ARTICLE

Trade's Mini-Deals

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The modern consensus is that U.S. trade law is made through statute and through large congressional-executive agreements, both of which maintain Congress' constitutional primacy over the regulation of foreign commerce. Contrary to this understanding, however, short, targeted agreements negotiated by the U.S. executive with foreign trading partners – recently referred to as "mini-deals" – have become a fixture of the trade law landscape over the last three decades in staggering number. More than 1,200 such agreements govern the movement of goods and services in and out of the United States from and to 130 countries. Such deals are not only now one of the primary ways trade law is made but also are likely to be the principal tool for trade lawmaking in the Biden Administration. Yet, despite their ubiquity, we know almost nothing about them. This Article explains how this transformation in U.S. trade law has occurred as a growing foreign commercial bureaucracy began to engage readily with foreign partners.

The Article provides an unprecedented look at trade mini-deals, where they come from, how they are made, and what they do. The data show a growing reliance by the executive on mini-deals to achieve foreign commercial goals in the last thirty years and a significant expansion of their scope in the last five years. They are not so "mini" anymore. The data also reveal that these agreements often slip under the radar of our ordinary accountability and monitoring regimes and have been missed by prior scholarship. Their obscurity has enabled them to grow quietly in importance as a means to achieve trade and regulatory policy aims. They have become a preferred tool for good reason, even if they suffer from procedural flaws.

The picture that emerges from this review disrupts prior understandings of the

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foreign commercial legal topography, demonstrating that both the trade and transnational regulatory landscapes are much more textured than previously understood. The Article uses this hand-collected quantitative and qualitative data set to sketch a more accurate portrait of how our trade law is made. It argues that such agreements serve constructive legislative and rulemaking purposes, supplementing statutes and regulations and sometimes substituting for them. The analysis presented here underscores the profound and cross-cutting bureaucratic authority across foreign relations and the administrative state. Given the importance of this transnational activity and its implications, the Article also opens a new field for interdisciplinary scholarly research.

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INTRODUCTION

At the center of U.S. trade law is a legal device undernoticed in trade law scholarship and underestimated in the other legal domains in which it operates. This tool is critical to regulating the ins and outs of foreign products in the United States. It is most easily visible in its application. Consider a foreign tomato. The law applicable to the foreign tomato coming into the United States includes some U.S. statutes and some regulations developed by federal agencies through a public rulemaking process. But major parts of the international produce canon consist of agreements concluded between the United States and the crop's country of origin that cover topics as specific as what treatment methods the tomato receives while still far from your kitchen, its processing and storage, its labeling and packaging, and under what conditions it may be sold in your supermarket. These sorts of agreements comprise the backbone of the rules that govern not just tomatoes,[1] but also trousers,[2] titanium,[3] telecommunications,[4] and much more. Together, they make up a set of over 1,200 agreements that control the cross-border movement of goods and services into and out of the United States. And this body of law has never before been explored.

Recently, commentators have referred to these typically short executive trade agreements as "mini" or "skinny" trade deals to distinguish them from large scale free trade agreements (FTAs) that are approved and implemented by Congress pursuant to now well-known statutory authorities.[5] In contrast to FTAs, so-called mini-deals are developed by the executive alone and occupy a unique place in our foreign relations and trade laws. The vast majority create binding obligations for U.S. government actors and private individuals. Made by a handful of different agencies across the executive branch, these deals are linked by both the special trade lawmaking process that they usually follow and, more

1 *See, e.g.*, Memorandum of Understanding for the Exchange of Information on Exports of Fresh Tomatoes Between the Secretariat of Economy of the United Mexican States and the Department of Commerce of the United States of America, Mex.-U.S., Aug. 19-23, 2013, http://www.economia-snci.gob.mx/sicait/5.0/doctos/MOU_Tomate_Ingl%C3%A9s.pdf [hereinafter Tomato MOU].

2 *See, e.g.*, Agreement Concerning Trade in Women's and Girls' Wool Trousers, Arg.-U.S., May 14-31, 1991, Hein's No. KAV 2937.

3 *See, e.g.*, Agreement on Reduction of Export Duties on Ferrous and Non-Ferrous Scrap Products, Ukr.-U.S., Feb. 22, 2006, T.I.A.S. 06-222.

4 *See, e.g.*, Understanding Concerning the Procurement Procedures for Telecommunications Equipment in Korea, S. Kor.-U.S., Mar. 29-Apr. 10, 1995, Hein's No. KAV 5190.

5 *See, e.g.*, Testimony of U.S. Trade Representative Robert Lighthizer, House Ways & Means Comm., C-SPAN (June 17, 2020), https://www.c-span.org/video/?473040-1/house-ways-means-committee-hearing-trade-policy [hereinafter Lighthizer Testimony 2020].

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importantly, by the fact that they regulate the movement of goods and services into and out of the United States.

That any foreign commercial deals could be negotiated and implemented by the executive alone is a departure from traditional understandings of the separation of trade law powers under the U.S. Constitution.[6] Those traditional understandings would point to congressional-executive agreements as the primary trade law tool since 1995. Generally, the professional consensus is that, apart from the imposition of tariffs, trade law is made through a remarkably successful dual-branch process constructed in 1974 and applied to its greatest extent in the last 25 years beginning with the North American Free Trade Agreement (NAFTA).[7] Yet, in the last decade, only one trade agreement has been made through the congressional-executive agreement process: the update to the NAFTA known in the United States as the United States – Mexico – Canada Agreement (USMCA).[8] By contrast, in 2020 alone, 32 of these trade-related executive agreements entered into force governing everything from steel to nuts.[9] The institutional arrangements for our separation of trade law powers have dramatically changed.

This Article is the first to note this feature of trade lawmaking in the United States and its implications. To do so, the Article takes stock of the many agreements that fall in this category. As detailed below, I have collected and reviewed more than 1,200 of these trade-related executive agreements to understand what they do, how they are part of U.S. law, and what processes and principles apply to their making and their maintenance. Surprisingly, almost no research has examined this piece of trade law governance – these agreements' content, scope, the relationships they create, their authority, or their institutional or economic impact. We know almost nothing about them – until now. What emerges in this first look is an astonishing array of agreements dictating broad swathes of economic law. Despite being underappreciated, these agreements are everywhere. They are often legislative and regulatory devices in unfamiliar clothes. They supplement statutes and regulations and also sometimes substitute for and purport to override them.[10] They fill the space between our administrative state and the global marketplace.

Given their expansion and their constitutional consequence, it is misleading to call them "mini" or "skinny" at all. I adopt here the term

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6 *See infra* Part I.A.

7 CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., R45148, U.S. TRADE POLICY PRIMER: FREQUENTLY ASKED QUESTIONS 27 (2021).

8 *See id.* at 34 fig.14.

9 *See infra* Part II.A.

10 *See* discussion *infra* Part I.B; *see also* Kathleen Claussen, *Regulating Foreign Commerce Through Multiple Pathways: A Case Study*, 130 YALE L.J. F. 266, 278-80 (2020) [hereinafter Claussen, *Multiple Pathways*].

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"trade executive agreements" (TEAs) to capture more accurately the work that these agreements are doing and their notable unilateral origins. This Article begins the conversation about the legal regime that governs their life cycle – their authority, their making, their application (or lack thereof), and even their eventual fade from prominence. In addition to their separation-of-trade-law-powers complications, TEAs are special among traditional notions of "executive agreements"[11] because they are made through a process entirely apart from other executive agreements. Strategic agency organizational design choices have enabled TEAs to flourish. And, when studied closely, these deals can be seen to make important contributions to trade and regulation.

When you consider TEAs' ubiquity, their obscurity seems all the more perplexing. Most of these deals fly under the radar of legislative and public attention, despite that they have been used in one form or another by presidents and agencies for more than a century.[12] In 2019 and 2020, some renewed congressional attention to TEA practice emerged when the Trump Administration entered into multiple TEAs with four of the United States' largest trading partners, including among those TEAs what is known as the "Phase One China Deal."[13] Touting the Deal as a major victory in the "trade war," the Administration emphasized its use of TEAs as part of the executive trade law arsenal.[14] Or, take the recent U.S. trade agreement with Japan.[15] On the surface, this agreement created reciprocal market access for certain agricultural and industrial goods by reducing tariffs on 241 categories of products coming from Japan, but it went

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11 This includes what some scholars would call ex ante congressional-executive agreements in which Congress has delegated authority to the executive to enter into an agreement without a requirement that Congress see the final product. Like others, I do not distinguish between ex ante congressional-executive agreements and sole executive agreements, but I note where the absence of distinction can be problematic. *See, e.g.*, Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1257 (2007-2008) [hereinafter Hathaway, *Treaties' End*]. Other important general studies of executive agreements acknowledge that some such agreements relate to trade; those studies concentrate on the constitutional authority underlying such agreements. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1207-08 (2017); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 258 (2009) [hereinafter Hathaway, *Presidential Power*].

12 *See* Hathaway, *Treaties' End*, *supra* note 11, at 1289-90.

13 Economic and Trade Agreement Between the Government of the United States and the Government of the People's Republic of China, China-U.S., Jan. 15, 2020, https://ustr.gov/sites/default/files/files/agreements/phase-one-agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf [hereinafter 2020 China Deal]. The other trading partners are Canada, Mexico, and Japan. I take up each relevant agreement in the following pages.

14 *See, e.g.*, Lighthizer Testimony 2020, *supra* note 5 (described in greater detail at Part III); Interview with USTR official 6, via Zoom (Nov. 4, 2020) (commenting that a recently concluded TEA with Brazil was an ordinary part of the executive trade toolkit).

15 Trade Agreement Between the United States of America and Japan, Japan-U.S., Oct. 7, 2019, https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-trade-agreement-text [hereinafter Japan-U.S. Trade Agreement].

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farther. In two annexes, it developed 78 pages of rules regarding the specifications of products and services that can flow in either direction.[16] In seven exchanges of letters negotiated apart from the principal agreement, it set out new arrangements with Japan on products like beef, rice, and alcoholic beverages.[17] A further "side agreement" on digital trade prohibits certain taxes on digital products, disallows data localization measures, and guarantees consumer privacy protections, among other obligations.[18]

The Trump Administration brought TEAs to the fore but puzzlingly little has been asked by members of Congress about where they came from and how far they can go.[19] Similarly, outside observers and academics have barely questioned their provenance and are largely unaware of TEAs' impact on the constitutional, regulatory, and bureaucratic landscapes. This Article excavates TEAs to discern answers to these questions. It does so

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16 *Id.*

17 Exchange of Letters Regarding Alcoholic Beverages, Japan-U.S., Oct. 7, 2019, https://ustr.gov/sites/default/files/files/agreements/japan/Letter_Exchange_on_Alcoholic_Beverages.pdf; Exchange of Letters Regarding Beef, Japan-U.S., Oct. 7, 2019, https://ustr.gov/sites/default/files/files/agreements/japan/Letter_Exchange_on_Beef.pdf; Exchange of Letters Regarding Rice, Japan-U.S., Oct. 7, 2019, https://ustr.gov/sites/default/files/files/agreements/japan/Letter_Exchange_on_Rice.pdf; Exchange of Letters Regarding Agricultural Safeguard Measures, Japan-U.S., Oct. 7, 2019, https://ustr.gov/sites/default/files/files/agreements/japan/Letter_Exchange_on_Safeguards.pdf; Exchange of Letters Regarding Skimmed Milk Powder, Japan-U.S., Oct. 7, 2019, https://ustr.gov/sites/default/files/files/agreements/japan/Letter_Exchange_on_Skimmed_Milk_Powder.pdf; Exchange of Letters Regarding Whey, Japan-U.S., Oct. 7, 2019, https://ustr.gov/sites/default/files/files/agreements/japan/Letter_Exchange_on_Whey.pdf; Exchange of Letters Regarding Interactive Computer Services, Japan-U.S., Oct. 7, 2019, https://ustr.gov/sites/default/files/files/agreements/japan/Letter_Exchange_on_Interactive_Computer_Services.pdf.

18 Agreement Between the United States of America and Japan Concerning Digital Trade, Japan-U.S., Oct. 7, 2019, https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text [hereinafter Japan-U.S. Digital Trade Agreement].

19 Some members of Congress questioned the Trump Administration's use of mini-deals with China, Japan, and Ecuador. *See, e.g.*, Letter from Members of the U.S. House of Representatives to USTR Robert Lighthizer (Dec. 9, 2020) (criticizing the USTR for negotiating and concluding a deal with Ecuador without congressional consultation); *Rep. Murphy: U.S.-Japan Deal 'Bad for our National Security,'* INSIDE U.S. TRADE, Sept. 11, 2020 (quoting Rep. Murphy: "It is unworthy of our relationship with Japan just to have some sort of 'mini-deal' . . . . It's substandard for everybody and not only is it bad for our economy, it's bad for our national security and national-regional stability."); Isabelle Icso, *Blumenauer, Kind Assess TPA Renewal Prospects, Election Ramifications*, INSIDE U.S. TRADE, Sept. 11, 2020 (noting that the administration used or planned to use a statutory "loophole" for mini-deals with Japan, China, India and Brazil). Little came of these brief criticisms. In fact, on other occasions, members have expressed support. Isabelle Icso, *Lawmakers Call on USTR, USDA to Strike Broad Phase-Two Deal with Japan*, INSIDE U.S. TRADE, July 10, 2020; Isabelle Icso, *Rep. Sewell Suggests 'Skinny' Digital Deals Could be Struck with Australia, Singapore*, INSIDE U.S. TRADE, June 26, 2020 [hereinafter Icso, *Skinny Deals*]; Alex Lawson, *U.S. and Brazil Aiming for Early-Stage Trade Pact This Year*, LAW360 (Apr. 17, 2020, 6:22 PM), https://www.law360.com/articles/1265058/us-and-brazil-aiming-for-early-stage-trade-pact-this-year.

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with some urgency. More TEAs are on the way.[20] Certain TEA delegations from Congress to the president will be under reconsideration in the coming year as they are scheduled to expire.[21] To fill the void at this critical juncture, this Article takes a comprehensive look at these instruments to conceptualize this constitutional moment with quantitative and qualitative force.

Ultimately, the biggest obstacle to studying TEAs is finding them. A key aim of this project is to provide some solid empirical grounding for an analysis of these instruments, but to do so based on the agreements that are publicly available. Approaching my search for TEAs this way produced striking and unanticipated results. My team discovered hundreds of agreements that were mentioned on public websites but only readily available through subscription services; other hundreds were mentioned only in subscription services; and still others were in the public sphere but missed by subscription services. In some instances, trade agreements into which the United States has entered are not available anywhere, including from the U.S. government. Executive branch agency recordkeeping, awareness or, perhaps better put, confusion and transparency are major contributing problems. Given the challenges that I describe below, we can safely assume that the 1,225 agreements reviewed here are just the tip of the iceberg.

The Article proceeds in four parts. Part I explains the notion of a TEA and accounts for how such an instrument can exist when the Constitution assigns trade governance to Congress, not the executive. I elaborate on how these agreements emerged from the practices of our foreign commerce bureaucracy, while scholars and lawmakers were overly concentrated on the congressional-executive agreements. This Part sets out a taxonomy of TEAs that categorizes these deals according to the types of commitments they create for governments and for private parties. It also draws on interviews with government officials to peel back the layers of the institutional design that has facilitated the executive branch's reliance on TEAs to do trade business. I take up how such agreements are actually made, rather than what scholarship and even statute would suggest. These organizational distinctions structurally favor the rise of TEAs, while also allowing TEAs to slip through the oversight cracks. Part I's overview of the TEA tapestry reveals how TEAs are distinct from other executive agreements in their constitutional positioning, their unique

20 *See, e.g.*, Isabelle Icso, *India's Trade Minister Hopes to Negotiate 'Fresh' Package with Biden*, INSIDE U.S. TRADE, Feb. 19, 2021 [hereinafter Icso, *India*]; Isabelle Icso, *Analysts Weigh Benefits, Drawbacks of 'Sectoral' Trade Deals*, INSIDE U.S. TRADE, Feb. 5, 2021; Marc L. Busch, *Biden's Pre-Trump Language on Trade Needs Updating*, THE HILL (Aug. 10, 2020, 8:00 AM), https://thehill.com/opinion/international/511231-bidens-pre-trump-language-on-trade-needs-updating.

21 19 U.S.C. § 4202(a)(1)(A)(ii).

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common content, and the similar process through which they are formulated.

Drawing together this body of law exposes patterns in with whom, where, and when TEAs are used. Part II provides these analytics. I introduce a descriptive account of this original data set of TEAs dating back to the nation's founding. TEAs have been a consistent feature in the trade law landscape for several decades, but they exploded into the administrative space as non-tariff barriers to trade became part of the trade portfolio beginning in the late 1990s.[22] For this reason, the study concentrates the greatest attention on these modern TEAs and their particularities. It documents the characteristics of TEAs – their numbers, their size and impact, their concentration in individual sectors, and their partner countries.

Part II also develops possible explanations as to precisely when these instruments are chosen, and on what grounds or for what reasons. An alliterative trio of rationalizations surfaces. Trends in TEAs appear to be the result of bureaucratic bundling, natural proliferation (what I call informally a bunny effect), and experimentation as building blocks for future large-scale deals. Further, TEAs circumvent tricky questions regarding their status in U.S. law by applying bootstrapping strategies.

Part III turns to the normative and prescriptive takeaways of this research. It evaluates and assesses TEAs, considering some of the costs of employing these tools as well as the countervailing benefits. TEAs are widely – and rightly – accepted as making valuable contributions to U.S. trade and trade law but have recently come under greater scrutiny for the trade-offs they create, as well as for the questionable legal authority on which some of them stand. Accordingly, this Part turns to ways TEAs could be better institutionalized to account for their approval in form, but their problems in process. It buttresses the case in favor of these below-the-radar agreements, arguing that their work should neither be overlooked nor heavily reconsidered. I maintain that we need these instruments, but that we might consider and treat them differently, including in the law. I then turn to how future trade and administrative institution architects might make modifications for more optimal governance and how, in the short term, some of the accountability issues may be tempered.

Finally, Part IV discusses how this unprecedented look at TEAs ought to trigger a modification of existing paradigms across multiple legal systems. One lesson from this study is that otherwise siloed areas of law are more interwoven through the work of TEAs than previously recognized. TEAs introduce a set of pressing trade law questions, but they

22 *See* discussion *infra* Part I.A.

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also intervene in longstanding debates about how the United States enters into binding arrangements with other countries – from a constitutional perspective and as a matter of statutory delegation. TEAs challenge the dominant conversations about distributions of authority and the incorporation of foreign commitments into U.S. law. Likewise, TEAs reorient our visions for ongoing conversations in administrative law: what that body of law does and what it can or should do. The Article concludes by reflecting prospectively on what additional work needs to be done across more than a half dozen legal and social scientific areas.

Given that TEAs occupy a central role in foreign-facing agency activity, understanding them and their surrounding legal context is vital to projects of U.S. and international law. Until now, we have missed these executive branch policymaking levers in language, law, and literature, but this Article starts to fill the gap. Rightly so, since TEAs are the primary means through which the executive branch regulates the foreign commerce of the United States.

I. THE LEGAL & ETYMOLOGICAL REGIMES

When the United States concluded two recent trade-related deals with Japan,[23] news outlets struggled with what to call them. Partly connected to tariffs, partly connected to technology and intellectual property, were they "trade agreements"? They did not look like the other recently concluded trade agreement about which the media knew, the USMCA.[24] A press release from the Office of the U.S. Trade Representative (USTR) said that Japan and the United States "reached agreement on early achievements from negotiations."[25] The *Wall Street Journal* reported that President Trump and President Abe signed a "trade-enhancement agreement."[26] In fact, the Japan deals were neither new nor quite the same as those that had come before them. But the uncertainty surrounding these two agreements extended beyond the vocabulary applied to them. We also lacked the theoretical and structural background to be able to compartmentalize and

23 Japan-U.S. Trade Agreement, *supra* note 15; Japan-U.S. Digital Trade Agreement, *supra* note 18.

24 Agreement Between the United States of America, the United Mexican States, and Canada, July 1, 2020, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

25 Press Release, Office of the U.S. Trade Representative, Fact Sheet on Japan-U.S. Trade Agreement (Sept. 25, 2019), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/september/fact-sheet-us-japan-trade-agreement.

26 Vivian Salama & Josh Zumbrun, *U.S., Japan Reach Trade Deal on Farm Goods, Digital Trade*, WALL ST. J. (Sept. 25, 2019), https://www.wsj.com/articles/u-s-japan-sign-trade-deal-giving-american-food-products-more-access-11569430694#:~:text=President%20Trump%20and%20Japan's%20Prime,%2D%20and%20third%2Dlargest%20economies.

