters into any international agreement or qualifying non-binding instrument on behalf of itself or the United States shall designate a Chief International Agreements Officer” who will be responsible “for efficient and appropriate compliance with this section.”).

agreeing	19	1%	1%	1%
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Many formal nonbinding agreements also have other features normally associated with binding agreements. As seen in Table 5, a significant percentage of formal nonbinding agreements reference implementation, provide for some manner of dispute resolution, designate a process for amending or revising the agreement, or include a termination or withdrawal provision. While none of these features makes an agreement binding, each has the potential to create some confusion about the nature of the agreement. Interestingly, with just one exception (dispute resolution), these features are more common in agreements that are expressly nonbinding. Perhaps agencies consider express disclaimers to be sufficient to meet the State Department's concerns.

TABLE 5: FEATURES FOUND IN FORMAL NONBINDING AGREEMENTS

Features	Total Agree- ments	All Agree- ments (%)	Ex- pressly Non- binding Agree- ments (%)	Not Ex- pressly Non- binding Agree- ments (%)
References Implementa- tion	1115	47%	50%	44%
References Dispute Reso- lution	579	24%	19%	28%
Provides for Amendments	1379	58%	72%	49%
Includes Termination or Withdrawal Provision	1535	65%	84%	51%

3. The agencies that conclude nonbinding agreements.

As noted above, we obtained formal nonbinding agreements from thirty-four agencies.¹⁷² Table 6 details the agencies in our database. Some rely heavily on nonbinding agreements, especially the Department of Defense, Department of Energy; Department of Health and Human Services (Food and Drug Administration); Department of State; Department of Transportation; Department of Commerce; Export-Import Bank; Commodity Futures Trading Commission (CFTC); Department of Agriculture; and the Securities and Exchange Commission (SEC). There are also a number of agency collaborations (for example, the DOJ and FTC collaborate on antitrust agreements). To account for collaborations, we recorded up to three agencies per agreement (hence the sum of the agreements in the table exceeds the total number of agreements in the database). Absence from the table does not necessarily mean that an agency does not use nonbinding agreements, as it is possible—indeed likely—that there are agencies that conclude agreements that have not been publicly disclosed and which were not in the files of any of the agencies we FOIA’d, including the State Department. However, it is unlikely that an agency that uses large numbers of formal nonbinding agreements is entirely absent from the table unless its agreements are classified (for example, the Central Intelligence Agency).

¹⁷² Within those thirty-four agencies, there are fifty separate units. For example, the Department of Health and Human Services has two units with nonbinding agreements in the database: the Food and Drug Administration and Centers for Disease Control and Prevention. For simplicity, we include the Executive Office of the President, though it is not properly an “agency” but an office.

TABLE 6: FORMAL NONBINDING AGREEMENTS, BY AGENCY

Agency	Total Agreements
Department of Defense	540
Department of Energy	318
Department of State	252
Department of Health and Human Services	202
Department of Commerce	128
Department of Transportation	120
Export-Import Bank	121
Department of Agriculture	102
Commodity Futures Trading Commission	101
Securities and Exchange Commission	101
Department of Homeland Security	87
Environmental Protection Agency	69
Department of the Treasury	59
Federal Trade Commission	47
United States Agency for International De- velopment	41
Executive Office of the President	33
Nuclear Regulatory Commission	31
Department of Justice	30
Department of the Interior	20
Department of Labor	20
Equal Employment and Opportunity Com- mission	12
Federal Communications Commission	7
National Labor Relations Board	4
Trade and Development Agency	4
International Development Finance Corpora- tion	4
Federal Reserve Board	4
United States Postal Service	3
National Aeronautics and Space Administra- tion	2
Consumer Financial Protection Bureau	1
Surface Transportation Board	1
National Science Foundation	1
Small Business Administration	1

Department of Education	1
Federal Deposit Insurance Corporation	1

What is notable here is the use of formal nonbinding agreements by many agencies beyond the Department of State. As explained in Part I, prior to the 2023 NDAA reforms, agencies were not required to consult with, or even disclose the existence of these agreements to, the Department of State. These data demonstrate that the Department of State, which is charged with overseeing U.S. foreign diplomacy, is frequently excluded from—and often completely blind to—a large and growing form of U.S. foreign diplomacy conducted by other agencies. This will remain true for nonbinding agreements that fall outside the recent reforms—including agreements not deemed to be “significant,” and all agreements concluded by the Department of Defense, Armed Forces, or Intelligence Community.¹⁷³

4. Subject areas.

The formal nonbinding agreements in our database are used in a variety of subject areas, but, as Table 7 shows, they are particularly concentrated in finance, trade, and investment; environment, conservation, and energy; defense; science, space, and technology; and nonproliferation.¹⁷⁴ Formal nonbinding agreements are common in areas where there are also significant numbers of binding executive agreements. Some differences between the percentages of binding and nonbinding agreements in Table 7 reflect a difference in what has been disclosed rather than a difference in propensity to conclude binding versus nonbinding agreements. The Defense Department, for example, does not publicly disclose nonbinding agreements. Yet it concludes “many hundreds and hundreds”¹⁷⁵ of nonbinding agreements each year, and, indeed,

¹⁷³ For further explanation, see *supra* note 91 and accompanying text.

¹⁷⁴ All of these figures are based on the primary subject area identified.

¹⁷⁵ Interview by Jack Goldsmith with U.S. Government Lawyer, *supra* note 124. By contrast, the larger number of formal nonbinding agreements in our database on Finance, Trade, and Investment may reflect not just reliance on nonbinding agreements but willingness—indeed eagerness—to disclose them. In the field of antitrust, for example, making public the nonbinding agreements signals a level of cooperation that regulatory authorities consider potentially helpful in encouraging companies to adhere to regulatory requirements. Interview by Oona Hathaway with Russell Damtoft, Assoc. Dir. of the Off. of Int’l Affs., Elizabeth Kraus, Dep. Dir. for Int’l Antitrust, Stacy Feuer, Assistant Dir. for Int’l Consumer Prot., Michael Shore, Couns. for Int’l Affs. & Randy Tritell, Dir. of the Off. of Int’l Affs., U.S. Fed. Trade Comm’n (Jan. 21, 2021).

the Department has identified six-thousand responsive documents in our FOIA litigation, only several hundred of which it has so far produced.

TABLE 7: PRIMARY SUBJECT AREAS

Subject Area	Formal Nonbinding Agreements (%)	Binding Executive Agreements (%)
Finance, Trade, and Investment	24%	14%
Environment, Conservation, and Energy	21%	9%
Defense	14%	25%
Science, Space, and Technology	9%	9%
Nonproliferation	9%	4%
Law Enforcement	8%	8%
Humanitarian	3%	9%
Transportation and Aviation	5%	6%
Diplomacy and Consular Affairs	4%	2%
Educational Ex- changes and Cul- tural Cooperation	2%	3%
Maritime	1%	2%
Taxation	0%	3%
Miscellaneous	0%	4%

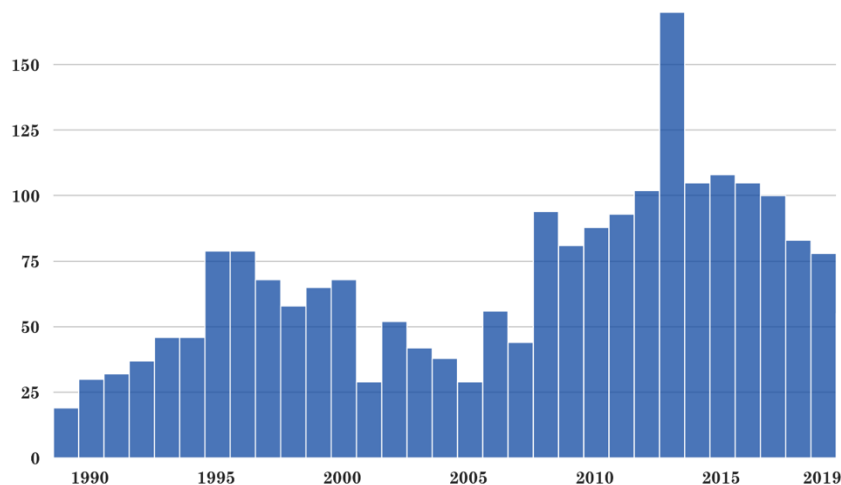
5. Formal nonbinding agreements over time.

Based on the agreements in our database, it appears that the number of formal nonbinding agreements has grown over time. Given the partial nature of the data, one should be careful about drawing conclusions based on these results alone. Nonetheless, there is good reason to think that these reflect a real trend. Nearly

all interviewees indicated that their agencies were relying more heavily on formal nonbinding agreements. All but one of the surveys of comparative scholars and practitioners (described in Part III) similarly affirmed that they had witnessed an increase in reliance on nonbinding agreements.

Figure 2 shows a gradual increase in formal nonbinding agreements in the database over time, accelerating in the late 2000s. The spike in 2013 is due to one-year jumps in nonbinding agreements concluded by three agencies: the Department of Energy; the CFTC; and the SEC. We cannot discern a precipitating cause for this bump, although it is possible that it was prompted by the 2012 Executive Order that encouraged agencies to engage in international regulatory cooperation “consistent with domestic law and prerogatives.”¹⁷⁶ The dip in recent years may represent a lag in posting agreements online. The key point for our purposes is that there has been an overall increase over time in the conclusion of formal nonbinding agreements.