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discuss them. This project aims to resolve the language predicament by introducing the term "trade executive agreement" in place of the colloquial "mini-deal," "skinny deal," or the indiscriminate "sectoral deal" – terms that have been deployed of late – and to begin a conversation on how we should think about these instruments and the legal issues they pose.

"Trade executive agreement" as I use the term refers to a written commitment between the United States and another country that relates to cross-border movement of goods and services and that has not been subject to congressional approval between its negotiation and its entry into force. That definition merits greater exploration, however, because the boundaries of each of those concepts can be hazy or even contested. TEAs do not fit the traditional molds. They are not FTAs[27]; they are not sole executive agreements[28]; and they are not rules issued by agencies – even if they purport to act as each of those. TEAs are understudied in part because of their Venn-like cartography, operating across not just trade but also foreign relations and administrative law.

A. Of Constitutional Oxymorons

Foreign commerce is expressly and unmistakably a congressional prerogative according to Article I of the Constitution.[29] Article II assigns treaty authority, apart from the advice and consent of the Senate, to the president.[30] For many years, this duality left trade treaties in legal limbo. If foreign commerce is assigned to Congress, and treaties are assigned principally to the executive, who has the first and last word on treaties related to foreign commerce? That conflict appeared to many to be resolved with the development of a shared congressional-executive process in 1974, known as the fast-track process.[31] In the fast-track process, the

27 "Free trade agreement" is typically reserved for agreements that purport to bring substantially all tariffs on goods between two or more countries down to zero. *See* General Agreement on Tariffs and Trade, pt. III art. XXIV, Oct. 30, 1947, 55 U.N.T.S. 194.

28 *See generally* Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581-82 (2007) (defining the term). *See also* Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT'L L. 885, 892-93 (2016) (citing Clark and expanding upon the basic typology that has arisen among foreign relations scholars for descriptive and normative purposes). TEAs as discussed in greater detail below do not rely solely on executive authority in most instances. Rather, TEAs are typically negotiated pursuant to delegated authority, even if stretching its limits.

29 U.S. CONST. art. I, § 8, cl. 1, cl. 3. *See also* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CAL. L. REV. 583, 586-97 (2019); Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT'L L. 315, 316-20 (2018); Harold H. Koh, *Congressional Controls on Presidential Trade Policymaking after* I.N.S. v. Chadha, 18 N.Y.U. J. INT'L L. & POL. 1191, 1191 (1986).

30 U.S. CONST. art. II, § 2, cl. 2. *See also* Duncan B. Hollis, *An Intersubjective Treaty Power*, 90 NOTRE DAME L. REV. 1415, 1418 (2015).

31 *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 803 (1995) ("The Trade Act of 1974 made a comprehensive effort to restructure the modern two-House procedure to suit the needs of economic diplomacy. This framework has proved remarkably successful - to the point where it is now taken for granted by all foreign-trade professionals.").

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constitutional impasse is managed by allowing the executive to negotiate with congressional direction and consultation what would be the treaty, now called an agreement, and reserving for both houses of Congress *ex post* approval and implementation rights.[32] But this research shows that that constitutional account of trade agreements is incomplete. The United States has entered into 15 FTAs through fast-track,[33] but it has entered into hundreds of trade agreements not approved or implemented by Congress, as this Article shows.

If trade belongs to Congress, then "trade" "executive" agreements appear at first to be a constitutional oxymoron absent some other delegation of authority.[34] Indeed, Congress has granted permission on occasion for the president to enter into some TEAs within narrow parameters.[35] On other occasions, however, an *ex ante* delegation is not obvious or may be debatable.[36] Apart from debates as to their authority, what is significant for both definitional and analytical purposes is that there are hundreds of trade-related agreements not approved by Congress post-negotiation regardless of their legislative or regulatory effects. The fact that these agreements are concluded by the executive without *ex post* congressional approval does not make them exceptional among U.S. international agreements more generally. Executive agreements have been the primary international lawmaking medium of the U.S. government for many years.[37] But TEAs' constitutional positioning sets them apart – as does their common function: regulating foreign commerce. It is this shared work of TEAs that most strongly justifies viewing them as a

32 *See generally* IAN FERGUSSON & CHRISTOPHER DAVIS, CONG. RSCH. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS, 3 (JUNE 21, 2019). Discerning trade scholars will rightly note that fast-track also includes a limited carveout for executive agreements related to tariff adjustments. *See, e.g.*, 19 U.S.C. § 4202(a). Those tariff barrier agreements comprise a very small set of the broader universe of TEAs discussed here.

33 OFF. OF THE U.S. TRADE REPRESENTATIVE, FREE TRADE AGREEMENTS, https://ustr.gov/trade-agreements/free-trade-agreements; FERGUSSON & DAVIS, *supra* note 32, at 4.

34 The one court that has had occasion to consider squarely the constitutionality of a trade agreement negotiated solely by the executive confirmed that the president cannot conclude trade-related agreements on the basis of his inherent authority. United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953) (holding that a sole executive agreement on trade was void).

35 For an overview of many congressional delegations on trade, see the House of Representatives' compilation. STAFF OF H.R. COMM. ON WAYS AND MEANS, 113TH CONG., COMPILATION OF U.S. TRADE STATUTES (Comm. Print 2013). Not all of these provide delegations for agreements; in fact, only a handful do.

36 None of these agreements is express about the authority according to which it was concluded or implemented. *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 (2020), at pt. III. I have included in my collection all of these categories: agreements that fall within recognized delegated congressional authority; agreements for which delegated authority is not expressly identified or known; and, agreements pursued without congressional delegation or that appear to go beyond existing delegations.

37 *See* sources discussed *supra* note 19.

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separate category. TEAs muddy the waters in the distribution of trade authority across the branches.

My coining the term "TEA" is reflective of our deficient legal vocabulary for these instruments that have grown largely out of practice. TEAs are underappreciated entries in the statutory encyclopedia of trade tools.[38] But they are not entirely unheard of. When questioned, executive branch officials have defended the development of TEAs as implicit in their agency mandates.[39] Such comments raise a fundamental governance question as to the limits of what the executive does or can do using a TEA – a question that, like most surrounding these instruments, has not been subjected to any recent judicial or scholarly testing, but which the next Section probes.[40]

B. *The Category and its Contents*

From the outside, it is easy to assume that TEAs would be concerned only with executive branch arrangements or that they are purely administrative in nature.[41] But TEAs matter more than most anticipate. Surprisingly, many TEAs shape the rights and obligations of individual actors – foreign and domestic. What links them all is that they govern trade relationships – the goods and services that enter and exit the United States – and they do not involve any congressional approval process upon conclusion and entry into force. The collection assembled here paints a previously unseen picture of U.S. trade law and our foreign trade law relationships, very different from what you would believe about U.S. trade practice if you looked only at FTAs or tariffs as many trade textbooks do.[42]

Looking back in the TEA chronology it becomes evident that their content evolved cotemporaneously with trade policy and with congressional delegations seeking to put that policy into effect. In the early part of the twentieth century, TEAs effectuated reciprocal reductions in tariffs.[43] In the second half of the twentieth century, they began to take on a new connotation with the rise of what are known as voluntary restraint agreements (VRAs) which were protectionist in nature, restraining rather

38 *See, e.g.*, JOOST H.B. PAUWELYN ET AL., INTERNATIONAL TRADE LAW (3d ed. 2016).

39 *See* discussion *infra* Part III.

40 Besides *Guy Capps*, few cases in the history of TEAs have sought to define their contours. *See* discussion *infra* Part II.C.

41 Dan Bodansky and Peter Spiro carve out this space as appropriate for "executive agreements+." Bodansky & Spiro, *supra* note 28, at 915-16.

42 *See generally* PAUWELYN ET AL., *supra* note 38; DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW (3d ed. 2017).

43 *See generally* DOUGLAS A. IRWIN, CLASHING OVER COMMERCE 433-43 (2017).

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than liberalizing trade flows.[44]

Since the 1990s, however, TEAs have been distinctly legislative or regulatory in that they create rules for private parties, for U.S. government actors, or for foreign government actors. They largely facilitate growth in trade and the removal of what are known as non-tariff barriers. Non-tariff barriers are domestic practices and measures that relate to the specifications of cross-border goods and services such as labels and licenses, health-related best practices, intellectual property rights, environmental protections, labor rights, and much more.[45] The rise of liberalization as a guiding paradigm in trade policy forced the expansion of trade law to engage these areas of domestic law, in addition to the reduction of tariffs. Topics like "food safety" are now interwoven with modern ideas of trade.[46] More than a dozen U.S. agencies work on trade issues, each with its own opinion of what the field encompasses.[47]

TEAs operate in this expanded trade law space. To differentiate among trade and non-trade agreements that my team and I collected, we included only those agreements that govern broadly cross-border commercial issues as their primary topic area or those that are considered by trade agencies to be part of their purview. Once these are collected and reviewed, it becomes clear that TEAs are doing much of the heavy lifting in trade lawmaking.

In addition to their variable trade-related content, TEAs reveal a spectrum of "bindingness." A small handful make no binding commitments; some include one or two binding commitments among a long list of non-binding statements; many include extensive binding rules. These qualities not only make them difficult to classify and analyze in traditional ways and terms, but they may suggest a need to revisit those conventional modes with a nuanced eye. Further, many agreements establish U.S. influence, capacity building, and dialogue that may help avert expensive litigation. They are multipurpose instruments in many senses of the word.

Four principal categories of TEAs emerge in this preliminary review, distinguished by their legal force and their primary objects: (1) those that operate like regulations creating binding rules for private actors; (2) those that impose binding U.S. government commitments with direct impact on

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44 *See* Michael M. Djavaherian, *Voluntary Restraint Agreements: Effects and Implications of Steel and Auto Cases*, 11 N.C. J. INT'L L. & COM. REGUL. 101, 102 (1986).

45 *See generally* World Trade Organization, *Non-tariff Barriers: Red Tape, Etc.*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm.

46 *See, e.g.*, Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT'L L. & FOREIGN AFF. 209, 211, 221-38, 260, 263 (2011) (providing an overview of the expansion of trade agreements).

47 *See* U.S. GEN. ACCT. OFF., GAO/NSIAD-00-76, STRATEGY NEEDED TO BETTER MONITOR & ENFORCE TRADE AGREEMENTS 9 (2000).

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private persons; (3) those that create U.S. government commitments to engage in a future lawmaking process with an indirect impact on private persons; and, (4) those that form cooperative or non-binding obligations or that create only binding obligations for a foreign government. I take up each in turn.

First are those TEAs that create binding obligations for individual persons and businesses. Take the following examples:

- A memorandum of understanding (MOU) regarding tomatoes from Mexico that describes how those tomatoes must be treated prior to export to the United States to be safe for consumption.[48]
- An e-commerce agreement with Vietnam setting out service requirements for cross-border electronic payments.[49]
- An exchange of letters with Chile limiting the application of the U.S. Department of Agriculture's (USDA) standards on grapes to a specified time of year for a period of five years.[50]
- An exchange of letters with Canada providing access to pipeline networks, including promising that a Pacific Northwest power service provider will offer "treatment no less favorable than the most favorable treatment afforded to utilities located outside the Pacific Northwest."[51]
- An agreement to share certain information with China about medical devices and drug development.[52]
- An agreement with the European Union (EU) regarding mutually recognized product labels for energy efficiency.[53]

These agreements are akin to typical regulations that agencies generate domestically. They create enforceable rules for private actors, directly and indirectly. Some are woven from whole cloth, while others reflect or build upon existing U.S. legislation or regulation.

Second are TEAs that chiefly create obligations for the U.S.

48 Tomato MOU, *supra* note 1.

49 Exchange of Letters, U.S.-Viet., Feb. 4, 2016, https://ustr.gov/sites/default/files/TPP-Final-Text-US-VN-Letter-Exchange-regarding-Electronic-Payment-Services.pdf.

50 Exchange of Letters, Chile-U.S., Nov. 21, 2008, T.I.A.S. 08-1121.

51 Exchange of Letters, Can.-U.S., Nov. 30, 2018, https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/letter-energy.pdf.

52 Agreement Between the Department of Health and Human Services of the United States of America and the State Food and Drug Administration of the People's Republic of China on the Safety of Drugs and Medical Devices, China-U.S., Dec. 11, 2007, https://www.fda.gov/international-programs/cooperative-arrangements/fda-sfda-china-agreement-safety-drugs-and-medical-devices.

53 Agreement Between the Government of the United States of America and the European Community on the Coordination of Energy-Efficiency Labelling Programs for Office Equipment, Dec. 18, 2006, Hein's No. KAV 8323.

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government that facilitate import and export or standardization that increase trade opportunities for U.S. exporters. These commitments are usually not memorialized in domestic law apart from the agreement itself, which means their lack of transparency has acute consequences. For one, the Agreement on Requirements for Beef and Beef Products to be Exported to Japan from the United States of America does exactly what the title suggests.[54] It provides certain rights to the Japanese government, including access to U.S. meat establishments, and creates a government-to-government process for disputes that may arise concerning U.S. beef. It also outlines the steps and obligations for U.S. exporters. Some of that information is made available through USDA, but not all.[55] Or consider the MOU between the United States and the Russian Federation Concerning Certification of Seafood Products.[56] This agreement puts obligations on the U.S. and Russian governments for the facilitation of seafood exports. The U.S. Commerce Department, for example, is obligated to issue veterinary certificates for products that originate from designated vessels and establishments.[57]

Third are agreements that commit the U.S. government to initiating a process for additional U.S. lawmaking. In this category, a 2020 exchange of letters with Bolivia promises to "publish a Notice of Proposed Rulemaking in which it will propose to promulgate a regulation . . . that would provide that Singani [a Bolivian alcoholic beverage] is a type of brandy that is a distinctive product of Bolivia."[58] These TEAs enter into force directly upon signature and commit the U.S. government to effectuating a domestic lawmaking exercise. The U.S. obligation is not to create rights, but rather to undertake an exploratory review that could result in a change in law. This is rather unusual in international law but not in U.S. trade law since FTAs are themselves signed and then "implemented" by Congress. In the case of FTAs, however, the agreement itself does not even enter into force until that domestic process is complete, whereas in the case of these TEAs, starting the domestic process is the entire commitment.

Finally, while most TEAs create binding obligations on the parties, a

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54 Requirements for Beef and Beef Products to be Exported to Japan from the United States of America, Japan-U.S., Jan. 25, 2013, https://ustr.gov/sites/default/files/Requirements%20for%20Beef%20and%20Beef%20Products%20to%20be%20Exported%20to%20Japan%20from%20the....pdf.

55 *See, e.g.*, Decision to Authorize the Importation of Fresh Carrots From the Republic of Korea Into the United States, 85 Fed. Reg. 34, 591 (June 5, 2020) (describing a work plan with Korea on fresh carrots but not providing the text).

56 Memorandum of Understanding Between the United States Department of Commerce National Oceanic and Atmospheric Administration and Rosselkhoznadzor of the Russian Federation Concerning Certification of Seafood Products from the United States of America to the Russian Federation, Russ.-U.S., Jan. 27, 2010, T.I.A.S. No. 10-225.

57 *Id.* at para. 3.

58 Exchange of Letters, Bol.-U.S., Jan. 6, 2020 (on file with author).

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minority of them do not. Thus, a fourth category in this taxonomy encompasses several dozen non-binding TEAs that generate soft commitments for dialogue and capacity building or standardization with trading partners.[59] Further, several agreements that I place in this fourth category contain some limited binding commitments, but their purpose is cooperative. Principally non-binding agreements are among the most difficult to identify because they rarely are prescribed by statute or congressional directive. They are not always made public either.

The most prominent among these mainly non-binding agreements are Trade and Investment Framework Agreements (TIFAs), which is a name given to a set of standardized agreements loosely based on a model developed by USTR. The United States is party to (at least) 54 TIFAs.[60] TIFAs are largely cooperative and "provide strategic frameworks and principles for dialogue on trade and investment issues between the United States and the other parties to the TIFA."[61] While most commitments in TIFAs are soft, they include some binding institutional commitments and create a forum for the United States and other governments to meet and discuss enhancing opportunities for trade and investment.[62]

Another standardized TEA found in the data set is what I call a "relations agreement". The United States entered into 31 of these; the last relations agreement was signed in 2003. The majority of the relations agreements were signed with countries in the former Soviet Union from 1978 through the 1990s.[63] They state expressly that they are intended to

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59 For more on soft law and its significance in international and foreign relations, *see generally* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 583-587 (2005) (providing a history of soft law and contending that it should be delineated into pledges and contracts); Jean Galbraith & David T. Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 739-40 (2014) (describing soft law and the general rise of "non-legal understandings" in international cooperation).

60 There is some uncertainty as to the correct total here because USTR, the State Department, and foreign governments all have different understandings of which TIFAs are in force, despite that they are well known and active instruments in the trade law orchestra. They are not codified in U.S. law but they are, for all intents and purposes, fully realized.

61 OFF. OF THE U.S. TRADE REPRESENTATIVE, TRADE & INVESTMENT FRAMEWORK AGREEMENTS, https://ustr.gov/trade-agreements/trade-investment-framework-agreements. It appears the State Department does not even consider TIFAs to be international agreements at all for reporting and publishing purposes, except for the fact that it reported about 10 of them as international agreements between 2002 and 2015, despite that they all have nearly identical content and only cosmetic differences between them. This inconsistency is endemic in State Department reporting on TEAs. *See* Kathleen Claussen, *Trade Transparency: A Call for Surfacing Unseen Deals*, 122 COLUM. L. REV. F. 1 (2022) [hereinafter Claussen, *Unseen Deals*].

62 *See e.g.*, Agreement Between the Government of the United States of America and the Government of the Federal Republic of Nigeria Concerning the Development of Trade and Investment Relations, Nig.-U.S., Feb. 16, 2000, art. 7, https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file172_7727.pdf (establishing a procedure to request a consultation on trade matters).

63 *See, e.g.*, Agreement on Trade Relations Between the United States of America and the Republic of Kyrgyzstan, Kyrgyz.-U.S., May 8, 1992, T.I.A.S. No. 92-0821; Agreement On Trade

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establish a framework for "the development and expansion of commercial ties . . . ."[64] While their primary purpose was political, they did contain some binding commitments. Distinct from TIFAs, relations agreements require the parties to accord "most favored nation" and non-discriminatory treatment to each other's products.[65] They also improve market access and strengthen intellectual property protection.[66]

Across the taxonomy, TEAs manage the cross-border movement of goods and services, set out the details of our foreign economic relationships, particularly in the removal of non-tariff barriers, and make foreign policy. These shared functions occur through their making binding rules, directing inter-governmental arrangements, and precipitating lawmaking processes. These are enormous responsibilities. Beyond these commonalities, TEAs also are distinct from other executive agreements and from ordinary notice-and-comment rulemaking in their nontraditional negotiation and conclusion procedures. The next Section addresses those procedures and uncovers how, despite their absence in express delegations, TEAs are promoted through structural features in our trade law.

C. Dealmaking

TEAs are also special procedurally. Certain particularities of trade lawmaking have structurally favored the rise of TEAs as well as, surprisingly, their concomitant obscurity. This Section demystifies how these agreements are made apart from other executive agreements. Congress has largely promoted the executive's use of TEAs by tightening or constraining alternative pathways for executive trade lawmaking. A look at the statutory moves that direct the TEA-making process illuminates how our institutional design lays the groundwork for TEAs to thrive. This structural analysis also sheds light on a troubling reality: TEAs are not readily accessible to the public or to lawmakers. They are not subject to the

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Relations Between the United States of America and the Republic of Uzbekistan, U.S.-Uzb., Nov. 5., 1993, T.I.A.S. No. 12515.

64 Agreement On Trade Relations Between the United States of America and the Republic of Uzbekistan, *supra* note 63, at pmbl.

65 *See, e.g.*, *id.* at 2-12 (providing for (1) most-favored-nation and nondiscriminatory treatment; (2) commitment to expand mutual trade; (3) transparency of laws and information; (4) protection of intellectual property; and (5) national treatment in access to courts and administrative bodies and renouncement of immunity from suit or execution of judgment).

66 The Commerce Department has developed an individualized guide for each of these "relations agreements." *See, e.g.*, U.S. DEP'T OF COM., ENF'T AND COMPLIANCE, U.S.-BULGARIA AGREEMENT ON TRADE RELATIONS, https://tcc.export.gov/Trade_Agreements/Exporters-Guides/List_All_Guides/exp_002791.asp. Interestingly, Commerce also states that it has a "designated monitoring officer" for these agreements despite that USTR is responsible for monitoring compliance. *Id.*

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same transparency and accountability mechanisms of either FTAs or other executive agreements. The two go hand in hand: as TEAs were removed from the "ordinary" international and trade lawmaking regimes, they fell farther off the congressional, scholarly, and public radars. Thus, after explaining how TEAs are made, I analyze the organizational gaps that render them invisible in text even if they remain influential in application.

The institutional framework in which U.S. trade law operates is vast and deep.[67] Although they have been employed for many decades, including as early as 1891, TEAs have evolved within that framework as they have changed hands.[68] In the early part of the twentieth century, the State Department was primarily responsible for their negotiation and conclusion.[69] The creation in 1962 of the USTR, now the lead agency for trade lawmaking in the United States, changed that.[70]

The institutional shift to USTR precipitated the creation of two statutory processes for making trade agreements. Both processes, first set out in the Trade Act of 1974, have served to foster the proliferation of TEAs, even if inadvertently.[71] First, the 1974 Act created "fast-track."[72] Fast-track included then and now heavy-handed congressional disciplines and intensive oversight mechanisms for the negotiation of FTAs.[73] A more cumbersome fast-track and FTA process set the stage for USTR's avoidance of that process through TEAs.

Second, the 1974 Act formalized an interagency engagement process for trade policymaking, putting USTR at the top.[74] This change removed oversight responsibility from the State Department, a position that State maintains for other executive agreements. USTR acts as the chief representative of the United States in international trade negotiations of all

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67 For a more robust review, *see* Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845 (2021) [hereinafter Claussen, *Trade Administration*] (explaining the significance of the administrative state in trade law).

68 *See generally* ALFRED E. ECKES, OPENING AMERICA'S MARKETS: U.S. FOREIGN TRADE POLICY SINCE 1776 (1995) (describing the evolution of the U.S. trade lawmaking bureaucracy); J. LAURENCE LAUGHLIN & H. PARKER WILLIS, RECIPROCITY, 209-11, 214-15 (1903) (describing the early history of trade agreements, including reciprocity agreements in the wake of the McKinley Tariff Act of 1890). The McKinley Tariff Act of 1890 first authorized the president to negotiate reciprocal trade agreements with foreign nations. Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 567, 612.

69 *See* IRWIN, *supra* note 43, at 433-43.

70 Trade Expansion Act of 1962, Pub. L. No. 87-794, § 241, 76 Stat. 872, 878 [hereinafter Trade Act of 1962]; 19 U.S.C. § 2171(c) (USTR shall "have primary responsibility for developing, and for coordinating the implementation of, United States international trade policy . . . .").

71 Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended in scattered sections of 19 U.S.C.) [hereinafter Trade Act of 1974].

72 *Id.* at §§ 101-103, 105, 151-154; FERGUSSON & DAVIS, *supra* note 32, at 4.

73 *See, e.g.*, Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1601(a)(1), 102 Stat. 1107, 1260 (1988); Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 102, 129 Stat. 320 (codified at 19 U.S.C. §§ 4201-4210) [hereinafter TPA 2015]. Some administrations have been more faithful to its objectives than others.

74 Trade Act of 1974, *supra* note 71, § 141.

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types and is "responsible to the President and the Congress for the administration of trade agreements programs."[75] Other agencies engaging in cross-border negotiations under the umbrella of trade law must coordinate with USTR.[76]

USTR realizes its organizing responsibility for trade agreements as convenor of the Trade Policy Staff Committee (TPSC).[77] This inter-agency committee, including representatives of more than a dozen agencies, reviews all trade agreements before their conclusion. USTR plays what would, in other foreign relations circumstances, be State's "clearinghouse role."[78] In the ordinary (non-trade) process,[79] the State Department requires an extensive memorandum internal to the U.S. government and a careful consideration of factors before providing authorization for an agency to proceed with an agreement or treaty.[80] The State Department is responsible for confirming the availability of legal authorities and granting a green light to agencies before they act for purposes of U.S. foreign-facing legal consistency.[81] This system helps to manage the enormous range of executive agreements concluded by the executive branch each year.[82]

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75 19 U.S.C. § 2171(c)(1)(F). The "trade agreements program" dates to 1934. IRWIN, *supra* note 43, at 433-43. However, it has been used primarily to describe reciprocal agreements to lower tariff rates and, more recently, to FTAs. *See generally* ECKES, *supra* note 68, at 189; U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 2018: OPERATION OF THE TRADE AGREEMENTS PROGRAM, 70TH REPORT (providing an example of FTA developments in 2018).

76 19 U.S.C. § 2171(c)(1)(D).

77 15 C.F.R. § 2002.2; OFF. OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE BRANCH AGENCIES ON THE TRADE POLICY STAFF COMMITTEE AND THE TRADE POLICY REVIEW GROUP, https://ustr.gov/about-us/executive-branch-agencies-trade-policy-staff-committee-and-trade-policy-review-group. To be sure, TPSC has sometimes taken a backseat to other actors in the White House like the National Economic Council leadership, depending on the administration and personal relationships. Claussen, *Trade Administration*, *supra* note 67, at 888. Likewise, different bureaucrats have sometimes chosen to coordinate only with some agencies depending on the TEA. Interview with former USTR official 2, in Washington, D.C. (Feb. 18, 2021).

78 Harold H. Koh, *Address: Twenty-First-Century International Lawmaking*, 101 GEO. L. J. ONLINE 1, 9 (2012).

79 *See* 1 U.S.C. § 112b(c) (explaining how most international agreements are subject to approval by the Secretary of State); U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL 720 (2006), https://fam.state.gov/fam/11fam/11fam0720.html (describing aspects of international agreement-making done with the consent of the Secretary of State).

80 *See* Hathaway, *Presidential Power*, *supra* note 11, at 249; John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 101 AM. J. INT'L L. 636, 657 n.18 (2007) ("Traditionally, the USTR has taken the position that Circular 175 [the State Department process for clearing agreements, also known as C-175] is a purely internal State Department matter that does not apply to the USTR. No parallel procedure exists in the USTR to determine whether an amendment to a U.S. trade agreement requires congressional approval.").

81 *See* Hathaway, Bradley & Goldsmith, *supra* note 36, at Part II (examining the process by which the State Department supervises agencies in forming international agreements).

82 *See* U.S. DEP'T OF STATE, BUREAU OF OCEANS AND INT'L ENV'T AND SCI. AFFS., C-175 PROCESS: SUPPLEMENTARY HANDBOOK ON THE C-175 PROCESS: ROUTINE SCIENCE AND TECHNOLOGY AGREEMENTS ch. 1 (2001), https://2009-2017.state.gov/e/oes/rls/rpts/175/index.htm (providing an example of how the C-175 process helps the State Department oversee science and technology agreements); 22 C.F.R. § 181.4 (describing how agencies seeking to form an

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In contrast, the TPSC regulations do not set out rigorous guidelines like the State Department's regulations do for identifying legal authority in agreements or choosing among instrument labels.[83] USTR makes these determinations instead. It also takes final decisions on agreement content and form.[84] For example, say importers of products from Uruguay approach USTR about concluding a possible agreement with Uruguay on trade facilitation that would reform Uruguay's customs processes, committing Uruguay to certain benchmarks and the United States to providing assistance. This is the type of agreement that is familiar to USTR: it addresses a grievance brought by U.S. businesses by working with foreign officials to change their practices in ways that would assist those businesses. Rather than get approval or guidance from the State Department, USTR would ordinarily commence negotiations with Uruguay and share its plans to do so with the TPSC. The TPSC would concur on the final text prior to signature.[85] This non-controversial example shows how, in just a few steps, USTR can conclude agreements with other countries with few checks or balances, often claiming a win for a U.S. business or industry in the process.

In sum, between the channeling function of an overly constraining fast-track process, and the creation of a separate trade lawmaking system giving USTR free reign to develop agreements, the statutory and institutional foundation was laid for using TEAs to conduct trade policy.[86]

While this analysis places emphasis on the internal international lawmaking processes and organization, external influences could likewise make or break TEAs as an instrument of choice. Just because the trade law system structurally favors alternative instruments like TEAs does not necessarily mean such instruments are necessary or useful. But the market

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international agreement must comply with Circular 175 and obtain approval from the Secretary of State or his or her designee).

83 15 C.F.R. §§ 2003, 2002.2. In exceptional circumstances, USTR staff may preemptively run an agreement plan past the two or three attorneys within the State Department that tend to work with USTR. Interview with U.S. government official A, in Washington, D.C. (Aug. 19, 2019). There is likewise no formal training or policy manual, such as within the State Department Foreign Affairs Manual, within USTR for policy staff or attorneys on how to make these choices, but these decisions are made by senior staff upon consultation with policy and junior staff. *Id.*

84 The State Department can justify this arrangement as satisfying its statutory and regulatory oversight rules given that the interagency committee gives it the requisite input per 22 C.F.R. § 181.4(g).

85 Importantly, the TPSC works through consensus, so it is not uncommon for TEAs to be framed in a way that anticipates the State Department's preferences or objections, but USTR maintains the last word. *Interagency Role*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/about-us/interagency-role.

86 This channeling phenomenon is not limited to TEAs, but rather can be seen throughout our trade law system. *See, e.g.*, Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151, 154-55 (2020) (noting how trade lawmaking has diverged detrimentally because Congress has separated economic redistribution from liberalization, making it more difficult to engage in legislative bargains as to the former).

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transformations and growth in global trade of recent decades have provided a further impetus for the deployment of TEAs to carry out foreign commerce regulation. Advances in technology and logistics led to more foreign goods and services in the local market and those goods and services need to be managed at the border and beyond.[87]

Redirecting trade lawmaking away from the State Department and increasing the requirements for making FTAs created a ripe environment for TEAs to fill those gaps. The design also favored the development of TEAs off the grid. USTR and other agencies will sometimes report the conclusion of a TEA but not share the text, even with those that may be affected directly or indirectly by its rule-making.[88]

Given this state of affairs, developing a comprehensive collection of TEAs is not just a matter of filing Freedom of Information Act requests. Rather, my team and I cast a wide net across U.S. government websites, legislative records, official executive branch records, foreign government websites, industry websites, academic journal articles, and several personal contacts to former colleagues both in the U.S. government and in foreign governments or working abroad.[89] Despite this seemingly exhaustive search through most of 2019 and 2020, the set reviewed here is necessarily incomplete. It is not uncommon for me to discover still more TEAs up through the moment of writing, and that process will continue collectively as this Article sheds light on what has been identified to date.[90]

The vast number of *possible* sources of TEAs alone highlights the difficulty in this undertaking, not just for scholars but also for practitioners

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87 *See, e.g.*, *How One Man and Some Metal Boxes Revolutionized Global Trade*, TRADETALKS PODCAST (June 29, 2020), https://www.tradetalkspodcast.com/podcast/133-how-one-man-and-some-metal-boxes-revolutionized-global-trade/ (describing the role of container shipping).

88 *See, e.g.*, Press Release, Off. of the U.S. Trade Representative, USTR Statement on Successful Conclusion of Steel Negotiations with Mexico (Nov. 5, 2020) [hereinafter Mexico Steel 2020], https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/november/ustr-statement-successful-conclusion-steel-negotiations-mexico; Press Release, Off. of the U.S. Trade Representative, United States and Brazil Update Agreement on Trade and Economic Cooperation with New Protocol on Trade Rules and Transparency (Oct. 19, 2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/october/united-states-and-brazil-update-agreement-trade-and-economic-cooperation-new-protocol-trade-rules; *UAE Agrees to Section 232 Quota Deal on Aluminum Imports*, INSIDE U.S. TRADE (Jan. 20, 2021), https://insidetrade.com/trade/uae-agrees-section-232-quota-deal-aluminum-imports. These unavailable agreements are not unique in their de facto secrecy. Megan Donaldson has tracked so-called secret treaties in her important work. Megan Donaldson, *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order*, 111 AM. J. INT'L L. 575 (2017). *See also* Danae Azaria, *Secret Treaties in International Law and the Faith of States in Decentralized Enforcement*, 111 AJIL UNBOUND 469 (2018); Ashley S. Deeks, *The Substance of Secret Agreements and the Role of Government Lawyers*, 111 AJIL UNBOUND 474 (2018).

89 All told, my team and I located full text copies of 1012 of the 1225 TEAs of which we are aware. *See infra* Appendix.

90 A thoughtful colleague offered an apt analogy: Imagine you are looking as hard as you can across the sky to find new stars for an extended period, and then, one day, you point your telescope to a part of the sky where you previously thought there was nothing and you discover more galaxies.

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– individuals and businesses – and for other governments. Our search experience confirms that this study is badly needed beyond merely academic interest. Foreign trading partners, U.S. and foreign businesses, workers and consumers, as well as staff within the U.S. government and members of the scholarly community should find rich and deep wells to explore in what follows.

II. SCOPING: AN EMPIRICAL ASSESSMENT

Apart from the anecdotal examples shared in Part I, how far do TEAs really stretch and how do they break down by year, trading partner, or trade sub-topic? This Part parses the preliminary data and then develops a positive theory for the trends that they evidence before turning to the legal issues that emerge. In this first look at the numbers, several clear patterns come to light – and several important outstanding questions.

A. The Data & their Topography

The map in Figure 1 illustrates the wide expanse of trading relationships with the darker blue indicating more TEAs. As the map indicates, 130 countries have signed at least one TEA with the United States.[91]

Nearly all these agreements are bilateral: between the United States and one other trading partner. I have included the handful of trilateral and plurilateral agreements that are for most purposes treated as bilateral. Some of those led to bilateral side or spin-off agreements which also make them important to include.

91 I will use the shorthand "countries," which treats the European Union as one "country" (in addition to its members) and likewise entities like Taiwan as countries.

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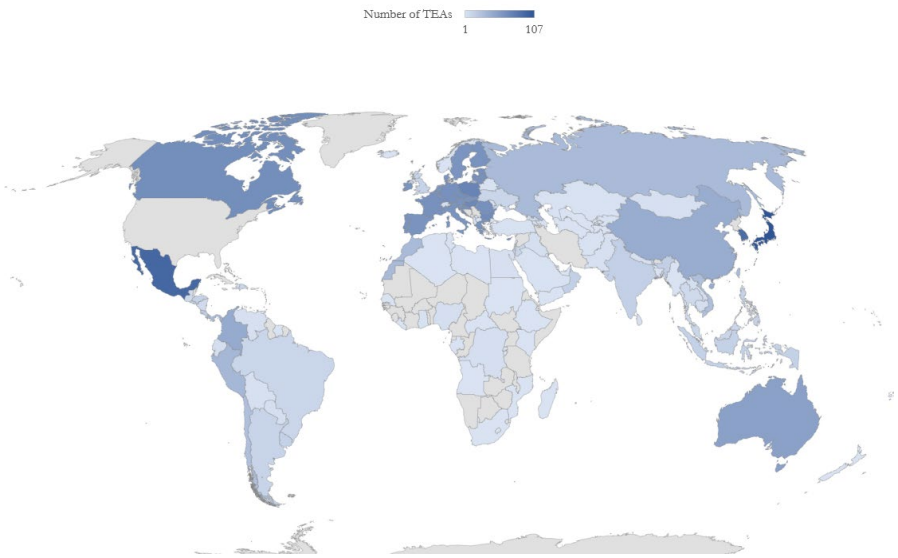
Figure 1



There is considerable variation in the number of agreements with each trading partner and in their content. The list is top-heavy: forty-six countries have entered into just one TEA with the United States, and another 50 have five or fewer. Twenty-two countries are parties to 70 percent of U.S. agreements. In fact, the top five countries alone account for 31 percent of TEAs. Figure 2 shows the 17 trading partners with 20 or more TEAs.

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Figure 2

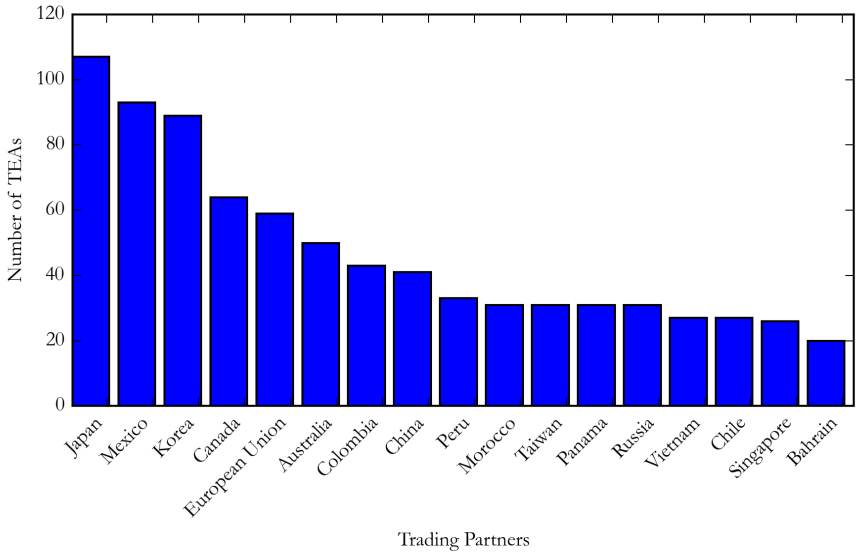

Figure 3 gives a sense of major trade-related topic areas that appear throughout the collection. The most prevalent (13 percent) are general trade agreements not limited to a particular category of goods, service, or otherwise. These include customs arrangements or general reciprocity arrangements. For example, one such TEA is a letter exchange between Bahrain and the United States in 2004 that sets out what parameters apply to classifying goods for the determination of their tariff rate, known to trade practitioners as rules of origin.[92] Next in frequency of appearance are food safety TEAs (12 percent); cooperative agreements (11 percent); textiles (10 percent); agriculture (8 percent), specific goods (6.5 percent), and investment (6 percent). A variety of topics fall into the "other" category (nearly 8 percent) including those on environmental protection or natural resources, labor, and institutional issues such as dispute settlement.

92 Exchange of Letters, Bahr.-U.S., (Sept. 14, 2004), https://ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file48_6274.pdf.

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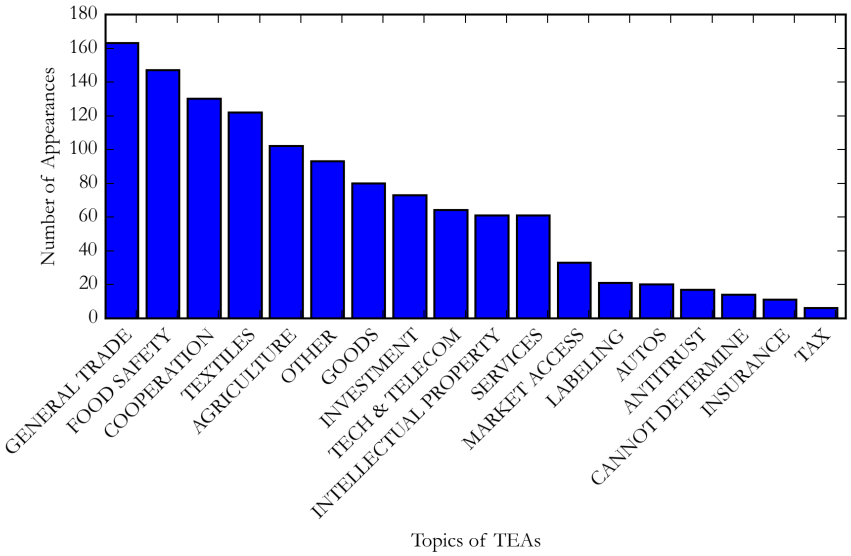
Figure 3



Categorizing agreements according to a single primary topic area is overly restrictive, even if generally informative. Thus, for a better sense of the diversity in the topics covered in the agreements at a glance, the following word cloud (Figure 4) shows what words appear most frequently in titles of TEAs.[93]

93 Some agreements were found without any indication of a title. Where we found a U.S. government or foreign government agency had titled something in discussing it even if no title appeared on the face of the document, we used the government-given title. We did not come across many instances of conflicting titles – i.e., conflicts between government sources and non-government sources. Where we did, we used the title provided by an official treaty source if available, or I made a judgment call when necessary. The "opposite" is also true: that is, when we did not have the full text of a TEA to verify the title, we relied on the title provided by whatever source noted the existence of the agreement.

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Figure 4

These two depictions and the impenetrable minutiae of the word cloud in particular reveal that these agreements tend to cover reasonably precise issues. Take, for example, the U.S.-Malaysia exchange of letters on distinctive products from 2016. This agreement commits to protecting two alcohol product names – e.g., Tennessee whisky – for sale in the territory of the other.[94] Or consider the 2006 Agreement between the United States and Vietnam concerning Trade in Certain Types of Poultry and Meat Products which determines under what conditions those products may enter the territory of either party.[95] The range of topics expose the assortment of specific matters that each highly specialized agreement in the collection seeks to govern.