FIGURE 2: FORMAL NONBINDING AGREEMENTS BY DATE CONCLUDED



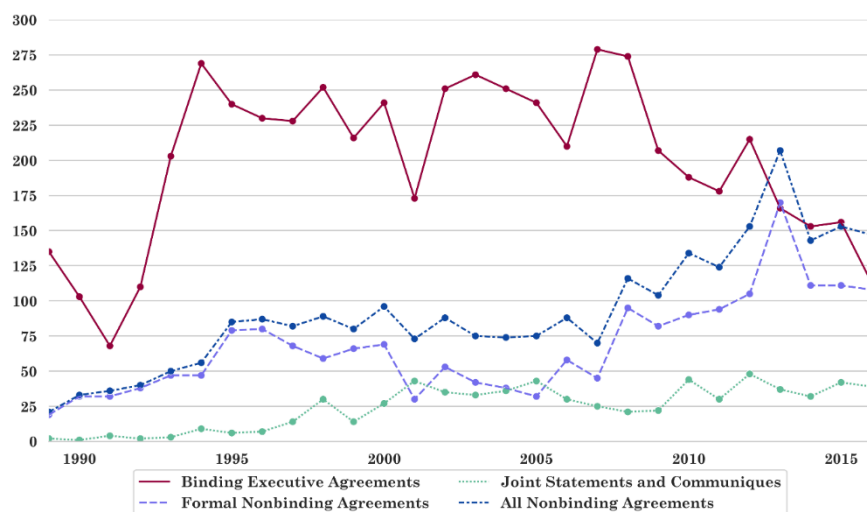
C. The Rise of Nonbinding Agreements

Nonbinding agreements concluded by agencies appear to have become more common even as binding executive agreements have become less common. Figure 3 compares binding agreements to formal nonbinding agreements, joint statements and

¹⁷⁶ See Exec. Ord. No. 13,609, *supra* note 106.

communiqués, and all nonbinding agreements (the sum of the previous two) from 1989–2016.¹⁷⁷ The set of binding agreements represented in this figure represents a complete set of binding agreements reported to Congress by the State Department during this period, as required by the Case-Zablocki Act and disclosed to us pursuant to a litigation settlement. The set of nonbinding agreements, however, is not entirely complete, for reasons already discussed. Even though our database of nonbinding agreements is incomplete, the number of nonbinding agreements in the database is *nonetheless* beginning to eclipse the number of binding agreements.

FIGURE 3: AGREEMENTS, BY DATE CONCLUDED



These data visually demonstrate the rise of nonbinding agreements. Today, nonbinding agreements are increasingly the way in which international agreements are made by the United States. There is no sign that this trend will slow. Indeed, it appears likely that we are in the midst of a transition from binding executive agreements to nonbinding agreements. While binding agreements are unlikely to disappear altogether, they are increasingly being eclipsed by nonbinding agreements. Nonbinding agreements are, on the whole, easier to conclude. They are made by many of the same agencies and on many of the same topics as

¹⁷⁷ Figure 3 ends in 2016, because the bindings database includes agreements from 1989 through 2016. See *supra* note 159.

binding executive agreements. And they use terminology that is very similar to that used in binding executive agreements, despite State Department guidance to the contrary. In short, nonbinding agreements appear to be serving many of the purposes historically served by binding executive agreements. The next Part will show that the United States is far from alone.

III. A COMPARATIVE PERSPECTIVE

Nonbinding agreements have become more important not just in U.S. practice, but around the globe. The practice of other nations is relevant to the analysis of U.S. practice for several reasons. These nations are potential partners with the United States in concluding both binding and nonbinding agreements, and how the United States approaches nonbinding agreements will affect its relations with these nations, and vice versa. Moreover, other nations may pursue reform strategies concerning nonbinding agreements that are relevant to the United States as it considers how best to address this growing phenomenon. This Part therefore describes comparative practice in this area. There are over 190 countries in the world, and this Part is not intended as a comprehensive worldwide assessment. Instead, the aim is simply to describe some of the laws and trends in this area, with a particular focus on the practices of prominent constitutional democracies.

To get a sense of how other nations are experiencing and addressing the phenomenon of nonbinding international agreements, we solicited information from government officials and scholars in Argentina, Austria, Canada, the European Union, Finland, France, Germany, Mexico, Israel, the Netherlands, Spain, the United Kingdom, South Africa, and Switzerland, both through detailed written surveys of the practice in their countries and through their participation in an online conference.¹⁷⁸ In addition, we drew upon a 2020 study by the Inter-American Juridical Committee of the Organization of American States (OAS) that discusses the laws and practices of thirteen countries (Argentina, Brazil, Canada, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru, Uruguay, and the United States).¹⁷⁹ We also drew upon a survey conducted in 2019

¹⁷⁸ See *Non-Binding International Agreements: A Comparative Assessment*, THE UNIV. OF CHI. L. SCH. (Sept. 23, 2021), <https://perma.cc/WA8J-SSGF>.

¹⁷⁹ See OAS Guidelines, *supra* note 27, at 14.

by Canada's treaty department in which eight countries (Canada, Finland, Germany, Israel, Japan, South Korea, Mexico, and Spain) were asked to describe their laws and practices relating to both binding and nonbinding agreements.¹⁸⁰ We further took account of materials in a recent meeting of European legal advisers on the topic of non-legally-binding agreements, which included presentations from officials of, among other countries, the Czech Republic.¹⁸¹ Finally, we took account of public information concerning the views and practices of a few other countries, such as Australia.

A. The Global Rise of Nonbinding Agreements

The rise in nonbinding agreements is not limited to the United States.¹⁸² Accounts from scholars and practitioners around the world suggest that it is a widespread phenomenon.¹⁸³ Most of our survey respondents also reported an increase in the use of nonbinding agreements.¹⁸⁴ When asked to explain why this has

¹⁸⁰ See Treaty L. Div., Glob. Affs. Can., Working Group on Treaty Practice, Survey on Binding and Non-Binding International Instruments (Sept. 18, 2019) (on file with authors) [hereinafter Working Group Survey on Treaty Practice].

¹⁸¹ See Petr Válek, Dir. of the Int'l L. Dep't of the Czech Ministry of Foreign Affs., Expert Workshop on Non-Legally Binding Agreements in International Law (Mar. 26, 2021).

¹⁸² Countries use a variety of terms to describe what we are calling nonbinding international agreements. In some countries, there is an effort to avoid using the word "agreement" in this context because that word might suggest a binding commitment.

¹⁸³ See, e.g., Christophe Eick, Legal Adviser, German Fed. Foreign Off., Expert Workshop on "Non-legally Binding Agreements in International Law: Welcome and Opening Remarks" (Mar. 26, 2021) (reporting that Germany's Federal Foreign Office claims that "the significance of non-legally binding agreements has consistently been rising in our practice" and that "[i]ssues that would have formerly been the subject of a binding treaty under international law are nowadays addressed through Joint Declarations of Intent"); AUST, *supra* note 24, at 29 (reporting that "the use of [MOUs] is now so widespread, some officials may see the [MOU] as the norm, with a treaty being used only when it cannot be avoided"); Working Group Survey on Treaty Practice, *supra* note 180, at 13 (showing that all respondents reported an increase in both the frequency and importance of nonbinding agreements); see also OAS Guidelines, *supra* note 27, at 9 (referring to the "rising number of non-traditional international agreements, including non-binding agreements among States"); ORG. FOR ECON. COOP. & DEV., COMPENDIUM OF INTERNATIONAL ORGANISATIONS' PRACTICES: WORKING TOWARDS MORE EFFECTIVE INTERNATIONAL INSTRUMENTS 24 (2021) (noting that "the proportionate use of non-legally binding instruments over those which are legally binding has increased, and continues to do so").

¹⁸⁴ See, e.g., Gib van Ert, Canada, Survey for University of Chicago Law School Conference on "Non-Binding International Agreements: A Comparative Assessment" (Aug. 11, 2021) (on file with authors) (reporting that "[t]here has been significant growth in the use of [nonbinding] arrangements" in Canada and that "Canada now concludes hundreds of arrangements per year"); Alejandro Rodiles, Instituto Tecnológico Autónomo de México, Mexico, Survey for University of Chicago Law School Conference on "Non-Binding

happened, our survey respondents attributed it to factors such as increased international cooperation by regulators, the ease and speed by which such agreements can be concluded, the greater flexibility offered by nonbinding agreements, and the desire for confidentiality.

Perhaps not surprisingly, governments and international organizations are increasingly turning their attention to the rise of nonbinding agreements. In 2016, the Inter-American Juridical Committee of the Organization of American States launched an initiative to identify state practices in the Americas regarding both binding and nonbinding agreements.¹⁸⁵ As Professor Duncan Hollis, the rapporteur for the OAS committee, explained, the initiative “found its impetus in the rising number of non-traditional international agreements, including non-binding agreements among States as well as agreements in both binding and non-binding form concluded by government ministries and sub-national territorial units.”¹⁸⁶ More recently, the concept note for a March 2021 meeting of the Council of Europe’s Committee of Legal Advisers on Public International Law (CAHDI) stated that nonbinding agreements “are of increasing prevalence in international relations” and cautioned that, although these instruments “present a number of advantages for states as compared to treaties,” “the usage of non-binding agreements is not without dangers.”¹⁸⁷ In addition, the U.N. International Law Commission has recently added the topic of nonbinding international agreements to its long-term program of work.¹⁸⁸

In considering the phenomenon of nonbinding agreements, nations and the European Union have been grappling with three

International Agreements: A Comparative Assessment” (Sept. 1, 2021) (on file with authors) (reporting that 70% of the agreements now submitted to the Mexican Foreign Ministry for review are nonbinding). Some survey respondents indicated that they thought there had been an increase but that it was difficult to know for sure given the lack of publication of the agreements. The respondent from the Netherlands reported that she had not seen an increase in nonbinding agreements. See Noortje van Rijssen, Legal Off., Netherlands Ministry of Foreign Affs., Netherlands, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (July 28, 2021) (on file with authors). All respondents in Canada’s eight-country survey reported that nonbinding instruments were becoming a more significant component of their agreement-making practice.