Thinking about the map and the topics together, there is considerable variation in each bilateral TEA profile. Compare Costa Rica and Russia, for example, as in Figures 5 and 6. Costa Rica has signed 16 TEAs with the United States covering six common subjects as well as electricity and mining. Russia has signed 21 U.S. TEAs across six diverse sub-topics.

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94 Exchange of Letters, Malay.-U.S., (Feb. 4, 2016), https://ustr.gov/sites/default/files/TPP-Final-Text-US-MY-Letter-Exchange-on-Distinctive-Products.pdf.

95 Agreement on Export Duties on Ferrous and Nonferrous Scrap Metal, U.S.-Viet., May 31, 2006, T.I.A.S. No. 06-531.8.

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Figure 5

COSTA RICA

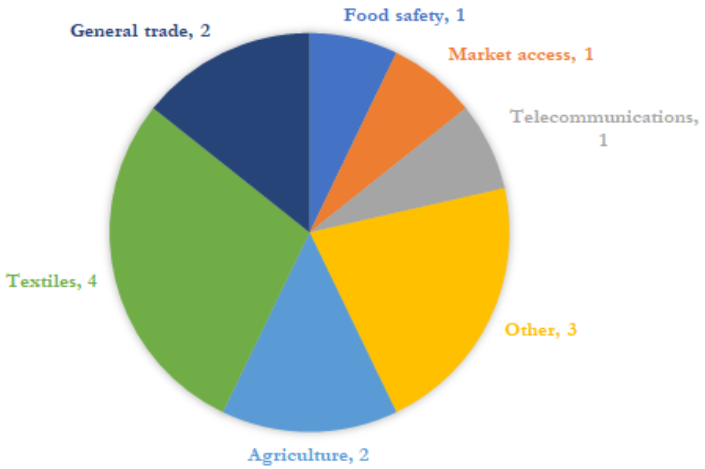
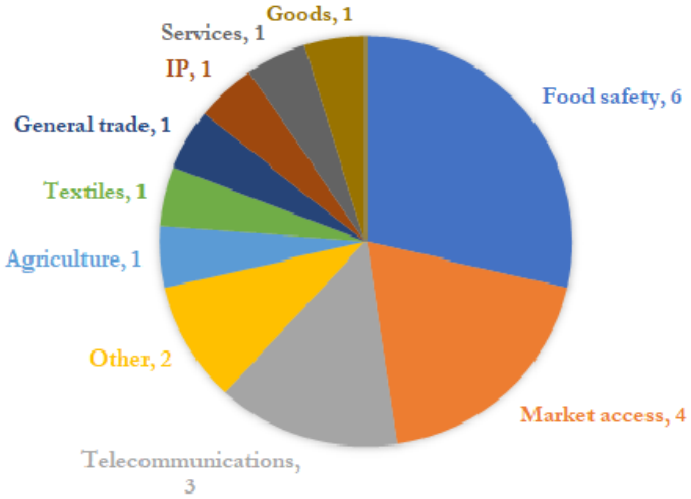


Figure 6

RUSSIA



Like other types of executive agreements, TEAs have been used by the executive branch for more than one hundred years, but the executive's reliance on them became far more pronounced in recent years. It was not until around 1990 that the United States surpassed a cumulative total of

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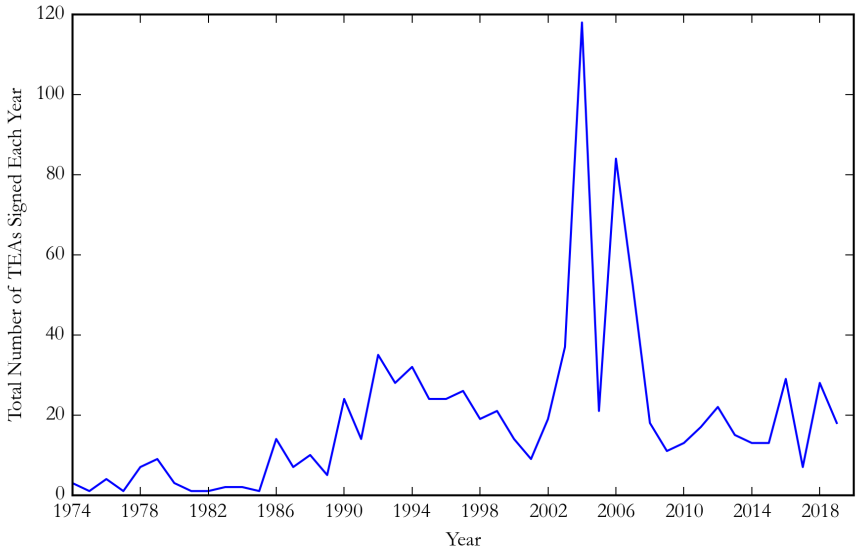
100 TEAs in force.[96] The earliest agreement still in force is a 1910 commercial arrangement with Portugal.[97] From the late 1980s, TEAs began to pick up in number and in scope as Figure 7 shows.[98] Since 1986, the United States has never entered into fewer than 12 TEAs in a given year.

Figure 7



2004 stands out with 119 agreements. That year, the United States entered into 25 side letters each with Australia and Morocco – a number high in general and in concentration.[99] It also concluded side letters with other FTA partners: Bahrain and nearly each of the countries involved in the Central America–Dominican Republic–United States FTA (CAFTA-DR). The next highest year is 2006 with 84, which again is mostly attributable to a run on side letters to FTAs.[100] Removing those two exceptional years produces an average of 20 TEAs concluded per year

96 *See infra* Figure 8. Even in the early part of the twentieth century when TEAs were first authorized, there were several dozen, but not more than 100. *See* U.S. TARIFF COMM'N, RECIPROCITY AND COMMERCIAL TREATIES 17 (1919); U.S. TARIFF COMM'N, OPERATION OF THE TRADE AGREEMENTS PROGRAM: JULY 1934 TO APRIL 1948, pt. 1, at 1-2, 6-7 (1948).

97 Commercial Arrangement Effected by Exchange of Notes Between the United States and Portugal, Port.-U.S., June 28, 1910, T.S. No. 514 1/2.

98 These numbers are imperfect because some agreements are undated.

99 That was the year that the FTAs with those partners were signed, although the Morocco FTA did not enter into force until 2006. Australia Free Trade Agreement, Austl.-U.S., May 18, 2004, Hein's No. KAV 7141; Morocco Free Trade Agreement, Morocco-U.S., June 15, 2004, Hein's No. KAV 7206.

100 Side letters related to FTAs with Colombia, Oman, and Peru figure prominently that year.

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since 1986.

The data also show that TEAs are cumulative and durable.[101] But the data are perhaps most unreliable on this measure over any other.[102] A significant challenge remains in identifying which of these is in force, which have yet to enter into force, and which may have once been in force but are no longer so.[103] From the information that we could gather, few modern TEAs have gone out of force.[104] Only about 11 percent of the agreements in the collection are known to no longer be in force, or are negotiated but not yet in force as of January 1, 2020.[105] The principal reasons for termination appear to be replacement by multilateral or plurilateral agreement or a change in technology that rendered the prior agreement less useful. Rarely do more than five TEAs drop out of force in any given year.[106] I also included agreements that have been signed but not yet entered into force. In several instances, whether an agreement is in force is nearly impossible to tell from outside (and possibly inside) the government and, occasionally, may also be a live legal question. Figure 8

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101 *Cf.* Julian Nyarko, *Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements*, 113 AM. J. INT'L L. 54 (2019) (describing treaties as more durable than ex ante congressional-executive agreements and executive agreements and suggesting that treaty durability means that presidents may choose treaties over other types of instruments to signal deeper commitment). But that theory does not explain what is happening with TEAs since, in trade, there is no treaty option. *See supra* Part I.B.

102 In at least one instance, the State Department lists an agreement in force, but neither USTR, the agency that signed the agreement, nor the foreign government believes it to be in force. *See* Agreement concerning a United States - Guatemala Council on Trade and Investment, Guat.-U.S., Oct. 2, 1991, Hein's No. KAV 3974; E-mail from Official, Ministry of Econ. of Guat., to Kathleen Claussen, Associate Professor of L., Univ. of Miami Sch. of L. (July 8, 2020 at 4:25PM EDT) (on file with author).

103 The USTR annual report and the State Department's *Treaties in Force* (TIF) publication provided the greatest guidance in this respect, but the TIF is missing many of these agreements so was not reliable. Moreover, sometimes information from these two sources conflicts. For example, the TIF stopped listing a 2011 TEA with the Philippines in 2019, as if to indicate it is no longer in force, but USTR lists it as in force in its 2020 Annual Report. *See* Protocol to the 1989 Trade and Investment Framework Agreement Concerning Customs Administration and Trade Facilitation, Phil.-U.S., Nov. 13, 2011, T.I.A.S. 11-1113. Neither TIF nor USTR lists from where its information is derived.

104 The exceptions are mostly outdated or replaced food safety and agricultural agreements, and textiles agreements that were replaced by multilateral systems in the 1990s. Again, however, there is competing information among the State Department, foreign governments, and USTR – each having different understandings of which TEAs are in force. The current collection is not comprehensive in early twentieth century agreements that we know to be out of force.

105 If I did not have definitive information indicating that an agreement was no longer in force, I have counted it as in force. The absence of information in this respect may also be symbolic of how international agreements, not just TEAs, fade from prominence and under what circumstances that may be the case. They may have a half-life that has yet to be studied or comprehensively understood. I thank Gary Horlick for raising this question with me.

106 My count is based on reviewing the Kavass list of agreements no longer in force related to trade each year from 2019 to 2000. *See, e.g.*, *Subject List of Bilateral and Multilateral Treaties and Agreements Listed in* Treaties in Force *January 1, 2018 But Not Listed in* Treaties in Force *January 1, 2019*, 2019 KAVASS'S GUIDE TO THE UNITED STATES TREATIES IN FORCE 671 (2019).

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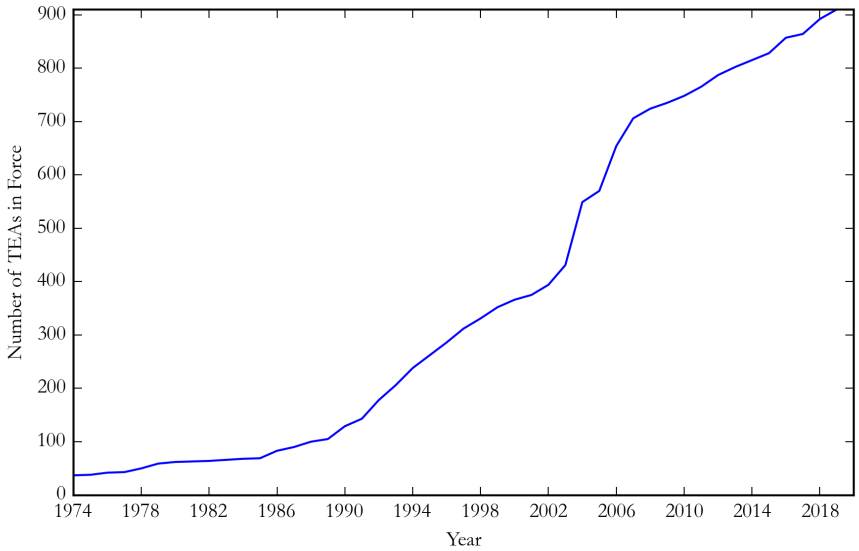
shows the estimated accumulation of TEAs in force over time.

Figure 8



What this chart does not capture, however, is just how TEAs have grown in *reach* over this period. In the 1980s and 1990s, the term "mini-deal" was apt. These agreements dealt with either tariff rate issues or very narrow product or service details. Consider an agreement with Norway in 1989 on customs. This eight-page agreement addresses exchange of information and mutual assistance on customs matters.[107] Or consider the even shorter 1993 exchange of notes with Nepal which establishes a limit on the import of terry cloth towels.[108] Narrow and short are common traits throughout.[109] In the last two decades, these single-issue TEAs still dominate the collection, but particularly during the Trump Administration, the executive branch has entered into longer and broader TEAs as well.[110]

107 Agreement between the United States of America and Norway, Nor.-U.S., May 17, 1989, T.I.A.S. 12118.

108 Memorandum of Understanding, Nepal-U.S., June 20, 1997, https://2001-2009.state.gov/documents/organization/99252.pdf (referencing Exchange of Notes, Nepal-U.S., Dec. 2, 1993).

109 Of the TEAs for which we have the full text, the average page number is about 14 pages. The median is six pages and the mode (190 agreements) is two pages each.

110 The "Phase One China Deal" is 91 pages, for example. *See* 2020 China Deal, *supra* note 13. The Obama Administration also used TEAs in pursuit of wide reforms such as in labor. *See, e.g.*, Colombian Action Plan Related to Labor Rights, Colom.-U.S., Apr. 7, 2011, https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/Colombian-Action-Plan-Related-to-Labor-Rights.pdf. This is not to suggest that the Trump Administration did not also conclude truly mini-deals. *See, e.g.*, Shawn Donnan (@sdonnan), TWITTER (Aug. 25, 2020, 9:18 PM), https://twitter.com/sdonnan/status/1298429567888166914 (asking why the Trump Administration concluded a skinny deal with the EU on lobsters).

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TEAs also appear in a variety of forms as reflected by their label or name. International law does not give much credence to names. Whether a document (or terms agreed orally) constitutes an "agreement" between two governments in international law depends not on title but, rather, on content.[111] The same is true in U.S. law on international agreements.[112] Whether states title their agreement as a MOU, an agreement, or a joint statement is not determinative of any legally significant fact.[113] Nonetheless, agreement name can create a signaling effect with respect to its popularization and implementation, including at the direction of the U.S. president.[114]

The TEAs in this collection take on 29 labels. "Agreement" is the most prevalent, comprising more than 35 percent of the set. The second most common label is the letter: side letter, exchange of letters, letter, or joint letter. Those together make up 27 percent of the collection. Letters appeared substantially more often in the last 20 years, accounting for a great deal of the growth in TEAs more generally. For example, since 2003, USTR has entered into nearly 100 agreements that it has labeled as "side letters". So-called side letters are agreements between the United States and another government with which the United States is also negotiating or has already negotiated a larger agreement, typically an FTA.[115] They can

111 In international law, interpretation of the content is what matters; in a minority of cases, the form may be one factor in such an interpretation. *See* Anthony Aust, *Alternatives to Treaty-Making: MOUs as Political Commitments*, *in* OXFORD GUIDE TO TREATIES 46 (Duncan Hollis ed. 2012). *See also* MALCOLM SHAW, INTERNATIONAL LAW 815 (2003).

112 *See, e.g.*, 22 C.F.R. § 181.2 (defining "international agreement" for purposes of the Case Act and noting that form is not important but rather is just one of many indicators of intent as to whether the government intended to be bound).

113 Those in the collection include: "Accord"; "Agreed Minute"; "Agreement"; "Arrangement"; "Compact"; "Conditions"; "Decision"; "Declaration"; "Establishment"; "Exchange of letters"; "Framework agreement"; "Joint announcement"; "Joint communiqué"; "Joint memorandum"; "Joint report"; "Joint statement"; "Letter"; "Measures"; "Memorandum of understanding"; "Note"; "Partnership"; "Principles"; "Proces-verbal"; "Protocol"; "Record"; "Resolution"; "Settlement"; "Side Letter"; and "Understanding".

114 In view of their nuance, TEA-related controversies about titles do not often fall beyond the short range of the halls and e-mails of bureaucrats, but, in early 2019, such titles became the subject of a heated televised debate in the Oval Office. A delegation from China came to Washington, D.C. for trade negotiations. In the announcement of a forthcoming "deal" between China and the United States, President Trump and the USTR had an impassioned exchange about what the agreement would be labelled: memorandum of understanding or something else. They finally settled on "trade agreement." Ambassador Lighthizer put the issue between him and the president to rest by declaring "we will never use MOU again." *See Trump and Trade Adviser 'Disagree' on What to Call Deal With China*, N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/video/us/politics/100000006381308/trump-trade-lighthizer-china.html; Jeff Mason, *No more MOUs! USTR Lighthizer Tweaks Trade Terminology after Dispute with Trump*, REUTERS (Feb. 22, 2019) https://www.reuters.com/article/us-usa-trade-china-trump/no-more-mous-ustr-lighthizer-tweaks-trade-terminology-after-dispute-with-trump-idUSKCN1QB2OR.

115 Interestingly, side letters and letters more generally are among the stickiest of TEAs. Their "still in force" curve is steeper than the curve for "agreements." Whether this is because their content or their form makes them particularly hard to terminate is difficult to assess. They may also be among

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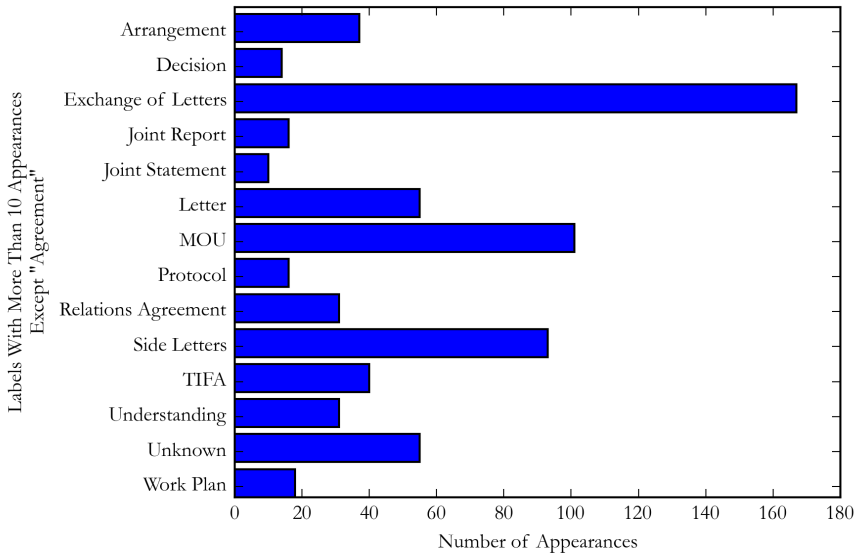
also have the effect of modifying trade agreement language or covering entirely new topics. Take, for example, a sugar side letter to the NAFTA.[116] That letter changed the NAFTA formula as to how much sugar Mexican exporters could export to the United States, and effectively increased the amount U.S. producers could sell.[117] Side letters have been used with every U.S. FTA except the FTA with Canada. There is also considerable variation in how many side letters are attached to each FTA. The U.S.-Peru FTA has six side letters, and the U.S.-Singapore FTA has 18. But those numbers are again misleading just as the term "side letter" is. The United States has many exchanges of letters with other FTA partners serving the same function – the naming is simply inconsistent. Figure 9 sets out the most popular labels used – those appearing 10 or more times – apart from "agreement" which would dwarf the set.[118]

Figure 9



One could also examine the set with respect to the agencies responsible for each TEA. As noted above, such an examination would

those most easily lost, although the TEAs the government was unable to locate upon request were not limited to letters.

116 *See U.S., Mexican NAFTA Sugar Side Letters Reveal Two Key Differences*, INSIDE U.S. TRADE (Mar. 20, 1998), https://insidetrade.com/inside-us-trade/us-mexican-nafta-sugar-side-letters-reveal-two-key-differences.

117 *Agriculture: A Glossary of Terms, Programs, and Laws, 2005 Edition*, CONG. RSCH. SERV., June 16, 2005, at 260.

118 In more than 50 instances, I could not identify a label at all because we do not have the document and the title does not reveal its form.

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indicate that USTR negotiates and signs the most TEAs by far. USTR has concluded roughly two-thirds of the agreements in force after 1974.[119] Before 1974, the State Department, the Food and Drug Administration (FDA), and the Commerce Department were among the principal actors in TEA signing.[120] The FDA and the USDA use MOUs as a means for assuring food products and agricultural commodities are packaged and handled properly, among other qualifications. USDA and other agencies also negotiate "arrangements" for technical assistance purposes.[121] In many instances, even though we have the full text of the agreement, the signature is illegible and there is no information about the individual signing or his or her agency affiliation.

B. Bunnies, Bundles, and Building Blocks

The empirical assessment above has shown that structural opportunities and TEAs' exceptional status have provided a platform for these instruments to proliferate and grow largely unnoticed by lawmakers and the public – except when they go from mini-deals to major ones. But why has the United States adopted these types of agreements for these topics with these countries? Just because the United States has a lot of agreements with Morocco, for instance, does not mean that the United States has a close or highly prioritized trade relationship with Morocco. Quantity does not represent either equal quality or content because TEAs are not commensurate in what they do. If they were all equal instruments, numerical comparisons might be more meaningful.