¹⁸⁵ OAS Guidelines, *supra* note 27, at 9.

¹⁸⁶ *Id.*

¹⁸⁷ CAHDI, EXPERT WORKSHOP ON NON-LEGALLY BINDING AGREEMENTS IN INTERNATIONAL LAW: CONCEPT NOTE 1 (2021).

¹⁸⁸ See U.N. GAOR, 77th Sess., Report of the International Law Commission, 73d Sess., Supp. No. 10 A/77/10, Annex I (2022).

basic issues: (1) how to ensure that there is sufficient coordination within the executive with respect to the making of nonbinding agreements, through mechanisms such as foreign ministry review and centralized collection; (2) whether and to what extent the transparency rules that apply to binding agreements should also apply to nonbinding agreements—in particular, whether these agreements should be made available to the public; (3) the extent to which the legislature should be involved in or notified of these agreements. The following sections describe national laws and practices in surveyed nations relating to these three issues.

B. Coordination

Many nonbinding international agreements are made not by heads of state or foreign ministries but rather by other departments and agencies of the executive branch. Governments have found that this disaggregation of the practice presents challenges with respect to the management of national foreign policy. The foreign ministry might not know what commitments are being made on behalf of the country, and it might not approve of them if it did know. In addition, some of those commitments might unintentionally create binding obligations if not drafted carefully. Moreover, without coordination, a commitment made by one department or agency might conflict with a commitment made by another department or agency.¹⁸⁹

Many foreign ministries have provided general guidance to executive ministries and agencies about the drafting of nonbinding agreements—for example, about terms that should be avoided to help ensure that the agreement will not be considered binding. Some nations have gone further and have instituted centralized foreign ministry review and approval of nonbinding agreements. In the United Kingdom, for example, the Foreign Commonwealth and Development Office (FCDO) has issued a guidance document emphasizing that, “[a]s with treaties, *all* draft [MOUs] should be sent to the relevant FCDO thematic or geographic department for

¹⁸⁹ See OAS Guidelines, *supra* note 27, at 114 (“When it comes to non-binding agreements, States currently suffer from an information deficit. Both the number and contents of a State’s political commitments, whether labeled as MOUs or otherwise, are often unclear.”).

clearance. . . . Moreover, there should be the same level of inter-departmental consultation as for treaties.”¹⁹⁰

Similarly, in Canada all departments and agencies are supposed to notify the Treaty Section of the Department of Foreign Affairs, Trade and Development before beginning agreement negotiations with another nation or an international organization, in part so that “a proper distinction between treaties and other international instruments that are not binding in public international law can be maintained.”¹⁹¹ All departments and agencies are directed “to avoid situations where instruments that, could reasonably be viewed as treaties . . . are not mistakenly classified as non-binding instruments.”¹⁹² In addition, nonbinding agreements concluded by departments or agencies in Canada require centralized government approval—usually through the Ministry of Foreign Affairs, although approval must come from the Cabinet if the nonbinding agreement “would result in a major shift in Canadian policy.”¹⁹³ In Canada’s Treaty Law Division, two lawyers are responsible for reviewing nonbinding agreements, and one of them serves as an “MOU Coordinator.”¹⁹⁴

The Australian government has a less formal process, but it also encourages centralized coordination. Its Guidance Note states that any agency that intends to enter into a nonbinding agreement should consult with the Treaties Section of the Department of Foreign Affairs and Trade when drafting and negotiating the text, and it has set forth guidelines about the appropriate language to be used and avoided, along with a model MOU.¹⁹⁵ The Guidance Note also states that all nonbinding agreements should be sent to the Treaties Section for clearance prior to signature. It directs agencies to retain the texts of these agreements, but it

¹⁹⁰ FOREIGN, COMMONWEALTH & DEV. OFF., TREATIES AND MEMORANDA OF UNDERSTANDING (MOUS): GUIDANCE ON PRACTICE AND PROCEDURES 4 (2022) (emphasis in original).

¹⁹¹ *Policy on Tabling of Treaties in Parliament*, GOV’T OF CANADA, <https://treaty-accord.gc.ca/procedures.aspx?lang=eng> (quoting § 6.1).

¹⁹² *Id.* (quoting § 8).

¹⁹³ *Id.* (Annex C).

¹⁹⁴ Working Group Survey on Treaty Practice, *supra* note 180, at 12; *see also* van Ert, *supra* note 184, at *3 (“The [Canadian] foreign ministry’s Treaty Law Division – MOU Unit must be consulted for review of all non-legally binding instruments prior to their conclusion.”); OAS Guidelines, *supra* note 27, at 70, 103–04 (describing centralized review in Ecuador and Peru).

¹⁹⁵ *See Guidance Note: Australia’s Practice for Concluding Less-Than-Treaty Status Instruments*, AUSTRALIAN GOV’T, DEP’T OF FOREIGN AFFS. & TRADE, <https://www.dfat.gov.au/international-relations/treaties/australias-practice-concluding-less-than-treaty-status-instruments>.

does not itself maintain any central collection of them. Administrative agencies in Germany follow a similar process: they are supposed to send proposed nonbinding agreements to a division of the Foreign Ministry for review and approval.¹⁹⁶ When reviewing agreements, the Ministry “will look for trigger words usually used only in international treaties, and ‘soften’ them down to a non-legally binding alternative.”¹⁹⁷ The agreements, once concluded, are supposed to be stored in the archives of the Foreign Ministry. In other countries, such as Austria and Argentina, centralized foreign ministry review is encouraged but not required.¹⁹⁸

Some countries have adopted registries of nonbinding agreements, although most do not make them public. The Czech Republic, for instance, has recently established a central, nonpublic registry within the executive branch for nonbinding agreements, but the Czech Legal Adviser has noted that “not all [MOUs] in practice reach my department and get registered.”¹⁹⁹ He also expressed support for the idea of a *public* registry for nonbinding agreements, noting: “In most States, there is an official register of published treaties (an official gazette)[;] nevertheless, there is a gap when it comes to [MOUs], so such register makes sense.”²⁰⁰ Israel also has centralized foreign ministry review of nonbinding agreements and maintains an internal executive branch registry of nonbinding agreements.²⁰¹ In Finland, the government is developing a new document management system that “could make all Governmental *soft law* instruments available in one archive.”²⁰² South Korea’s foreign ministry manages a central database of agency-to-agency agreements, and each agency is encouraged to

¹⁹⁶ GERMAN FOREIGN MINISTRY GUIDELINES (RICHTLINIEN FÜR DIE BEHANDLUNG VÖLKERRECHTLICHER VERTRÄGE) (2019) (translation on file with authors).

¹⁹⁷ Eick, *supra* note 183, at 3.

¹⁹⁸ See Nahuel Maisley, Univ. of Buenos Aires and N.Y.U., Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (July 28, 2021) (on file with authors); Michael Waibel, Universtat Wein, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (July 31, 2021) (on file with authors).

¹⁹⁹ Valek, *supra* note 181.

²⁰⁰ *Id.*

²⁰¹ See Naomi Elimelech Shamra, Dir., Treaties Dep’t, Ministry of Foreign Affs., Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (July 25, 2021) (on file with authors).

²⁰² Kaija Suvanto, Dir. Gen., Legal Serv., Ministry for Foreign Affs. for Finland, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (July 7, 2021) (emphasis in original) (on file with authors).

input its agreements into the database.²⁰³ Starting in 2014, Germany started storing nonbinding agreements in a central archive.²⁰⁴ Canada reported in 2019 that its Treaty Law Division was “in the process of developing a digital database of these [non-binding] instruments” and was “reaching out to lead divisions, department and agencies to ensure all signed instruments are included in the database.”²⁰⁵ The database is not public. Ecuador similarly has a practice of central executive branch recording of nonbinding agreements.²⁰⁶

While most of the above registries have been established through informal or regulatory means, since 2014 a registry has been required by law in Spain. The Treaties and Other International Agreements Act²⁰⁷ provides that when agencies conclude nonbinding international agreements (which the Act refers to as “non-normative agreements”), they must submit them to the Ministry of Foreign Affairs for inclusion in a central, public registry. As of the date of this Article, however, this registry still had not been established.

C. Transparency

Even if a country’s executive branch monitors and collects nonbinding international agreements, the public does not necessarily have access. Yet these agreements sometimes entail significant commitments by the government that can affect national policy, or at least the interests of particular stakeholders.

Several nations make, at the minimum, some nonbinding international agreements available to the public. But as in the United States, publication is usually done voluntarily rather than pursuant to a legal mandate, and it is typically not comprehensive. For example, New Zealand maintains a public database that includes its treaties as well as “a record of some of New Zealand’s non-legally binding arrangements,” although it does not include “[m]inor or technical arrangements [or] financial or commercially sensitive arrangements.”²⁰⁸ Similarly, although there is no legal

²⁰³ See Working Group on Treaty Practice, *supra* note 180, at 27.

²⁰⁴ *Id.* at 9.