Trying to explain the use of TEAs and, more specifically, their seemingly indiscriminate deployment is fundamentally a matter of guesswork. Nevertheless, qualitative research carried out for this project provides some clues. From the comments of current and former bureaucrats interviewed for this Article, we can piece together two related reasons for the proliferation of TEAs: a bunny effect and a bundling trend.

First, some former government staff referred to the need to conclude multiple TEAs because shortly after concluding one, new questions would come to light that would necessitate another.[122] The U.S. government

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119 This includes agreements that USTR signed and that USTR negotiated even if an ambassador or other government representative signed the text on behalf of the United States.

120 As noted in the Appendix, the collection is imperfect before 1974 but among the several dozen that we have collected from this period, these are the agencies that feature prominently. *See also* Thomas R. Graham, *The Reorganization of Trade Policymaking: Prospects and Problems*, 13 CORNELL INT'L L.J. 221, 224-225 (1980).

121 *See, e.g.*, Organic Equivalency Arrangement Exchange of Letters, Taiwan-U.S., *entering into effect* May 30, 2020, https://www.ams.usda.gov/services/organic-certification/international-trade/Taiwan.

122 Interview with former USTR official 1, Washington, D.C. (Feb. 1, 2021).

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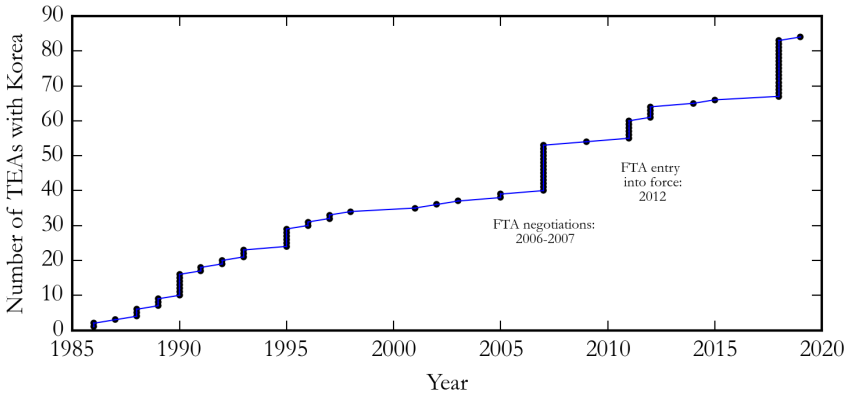
would conclude a TEA quickly to achieve a political goal, for example, but then interpretative questions might arise or circumstances – whether technological or political or otherwise – might change, requiring a further agreement to tie up those loose ends.[123] In other words, the TEA negotiation process would lead to multiple offspring – like the metaphorical rabbit – with the number of TEAs growing exponentially as earlier TEAs required. A single TEA could lead to several spin-offs.[124]

This explanation helps us start to resolve one of the greatest mysteries of this data set persists: why does the United States conduct trade law in such small pieces? As these bureaucrats' experiences confirm, in some instances, the small pieces were the result of a multiplier effect as negotiations were ongoing with an individual trading partner such as the engagement with Korea shown in Figure 10, with nearly 100 TEAs since the 1980s. In certain years, there is a run on agreements – like 2007 and 2018. (The negotiation of the U.S.-Korea FTA occurred in 2007 and the Trump Administration carried out an "update" in 2018.) Still, that those events occurred in those years does not explain why the arrangements were concluded in several separate agreements rather than in a single agreement, apart from the bunny possibility that one agreement was concluded and others were realized in short succession.

Figure 10



A second explanation arising from comments of former government officials is that of a need for bundling which the Korea example also substantiates. While different agreements were used for different subjects, they were bundled at that moment in time for political reasons. Separate agreements were simpler to track and understand when they covered

123 *Id.*
124 *See supra* Part II.A.

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different topic areas, especially if there were few to no linkages between them apart from the trading partner.

Concluding separate agreements is sometimes also necessary for legal reasons. For example, if delegated authority is framed in very specific ways, that constraint requires dividing up the bargain rather than indiscriminately lumping. A similar but still stronger legal reason is that separate agreements help agencies avoid tipping the balance toward congressional authority. In other words, small agreements are sometimes authorized whereas large-scale agreements covering multiple topic areas require congressional review to enter into force.

Additionally, there are sometimes pragmatic rationales for negotiating many subject-specific agreements. Negotiating separate agreements enhances flexibility on the part of negotiators in the future including their ability to withdraw. But these reasons must be balanced against efficiency gains in taking up issues together. There is no evidence that such calculations take place within the executive. Such deliberations, if they do occur, are well beyond the public eye.

The rationale for using multiple TEAs is less obvious when these deliberations are not chronologically proximate. Sometimes the speed of markets and changing conditions at home and abroad require or enable new agreements to facilitate those changes and so new agreements are needed from time to time. These sorts of conditions help explain trends like that seen in the relatively straightforward but separated data of TEAs with Paraguay as seen in Figure 11. Both this depiction and that of Figure 10 emphasize the modularity of TEAs: they are separate individual units that can be altered or replaced without affecting the remainder of the system. They rarely interact with one another even in the course of a single trade relationship with a trading partner.

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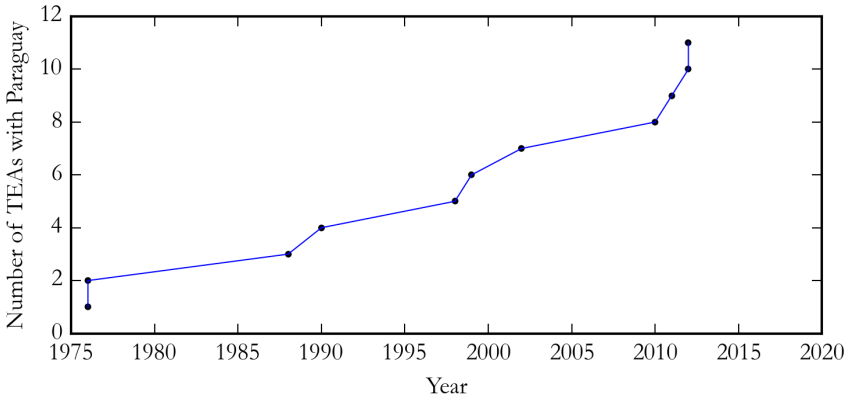
Figure 11



Like other types of agency actions, there are also sociological and strategic reasons to conclude TEAs in separate pieces where doing so is consistent with individual leader preferences or where it allows the agency to grow political capital in a relatively costless way.[125] Executive branch officials may find that having such a document to evidence foreign cooperation and especially market access may be advantageous to appease an interest group or even branch leadership, for example.[126]

Beyond these theories for TEA proliferation, additional questions remain: for one, why *these* trading partners? We could hypothesize that the number of TEAs might correspond with volume of trade. That theory holds reasonably well. In recent years, the top five trading partners of the United States for goods have included Mexico, Canada, China, Japan, and Germany, with Korea hovering around sixth.[127] Notably, the United States maintains FTAs with only Mexico, Canada, and Korea in that group.[128] So, given the numbers in Figure 2, it appears that TEAs are in that sense a potentially better predictor of trade volume in goods than the presence of an FTA, but that theory is less valid as one goes beyond the top ten. For example, the only other TEA partners with more than 20 TEAs that also figure in the top 15 U.S. trading partners for total trade in goods in 2019 are the EU (considering its members cumulatively), Taiwan, and

125 Interview with USTR official 6, via Zoom (Nov. 4, 2020).

126 Telephone Interview with former U.S. government official (June 24, 2020) (referring to one TEA that was concluded only to show government leaders and the public that years of negotiating a different larger failed agreement were not wasted).

127 *See, e.g.*, U.S. CENSUS BUREAU, TOP TRADING PARTNERS – December 2019, https://www.census.gov/foreign-trade/statistics/highlights/top/top1912yr.html.

128 The United States is negotiating a trade agreement, likely an FTA, with the United Kingdom. Press Release, Office of the U.S. Trade Representative, Joint Statement of USTR Robert Lighthizer and UK Secretary of State for International Trade Elizabeth Truss (May 5, 2020).

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Vietnam.[129] Turning to services, where the major partners are the United Kingdom, Canada, China, Ireland, Japan, Germany, and India, those countries map less well onto the TEA data. Among that group, as Figure 2 shows, only Japan, Canada, China have high numbers of TEAs.[130]

But do the numbers have another symbolic or representative significance? Why does the United States have 106 TEAs with Japan, or 40 with Colombia, or even more peculiarly, 11 with Indonesia? In some instances, TEAs appear to substitute for an FTA. Some trading partners have to rely on TEAs to facilitate their trade because FTAs are untenable politically. In the case of Japan and the EU, TEAs are doing some of the work of FTAs even though they do not bring tariffs down to zero.[131] They are building blocks that may lead to an FTA, or at least foreign trading partners may see them that way even if that is not the intent of the U.S. government. But, as noted, Korea, Mexico, and Canada all have a significant number of TEAs *in addition to* their FTA. In fact, many of the top TEA partners are also FTA partners. This correlation indicates not that TEAs are surrogates necessarily, but rather that FTAs serve as a floor to a larger relationship on which additional TEAs build. At the least, the TEA map complicates the traditional story about U.S. trading relationships. When one considers TEAs in addition to FTAs, the U.S. geoeconomic picture changes quickly.

III. DESIRABILITY & POTENTIAL REFORMS

TEAs have grown to fill three functional gaps in our trade toolbox and they do so to some degree with implicit blessing, despite recent congressional grumbles when they get "too big" or move too far from what some members perceive to be U.S. national interest. I begin with a

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129 EU members make up most of the remaining 15 so the comparison is imperfect. The trading partners that do not feature on the TEA list but that feature prominently in total trade numbers (goods) are India and Brazil. The collection shows only 13 TEAs with India and only 11 with Brazil. But more may be imminent. *See, e.g.*, Icso *supra* note 19; Lawson, *supra* note 19.

130 Recent Trends in U.S. Services Trade, 2019 Annual Report, Inv. No. 332-345, 10, USITC Pub. 4975 10 (Sept. 2019) (Final).

131 These hypotheses presume some sort of relationship between the content of the TEAs and the facilitation of goods and services or in the case of the latter hypothesis, it could be assuming that TEAs are liberalizing instruments as FTAs are intended to be. Unfortunately, however, there is no straightforward way to trace a relationship between an agreement and trade flows to know just how much TEAs are facilitating trade liberalization. One could look more closely at the topics they cover, but then additional work would be needed to connect those topics to volumes of exports and imports. The data set assembled here likewise lends itself to further research with respect to the economic impact of these agreements. Their impact could be considered along multiple dimensions or measurements such as the volume of trade to which they apply. But there is a great deal of noise in the data that requires deconstructing. Such an examination is beyond the scope of this project but would very much enhance our understanding of TEAs' economic contributions, which may in turn influence our legal analysis as to appropriate governance structures.

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relatively modest defense of the functions TEAs serve. TEAs serve vital policy roles. These attractions should not be undervalued even if they need to be better organized and theorized.

I then consider possible reforms to TEA-making and -maintenance that could improve their oversight and availability. TEAs would benefit from a re-institutionalization that would reduce legal ambiguity at their front, middle, and back ends; restrict certain uses of TEAs while expanding others when circumstances so demand; and, improve public access to information about them. I identify a set of legal and organizational design choices that can best address the current impediments to transparency and availability. To be sure, these alterations are second-best solutions in the absence of a wider legislative framework for TEAs, but they account for the negligible present political potential for more. If not done well, reforming the processes surrounding TEAs could diminish their utility. To avoid these pitfalls, this Part draws on additional specific feedback garnered from interviews with government officials to make a discreet recommendation, in three parts, with respect to the procedure for concluding and maintaining TEAs.

A. Functional Defense

TEAs' reception is mixed. They are neither widely praised nor are they widely disputed in a general sense. Much of the commentary on TEAs is specific to an individual TEA and its content. Because they are difficult to see, despite their importance, most TEAs never make primetime news. When they have hit the news cycle, some observers have disputed their legal foundation and, occasionally, their content.[132] Perhaps most often, observers contest a TEA's legal foundation as a means to contest their content. They insist that TEAs conform to specific and direct delegations chiseled out by Congress. That instinct, while well intentioned, is overly limiting. The delegation issue is important for the rule of law, but the lines are not as clear cut as many commentators suggest. TEAs accentuate how that is so.

The same mixed view tends to be shared by members of Congress. Speaking broadly, TEAs operate in a zone of congressional approval verging on congressional acquiescence. Still, when members of Congress challenge USTR's negotiation of a TEA, they typically do not do so with respect to form. Among the TEAs that have been discussed on the legislative floor, members have generally accepted them and even supported their use.[133] One compelling reason for TEAs' general approval

132 *See infra* text accompanying note 137.

133 *See supra* note 11. This frequent legislative acceptance of TEAs as an appropriate form for

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and even success to date is their utility.

There are strong arguments for executive branch leadership and discretion in this space given the scale and complexity of modern government and global trade. That TEAs may be at least partly *accepted* does not mean, however, that our present system for making and maintaining TEAs is entirely *acceptable*. Still, moving past those debates helps us recalibrate our assessment. The law and especially the spectrum of congressional authorization is expansive enough here to accommodate TEAs, even if it could be done better. Given this state of affairs, I argue as a preliminary matter that TEAs merit a place in our law for institutional, diplomatic, and practical reasons.

TEAs fill at least three specific functions for which other instruments are less well situated: problem solving; fulfillment of implicit congressional priorities on trade; and enforcement of trade law (domestic and international). Although these general functional justifications of the work TEAs do are not express or easily deciphered from the law, their invocation is contributing in these many ways to normative development.[134] Here, I lay out these functions and note also their costs and exaggerations. While TEAs make meaningful contributions to trade law and cross-border regulation, not all is rosy.

Problem solving is the commonly offered rationale for "singles and doubles," as former USTR Robert Lighthizer calls TEAs. When asked in a 2020 congressional hearing about these "skinny deals,"[135] Ambassador Lighthizer replied:

> [E]verything we do at USTR is not just an FTA. Right? We worry about problems that come from American manufacturers and workers and unions and the like all over the world all the time. And I have a list here which I won't go through which has got 40

trade lawmaking, at least where they are visible, supports an argument that TEAs are also presumptively constitutional. But there are perhaps too many unknowns – literal and figurative – to be fully confident of that position. While Congress accepts the TEAs it knows about, there are many more about which it may not, making it difficult to rely upon this silence as acquiescence. Congress sees only a slice of the full array of TEAs – the slice that loud actors want it to see. On the other hand, congressional non-intervention may be intentional, strengthening support for an idea of TEAs creating quasi-constitutional custom, to borrow this term from Harold Koh. *See* HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 70-71 (1990) (describing "quasi-constitutional custom" as embracing a set of institutional norms generated by practice of the branches and noting that it is perennially subject to revision). Until these are tested in their modern form, both branches appear to have reasonably adopted this stance.

134 Bodansky & Spiro, *supra* note 28, at 890 (observing that "[i]n the foreign affairs context, practice has historically played a crucial function in setting constitutional norms").

135 Rep. Terri Sewell expressed concern that these "skinny deals" would bypass Congress, asking for assurance that USTR would not be concluding "skinny deals" like the Japan agreement in its negotiations with United Kingdom or Kenya. Hearing on the 2020 Trade Policy Agenda Before the Committee on Ways and Means, No. 116–46, 116th Congress (2020). *See* Icso, *Skinny Deals*, *supra* note 19.

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> or 50 - I call them singles and doubles. . . . And we work through these things. . . . Opening the sorghum market in Vietnam[, for example]. I mean there are just scores of these kinds of things. And that's one of the things we do at USTR.[136]

This reference to the many TEAs that USTR has concluded to gain market access for U.S. products or precipitate other salutary changes in foreign law is not new. The debate on this issue was perhaps at its height during discussions about the Anti-Counterfeiting Trade Agreement (ACTA) from 2007 to 2009.[137] ACTA was a TEA directed at changing intellectual property (IP) standards in the legal regimes of U.S. trading partners.[138] In a letter to Congress, then-USTR Ron Kirk stressed that ACTA would resolve concerns about counterfeiting and piracy by developing in the domestic law of other countries strong IP enforcement regimes just as earlier TEAs negotiated by the Clinton Administration had done.[139]

These exchanges accentuate how the art of the skinny deal, to these advocates, is to resolve deficiencies arising out of existing trade policy.[140] From their perspective, TEAs address concerns raised by U.S. business and they happen to do so through agreement.[141] The swiftness with which they can be completed is typically a benefit to U.S. industry in a rapidly changing market.[142] As Ambassador Lighthizer reiterated: "What we do in all of these cases is we go and we solve problems for American business and farmers and ranchers and labor."[143] As per the simplified Uruguay examples in Part I above, these proponents see TEAs' primary function as clearing nuanced or technical impediments without demands for deep

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136 *Id.*

137 *See, e.g.*, Oona A. Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, AM. SOC'Y OF INT'L L. INSIGHTS (Aug. 24, 2011), http://www.asil.org/pdfs/insights/insight110824.pdf (noting dispute over whether the ACTA is fully compatible with existing U.S. domestic law).

138 Anti-Counterfeiting Trade Agreement (ACTA), Dec. 3, 2010, 50 I.L.M. 243, https://ustr.gov/acta.

139 Letter from U.S. Trade Representative Ron Kirk to U.S. Senator Ron Wyden (Dec. 7, 2011) (on file with author).

140 As another former USTR official noted, TEAs may also be used to address problems in prior TEAs, per the "bunny theory" laid out above. Interview with former USTR official 1, Washington, D.C. (Feb. 1, 2021).

141 *See* Lighthizer Testimony 2020, *supra* note 5 (commenting that USTR has "trade discussions across the board and those have led to a variety of successes . . . clearing up a whole variety of impediments to U.S. exports and in some cases opening up markets.").

142 That is, they can be legally completed in a single day which makes them far faster than "fast-track" – a misnomer in that it takes quite some time, even if not as long as most ordinary legislation. *See* Caroline Freund & Christine McDaniel, *How Long Does It Take to Conclude a Trade Agreement With the US?*, PETERSON INST. FOR INT'L ECON. (July 21, 2016), https://www.piie.com/blogs/trade-investment-policy-watch/how-long-does-it-take-conclude-trade-agreement-us. *But see* Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 508 (2014) ("the need for speed and secrecy in foreign affairs, are largely overblown").

143 *See* Lighthizer Testimony 2020, *supra* note 5.

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investigation. USTR and other agencies enter into these arrangements, applying agency expertise just as would be expected of bureaucrats in any regulatory space.[144] They do so quickly and practically without any additional unnecessary scrutiny or impediment.

What this view omits, however, are the trade-offs in such exchanges. TEAs may serve certain meaningful ends in resolving trade problems for one industry or business, but they are not without substantive and procedural costs. For one, Ambassador Lighthizer characterizes TEAs as entirely one-sided gains for the United States, which is sometimes but not always true. They are often reciprocal. Take the TEAs that guarantee IP protection for a foreign label, for example.[145] Many of those agreements commit the United States to reserving a label for products made only from a certain foreign region at the exclusion of potential U.S. producers.[146] Agricultural arrangements often feature the same sorts of compromises.[147] Trade agreements inevitably create collateral damage, and it is misleading to suggest that TEAs are exclusively about opening markets for U.S. products. There is also a cost in the leverage expended with foreign trading partners in concluding a TEA. While difficult to measure, using a narrow, limited tool may achieve certain aims with a foreign government but query whether there are other foreign policy priorities that are sacrificed by not building on any possible momentum toward a larger deal. In fact, it was this silo effect that Ambassador Lighthizer saw as a strength in reaching a deal with China in 2020. He was able to isolate the issues over which USTR had authority from other irritants in the relationship with China.[148] Commentators saw this as a double-edged sword.[149]

Likewise, TEAs may achieve victories for well-financed interest groups that have access to USTR or other agencies, but those may not be as beneficial on the whole as compared to what might be obtained through

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144 *See, e.g.*, Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2021-23 (2015), https://columbialawreview.org/content/a-place-for-agency-expertise-reconciling-agency-expertise-with-presidential-power/.

145 *See, e.g.*, Protection of Names of Bourbon Whiskey and Certain French Brandies, Fr.-U.S., Dec. 2, 1970, Jan. 18, 1971, 10 I.L.M. 673.

146 *Id.*

147 *See, e.g.*, Letter from Krysta Flarden & Darci Vetter to Johann N. Schneider-Ammann on the U.S.-Switzerland Organic Equivalency Arrangement (July 9, 2015), https://www.ams.usda.gov/sites/default/files/media/Letter%20to%20swiss%20FOAG.pdf.

148 *See, e.g.*, Bob Davis, *Trade Chief Lighthizer Urges Biden to Keep Tariffs on China*, WALL ST. J. (Jan. 11, 2021), https://www.wsj.com/articles/trade-chief-lighthizer-urges-biden-to-keep-tariffs-on-china-11610361001 (referring to when U.S. Trade Representative Lighthizer commented that he sticks to his "lane").

149 *See, e.g.*, Wendy Cutler (@wendyscutler), TWITTER (Aug. 21, 2020, 1:34 PM), https://twitter.com/wendyscutler/status/1296863176466796549 ("Looks like US mini #tariff deals are all about catching up with lost market access due to our trade wars and sitting on the sidelines as others do preferential deals. There's so much more we could and should be doing with the EU on trade beyond lobsters.").

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another process including public input.[150] With the limited information now available, it is difficult to compare readily the present TEA-making process to alternatives. But the fact that information is limited contributes to the problem. TEAs represent a workaround to regular rulemaking that helps bureaucrats avoid the processes associated with that system, therein shielding interest groups or other advocates from exposure. A related vulnerability of TEAs is their fragility, though this likewise cuts both ways. FTAs implemented by Congress are seen by many as more dependable than an executive agreement without the same lock-in effect.[151] As President Biden recently did with a deal with the United Arab Emirates, executives can exit TEAs as easily as they can get into them, creating questions of predictability for trading partners.[152]

A second potentially salutary function of TEAs is that they can realize congressional will – spoken and unspoken. In both the 2019-2020 congressional debates and in the context of the ACTA, officials justified TEAs as carrying out that which Congress intends even if not explicit. According to Ambassador Lighthizer: "The purpose of a [trade agreement] is to make sure that the United States Congress has enough room – policy space – within whatever we negotiate to accommodate whatever the Congress comes up with. . . . what I wanted to do in a trade agreement is just make sure there is space so that you could do – I mean, you, collectively – what the United States Congress decides U.S. policy should be."[153] This attraction turns on a particular vision of the separation or rather the cooperation of trade law powers: one that sees authority on a spectrum of approval, even if indirect.[154] Referring to ACTA, then-Legal Adviser of the State Department Harold Koh likewise pointed to statutory authority in the form of a congressional call to action to engage with international partners.[155] He suggested that congressional approval can be implicit including where the executive finds it "consistent with existing law."[156]

This general rationale for TEAs accounts for the fact that Congress sweeps in broad strokes and cannot be expected to anticipate every cross-

150 One practitioner pointed to the U.S.-Canada Softwood Lumber TEAs as representative of a broader trend according to which "special interests make deals". Interview with former USTR official 2, Washington D.C. (Feb. 20, 2021).

151 *See* Claussen, *supra* note 29, at 318, 320 (describing the reliability that fast track created).

152 *See* Jennifer Doherty, *Biden Reverses Trump's Softening of UAE Aluminum Tariffs*, LAW360 (Feb. 2, 2021), https://www.law360.com/articles/1351146/biden-reverses-trump-s-softening-of-uae-aluminum-tariffs.

153 Lighthizer Testimony 2020, *supra* note 5.

154 Koh, *supra* note 78, at 7-8.

155 Letter from Harold Koh, Legal Adviser, U.S. Dep't of State, to Senator Ron Wyden (Mar. 6, 2012), http://infojustice.org/wp-content/uploads/2012/03/84365507-State-Department-Response-to-Wyden-on-ACTA.pdf.

156 Koh, *supra* note 78, at 8.

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border issue that may arise. Moreover, in the face of interbranch deadlock, TEAs are well positioned. The question, however, that remains for lawyers is just how specific that delegation needs to be to avoid undermining congressional authority and creating uncertainty in not just our international commitments but also in related domestic regulation.[157] Those are significant issues that weigh strongly against the functional benefits TEAs may provide.

Further, to be sure, by stepping away from the congressional-executive legal regime for trade agreements, TEAs can more easily avoid abiding by the carefully enumerated congressional direction. The executive is now incentivized to work outside the shared congressional-executive system in light of its increased constraints.[158] The growth in reliance on TEAs could signal that fast-track priorities and that legal regime more generally have grown too large for management or for practical foreign commercial lawmaking.

A third constructive function TEAs serve is enforcing both domestic and international law. For instance, the 2020 China "Phase One Deal" is intended as a step toward settling issues the United States raised with China under Section 301 of the Trade Act of 1974.[159] Section 301 permits the president to act when the USTR determines that an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts U.S. commerce.[160] In its Section 301 investigation report issued in March 2018, USTR concluded that China is engaged in acts, policies, or practices related to technology transfer, intellectual property, and innovation that are unreasonable or discriminatory and that burden or restrict U.S. commerce.[161] Section 301 authorizes the USTR to "obtain the elimination of that act, policy or practice" through any action within the power of the president.[162] In this instance, USTR negotiated a "deal" with China as part of its enforcement.[163]

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157 *See* Bodansky & Spiro, *supra* note 28, at 46 (arguing for the use of "executive agreements+" in face of inter-branch deadlock).

158 That the executive would shift to tools where congressional oversight is decreased can be seen also in the recent shift to use tariffs instead of trade agreements. *See, e.g.*, Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1102 (2020).

159 *See* Trade Act of 1974, *supra* note 71, § 301.

160 *Id.*

161 Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13,099 (Mar. 22, 2018).

162 19 U.S.C. § 2411(b)(2).

163 2020 China Deal, *supra* note 13. When USTR Lighthizer testified before the House Ways & Means Committee in February 2019, he told members of Congress that USTR would not be sharing the draft deal with Congress because it was an executive agreement negotiated without obligation of congressional approval further to statutory authority. *Testimony of U.S. Trade Representative Robert Lighthizer, House Ways & Means Comm.*, YOUTUBE (Feb. 27, 2019), https://www.youtube.com/watch?v=plJBuKzC_Hg.

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But the China "Phase One Deal" also reflects some of the difficulty with relying on general enforcement rationales for TEAs, even when backed by delegations of authority. For one, they suffer from few instructions on the limits of that authority. The China deal goes much farther than just the intellectual property practices that the Section 301 investigation reviewed. USTR also describes monitoring trade agreements for compliance by U.S. trading partners as one of its core functions,[164] except that the transparency problems identified earlier diminish the strength of that position. The fact that USTR staff could not locate many TEAs suggests that compliance may not be a top priority. That this is so would be less consequential if these were soft law agreements with few or no binding commitments, but that is not the case. Finally, a corresponding enforcement consideration in U.S. and international law may be just how much weight the United States places on TEAs as binding arrangements for itself or U.S. actors.[165] Given TEAs' complicated status in U.S. law, international partners would face difficulty ensuring that the *United States* is acting in compliance with any commitments it has made.

Apart from these three major functions, TEAs can serve still other practical functions such as by signaling diplomatic priorities in addition to trade priorities. And they may also suffer from additional practical flaws and costs such as by creating fatigue among trading partners or with members of Congress.

What becomes apparent from these attractive functions and their costs and overstatements is that TEAs are at least *somewhat* useful *some* of the time. Under certain conditions, the institutional, diplomatic, and practical advantages may outweigh valid concerns about public participation and unscrupulously defined delegations, among others. The challenge is in agreeing when that may be so.

B. *An Organizational Proposal*

A risk of drawing attention to the hidden world of TEAs, their recent expansion, and their problems is that opponents will overemphasize their

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164 *See, e.g.*, OFF. OF THE U.S. TRADE REPRESENTATIVE, ENFORCEMENT, https://ustr.gov/issue-areas/enforcement.

165 This point assumes that trading partners will start to rely on TEAs more heavily than in the past – and that is precisely what I would expect given the Trump Administration's expansive use and the anticipated use by the Biden Administration. *See, e.g.*, Maria Curi, *Canada's Ambassador: Aluminum Exports 'Aren't Hurting the U.S. Market'*, INSIDE U.S. TRADE, June 23, 2020 (describing the disingenuous use of a TEA reached between the U.S. and Canada that the Trump Administration was then prepared to disregard). Indiscriminate uses of agreements risk harm to the institutional integrity of executive agreements more generally as well as U.S. credibility among our trading partners. *See, e.g.*, David Henig (@DavidHenigUK), TWITTER (June 23, 2020, 10:59 AM), https://twitter.com/DavidHenigUK/status/1275443263751589888 ("Signing trade agreements counts for little for this US administration.").

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flaws. They could become pawns in a separation-of-powers tug-of-war or the target of interest groups seeking external control over agencies. Tightening congressional influence on TEAs through more intensive controls on their underlying delegations could also incentivize the executive to achieve the same even farther beyond the public eye. TEAs ought not to be overlooked, but they also ought not to be covert. Transparency and recordkeeping challenges are subsidiary problems in this study and in the operation of TEAs, including with respect to TEAs or parts of TEAs not covered here that may be classified.

In short, TEAs are "under the radar," but should not become "under the table."[166] TEAs ought to be accessible and available, but it would limit their utility substantially if they were to be in all instances bogged down in the full panoply of administrative or congressional review. The better choice is to reconsider how to institutionalize TEAs in a way that endeavors to rectify their problems and exploit their benefits over alternatives.

At present, we lack a legal process that accommodates appropriately TEAs for all that they do. Such a legal process – as in the form of framework legislation that would replace or be part of fast-track – could establish rules of engagement that incorporate the TEA customs that have evolved and which Congress advanced implicitly with the structure it built. TEAs are here to stay. Pivoting then to some ways to parse that delicate conversation, one key may be in determining in what ways TEAs ought to maintain their current functions, expand or contract them, and in what forms. Lawmakers may wish to seek to identify a continuum of appropriate TEA use. For example, a re-evaluation of the system could select the ways TEAs work best or are uniquely positioned and the ways they interfere with congressional prerogatives the most, making certain adjustments to the decision-making levers available to the executive. Our collective work going forward ought to be teasing out this continuum for different categories of TEAs and their respective organization.

What I outline may be a first-best institutionalization option, but the likelihood of such an undertaking being realized anytime soon is somewhat low. The mixed incentives of all the players at work in this space make such a creative renaissance for trade law and policymaking implausible. Moreover, as noted from the outset, this project illustrates that we know too little about this uncharted legal domain. To make more than uncomplicated recommendations at this stage would be premature. But the time for at least considering the menu of possibilities begins now. It makes sense to activate TEAs while correcting where possible these operational

166 *Cf.* Bodansky & Spiro, *supra* note 28, at 891 (commenting that suppressing executive agreements+ in the courts or otherwise will likely drive this agreement-making underground).

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mechanics. An organizational revision ought to be a politically feasible step forward and a reasonable second-best option to a general enabling statute.

First in this revision could be differentiation. The dominant (mis)perception is that current law provides for the conclusion and implementation of only one type of trade agreement – the FTA – through fast-track legislation. But, as noted above, that same statute also provides for limited TEAs. With some additional differentiation in the statutory and administrative requirements for making trade agreements, such as through a sort of "fast-track-lite" arrangement, Congress could create a reporting system for certain TEAs. Revised fast-track provisions with intermediate steps precedent for certain types of TEAs according to which USTR works directly with its congressional oversight committees would facilitate better engagement. Such an arrangement could provide safeguards to avoid executive overreach that opponents of TEAs fear. It would create congressional off-ramps to stop TEAs that risk going beyond executive mandates.[167] The details would be important to prevent Congress from taking an overly interventionist approach. But it would provide some oversight where presently there is none. Moreover, a modified fast-track could better distinguish between alternative types of reporting for different types of TEAs. Congress could work within the existing legislation to which it is accustomed and make these changes at the margins.

A second aspect of this revision, ironically, is standardization. To assist in managing the differentiated legal approval process I have just proposed, the system could be simplified with some basic organization among labels for trade agreements. As Part II displayed, the mix-and-match style of labeling allows executive branch agencies to game the naming process and avoid accountability. Some easily distinguishable lines on labels and their uses would help in this restructuring.

Third, to improve public agreement awareness, Congress ought to consider revising the statutory guidelines for publishing executive agreements and expressly treat TEAs apart, but in a way that requires their publication, rather than leave USTR to develop its own practices.[168] In other words, it should rework the structure that favors TEAs' exceptionalism and create a normal process to make their existence known. At present, the Case Act leaves it to the State Department to

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167 *See generally* Julian Ku, *Treaties as Law: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005). Of course, Congress could legislate over TEAs if it wanted, and it has, but not for some time. *See* Trade Agreements Extension Act of June 15, 1951 Act, § 5. On more recent occasions, it appeared to act to rein in letter practice, but if that was its intent, it has undoubtedly looked the other way since doing so. *See* 19 U.S.C. § 3805.

168 Others have gone still farther suggesting an APA for executive agreements. *See* Hathaway, *Presidential Power*, *supra* note 11, at 242-53. I fear, however, that the full constellation of APA rights and duties may prove counterproductive for TEAs, as discussed above, although more might be done to reconcile the C-175 and TPSC processes.

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decide what is made public, and State relies on other agencies to provide that information to it.[169] Trade's constitutional status warrants a trade-specific Case Act provision that cuts out the State Department as a middle-person.

Organizational adjustments alone will not resolve the legal questions that TEAs raise, nor will they fully institutionalize TEAs in the zones in which they operate whether inside or outside the executive branch, or inside or outside the U.S. government. But these recommendations could ensure that the law takes better account of the work TEAs are playing, and then lawmakers may consider those consequences in greater depth.

IV. IMPLICATIONS: REVISITING PARADIGMS

The previous Parts showed the extent of TEAs' control – as trade tools, as instruments of foreign policy, as products of constitutional law-driven choices, and, perhaps most importantly, as domestic law-making devices. They have emerged wielding considerable power in the governance of individuals, businesses, and the work of the government – protecting health and safety, promoting innovation, supporting economic growth, and policing detrimental practices, just to name a few of their crucial roles. There are institutional, procedural, legal, and epistemic lessons to be gleaned, and then there is a long list of descriptive and analytical work yet to be done. This Part analyzes the early takeaways and articulates a list for future scholarship.

A. The Many Sites of Foreign Commerce

Among the most significant outcomes of this project is that recognizing the work of TEAs both clarifies and complicates our understanding of trade. First, it calls into question prior accounts of trade law that focus on the big congressional-executive agreements.[170] The field of trade law today is broad in subject, but most of the study of trade law has focused narrowly in form on the WTO and on FTAs. Leading accounts of trade law over the years have provided rich insights into the content and constitutionality of FTAs as well as into the workings and dispute settlement features of the WTO.[171] That work began at the time

169 We might also consider the Case Act's antiquated design. I elaborate on this in a recently published piece. *See* Claussen, *Unseen Deals*, *supra* note 61.

170 *See, e.g.*, Chad Bown, Robert Staiger & Alan Sykes, *Multilateral or Bilateral Trade Deals? Lessons from History*, *in* ECONOMICS AND POLICY IN THE AGE OF TRUMP 153, 158 (Chad Bown ed., 2017); DEVIKA DUTT & KEVIN GALLAGHER, *Trade Liberalization and Fiscal Stability in Developing Countries* (June 2020), http://www.bu.edu/gdp/files/2020/07/GDP_Fiscal-Stability-Report_Final.pdf.

171 *See, e.g.*, Ackerman & Golove, *supra* note 31 (covering the constitutional questions regarding FTAs); John H. Jackson, *The Case of the World Trade Organization*, 84 INT'L AFFS. 437 (2008).

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those FTAs became regular trade policy fixtures in the early 1990s and 2000s, but the debates and discussions continue, including most recently with the USMCA, and the U.S. calls for WTO reform.[172] However, this spotlight, while reflective of widely reported international trade policy decisions, gives a false sense of precisely all the legal instruments at play in the field. The trade literature has left the story of TEAs largely untold.

Thus, this study gives us not just a more complete picture, but quite a different one as to who writes the rules and what those rules look like. And yet, if the absence of TEAs from trade law were simply an academic matter, this study might be less consequential. But the matter is hardly academic. Rather, TEAs are often left out of the *congressional* field of view, in an area in which Congress has the constitutional prerogative.[173] The result is that Congress' policymaking choices turn on not just incomplete but also incorrect information.

The economic stakes that we know so far are already high. Consider the recent China deal.[174] It implicated U.S. tariffs of 25 percent on $250 billion worth of Chinese goods.[175] China also committed to buying $200 billion worth of U.S. products and services over two years.[176] Research presented to Congress as representative of our trade law omitting these types of arrangements has sorely underestimated the work of the executive.[177] And that is just among what is obviously part of trade. Moreover, we know now that, because of trade's disciplinary growth, and expansive interpretations of delegated authority, TEAs extend the reach of "foreign commerce"-premised regulation far beyond the work of USTR. There are today so many delegations to the executive to engage in trade-related activities that it takes a two-volume compilation for Congress to keep track and even that is incomplete.[178] Since it is a herculean, if not impossible, task to link up every agreement that is related to trade with a

172 *See* Mark Linscott, *The Trump Administration's Plan to Upend the WTO*, NEW ATLANTICIST (June 18, 2020), https://www.atlanticcouncil.org/blogs/new-atlanticist/the-trump-administrations-plan-to-upend-the-wto/.

173 U.S. CONST. art. I, § 8, cls. 1, 3. This is despite the fact that occasionally Congress has tried to control for extralegal lawmaking by the executive. *See, e.g.*, 22 U.S.C. § 4805; James Gathii, *Defining the Relationship between Human Rights and Corruption*, 26 U. PA. J. INT'L ECON. L. 31, 42 (discussing the congressional efforts to limit TEAs while recognizing it was impossible to fully tie the hands of the executive).

174 2020 China Deal, *supra* note 13.

175 David Lawder, Andrea Shalal & Jeff Mason, *What's in the U.S.-China Phase 1 Trade Deal*, REUTERS (Jan. 15, 2020), https://www.reuters.com/article/us-usa-trade-china-details-factbox/whats-in-the-u-s-china-phase-1-trade-deal-idUSKBN1ZE2IF.

176 *Id.*

177 *See, e.g.*, CONG. RSCH. SERV., *Treaties and Other International Agreements: The Role of the United States Senate* (2001), https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf (noting linkages between investment and trade agreements, and tax and trade agreements) [hereinafter Senate Report 2001].

178 *See* STAFF OF H.R. COMM. ON WAYS AND MEANS, *supra* note 35.

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particularized applicable delegation from Congress,[179] the question is more often avoided than addressed.

Drawing together this body of law corrects our idea of *how* trade law is made. U.S. trade law is developed through international agreements, statutes, regulations, presidential proclamations, judicial decisions, and arbitrations, among others. No one type exists in isolation, however; the law generated from these sources regularly interacts – sometimes in unexpected ways that create more questions than they resolve. Agencies like USTR may select from among an FTA, TEA, tariff, diplomacy, international institution, or sanction, among others, to carry out executive branch priorities. Not all are created equal.[180] In some instances executive authorities may serve better than congressional-executive agreements. Each tool has its own set of constraints and requires different types of transparency and consultation with Congress.

Acknowledging these distinctions allows us to deconstruct the president's choices in the ongoing trade war and contextualize them in this highly textured bi-branch environment. With the unfettered ability to select from this menu of lawmaking devices, executive officials determine not just the method to achieve U.S. transnational commercial policy aims, but also the policies themselves. This revised account calls for more study of those critical interactions and the effects of relying on any one type in each circumstance or to achieve the functions that trade policymakers claim they are pursuing. Ultimately, trade policymakers need to think about TEAs, tariff authorities, FTAs, and other rules together.[181] By largely ignoring TEAs, these policymakers may have missed the forest for the trees.

The interagency process also bears lessons for foreign relations and administrative law practitioners and scholars alike. USTR has an outsized influence in the TPSC process, akin to the role of the Office of Management and Budget in interagency regulatory review.[182] It can redirect other agency action in the shaping of TEAs. Sparse public discussion of the deliberative process in that setting means we know little about what actually goes on at that ground level of TEA-making. Apart from rendering it difficult to evaluate alone, these constraints also make it

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179 *But see* Hathaway, Bradley & Goldsmith, *supra* note 36, at Part III (undertaking to look at the trade agreement delegations reported by the State Department to Congress).

180 *See* Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1697 (2017) [hereinafter Galbraith, *Changing Landscape*] (describing how a structural shift toward multiple pathways for making international commitments has altered traditional separation of powers ideas).

181 And more. *See e.g.*, Meyer, *supra* note 86, at 154-55 (analyzing other trade policies that have become siloed).

182 *See, e.g.*, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 830 (2003).