²⁰⁵ *Id.*

²⁰⁶ See OAS Guidelines, *supra* note 27, at 114 n.193.

²⁰⁷ B.O.E. 2014, 288.

²⁰⁸ *New Zealand Treaties Online*, N.Z. MINISTRY OF FOREIGN AFFS. & TRADE, <https://perma.cc/8F7K-L6A9>.

requirement in Japan to publish nonbinding agreements, many such agreements are apparently published.²⁰⁹

In the 1990s, Australia adopted various reforms designed to increase the transparency and accessibility of its treaties, but those reforms apply only to binding agreements. Professor Andrew Byrnes has observed that, even though many nonbinding agreements made by Australia are important, the publication of these agreements is “sporadic and unsystematic, and the text of many such instruments is not available to the public on government websites.”²¹⁰ Other nations, such as the United Kingdom, apparently do not routinely publish nonbinding agreements.²¹¹

Although Finland currently has no public registry system for nonbinding agreements, the government is required by statute to provide public notice of important foreign relations actions, and the legal adviser for its foreign ministry has suggested publication “of non-legally binding instruments considered to be of importance that are made between Governments.”²¹² She also has observed that establishing a more general public registry for non-binding agreements would serve a number of useful functions:

It is clear that this kind of a registry comparable to a treaty register would make access to these political commitments easier and make them more visible. This is positive from the point of view of democracy, and transparency as well. Public access to non-legally binding instruments could also serve the goal of using political instruments only when they are an appropriate tool to reach the intended purpose and when there is no need for legally binding obligations. It could make the practice of using non-legally binding instruments more coherent in an individual state as well as between states. In the name of transparency, it would also be interesting to

²⁰⁹ Email from Ryo Fukahori, Dir., Treaties Div., Int’l Legal Affs. Bureau, to Curtis Bradley (Feb. 28, 2021) (on file with authors).

²¹⁰ Andrew Byrnes, *Time to Put on 3-D Glasses: Is There a Need to Expand JSCOT’s Mandate to Cover Instruments of Less Than Treaty Status?*, 22 AUST. INT’L L.J. 1, 3–4 (2016).

²¹¹ See Guidance on Practice and Procedures, *supra* note 190, at 11 (noting that MOUs are “not usually published”); see also Arabella Lang, Pub. L. Project, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (July 30, 2021) (on file with authors).

²¹² Suvanto, *supra* note 202, at *3.

collect the practice of different countries of publishing these instruments, such as [MOUs], e.g. in their treaty series.²¹³

As noted above, the Czech Legal Adviser has expressed similar sentiments. In France, although there is no publication system currently in place for nonbinding agreements, a proposal has been made to require publication of such agreements except where publication would be incompatible with “secret national defense” or foreign policy requirements.²¹⁴ In South Africa, the government publishes both binding and nonbinding agreements that have recently been concluded, although it is unclear how comprehensive this is.²¹⁵ The OAS Guidelines recommend that “States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.”²¹⁶

D. Legislative Participation

Nations vary in the extent to which they involve their legislatures in treaty-making.²¹⁷ Commonwealth countries normally do not require legislative approval, although a number of these countries (and other countries, such as Israel) as a matter of custom or statutory mandate inform the legislature about treaties before they are ratified.²¹⁸ In many countries outside the Commonwealth, formal legislative approval is required for some or all treaties.²¹⁹ In countries in which parliamentary approval is required, treaties typically can operate in some circumstances as

²¹³ Kaija Suvanto, Dir. Gen., Legal Serv., Ministry for Foreign Affs. of Finland, Towards Uniform State Practice Concerning Non-Legally Binding Instruments – Relevant and Desirable?, Expert Workshop on Non-Legally Binding Agreements in International Law (Mar. 26, 2021).

²¹⁴ Mathias Forteau, Univ. of Paris Nanterre, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (July 31, 2021) (on file with authors).

²¹⁵ See Hannah Woolaver, Univ. of Cape Town, Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (Aug. 24, 2021) (on file with authors).

²¹⁶ OAS Guidelines, *supra* note 27, at 113.

²¹⁷ See Pierre-Hugues Verdier & Mila Versteeg, *Separation of Powers, Treaty-Making, and Treaty Withdrawal*, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 138–42 (Curtis A. Bradley ed., 2019); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1271–84 (2008).

²¹⁸ See, e.g., Amichai Cohen, *International Law in Israeli Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 521 (Curtis A. Bradley ed., 2019).

²¹⁹ See Verdier & Versteeg, *supra* note 217, at 140.

domestic law; by contrast, when parliamentary approval is not required, treaties typically must be implemented by the legislature before they have domestic effect.²²⁰

These requirements of parliamentary notice and approval, however, typically apply only to binding agreements. For example, the U.K. statute that requires that agreements be laid before Parliament for at least twenty-one days prior to ratification applies only to binding agreements.²²¹ Noting this fact, the EU Committee of the British House of Lords observed in 2019 that “[a]ny future Treaties Committee may wish to consider proportionate means to remedy the resulting scrutiny gap.”²²² More recently, the International Agreements Committee of the House of Lords urged the executive to report significant nonbinding agreements to Parliament, and it suggested some criteria for what would qualify as significant.²²³ New controversy erupted over this issue in connection with a nonbinding asylum partnership agreement that the U.K. government concluded with Rwanda in 2022.²²⁴

In Finland, the constitution prescribes the process for concluding binding agreements (which requires legislative approval for some but not all treaties) but is silent about nonbinding agreements.²²⁵ Finland’s Legal Adviser recently noted that “there could

²²⁰ See *id.*

²²¹ See Lang, *supra* note 211, at 41.

²²² House of Lords, EU Comm., 42d Report of Sess. 2017–19, *Scrutiny of International Agreements: Lessons Learned* ¶ 75 (June 27, 2019). The Committee also concluded that, for a variety of reasons, the 2010 law was not well designed to promote parliamentary scrutiny of binding agreements. *Id.* at ¶ 26.

²²³ See House of Lords, Int’l Agreements Comm., 7th Report of Sess. 2021–22, *Working Practices: One Year On* ¶¶ 73–88 (Sept. 17, 2021) (calling for the reporting of a non-binding agreement if it either “(a) is politically or economically important; (b) imposes material obligations on UK citizens or residents; (c) has human rights implications; (d) is directly related to a treaty; or (e) would give rise to significant expenditure”).

²²⁴ See *Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, GOV.UK (Apr. 13, 2022), <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r>; Stephen Castle, Megan Specia & Abdi Latif Dahir, *U.K. Plans to Send Some Asylum Seekers to Rwanda*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/world/europe/uk-rwanda-asylum-seekers.html>. This agreement prompted, among other things, an inquiry by the International Agreements Committee in the U.K. Parliament’s House of Lords. See *UK-Rwanda Memorandum of Understanding*, UK PARLIAMENT, <https://committees.parliament.uk/work/6766/ukrwanda-memorandum-of-understanding>.

²²⁵ FIN. CONST. ch. 8, §§ 93–97.

be merit to inform Parliament of the most significant non-legally binding instruments,” but she indicated that this happens only on an ad hoc basis in her country.²²⁶

In some countries, there have recently been calls for more legislative involvement in nonbinding agreements. For example, in the wake of controversy in Switzerland over the Global Compact for Migration, a nonbinding multilateral instrument that sets forth a variety of “guiding principles” and “objectives and commitments” relating to migration, the Foreign Policy Committee of the Council of States in Switzerland asked the government to report on the “growing role of soft law in international relations” and “the resulting creeping weakening of Parliament’s democratic rights.”²²⁷ Switzerland’s Federal Council (a seven-member executive council) responded by agreeing to increase parliamentary involvement in the development of soft law, including in the conclusion of nonbinding agreements.²²⁸ It noted, though, that “[g]iven that there are a large number of soft law instruments and that they are usually issued under tight deadlines, it would be unfeasible for Parliament to participate in the creation of these instruments across the board.”²²⁹ But it made a commitment to the legislature that “members of Parliament are to be consulted more frequently and provided with better documentation and regular reports on relevant soft law projects,” something that it indicated would not require a change in the law.²³⁰ A Swiss parliamentary subcommittee continues to focus on how to adapt existing procedures and practices in light of the increasing role of nonbinding agreements.²³¹

Concerns about evasion of legislative prerogatives appear to be growing in other countries as well. In Australia, Professor Byrnes has argued before a committee in Parliament reviewing

²²⁶ Suvanto, *supra* note 213.

²²⁷ Anna Petrig, *Democratic Participation in International Lawmaking in Switzerland After the “Age of Treaties”*, in ENCOUNTERS BETWEEN INTERNATIONAL LAW AND FOREIGN RELATIONS LAW: BRIDGES AND BOUNDARIES 180, 202 (Helmut Aust & Thomas Kleinlein eds., 2021) (quotes translated by author).

²²⁸ *See id.*

²²⁹ *Parliament to Be More Closely Involved in Soft Law Projects*, FED. COUNCIL, (June 27, 2019), <https://perma.cc/EVQ5-2ZZ7>; *see also* Petrig, *supra* note 227, at 202 (discussing the efforts undertaken in Switzerland to “associate Parliament more closely in the making of ‘soft law’”).

²³⁰ *Soft Law Projects*, *supra* note 229.