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difficult to assess in comparison with ordinary rulemaking, for example, or to appreciate fully the value of agency expertise that such a process may yield. But at least one initial takeaway is that there is an expansive community – call it the "foreign commerce bureaucracy" – through which TEA and other foreign commerce law decisions are filtered. Its work is not static, but rather highly productive and dynamic in pushing out TEAs each year.

There are likewise institutional lessons to be reviewed from the tapestry woven here about what happens *after* trade agreements are made. A first is that the existing literature tends to overemphasize the start and end of the international agreement process. With those emphases, it is not surprising that the primary areas of commentary relate to legal authority to enter agreements and legal authority to exit.[183] But there is much more to the life of TEAs after they enter into force. Apart from their duration, they have active and passive features. A number of TEAs create councils for engagement that may engender a sense of community and carry out their own additional lawmaking.[184] TEAs accumulate over time.[185] Their implementation may not occur in a solitary moment, but may bootstrap other TEAs and other domestic rules.[186] Thus, this study helps us adjust the compass from just inputs and outputs in trade or foreign relations to also consideration of what I will name "midputs": the points in the existence and application of the international agreement that are meaningful in law or policy.

The system for achieving compliance with international rules on which Congress and civil society tends to place strong emphasis[187] may not be manageable in light of this extensive landscape of agreements, even apart from the recordkeeping challenges. Agreement maintenance, monitoring and enforcement opportunities feature more prominently here. We have seen that the constellation of U.S. obligations has become so complex, the government has lost track of them. Resolving this organizational problem is not a matter of increasing the size of the foreign commerce bureaucracy where continued growth to date has become a self-fulfilling prophecy as it

183 *See, e.g.*, Joel P. Trachtman, *Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause Verses an Historical Gloss Half Empty*, 51 INT'L L. 445, 445 (2017); Bradley & Goldsmith, *supra* note 11, at 1206-20, 1223-26.

184 *See, e.g.*, Agreement between the Government of the United States of America and the Government of the Republic of Ecuador relating to Trade Rules and Transparency, Ecuador-U.S., July 23, 1990, Hein's No. KAV 3963.

185 *See, e.g.*, Figure 9, *supra*.

186 *See, e.g.*, Claussen, *Multiple Pathways*, *supra* note 10, at 274-78 (describing how the entry into force of certain TEAs required the Treasury Department to engage in supplementary lawmaking).

187 *See, e.g.*, *W&M Democrats Urge USTR to Strengthen USMCA's Environmental Language*, INSIDE U.S. TRADE, Apr. 17, 2019, at 2 (noting that enforcement was the primary political issue in the USMCA negotiations).

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continues to box other actors out.[188] To approach this systemic problem with such a band-aid is the retail-level takeaway from a bird's eye view of this collection. Instead, the wholesale version for addressing this challenge involves identifying TEAs as tools in the trade arsenal, and thoughtfully evaluating priorities and systemic design choices.

B. *Interdisciplinary Reorientations*

Taken as a whole, a now-perhaps-obvious conclusion is that TEAs demand interdisciplinary treatment to be fully understood. The process through which they are designed, negotiated, implemented, and maintained is a hybrid exercise that draws on and offers takeaways for multiple areas of law. They are both subjects of and products of diverse and overlapping bodies and carry lessons for how we think about those bodies' intersections. In particular, seeing TEAs at the legal core of the cross-border administrative state's activities ought to prompt scholars and practitioners to reevaluate existing paradigms and the norms shared or contested across these fields.

One reorientation prompted by this study concerns thinking about executive agreements generally not through authority-driven categories but rather through a functional taxonomy of what these agreements achieve, or seek to achieve in U.S. and international law. Driven by typologies of international agreements oriented around the separation of powers, and seeing FTAs as occupying the trade space, most foreign relations law studies have only briefly touched upon TEAs.[189] Now visible, TEAs unsettle the constitutionally driven categorization of international accords in U.S. law.[190] The dependence on carefully delineated categories of sole executive agreements, congressional-executive agreements (especially ex post agreements), and treaties elides the under-the-radar instruments that fall elsewhere on the spectrum. In this cross-cutting terrain, TEAs push our thinking beyond the traditional molds and categories. Indeed,

188 *See also* Fred O. Boadu & Jie Shen, *An Empirical Analysis of the Growth and Autonomy of the Office of the United States Trade Representative*, 6 CURRENTS: INT'L TRADE L.J. 3, 9 (1997).

189 *See* Senate Report 2001, *supra* note 177, at text accompanying note 73 (acknowledging that it is omitting TEAs from its review). *See also* Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 964-1009 (2001); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 160-83, 218-35 (1998). Even studies that have looked a bit beyond traditional categories still paint typologies on the basis of constitutional authority. *See, e.g.*, Bodansky & Spiro, *supra* note 28, at 887-88 (suggesting a new typology based on a range of legislative authorizations).

190 Some commentators have recently pushed back on this taxonomy. *See* Harold H. Koh, *Triptych's End: A Better Framework To Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 338, 339-45 (2017); Galbraith, *Changing Landscape*, *supra* note 180, at 1678-79; David A. Wirth, *Executive Agreements Relying on Implied Statutory Authority: A Response to Bodansky and Spiro*, 50 VAND. J. TRANSNAT'L L. 741, 751 (2017).

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preexisting normative ideals of cooperation among the branches and treatments of executive branch international lawmaking as monolithic are part of the reason we tend to miss TEAs hiding in plain sight in the first place.

Further, existing studies do little to uncover precisely what these agreements achieve in practice. Congressional and scholarly attention to one set of constitutional bargains may have in fact pushed executive branch agencies to proceed through other means. One implication of this project then may be to socialize the many players in the TEA story to the significance and contributions of TEAs, rather than their limitations.

A related interdisciplinary reorientation is toward identifying codified state commitments to supplement scholarship on transnational regulatory networks. The literature concerning how domestic actors cooperate in international settings has peered below the surface to examine the extensive work of bureaucrats harmonizing and creating best practices.[191] However, those studies do not often extend beyond the frequent informal, soft law arrangements of civil servants to consider the formal, hard law created by TEAs to which their work contributes or that may be orthogonal. Reframing our attention toward TEAs then opens parallel research streams.

A third reorientation is a corollary of the first two: rather than see TEAs as only foreign policy instruments, we ought to view them properly as domestic rules. Such a new paradigm would consider this manifestation of trade lawmaking as not just the province of constitutional and foreign relations law, but also belonging and contributing to administrative law.[192] Isolating TEAs as this study has done concentrates our attention on how they serve as an alternative medium through which some agencies operate. It is not just that they *could* create binding rules or that they are doing so outside our rulemaking system.[193] through ordinary notice-and-comment means. Agencies exploit TEAs to govern cross-border economic activity when that work would otherwise occur through notice-and-comment or through statute, across a host of subject areas. Moreover, TEAs have significant force: they can stop the movement of goods and services with a foreign country with a simple termination or modification to the

191 *See, e.g.*, Elizabeth Trujillo, *Regulatory Cooperation in International Trade and Its Transformative Effects on Executive Power*, 25 IND. J. GLOB. L. STUD. 365 (2018); David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547 (2005); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113 (2009).

192 Jean Galbraith has convincingly argued that administrative law influences the way international commitments are implemented. *See* Galbraith, *Changing Landscape*, *supra* note 180, at 1679. My argument seeks to move this one step farther through the window of TEAs.

193 *See generally* Hathaway, *Treaties' End*, *supra* note 11, at 239 (arguing for bringing international agreements into administrative law).

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agreement, and those affected would have little legal recourse.[194] Thus, with the information collected here, we can analyze for the first time how big a role TEAs play in the vast trade administrative state.

Since TEAs are executive branch instruments, we might expect them to trigger certain requirements under administrative law – either transsubstantive statutes like the Administrative Procedure Act (APA)[195] or subject-specific statutes and processes that direct agency action and accountability. There also, however, the search for guidance as to the workings of TEAs yields few clues. Most administrative law scholarship does not take up foreign agreements as a means of making binding rules, even if they have domestic effect.[196] As Ganesh Sitaraman has noted, some administrative law commentators tend to over-generalize and exclude international agreements from consideration because the APA carves out "foreign affairs" from some of its accountability mechanisms.[197] Increasingly, however, scholars from outside administrative law have called for greater attention to the processes through which U.S. agencies make international law – a first step in recognizing the work of TEAs in making both international and domestic law.[198] For example, some scholars have advocated making U.S. international lawmaking more like administrative lawmaking.[199] The same administrative law blind spot exists in trade more generally. In earlier work I have discussed how administrative law punts when it comes to trade agencies.[200]

To reflect on the administrative state without considering the role of TEAs is analogous to examining civil procedure without studying alternative dispute resolution. While different in form, the latter is another mechanism to achieve the same outcomes to which the former aspires. Similarly, the legal force of TEAs can be commensurate to normal federal

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194 *See* Claussen, *Multiple Pathways*, *supra* note 10, at 274-78.

195 Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 500–04, 551–59, 561–84, 591–96, 701–06).

196 In fact, the foundations for this work were laid in scholarship more than a half century ago. *See, e.g.*, Frederick Davis, *The Regulation and Control of Foreign Trade*, 66 COLUM. L. REV. 1428, 1428-29 (1966) (discussing how federal agencies direct the flow of foreign commerce); George Bronz, *The Tariff Commission as Regulatory Agency*, 61 COLUM. L. REV. 463, 463-64 (1961) (describing the role of what was then the Tariff Commission). Strangely, however, they have received little attention since despite the boom in TEAs.

197 Sitaraman, *supra* note 142, at 493 (noting they are subject to arbitrary and capricious review); *see also* Meyer & Sitaraman, *supra* note 28, at 587-90.

198 *See, e.g.*, Jean Galbraith, *Make Treaty Implementation More Like Statutory Implementation*, 115 MICH. L. REV. 1309, 1349-62 (2017); David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 237-41 (2010); Sitaraman, *supra* note 142, at 508-14; Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 696-97 (2005) (discussing international regulatory regimes).

199 *See generally* Galbraith, *supra* note 198; Hathaway, *Treaties' End*, *supra* note 11; David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 84 (2013).

200 Claussen, *Trade Administration, supra* note 67, at 902.

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rules, but the method for making them is not. TEAs are unorthodox instruments in the administrative state and ought to be examined as such.[201]

By situating TEAs at the center of foreign commercial and regulatory power, we may better understand the pathologies that may be at work in their deployment. The processes behind them become paramount.[202] Policymakers then may return to delicate normative questions about *whether* and *how* expert trade negotiators should be the primary expositors of binding cross-border rules. Imagining cross-border regulations in this way would be a significant departure from previous scholarly accounts and orientations and could have institutional effects that reverberate across all three strands of law, crystallizing their intersections.

C. Pathfinding

This Article has laid the groundwork for a lengthy multidisciplinary research agenda. There remains a substantial task list building from the empirical work set out here. To name just three such tasks: in the absence of additional historical research, we do not yet fully appreciate the details of TEAs' change over time. Likewise, in the absence of additional qualitative investigation, we lack a sense of the role of bureaucrats as compared to political appointees in TEAs' drafting and promotion, or how interest groups and foreign countries activate and motivate them. These details of TEAs' institutional evolution "all the way down" are critical to capture before considering how they might be adjusted or institutionalized differently. And until additional econometric work can be completed, we do not have a clear sense as to how these TEAs influence trade volumes and supply chain configurations.

This study also suggests more analytical research is needed in each of the fields it implicates. With respect to international law, scholars and policymakers ought to consider what TEAs tell us about the significance of the concept of "agreement" in international law: how "agreements" are being used or abused as quasi-legal instruments beyond the conventional wisdom in treaty law, for example. Beyond the definition of "agreement," it draws attention to the additional work to be gleaned from seeing the whole of the agreement life cycle – its authority and process for negotiation (before), application, publication, and monitoring (during), and

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201 *See* Abbe R. Gluck, Anne J. O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1791-96 (2015) (describing the emergence of unorthodox legislative and agency practices in recent decades).

202 *See* Galbraith & Zaring, *supra* note 59, at 754-55 (commenting that "U.S. administrative law was designed for purely domestic decision making," and does not map well onto the cross-border regulatory instruments that make up much of our foreign commercial rules today).

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modification and termination (after). Likewise, this work has not explored TEAs' legality under international law regimes, such as WTO law.[203]

Domestically, this work only provides hints as to the likely problematic delegations on which different administrations have relied, and only anecdotally highlights some of the regulatory impacts stressed by reviewing them as a collection. More work ought to be done to explore the full impact of "rulemaking through agreement": to ask when notice-and-comment is best suited to achieve policy aims as compared to what can be accomplished through agreement. Additionally, we do not have any information about through what mechanisms TEAs are legally terminated. That data would help us assess appropriate processes and notification methods for doing so.

The constitutional questions loom large. First is the issue of the authority upon which TEAs rely. As described above, there is little inherent authority on which the executive branch could rely in foreign commerce. Our work tracing each of these to an express (or implied) delegation has only just begun.[204] Is this a story of congressional acquiescence as the executive branch actors have boxed Congress out? Or is there an informal dialogue occurring with members of Congress (or their staff) to be unearthed rather than what appears to be tacit acceptance?[205] How far does that stretch? Drawing lines around the limits of TEAs is the important separation of powers work that waits. TEAs expand executive power to strategically address functional gaps in decision-making but sit in a legal quandary in what is supposed to be a democratically responsive and constitutionally situated system. Further, there is more to be explored as to their legislative or other form of implementation.

There is also much to be gleaned here for the literature on bureaucracies and their features, just as this contribution creates more questions for scholars working in that field. Is this a story of bureaucratic growing pains or is it representative of agencies simply doing their jobs? As to the newly introduced concept of the foreign commerce bureaucracy,

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203 *See, e.g.*, Simon Lester, *Questions about the U.S.-Japan Trade Agreement and GATT Article XXIV*, INT'L ECON. L. & POL'Y BLOG (Oct. 12, 2020, 7:36AM), https://ielp.worldtradelaw.net/2020/10/questions-about-the-us-japan-trade-agreement-and-gatt-article-xxiv.html (compiling other governments' comments on the U.S.-Japan deals); Simon Lester, *The U.S.-Japan Trade Deal: Can a Political Agreement Liberalize Trade Without Institutions*, INT'L ECON. L. & POL'Y BLOG (Oct. 7, 2019, 6:03PM), https://ielp.worldtradelaw.net/2019/10/the-us-japan-trade-deal-can-a-political-agreement-liberalize-trade-without-institutions.html (asking whether the U.S.-Japan deals violate WTO rules).

204 *See supra* text and sources in note 36.

205 *See* Joe C. Mathew, *US Congressional Caucus on India Co-Chairs Ask USTR to Expedite India-US Mini Trade Deal*, BUS. TODAY (Aug. 28, 2020), https://www.businesstoday.in/latest/economy-politics/story/us-congressional-caucus-on-india-co-chairs-ask-ustr-to-expedite-india-us-mini-trade-deal-271499-2020-08-28; *see also* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

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what problems may result from its lack of transparency beyond those already identified here? Who has the authority to bind the U.S. government? More broadly, what institutional design best enables the United States to engage in international relations with so many competing priorities among different agencies and expansive technical issues that need to be coordinated across borders?

Finally, from a political science or international relations perspective, we might look more closely at (1) the power structures and institutional frames emerging and contributing to this landscape as well as who is driving these frames, and (2) how TEAs influence norm development outside of the United States. TEAs' geographic prevalence and expansive topical coverage suggest something of an iterative relationship in our "trade qua foreign affairs" engagements, ripe for more study. Is the United States a rule maker or a rule taker through these agreements? Is this an instantiation of a "Washington Effect" according to which foreign bureaucrats change and adopt their systems to accommodate U.S. regulatory aims?[206] If so, there could be highly significant norm proliferation and institutional learning underway that could prove a counterweight to the activities of non-allied rules regimes.[207]

V. CONCLUSION

The body of TEAs comprises a substantial compilation of foreign regulatory engagement across more than a dozen trade-related topic areas previously unseen or unstudied. The more than 1,200 TEAs analyzed in this Article permit the United States to resolve hundreds if not thousands of foreign commercial issues. Continued and innovative use of these tools has brought some new attention to precisely their bounds, but until now, we knew almost nothing about them. This Article is the first to unearth TEAs through original empirical assessment, and to consider the implications – legal and practical – of doing foreign commerce this way.

Although I am cognizant of the risk of over-relying on TEAs' functional benefits at the expense of other values, their widespread application indicates at the very least that they merit a closer look. TEAs appear at this first glance to make valuable contributions to trade law and U.S. economic governance. Under the Biden Administration, which has

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206 *Cf.* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD *passim* (2020).

207 This effect could be akin to what advocates of the TPP sought to achieve, writing the rules so China could not do so. *See* Barack Obama, *President Obama: The TPP Would Let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html13.

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committed not to negotiate large scale trade agreements, there is a high likelihood that TEAs will fill that gap. They will be the primary way that the United States makes trade law despite their constitutional dissonance.

Given their prevalence, lawmakers and scholars ought to focus on fine-tuning the system to account for the fact that TEAs form part of our constitutional law story as well as of our administrative law toolkit. They may not meet the mold of other executive or trade agreements, and they may not resemble regulations in their form, but they are doing this same critical governance work and they are likely only to grow in importance.

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VI. APPENDIX

This Appendix outlines the steps taken to complete our twofold search: identifying trade deals and then locating their full texts. It also notes adjustments to the collection necessary for an accurate representation of the empirical landscape.

A. Identification

Four trade agencies – the USTR, State Department, Commerce Department, and the ITC – are among the agencies that make names of trade agreements publicly available on their websites, creating easy access to at least some lists of trade mini-deals. For example, before March 1 of each year, pursuant to statutory requirements,[208] USTR produces the *Trade Policy Agenda and Annual Report of the President of the United States on the Trade Agreements Program*. In an annex to that publication, USTR provides a list entitled "U.S. Trade-Related Agreements and Declarations."[209] This list is not expressly required in the statute as a part of the Annual Report, but copies of the Report dating back to 2000 are available on the USTR website and all of them include such an annex.[210]

In its 2019 Annual Report annex, USTR lists 648 agreements: 57 multilateral and plurilateral in force; 403 bilateral in force; 4 multilateral or plurilateral not yet in force; and 21 bilateral not yet in force.[211] Also included among the 648 are other agreements that include few to no binding commitments: 73 multilateral arrangements of this sort and 90 bilateral.[212] The annex does not provide any information about its selection process nor does it include links to or copies of the full text of any agreement.[213] We found 124 of the agreements listed there to be listed

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208 19 U.S.C. § 2213.

209 *See, e.g.*, OFF. OF THE U.S. TRADE REPRESENTATIVE, 2020 TRADE POLICY AGENDA AND 2019 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, at Annex II. [hereinafter 2019 ANNUAL REPORT].

210 The USTR website and its archived website do not allow a user to click through to the Annual Report for 2008, 2009, or 2011. For those years, I used the Wayback Machine (https://archive.org/web/) to retrieve the Annual Report.

211 2019 ANNUAL REPORT, *supra* note 209, at Annex II.

212 *Id.* Note that the 2019 Annual Report is the Report that was made available in spring 2020.

213 The list is divided into three sub-categories: "Agreements That Have Entered Into Force," "Agreements That Have Been Negotiated, But Have Not Yet Entered Into Force," and "Other Trade-Related Agreements, Understandings, and Declarations." With respect to the first, USTR states that these are "trade agreements entered into by the United States since 1984 and monitored by the Office of the United States Trade Representative for compliance." *Id.* In fact, there are agreements that go back earlier than that. *See, e.g.*, Agreement on Trade Relations, Hung.-U.S., Mar. 17, 1978, T.I.A.S. 8967.

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elsewhere on the USTR website.[214] We also found an additional 225 trade-related agreements not mentioned in the Annual Report annex on the USTR website.

The State Department manages the primary official full-text publication for treaties and agreements: *Treaties and Other International Acts* (TIAS). TIAS is regularly updated, even if delayed and incomplete, and is available on the State Department website.[215] It is populated by agencies sending the State Department their concluded agreements – a process that occurs pursuant to requirements set out in the Case Act.[216] The TIAS is thus also a valuable source for identifying trade-related agreements and includes their full text.

Like USTR, the State Department maintains or has maintained in the past other websites with agreements apart from its formal TIAS publication process. Two other State Department websites, no longer maintained, make available agreements from the early 2000s that were reported to Congress under the Case Act and not all of those are in TIAS.[217] The State Department also publishes annually *Treaties in Force* (TIF), providing information on the status of treaties and other agreements to which the United States is a party, including those that do not appear in TIAS.[218] Again, by their own language, these collections, which include many types of agreements not just trade agreements, are not comprehensive. Still, we reviewed all these publicly available State Department resources for possible trade-related agreements and identified 246 additional such agreements there.