²³¹ *See* Roland Portmann, Swiss Fed. Dep’t of Foreign Affs., Survey for University of Chicago Law School Conference on “Non-Binding International Agreements: A Comparative Assessment” (Aug. 1, 2021) (on file with authors).

the issue that, “[b]ecause [nonbinding agreements] involve formal arrangements for the exercise of public power, their texts should as a matter of principle be made public and thus subject to Parliamentary and public scrutiny.”²³² Another commentator has observed that the Australian government sometimes uses nonbinding agreements to avoid political constraints and has argued for “some kind of accountability regime.”²³³ Similar questions are being raised with respect to the effect of the European Union’s conclusion of nonbinding agreements on that institution’s separation of powers.²³⁴ Japan’s legislature has similarly inquired about the effect of some nonbinding agreements on its prerogatives.²³⁵

E. Summary

The above account of comparative practice on nonbinding agreements, while not comprehensive, shows that other nations are grappling with many of the same regulatory questions faced by the United States. Around the globe, there is increasing awareness of a regulatory gap: the laws and practices that states have in place to ensure coordination, transparency, and legislative involvement in the making of international agreements are typically focused only on binding agreements, but their executives increasingly are using nonbinding instruments.

The nations that have to date addressed these issues have mainly focused on internal coordination. In the countries we surveyed, the foreign ministry has provided some general guidance

²³² Byrnes, *supra* note 210, at 14. Byrnes presented the argument in a paper in the 2016 20th Anniversary Seminar of the Joint Standing Committee on Treaties.

²³³ Peter C. Lundy, *International Law: The Netherworld of Nonbinding Agreements* AUSTL. INST. OF INT’L AFFS. (July 17, 2017), <https://perma.cc/R4EH-SXJA>.

²³⁴ See Ramses A. Wessel, *Normative Transformations in EU External Relations: The Phenomenon of ‘Soft’ International Agreements*, 44 W. EUR. POL. 72, 86 (2021); see also Mario Mendez, Written Evidence, House of Lords, EU International Agreements Subcommittee (June 8, 2020) (“In the EU concerns are also being raised about increasing recourse to political agreements given they are not channeled through the Article 218 TFEU framework that applies to legally binding agreements.”). Other international organizations also face issues relating to the rise of nonbinding agreements. See, e.g., Miguel de Serpa Soares, Under-Sec’y-Gen. for Legal Affs. and U.N. Legal Couns., Expert Workshop: Non-Legally Binding Agreements in International Law (Feb. 26, 2021) (“[M]y Office – as the centralized legal service of the Organization – regularly reviews legally binding and non-legally binding draft agreements submitted by the various United Nations Secretariat Departments, Offices, and Regional Commissions, including to avoid misunderstandings and legal uncertainties.”).

²³⁵ See, e.g., Yusuke Nakanishi, *Defining the Boundaries of Legally Binding Treaties—Some Aspects of Japan’s Practice in Treaty-Making in Light of State Practice*, 20 INT’L CMTY. L. REV. 169, 187 (2018).

to ministries and agencies with respect to the drafting of nonbinding agreements. These countries differ, however, on the extent to which they centralize foreign ministry review of nonbinding agreements before they are concluded, and over whether to have centralized collection of nonbinding agreements. A number of countries are considering reforms to further improve internal coordination. As for transparency, most of the nations that we surveyed do not have any systematic publication of nonbinding agreements, although legal advisers in some of these countries have stated that such publication might be desirable. A number of countries are considering whether and how to provide public access to nonbinding agreements. In most countries surveyed, there is little legislative involvement with nonbinding agreements, and only a few countries are entertaining proposals to change this.

IV. LEGAL REFORM

Nonbinding agreements have become a major feature of how the United States conducts international relations. The category of nonbinding agreements that we have described as “formal” are concluded by numerous executive agencies and departments, cover a vast array of subject matters, and resemble binding agreements in their form and function. Despite their growing importance and potential interchangeability with binding agreements, formal nonbinding agreements have for a long time fallen completely outside of Congress’s transparency mandates.

The revisions to the Case-Zablocki Act in the 2023 NDAA for the first time require the reporting and publication of some of these agreements.²³⁶ The law represents a first step toward ensuring that many nonbinding agreements are held to the same transparency requirements that apply to binding executive agreements.²³⁷ It already makes the United States a world leader in attempting to ensure accountability in this area, and it shows that Congress is interested in regulating nonbinding agreements

²³⁶ The legislation also enacts many key transparency reforms for binding executive agreements that we advocated in Hathaway, Bradley & Goldsmith, *supra* note 1, at 691–707. Despite the gaps noted herein, it represents the most significant transparency reform for international agreements since the Case-Zablocki Act was first enacted a half century ago.

²³⁷ For our arguments on why some accountability for nonbinding agreements is appropriate, which we shall not repeat here in light of the new law, see Hathaway, Bradley, and Goldsmith, *supra* note 1, at 708–09.

and can do so. Despite its significance, however, the new law has important gaps and limitations. Just as the initial accountability reforms for binding agreements from the 1950s (for publication) and the 1970s (for reporting) were far from the last word for binding agreements, and have been amended a number of times, the new law is unlikely to be the last word on the regulation of non-binding agreements.

Section A of this Part assesses the new transparency mandates for nonbinding agreements and considers arguments for expanding these requirements. Section B addresses an issue not covered by the new reform: how Congress might influence or check presidential uses of nonbinding agreements that—like the controversial Iran nuclear deal and an element of the Paris Agreement on climate change—depend on preexisting delegations of congressional authority to implement the agreements. Finally, Section C examines whether the United States should work with partner nations to develop international best practices for the drafting of nonbinding agreements.

A. Additional Transparency for Nonbinding Agreements

As noted above, the 2023 NDAA expanded the executive branch's publication and reporting duties for binding agreements and mandated greater coordination of such agreements inside the executive branch.²³⁸ Of more relevance to this Article, the new law for the first time extended all of these requirements—internal executive branch coordination, reporting to Congress, and publication—to what it calls “qualifying non-binding instruments,” which includes “non-binding instruments” that “could reasonably be expected to have a significant impact on the foreign policy of the United States” or that are “the subject of a written communication from the Chair or Ranking Member” of the Senate Foreign Relations Committee (SFRC) or House Foreign Affairs Committee (HFAC) to the Secretary of State.²³⁹

The term “non-binding instrument” is undefined in the new law but likely accords with our notion of a “formal nonbinding

²³⁸ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 § 5947 (*amending* 1 U.S.C. § 112b (1972)); *see supra* text accompanying notes 86–92. As noted earlier, these changes become effective on September 19, 2023.

²³⁹ 1 U.S.C. § 112b(k)(5)(A)(ii)(I)–(II).

agreement.”²⁴⁰ As noted above, the new law limits publication and reporting of such agreements to those with a “significant impact” on U.S. foreign policy or those that are a subject of a specific request by the Chair or Ranking Member of the SFRC or HFAC. The new law thus answers the once-open question whether nonbinding agreements would ever be subject to transparency mandates.²⁴¹ The key question now is whether the new law, with its qualified scope as applied to nonbinding agreements and its various carveouts, imposes a sufficient degree of accountability for such agreements. In this Section, we consider the arguments for expanding the transparency regime for nonbinding agreements, as well as some of the potential tradeoffs of doing so.

1. Limits on transparency under the new law.

The case for additional reform begins with the narrow scope of the executive branch’s duties to report and publish nonbinding agreements, and to coordinate them internally, under the new law. The executive branch will have enormous discretion in deciding which nonbinding agreements have a “significant impact” on U.S. foreign policy. One guidepost for how narrowly the executive branch might read its duty to publish and report nonbinding agreements can be found in the criterion it uses for inclusion of nonbinding agreements in the *Digest of United States Practice in International Law*. The *Digest* is published each year by the Office of the Legal Adviser of the State Department. It includes all developments related to international law and practice—including nonbinding agreements—that the State Department deems “significant.”²⁴² But we have found that the *Digest* identifies and discusses only a handful of nonbinding agreements each year.²⁴³

²⁴⁰ The new law refers to nonbinding instruments in parallel with binding agreements and at one point refers to such instruments as ones “signed, concluded, or otherwise finalized.” See 1 U.S.C. § 112b(a)(1)(A)(i).

²⁴¹ See Hathaway, Bradley & Goldsmith, *supra* note 1, at 708–10; see also Harrington, *supra* note 21, at 1236–42.

²⁴² OFF. OF THE LEGAL ADVISER, INTRODUCTION, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW*, at xv–xvii (Sally J. Cummins & David P. Stewart eds., 2000); see also Off. of the Legal Adviser, *Digest of United States Practice in International Law*, U.S. DEPT OF STATE, <https://perma.cc/T384-GN8W> (noting that the Introduction to the *Digest* in 2000 contains an “explanation of the current format of the book”).

²⁴³ We identified 112 formal nonbinding agreements in the *Digest* between 1989 and 2019. Our database of formal nonbinding agreements contains over 2,300 agreements during that same period.

There is no way to know at this point whether the State Department will use the same criteria for identifying nonbinding agreements with a “significant impact” on U.S. foreign policy (the standard under the new law) as it has in determining which nonbinding agreements count as a “significant” development for U.S. international practice (the standard for inclusion within the *Digest*). As we were finalizing this Article, the State Department was in the process of developing regulations to implement its new statutory obligations. But the similarity in the phrasing underscores how narrowly the executive branch might interpret its obligation to be.²⁴⁴ To be sure, the duty to report under the new law also extends to nonbinding agreements requested by senior members of Congress. Yet this authority, while important, will almost certainly have a limited range in practice; and of course, members of Congress do not know what they do not know.