The Commerce Department maintains a website that contains a list of trade-related agreements and copies of them mostly in HTML format.[219] Commerce's Office of Trade Agreement Negotiations and Compliance

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214 OFF. OF THE U.S. TRADE REPRESENTATIVE, HOME, http://www.ustr.gov.

215 U.S. DEP'T OF STATE, TREATIES AND OTHER INTERNATIONAL ACTS SERIES (TIAS), https://www.state.gov/tias/.

216 1 U.S.C. § 112b(a) requires any federal agency that enters into an international agreement on behalf of the United States to report the agreement to the Department of State within 20 days after entering into the agreement. The Department of State must in turn inform Congress of the new agreement within 60 days of its entry into force. *Id.*

217 *See* U.S. DEP'T OF STATE, REPORTING INTERNATIONAL AGREEMENTS TO CONGRESS UNDER CASE ACT, https://2009-2017.state.gov/s/l/treaty/caseact/index.htm; U.S. DEP'T OF STATE, REPORTING INTERNATIONAL AGREEMENTS TO CONGRESS UNDER CASE ACT, https://2001-2009.state.gov/m/a/ips/c24150.htm.

218 U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020, https://www.state.gov/treaties-in-force/. TIF lists the agreements to which the United States is a party in any given year but does not provide their text.

219 U.S. DEP'T OF COM., TRADE AND RELATED AGREEMENTS DATABASE, at https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp. One former bureaucrat interviewed for this project believed there was an effort at Commerce to make a more comprehensive list at the start of the Obama Administration. Interview with former USTR official 2, Washington, D.C. (Feb. 18, 2021).

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claims that it posts "active, binding agreements between the United States and its trading partners covering manufactured products and services."[220] We identified additional agreements through yearly reports from the ITC entitled *The Year in Trade*.[221] The ITC is an independent agency responsible mostly for trade reporting and research, but also responsible for the administration of different types of trade remedies processes, among other tasks.[222] One of those primary tasks since its creation has been advising Congress and the executive branch on what has been called since the early part of the twentieth century the Trade Agreements Program.[223] The name is used still today mostly to refer to FTAs that proceed through the fast-track process.[224] Consequently, in recent years, the ITC has concentrated its reporting on activities surrounding each of the 15 U.S. FTAs but earlier reports note other types of agreements into which the United States has entered.[225]

My team and I also combed additional resources inside and outside the government and from those sources we added several hundred more TEAs. Among those additional sources, other U.S. government agencies, apart from these four, discuss their international trade agreements on their websites or in the Federal Register.[226] Agencies sometimes issue press releases about an agreement not otherwise reported or available.[227] U.S. presidents have acknowledged agreements in presidential proclamations.[228] Certain legislative reports mention agreements in passing, mostly historical

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220 U.S. DEP'T OF COM., ALL TRADE AGREEMENTS, https://www.trade.gov/all-trade-agreements. Further, the Department states that it monitors the operation of over 250 agreements, but it is not clear which ones. U.S. DEP'T OF COM., TRADE AGREEMENTS COMPLIANCE PROGRAM, https://tcc.export.gov/trade_agreements_compliance/index.asp.

221 U.S. INT'L TRADE COMM'N, COMMISSIONS PUBLICATIONS LIBRARY, https://www.usitc.gov/commission_publications_library?search=year+in+trade. At the time of writing, the most recent publicly available report is the report from 2018.

222 *See generally* U.S. INT'L TRADE COMM'N, ABOUT THE USITC, https://www.usitc.gov/press_room/about_usitc.htm.

223 *See* IRWIN, *supra* note 43, at 433-43 (discussing the origins of the program). The Trade Agreements Program report (*The Year in Trade*) is submitted pursuant to the Trade Act of 1974 and its predecessor legislation. Trade Act of 1974, *supra* note 71, § 163(c) (codified at 19 U.S.C. § 2213(c)) (the ITC "shall submit to the Congress, at least once a year, a factual report on the operation of the trade agreements program.").

224 *See, e.g.*, U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 2018: OPERATION OF THE TRADE AGREEMENTS PROGRAM, 70TH REPORT.

225 *See, e.g.*, U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1992: OPERATION OF THE TRADE AGREEMENTS PROGRAM, 44TH REPORT 47-49, 59-73 (discussing TEAs with Japan, Korea, and the EU).

226 *See, e.g.*, U.S. FOOD & DRUG ADMIN., INTERNATIONAL ARRANGEMENTS, https://www.fda.gov/international-programs/international-arrangements; 38 Fed. Reg. 33,470 (Dec. 5, 1972).

227 *See, e.g.*, Press Release, Office of the U.S. Trade Representative, U.S. Beef Gains New Market Access in Morocco (Dec. 6, 2018) (announcing an agreement with Morocco to allow imports of U.S. beef).

228 *See, e.g.*, Proclamation No. 4630, 93 Stat. 1477 (Dec. 15, 1978) (announcing an agreement with Finland).

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and no longer in force.[229] Academic articles from the early part of the twentieth century, especially in the *American Journal of International Law*, occasionally catalogued what were then recent developments in trade agreements entered into by the executive.[230]

Throughout our search process, I also added TEAs that I came across in my general research and based on my past practice experience. For example, I also worked with librarians from the Library of Congress, National Archives, and Congressional Research Service. Other scholars kindly shared their relevant data sets as well.[231]

After exhausting public and personal sources, my team and I then consulted commercial services which provide access to still more agreements with a subscription. HeinOnline maintains a commercial database of international agreements known as the Kavass Collection, named for its founder and principal collector, containing trade and other agreements, and the accompanying Kavass Treaty Index.[232] A team of Hein staff assisted in reproducing materials available in the Hein collection.[233] Another commercial entity, ThomsonReuters/Westlaw, maintains a Customs and International Trade Treaty Collection (updated through summer 2018) that also contains a list of agreements related to customs and international trade.[234]

Determining whether a document created binding or non-binding law was another challenge, but not an exclusionary one. That is, non-binding and cooperative documents count as "agreements" in my definition just as they do in international law more generally.[235] The unifying factor among documents added to the collection is that they are representations of

229 *See, e.g.*, Senate Report 2001, *supra* note 177, *passim*.

230 *See, e.g.*, *A List of the Commercial Treaties and Conventions and Agreements Effected by Exchange of Notes or Declarations, In Force Between the United States and Other Countries*, 22 AM. J. INT'L L. 196 (1928). As explained below, I excluded many of these mostly due to their unavailability.

231 I thank in particular Oona Hathaway for sharing results of a Freedom of Information Act request to the State Department for cover memos of executive agreements sent to Congress under the Case Act from 1989-2016. *See generally* Hathaway, Bradley & Goldsmith, *supra* note 36. The list of memos generated through that work included references to four trade-related agreements that were not mentioned in any other source.

232 HeinOnline, Kavass Collection, at https://home.heinonline.org/titles/World-Treaty-Library/KAV-Agreements/. There are more than 22,000 agreements in the Kavass Treaty Index, which contains the TIAS, *U.S. Treaties*, the *U.S. Treaty Series*, the *Executive Agreement Series*, and the *Kavass Collection*.

233 Thank you to Dan Rosati, Chris Czopp, and Ana Derosa for their assistance in facilitating our receipt of several hundred trade-related agreements. The Hein collections produced roughly an additional 150 unique agreements (another 200 or so were excluded because they were amendments or extensions). Approximately 350 agreements we had identified from other sources were also available in Hein, which helped expedite the subsequent collection process.

234 This database is a subset of another database once was known as the Oceana collection which is described by Oona Hathaway in her earlier work before the collection became entirely inaccessible. *See* Hathaway, *Treaties' End*, *supra* note 11, at 1254 n.44.

235 *See* Aust, *supra* note 111, at 46.

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shared government views on certain themes or actions (or non-actions) in a document with a foreign government.[236] Where this becomes most difficult is in the many joint reports and outcomes of meetings that governments occasionally announce as "agreements."[237] Those documents are sometimes but not always included in this set, depending the details available.[238] In total, this process yielded a list of 1,438 agreements by fall 2020.[239]

Thereafter, I excluded certain agreements that some of these datasets include but were "not trade enough" for purposes of this project. The capacious definition of "trade" today makes empirical line-drawing challenging, even while it increases demand for these instruments. For example, the ThomsonReuters database includes as customs or trade agreements several dozen agreements related to air transport.[240] The primary purpose of these agreements is to govern the relationship between the U.S. Federal Aviation Authority and foreign flight administrations, as well as to permit U.S. commercial carriers to have access to foreign airports.[241] They are focused on the safe passage of commercial jetliners. There is a similar set of agreements also governing maritime transport. Such agreements mention in typically a single article or part of an article that these commercial carriers will not be subject to customs review upon arrival at these respective airports. Thus, while they do include a brief reference to customs, they are air transport agreements that briefly mentioned trade, whereas the bulk of the agreements in my collection govern trade issues as their primary topic area or are considered by trade agencies to be part of their purview. In the same spirit, I excluded agreements that are unmistakably related to defense – even if they had to

236 It does not include purchase or similar contracts, however. My design choices in this respect track the State Department's decision-making process on whether something is an "agreement" for purposes of publication or reporting to Congress except that I include non-binding agreements, whereas 22 C.F.R. § 181.2(a) does not.

237 *See* E-mail from USTR official 4 to Isabelle Janssen, Research Assistant and Student, U. of Mia. School of L. (June 15, 2020, 1:15:50 PM EDT) (on file with author).

238 A joint declaration such as that described here would be included if a government agency labeled it as an agreement. Also, if there was an announcement of agreement in the public space without more, i.e., without the text, I could not guarantee a threshold level of formality and commitment, so I would not include such agreements. In those instances, I could not be certain that the agreement was reduced to writing which was imperative for the project.

239 Since concluding the calculations in this Article, my team and I have received an additional 294 agreements – either because they were recently identified from additional sources or because the agreements were only concluded in late 2020/early 2021 – of which 191 remain under our review for possible inclusion and analysis at the time of publication of this Article. Thus, the total number of agreements for consideration could be closer to 1629.

240 In another example of the ill-defined boundaries of trade law, the State Department also makes these agreements available but, unlike Westlaw, does not classify them as trade agreements. *See, e.g.*, Agreement between the United States of America and Gabon, May 26, 2004, T.I.A.S. 04-526 (classified as "Aviation: Transport Services").

241 *See, e.g.*, *id.*

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do with trade in arms or drugs; those sorts of illicit trade were not of foreign commercial interest.

There are still other agreements that are closer to ideas of foreign commerce that had to be carefully parsed. Examples in this borderline category include fisheries agreements, health-related agreements, taxation, and agriculture.[242] For these categories of agreements (so-labeled by external sources), my team and I reviewed nearly every text individually to make a determination as to whether they were "trade enough." The guiding question for this exercise was whether the regulation of cross-border commerce was among the agreement's primary goals.[243]

Further, my original collection swept in many amendments and extensions of trade deals that I did not count as unique agreements in the calculations presented above.[244] I excluded agreements that crept into the larger collection that were not properly "executive" such as any FTAs, friendship, commerce, and navigation treaties (FCNs), bilateral investment treaties (BITs), and other treaties that had been inadvertently included.[245] I also removed settlement agreements from WTO cases.

Two other sets of agreements posed a denotational challenge: suspension agreements and VRAs. Suspension agreements are agreements that may be concluded by the Commerce Department in a trade remedies investigation in which the Department agrees to suspend the investigation in favor of a deal with foreign exporters or a foreign government that seeks to eliminate the unfair trade practice or limit its effect.[246] VRAs are agreements to limit exports from one country to another.[247] I included

242 Agriculture is particularly challenging as the form of agreements related to agricultural commodities has changed over time from what once were agreements that would meet my criteria for inclusion to ordinary purchase contracts that I excluded. *Compare* Agriculture Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, § 101, 68 Stat. 454, 455 (authorizing the president to enter into agreements regarding agricultural sales and other issues) *with* 7 U.S.C. § 1701 (2018) (authorizing the president "to provide for the sale of agricultural commodities to developing countries and private entities for dollars on credit terms, or for local currencies (including for local currencies on credit terms)").

243 The ability to differentiate between "trade" agreements and other regulatory agreements is made still more difficult by the fact that certain databases and sources only apply a single category to an agreement or only allow a user to search by top-level subjects. Further, those subjects are not consistent across those resources.

244 I did not intentionally collect extensions and amendments and most of the time I purposefully excluded them, but some inevitably appeared among the collection and then were discounted for purposes of these statistics. They were helpful, however, to determine whether an agreement was in force and could themselves be counted as separate deals, particularly when they make substantive changes. I am looking at these more closely in a separate project on *Executive Trade Authority* (in progress).

245 *See* John F. Coyle & Jason Yackee, *Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts*, 49 ARIZ. ST. L.J. 61, 62 (2017) (describing BITs, FCNs).

246 *See, e.g.*, 19 U.S.C. § 1673c(b)-(c); Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico, Sept. 19, 2019.

247 *See* Djavaherian, *supra* note 44, at 102.

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VRAs when they were obviously state-to-state agreements, but I excluded suspension agreements and likewise non-state-to-state VRAs due to their ambiguous intergovernmental status.[248] With this variation and trade's fuzzy boundaries in mind, I cast the net widely. I collected a wide-ranging set of documented U.S. commitments with trading partners and eliminated some of this overbreadth in later stages. For some statistics, and for historical purposes and analysis, having the wide set of trade-related agreements as background proves useful.

Following my exclusion of those agreements that were not "trade enough" or otherwise did not meet the criteria as identified above, 1,225 agreements remained. It is the set of 1,225 that was analyzed for purposes of the calculations in the Article.

To be sure, all the statistics presented here are undoubtedly underestimates. The lack of comprehensiveness in the numbers is not only the result of the transparency challenges involved, but also because there is a Matryoshka effect at play within the data.[249] This is especially true in official treaty sources and in HeinOnline. I discovered that what in several instances may be seen or counted by a database as a single agreement is actually a compilation of several agreements in one. If one looks below the surface of the first few pages, one may find several more agreements embedded in a single PDF. Take the Trade Relations Agreement of 1992 with Albania, for instance.[250] This agreement is available in the Kavass Collection but upon inspection, the PDF file with this agreement contains not just the original agreement, but also multiple letter exchanges some of which have further addenda and annexes.[251] In some instances, those letters modify the original agreement, but most are separate agreements within themselves and under my ordinary criteria, would constitute independent agreements. These types of anomalies dot the collection and

248 Some commentators have asserted that the publicly known VRAs are only a small fraction of the true number. *See* Warren H. Maruyama, *The Wonderful World of VRAs: Free Trade and the Goblet of Fire*, 24 ARIZ. J. INT'L & COMP. L. 149, n.2 (2007) ("[The story of VRAs] is necessarily incomplete because governments that negotiated VRAs were often careful to hide their tracks. No doubt, there are many more VRAs hidden in obscure boxes and aging file drawers of government records"). For a case study on alternative types of agreements among government and non-government entities, *see* Guillermo Garcia Sanchez's terrific and illuminating forthcoming work on *Inter-Institutional Agreements* (manuscript on file with the author).

249 Matryoshka dolls are the Russian nesting dolls that contain other dolls which contain other dolls.

250 *See* Agreement between the United States of America and Albania, Alb.-U.S., May 14, 1992, T.I.A.S. 12454.

251 Notably, many of the agreements identified informally, unexpectedly, or through unofficial sources also create a challenge for citation, especially when the goal of citation is to permit a reader to locate the document herself. The Bluebook at Rule 21 invites authors to "cite [to] another unofficial treaty source"; in some instances, creativity was required in that respect and agreements may not be available apart from my personal contacts. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION Rule 21 (Columbia Law Review Ass'n et al. eds., 21st ed. 2020).

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had to be addressed on a case-by-case basis – representative of so many aspects of these specialized and understudied agreements.

B. *Collection*

To find the text of these agreements, I began with full text official treaty sources. The TIAS is one such source; it contained texts for 21 percent of our collection. But finding the full text, especially once official sources were exhausted, required highly detailed investigative research led by an expert library team.[252] We checked additional commercial sources such as Bloomberg Law, the Kavass Collection, and Westlaw.[253] We carried out Advanced Google searches on each missing agreement. We used other websites like the Organization of American States website that had some copies of agreements not available elsewhere.[254] We reviewed as many foreign government websites as possible using our team's language skills. Through these detailed web searches, official sources, and commercial databases, the team was able to locate nearly 79 percent of the texts.

For the remainder, I used personal contacts to try to fill in the gaps. For nearly every agreement that my team was unable to locate online and that had been identified in the USTR annex, I approached the USTR official responsible for that country or another contact with subject matter oversight.[255] In the case of a small handful of agreements, I contacted the lead author of the USTR annex or former USTR staff. In many instances, these individuals helped us identify where one or more agreements could be located, but more often than not, not even these bureaucrats had copies of the agreements.[256]

I sent also targeted queries to colleagues at other U.S. agencies

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252 Librarians Bianca Anderson and Pam Lucken went above and beyond, assisting me with processing these huge swaths of information daily for more than a year. Their stellar guidance and contributions were invaluable to bringing this work to fruition.

253 Despite multiple e-mails to ThomsonReuters/Westlaw, we were unable to obtain additional information or copies of the full text of the materials; however, based on their titles, it appears that many if not all of the agreements in the Westlaw collection are also available in HeinOnline.

254 *See, e.g.*, Agreed Minutes on Fuel Economy and Greenhouse Gas Emissions Regulations, S. Korea-U.S., Feb. 10, 2011, at http://www.sice.oas.org/TPD/USA_KOR/Negotiations/AgreedMin1_11_e.pdf.

255 I chose to approach staff directly rather than file a Freedom of Information Act request for these documents that would have likely taken several months to process, if not longer. Based on my past practice experience and in light of my personal contacts, approaching responsible staff likely yielded the same result.

256 This is by no means a criticism of these civil servants. As noted above, USTR and other government agencies suffer from major recordkeeping problems despite federal records rules. On multiple occasions during my time in government, we were unable to locate historical records due mainly to turnover and a lack of institutional memory. At least three former USTR staff interviewed for this project have communicated the same experience to me.

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including the FDA and USDA. USDA maintains a collection of non-public TEAs, often called "work plans," that govern the terms of the import and export of certain agricultural products.[257] Although work plans are not available on the USDA website, in a rulemaking in 2007, USDA noted that they are available "by request."[258] My team requested a list of and/or copies of the work plans for purposes of this project, but USDA replied that the agency does not share them, contrary to its representation in the Federal Register.[259] Despite USDA's unwillingness to provide me with this information, I was able to get a partial list of such work plans with Mexico with the assistance of a colleague who had access to Mexican government information,[260] and came across one concerning Taiwan in a law review article.[261]

I then approached certain foreign governments' trade ministries through personal contacts to see if they had copies of these agreements. I sent targeted queries to trade experts with whom I had personal connections in other countries. I also sent out the list of agreements we were missing to a group of experienced trade practitioners. Across nearly all of these engagements, very few additional agreements (only about 5 percent) were located.[262] We still do not have the text for 213 agreements.

257 *See, e.g.*, Work Plan for the Export of Peaches, Nectarines, Plums, Interspecific Plums, Apricots and Interspecific Apricots from the United States to Mexico with Quarantine Treatment, Mex.-U.S., date unknown.

258 72 Fed. Reg. 39,482, 39,484 (July 18, 2007).

259 E-mail from Abbey Powell, Acting Chief of Staff, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, U.S. Department of Agriculture to Kathleen Claussen, Associate Professor, U. of Mia. School of L. (June 22, 2020 at 13:36 EDT) (on file with author).

260 Thanks are due to Guillermo Garcia Sanchez who shared information he received through a request to the Mexican government for all agreements with the United States. In comparing notes, we discovered that the list the Mexican government provided to him and the list that my team and I had developed from the U.S. side were both incomplete. Telephone Interview with Guillermo Garcia Sanchez, Assistant Professor, Texas A&M School of L. (April 28, 2020).

261 *See* Hungdah Chiu, Su Yun Chang, *List and Text of Agreements Concluded between the American Institute in Taiwan (AIT) and the Coordination Council for North American Affairs (CCNAA) in 1993*, 12 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 623, 634 (1994) (providing the text of the Work Plan for Taiwan Mango Treatment and Preclearance, Taiwan-U.S., Apr. 28, 1993).

262 In other words, not even foreign governments were able to locate these. Some colleagues speculated they may be available in now-inaccessible paper archives. *See* E-mail from USTR official 5 to Kathleen Claussen, Associate Professor, U. of Mia. School of L. (July 14 at 12:06AM EDT) (on file with author).

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