Even apart from the “significant impact” criterion, the new law has broad carveouts for agreements related to military and intelligence matters, regardless of whether they are classified. The publication and reporting mandates are inapplicable to agreements addressing “military operations, military exercises, acquisition and cross servicing, logistics support, military personnel exchange or education programs, or the provision of health care to military personnel on a reciprocal basis.”²⁴⁵ More significantly, the statute entirely excludes any nonbinding agreement “that is signed or otherwise becomes operative or is implemented pursuant to the authorities relied upon by the Department of Defense, the Armed Forces of the United States, or any element of the intelligence community.”²⁴⁶

There were already military-related exemptions in the State Department regulations relating to publication of binding agreements,²⁴⁷ but the new law expands the exemptions, makes them statutory, and applies them to reporting as well as publication of

²⁴⁴ Somewhat analogously, since 1994 the State Department was given the discretion of not publishing binding agreements that it deemed of insufficient public interest, and we found in a prior article that under that regime it was publishing less than half of the agreements it was reporting to Congress. See Hathaway, Bradley & Goldsmith, *supra* note 1, at 626, 668. Congress has now removed this discretionary element for publishing binding agreements but created an even broader discretionary trigger for the reporting and publication of nonbinding agreements.

²⁴⁵ 1 U.S.C. § 112b(b)(3)(B).

²⁴⁶ 1 U.S.C. § 112b(k)(5)(B). Because this carveout is from the definition of “qualifying non-binding instrument,” these agreements appear to fall outside even the statutory provision that allows for specific requests for agreements by congressional leadership.

²⁴⁷ See 22 C.F.R. § 181.8(a)(4), (5), (12), (14), (15).

binding and nonbinding agreements alike. The overall carveout is substantial in scope. As part of our work on this Article, we settled a lawsuit against the Department of Defense brought under FOIA in which the Department identified more than *six thousand* nonbinding agreements, which it is in the process of producing under our settlement agreement. This dwarfs the number of agreements produced by any other government agency. Indeed, it is larger than the number of agreements we have identified by the rest of government during the same period *combined*. The carveout for all nonbinding agreements and many categories of binding agreements concluded by the Department of Defense therefore means that Congress—and the public—will remain unaware of vast numbers of agreements concluded by the U.S. government in the years to come, even when these agreements are considered significant. The additional carveout for nonbinding intelligence agreements further deepens the transparency gap. Such agreements will remain hidden not only from Congress and the public, but from the Department of State as well.

2. The case for greater transparency.

There are several reasons to think that the scope of the executive branch's new duty to report, publish, and coordinate nonbinding agreements under the new law is too narrow. First, the vast majority of formal nonbinding agreements that we have discovered as part of our FOIA requests and other data-collection efforts will likely not be covered by the NDAA's transparency mandate. That is due both to the "significance" standard for "qualifying non-binding instruments" and the wholesale carveout for the Defense Department, Armed Forces, and Intelligence Community. Yet there is little reason to think that the average formal nonbinding agreement is any less significant than the average binding executive agreement, and thus little reason on that ground to differentiate between the two in terms of Congress's and the public's need to know about their content. Indeed, in some cases they are nearly identical. For example, the Nuclear Regulatory Commission sometimes concludes agreements on the exchange of technical information in nuclear safety measures as binding agreements and other times as nonbinding agreements. The content of the agreement varies little between the two.²⁴⁸

²⁴⁸ Compare Arrangement Between the United States Nuclear Regulatory Commission and the Australian Radiation Protection and Nuclear Safety Agency of Australia for

Similarly, the United States has concluded agreements on the exchange of terrorism screening information as both binding and nonbinding agreements—again with little difference in content between the two agreements.²⁴⁹ To the extent that binding and nonbinding agreements appear to often be substitutes, having a less stringent transparency regime for nonbinding agreements may encourage use of that category precisely to avoid oversight.²⁵⁰ Indeed, this historical mismatch has likely contributed to the rise of nonbinding agreements over the last several decades. Whether the balance will be shifted by the new transparency requirements for (some) nonbinding agreements in light of the simultaneous increase in the transparency requirements for binding agreements remains to be seen.

Second, expanding internal coordination of a broader array of formal nonbinding agreements would (just as the new law accomplishes for binding agreements) enhance the State Department's understanding of U.S. nonbinding agreement practice and better ensure the coherence of U.S. agreement practice. Such coordination would make it easier to implement State Department recommendations about how to draft nonbinding agreements to avoid ambiguity, which can cause confusion about the nature of agreements and the consequences for noncompliance, among other things. Our formal nonbinding-agreements database and interviews provide reason to believe that these thin suggestions by the State Department are often ignored and are thus not serving their

the Exchange of Technical Information and Cooperation in Nuclear Safety Matters, U.S.–Austl., Sept. 16, 2013 [31-NRC] (produced by the Nuclear Regulatory Commission pursuant to our FOIA request for nonbinding agreements), *with* Arrangement Between the Nuclear Regulatory Commission of the United States of America and the Vietnam Agency for Radiation and Nuclear Safety of the Socialist Republic of Vietnam for the Exchange of Technical Information and Cooperation in Nuclear Safety Matters, U.S.–Viet., May 9, 2013, T.I.A.S. No. 13-509 (reported to Congress by the Department of State as a binding executive agreement).

²⁴⁹ *Compare* Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru for Exchange of Terrorist Screening Information, U.S.–Peru, June 19, 2018 [4-DOS] (produced by the State Department pursuant to our FOIA request for nonbinding agreements), *with* Arrangement Between the Government of the United States of America and the Government of the Republic of Albania for the Exchange of Terrorism Screening Information, U.S.–Alb., Apr. 14, 2016, T.I.A.S. No. 16-914.1 (reported to Congress by the Department of State as a binding executive agreement).

²⁵⁰ See Hathaway, Bradley & Goldsmith, *supra* note 1, at 708 (noting that “if the reporting requirements for binding agreements are made more effective, it is possible that the executive branch or agencies within it could be even more motivated to circumvent those rules by concluding the agreements instead as ‘nonbinding’ agreements not subject to the reporting rules”).

goals. For instance, as noted above in Table 4, 69% of the formal nonbinding agreements in our database use the term “will” even though the State Department counsels against doing so. The absence of mandatory terminological practice across agencies can cause confusion among U.S. agreement partners. Broader internal coordination—and in particular expanding the range of nonbinding agreements that require prior State Department approval—could ameliorate this problem.²⁵¹ It would also ensure that the department that is chiefly responsible for U.S. foreign relations is not left completely blind to thousands of international agreements that together, even if not individually, have a major impact on U.S. foreign relations.

Third, we know from the fact that several agencies publish all their nonbinding agreements, and from the fact that we received thousands of previously unpublished agreements from agencies—including the Department of Defense—that agencies can find and publish formal nonbinding agreements. Indeed, it seems incongruous for us to be able to receive and publish an extensive database on nonbinding agreements going back decades but for the executive branch to hide most of this very same information from Congress and the American people going forward.

3. Tradeoffs of expanding transparency.

Before expanding the transparency mandates, Congress would need to consider several tradeoffs. First, expanding the array of formal nonbinding agreements subject to transparency mandates would increase compliance costs for the executive branch. Importantly, though, some of these costs—in particular, the costs to each agency of setting up a system for transmitting agreements to the State Department and the costs to the State Department of setting up a system to receive, organize, transmit to Congress, and publish these agreements—are already required to some extent by the new law. The agencies and the State Department are required under the new law to develop these

²⁵¹ A broader coordination regime would serve goals similar to the existing “C-175” process currently used by the State Department for the executive branch’s conclusion of binding agreements. *See supra* text accompanying notes 79–81. That process is designed to: “facilitate[] the application of orderly and uniform measures” for the negotiation and conclusion of agreements; ensure complete and accurate records of these agreements; ensure that the agreements are “carried out within constitutional and other appropriate limits” and do not conflict with other agreements or U.S. law; and ensure that they can be properly reported to Congress and published, as required by statute. 11 U.S. DEP’T OF STATE, 11 FOREIGN AFFAIRS MANUAL §§ 721(a), 722(1), (2), (9) (2006).

systems for significant nonbinding agreements, which will require sorting as well as internal coordination. (The law allocates to the State Department \$1 million per year for five years in recognition of its additional compliance costs.) The additional costs associated with reporting on a broader number of agreements are hard to measure, but they would need to be considered in deciding whether to expand the transparency mandates.

Second, one important justification for nonbinding agreements in the scholarly literature and in some of our interviews with domestic and foreign officials is that they, in contrast to binding agreements, are easier to keep secret. There is a general presumption in international law, reflected in the U.N. Charter and other instruments, that binding international agreements should be published, or at least not kept secret.²⁵² There is presently no such international presumption for nonbinding agreements (although, as noted in Part III, the issue of transparency for nonbinding agreements is a matter of current debate in many countries). Imposing a publication requirement on nonbinding agreements might therefore change both their effectiveness and import. Publicity after the fact might make some nonbinding agreements harder or impossible to make, therefore diminishing their effectiveness as a tool for cooperation. It might also lead nonbinding agreements to be treated *more* seriously than if they were secret, thus diminishing another element of their flexibility. That said, there may be similar foreign policy reasons for keeping binding agreements secret as well, yet Congress has long rejected that argument for nontransparency outside the context of classified agreements, which must be reported to Congress but need not be made public.²⁵³ Moreover, the legal mandates under FOIA have already allowed us to extract thousands of nonbinding agreements from the government and publish them, undercutting any secrecy rationale.

²⁵² The Regulations to give effect to Article 102 of the U.N. Charter state that “[e]very treaty or international agreement, whatever its form and descriptive name, entered into by one or more Members of the United Nations . . . shall as soon as possible be registered with the Secretariat in accordance with these regulations.” Registration and Publication of Treaties and International Agreements: Regulations to Give Effect to Article 102 of the Charter of the United Nations, 1st Sess., 55th plen. mtg. Res. 97 (Dec. 14, 1946). This provision has been interpreted to apply to binding but not nonbinding agreements.

²⁵³ One of Congress’s justifications for enacting the Case-Zablocki Act was a concern about secret agreements, especially those relating to military matters. See Hathaway, Bradley, & Goldsmith, *supra* note 1, at 649–50.

Third, any effort to expand the transparency regime for nonbinding agreements would face the difficult question of how to define the category of nonbinding agreements subject to regulation. The 2023 NDAA imposes a significance criterion and allows the State Department discretion in applying it. A more expansive approach would require a more formal definition of what is covered by the obligation, and it would need to leave some agreements outside of its scope. Nonbinding agreements share characteristics with other forms of diplomatic speech by the executive—for example, a president’s oral commitments to a foreign leader in a phone call—that it would be inappropriate to regulate. We outline one possible approach to defining the relevant nonbinding agreements below in Section A.4.

Finally, just as the current regime makes it possible for the executive branch to evade transparency requirements by using nonbinding agreements in lieu of binding agreements, an expanded transparency regime for nonbinding agreements might also lead the executive branch to develop workarounds. Agencies could, for example, resort to telephone calls, unexchanged bullet points, and other informal means to reach agreements that fall outside of any reporting (or internal-coordination) duty. If this happens, the result might be weaker international cooperation without any corresponding gain in transparency. There are reasons to believe, however, that this is unlikely to be a significant problem. Agencies derive substantial benefits from memorializing their agreements in common written texts. This gives them, their staff, and their successors—and those of their counterparts—a common reference for cooperation on an ongoing basis. Moreover, the contractual form likely helps give the agreements more normative force, which promotes compliance, especially within a bureaucracy. In addition, based on our interviews of agency officials, the lack of transparency is often due to the lack of any legal structure in place to mandate or provide a process for disclosure, not a conscious effort at secrecy. If that is the case, then the agencies are unlikely to seek to evade broader transparency mandates, at least in any systematic way.

4. A broader possible definition of covered nonbinding agreements.

As noted above, the new law does not define the term “nonbinding instrument.” If Congress wanted to extend the transparency requirements to a broader array of nonbinding agreements,

one approach (in addition to reducing or eliminating the carveout for agreements concluded by the Department of Defense, Armed Forces, and Intelligence Community) would be for Congress to eliminate the “significance” requirement and adopt a formal definition that seeks to capture the class of what we have referred to as formal nonbinding agreements.²⁵⁴ Such a definition might contain the following elements:

First, the agreement must be reduced to writing. In other words, there must be a shared written text.

Second, the agreement must have at least two parties or participants, at least one of which is the U.S. federal government or one of its departments, agencies, or subentities (for example, a federal agency or office within an agency), and at least one of which is a foreign sovereign state or subentity, or an international organization.

Third, if a document has been reported to Congress as an international agreement under the Case-Zablocki Act, it is excluded.

Fourth, the agreement must contain some of the formal elements normally associated with binding agreements, such as:

Title: The document’s title includes the following terms or similar terms: “Memorandum of Cooperation,” “Memorandum of Intent,” “Statement of Intent,” “Declaration on Cooperation,” “Understanding,” “MOU,” “Declaration of Principles,” “Joint Declaration,” “Joint Statement,” “Joint Communique,” “International Plan of Action,” “Terms of Reference,” “Joint Contingency Plan,” “Arrangement,” “Agreement,” or “Confidentiality Commitment.”²⁵⁵

Body: The document is divided into “sections,” “articles,” or other numbered or lettered parts.

Date: The document contains a date, sometimes expressly identifying an “effective date,” date of “entry into force,” or something similar.

Signature Line: The document contains a signature line or similar indication of conclusion:

²⁵⁴ Joint statements and communiques are typically coordinated within the executive branch, and they are by definition transparent. As a result, they do not need additional regulation.

²⁵⁵ 88% of the agreements in our formal nonbinding agreements database, and nearly all of the agreements in our joint statements and communiques database, have one of these terms in their titles.

- The phrase “Signed in,” “Signed at,” or “Done on,” or “Done at” preceding a location and a date, such as “Signed in Washington, D.C. on July 31, 2009,” “Signed in duplicate at Washington, D.C., the 1st day of September, two thousand and sixteen,” “Signed at Washington, D.C., in duplicate, this 19th day of August, 2014,” or “Done on the 23rd Day of November, 2009,” or similar term.
- The signature line or similar indication of conclusion includes two or more signature lines, one of which features “For the Government of the United States of America,” “For the U.S. Department of Commerce,” “For the Department of Commerce of the United States,” or “For the Office of the General Counsel of the U.S. Department of Commerce,” or a similar phrase.

These criteria would be far from determinant. But our experience with the FOIA process suggests that it is possible to define a category of nonbinding agreements that is meaningful. Initially, the absence of an adequately clear definition of a “nonbinding agreement” was an issue for some of our FOIA requests to the agencies. Several agencies asked for additional information on the ground that our initial requests were not sufficiently specific.²⁵⁶ In every single case where an agency gave this response, we provided clarification that allowed the agency to find and report the agreements we hoped to receive. The above definition

²⁵⁶ See, e.g., Letter from Roberta Parsons, Acting Dep. Chief FOIA Officer and Acting Dep. Dir. for FOIA/Privacy Act Operations, Off. of Priv. and Open Gov’t, U.S. Dep’t of Com., to Oona A. Hathaway (Feb. 11, 2021) (“Specifically, we need more description about what constitutes a non-binding arrangement or understanding for purposes of this request that provides guidance for conducting a search, so that the level of effort required to locate responsive documents is reasonable.”). The initial requests provided a background statement describing nonbinding agreements and then requested “any and all *unclassified* non-binding understandings or arrangements with foreign countries or international organizations actually in” the agency’s possession. *Id.* The requests specified that they included “[a]ny and all understandings or arrangements that are nonbinding based on the text or drafting history, as described in the Background statement above,” or that comply with the definition set forth in the MOU Guidance document. *Id.* They also included “[a]ny and all understandings or arrangements transmitted to the Department of State and determined to be nonbinding and therefore *not* reportable to Congress as an international agreement under the Case-Zablocki Act.” *Id.* (emphasis added). The requests specifically excluded agreements reported to Congress under the Case-Zablocki Act and agreements solely in oral form.

builds on our learning in the course of these exchanges about how to effectively clarify the definition of nonbinding agreements so that agencies—many of the very same agencies that would be regulated by an expanded transparency regime—could produce the relevant documents.²⁵⁷

B. Nonbinding Agreements and Domestic Delegation

As discussed earlier in this Article, the executive branch has sometimes used nonbinding commitments in combination with domestic regulations to forge consequential international cooperation without the contemporary approval, or even involvement, of Congress.²⁵⁸ The Iran nuclear deal and the Paris climate change agreement are prime examples. While controversial, this mechanism is generally lawful. It merely combines two lawful presidential functions—making nonbinding agreements and exercising statutorily delegated regulatory authority—in novel ways.²⁵⁹ The 2023 NDAA, which is focused only on coordination and transparency, does not purport to limit the use of this mechanism. It does require that the executive branch report and publish significant nonbinding agreements, along with a “detailed description of the legal authority that, in the view of the Secretary [of State] . . . provides authorization for [the agreement] to become operative.”²⁶⁰ These provisions might help draw attention to agreements like the Iran deal and Paris agreement. But there are several reasons why Congress might want to regulate these agreements more directly.

First, it is unlikely that Congress contemplated that its delegation of authority to the president in these contexts would be

²⁵⁷ The clarifications included additional information such as common title language, the presence of formal signature lines together with common accompanying language, common phrases indicating the agreement is meant to be nonbinding, the presence of a date and common accompanying language, and links to illustrative examples of nonbinding agreements.

²⁵⁸ See *supra* text accompanying notes 112–16.

²⁵⁹ It is lawful, that is, as long as the agreement is in fact nonbinding and the president properly exercises the authority delegated by Congress. Cf. Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 FORDHAM L. REV. 1199, 1203–04 (2017) (arguing that the Iran nuclear agreement exceeded presidential authority because “it is not clear that the [agreement] is a nonbinding political commitment” and because “the President’s across-the-board exercise of waiver authority contradicts the expressed intent of Congress in the sanctions statutes”).

²⁶⁰ 1 U.S.C. § 112b(a)(1)(B)(iii).

used as the basis to implement international agreements. Second, when a president relies on preexisting domestic delegations to implement new nonbinding international commitments, Congress can block the agreement only by enacting a new statute, which in many if not all cases would require it to overcome a presidential veto. Third, the use of domestic delegations to implement nonbinding agreements portends a potentially broad shift of agreement-making power to the president since there are no limits on the president's power to make nonbinding agreements, and since Congress has delegated regulatory authority to the president in broad terms across a range of topics. These three points taken together underscore that Congress is at a significant structural disadvantage in the face of novel uses of extant delegated authority to implement nonbinding agreements.

But Congress is not powerless, at least in theory. If it wishes, and if it can overcome possible vetoes (two big ifs), it can curb this presidential power through legislation that alters the prior delegations. First, it can narrow or clarify discrete delegations to make them less susceptible to use as the basis for implementing a nonbinding agreement. If Congress were truly concerned about the Paris Agreement, for example, it could have amended the Clean Air Act²⁶¹ to specify that it could not be the basis for the carbon reduction elements of the Clean Power Plan,²⁶² the primary regulatory vehicle for implementing the nonbinding emissions reduction pledge in the Paris Agreement. Second, Congress could specify that particular delegations of authority cannot be the basis for implementing a nonbinding international agreement without new congressional approval. This is precisely the power that Congress leveraged when it passed the Iran Nuclear Agreement Review Act,²⁶³ which suspended authority that Congress had previously delegated to the president to waive U.S. sanctions on Iran while Congress reviewed the draft nonbinding Iran nuclear deal.²⁶⁴ Third, and most aggressively, Congress could enact a statute that makes clear that *none* of its domestic delegations to the president could be the basis for implementing a nonbinding international agreement that was not otherwise authorized by Congress.

²⁶¹ 42 U.S.C. §§ 7401–7671q.

²⁶² 80 Fed. Reg. 64,662 (Oct. 23, 2015).

²⁶³ 42 U.S.C. § 2160e.

²⁶⁴ See Bradley & Goldsmith, *supra* note 144, at 1219–20.

The last option obviously has the broadest implications; its practical impact would depend on the unknowable extent to which future presidents wanted to build on the Obama administration's examples to implement consequential nonbinding agreements through domestic regulations. The policy desirability of the first two options is similarly impossible to assess divorced from the particular application. Our point is simply that if Congress decides that it wants to regain some of the authority claimed by novel uses of nonbinding agreements, it has legally available options. None of these options would interfere with the president's power to make nonbinding international agreements, or to conduct negotiations in connection with those agreements, or to implement or enforce nonbinding agreements through exercises of the president's Article II power.²⁶⁵ Rather, they would simply alter the terms of domestic statutory delegations that clearly fall within Congress's Article I powers. Congress is not required to delegate these various forms of regulatory authority in the first place and thus almost certainly has the authority to restrict the uses to which the delegated authority is put.

The new legislation, by bringing greater transparency to the authorities on which the executive branch relies in implementing nonbinding agreements, will offer an opportunity for Congress to more fully engage these questions. While it is possible that Congress may determine that it should restrict the use of these authorities, it is also possible that Congress, now more fully aware of how these authorities are used to achieve U.S. foreign policy aims, will be content to leave the delegations unaltered. Either way, it will be an important step forward in interbranch coordination.

C. International Best Practices

The information on comparative practices described in Part III demonstrates that many nations are struggling with some of the same issues as the United States when it comes to

²⁶⁵ They thus would not run afoul of the executive branch's contestable claims of a very broad exclusive power to conduct the nation's diplomatic relations. See Jean Galbraith, *The Runaway Presidential Power over Diplomacy*, 108 VA. L. REV. 81, 97 (2022) (analyzing and criticizing this asserted power). Of most relevance here, congressional changes to the terms of domestic law delegations would in no way interfere with the executive branch's assertion of "'exclusive authority to determine the time, scope, and objectives' of international negotiations." CONSTITUTIONALITY OF SECTION 7054 OF THE FISCAL YEAR 2009 FOREIGN APPROPRIATIONS ACT 8 (2009).

nonbinding agreements. Moreover, we uncovered some clearly inconsistent assumptions about nonbinding agreements among foreign partners that could give rise to misunderstandings about the nature of an agreement.²⁶⁶ Indeed, we have documented several instances where the United States did not have a common understanding with its partners about whether an agreement is binding.²⁶⁷ And of course there may be many examples that we are unaware of due to the lack of transparency of these agreements.

To address these concerns, states—including the United States—might consider developing a set of international best practices for the drafting of nonbinding agreements. Indeed, the Inter-American Juridical Committee of the OAS has recently suggested some best practices, including with respect to the terminology that should be used and avoided when drafting nonbinding agreements.²⁶⁸ As rapporteur Duncan Hollis noted, “[w]ithout further clarifications and elaboration, there are legitimate concerns that existing agreement practices may lead to inconsistent understandings, unaligned expectations, and even disputes among OAS Member States, to say nothing of the international community as a whole.”²⁶⁹ The OAS Guidelines could potentially serve as a foundation for future discussions on drafting practices that extend beyond that region. At a recent meeting of the Council of Europe’s CAHDI, the Director General of the Legal Service of Finland’s Ministry of Foreign Affairs expressed the view that “uniform state practice in the field of non-legally binding instruments [is] desirable,” and she expressed the “hope the OAS guidelines will pave the way for a similar process” in Europe.²⁷⁰ Many states have their own internal drafting guidance, and it might make sense as a first step to compile examples of this guidance from around the world to identify commonalities and differences. Indeed, this was one of the suggestions made at the CAHDI meeting.²⁷¹

In the absence of an international agreement on best practices, some countries are borrowing from the guidelines developed in other countries. The director of the international law department in the Czech foreign ministry has reported, for example,

²⁶⁶ See also OAS Guidelines, *supra* note 27, at 91 (“Not all States employ the same linguistic markers, titles, or clauses to differentiate a treaty from a political commitment.”).

²⁶⁷ See *supra* text accompanying notes 38–40.

²⁶⁸ See OAS Guidelines, *supra* note 27, at 28–29.

²⁶⁹ *Id.* at 10.

²⁷⁰ Suvanto, *supra* note 213, at 5.

²⁷¹ See Eick, *supra* note 183 (suggesting this as a first step toward standardization).

that he borrows from guidance developed in the United Kingdom's Foreign and Commonwealth Office.²⁷² Therefore, another reason for the United States to become involved in discussions of international best practices would be so that its own views, such as those reflected in the current State Department Guidance,²⁷³ can potentially influence the resulting international standards.

To be sure, there may be instances in which states—again, including the United States—desire ambiguity about whether an agreement is binding—perhaps for domestic political reasons at home or in a partner country. We have identified some potential examples in this Article—for example, the Iran nuclear deal and the Mexico migration agreement, where the different positions about bindingness may have stemmed more from U.S. executive branch domestic political considerations than from failures in drafting.²⁷⁴ But the adoption of best practice guidelines would not eliminate the possibility of such strategic ambiguity; in those instances, states could simply decide not to follow the best practices. We acknowledge, however, that ambiguity will be harder to maintain if best practices are widely followed. In the vast majority of cases, including in essentially all of the agency-to-agency agreements that have been a particular focus of this Article, it is in the interest of states to have a common understanding with their partners about whether an agreement is binding.

CONCLUSION

When the Case-Zablocki Act first passed in the 1970s, the central issue was how to address the shift from Article II treaties to executive agreements. We are now in the midst of another fundamental change in how the United States makes international agreements. While executive agreements remain an important part of U.S. foreign relations, they are increasingly being eclipsed by nonbinding agreements—agreements that are often identical in form and function to binding agreements, but, until recently, have not been subject to any legal regulation. The mandates in the 2023 NDAA are good first steps toward ensuring transparency and accountability for this form of international commitment, but additional reforms will likely be needed.

²⁷² See Valek, *supra* note 181.

²⁷³ See State Department Guidance, *supra* note 59. This guidance is strangely located only in the archived portions of the State Department's website.

²⁷⁴ See *supra* text accompanying notes 39–40.

It is also time to reorient the field of international law to take account of the rise of nonbinding agreements. The growing use of these agreements has potentially profound implications for the future of the international legal system. Both the teaching and study of international law need to be updated to more accurately reflect how nations today are making commitments. And core assumptions underlying the field—including most fundamentally the assumption that international agreements are operating as law in constraining the behavior of nations—need to be revisited in light of what appears to be an increasing shift toward nonbinding agreements in international cooperation.

There are a range of changes to the field that should be prompted by the rise of nonbinding agreements. First, the teaching of international law courses should be updated to contain more emphasis on these agreements. At present, nonbinding agreements are treated as an afterthought in most international law casebooks, if they are discussed at all. Not only should nonbinding agreements be taught, but there should be more attention to the ways in which such agreements interact with binding agreements—and more generally to the ways in which law and diplomacy intersect.

Second, these agreements should receive significantly more scholarly attention. We hope that the information in our databases of nonbinding agreements will motivate scholars to further analyze them and the uses to which they are put. There is a great deal of terrain still to explore. This Article has focused on the nonbinding documents that are most akin to binding international agreements, but there is a wide range of other nonbinding documents concluded during international cooperation that remain to be documented and explored. This includes unilateral statements, exchanges of notes or letters, and oral arrangements, to name a few. Exploring and documenting this wider range of nonbinding documents would deepen the field's understanding of how such documents shape international diplomacy.

Third, theories about international law and international cooperation need to be revised to take account of nonbinding agreements. While there has been some scholarship on why states choose to conclude nonbinding agreements over binding ones, that scholarship remains sparse, and relatively little has been written on the subject in recent years. There are a range of questions waiting to be answered, including: Are there contexts or subject areas that are more (or less) amenable to nonbinding

agreements? To what extent are nonbinding agreements substitutes for binding agreements, and to what extent do they pave the way to binding agreements? Are states more likely to enter into nonbinding agreements with certain countries and, if so, why? In addition, there are deeper theoretical issues to be explored. What effect does the legal bindingness of a commitment have on the nature of the commitment? Does the presence of a legal commitment affect state behavior in some way that a nonlegal commitment (such as that in a nonbinding agreement) does not?

In short, the rise of nonbinding international agreements opens up a vast range of new questions for international law teachers, scholars, and practitioners to explore.

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