ARTICLE

THE OTHER SECRET DEALS: UNCOVERING THE POWER OF NON-BINDING INTERNATIONAL AGREEMENTS[*]

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ABSTRACT

In recent decades, the use of traditional international treaties has declined as states increasingly rely on deformalized agreements*—non-binding arrangements such as interinstitutional agreements and memoranda of understanding. These agreements allow governments to bypass the complexities of formal treaty-making while addressing shared challenges. This Article, based on four years of research and previously undisclosed agreements, examines a twenty-year database of non-binding agreements between the United States and Mexico. Through this case study, the Article demonstrates how* deformalized agreements *drive much of the cross-border collaboration, offering a flexible mechanism for government agencies to shape state behavior, coordinate policies, and engage in international cooperation outside the framework of formal treaties. The findings reveal that these non-*

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binding agreements play a crucial role in shaping US-Mexico relations, influencing areas such as security, trade, and law enforcement. The Article highlights key moments, such as the response to the migrant surge at the United States-Mexico border, where these agreements led to significant policy decisions, often beyond the public's view. The study concludes that deformalized agreements are powerful instruments in modern diplomacy, raising important questions about their legal implications and future regulation by the U.S. Congress and the U.N. International Law Commission.

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I.INTRODUCTION

> "That is the agreement that everybody says I don't have. So, no, because I am going to let Mexico do the announcement at the right time . . . from Mexico they want to go through, but here is the agreement. It is a very simple agreement. This is one page, this is one page of a very long and very good agreement for both Mexico and the United States."
>
> - President Donald J. Trump, June 11, 2019[1]

On June 11, 2019, President Donald J. Trump held a press conference in the lawn of the White House to address allegations that his administration had lied about a "secret deal" with the Mexican government to keep Central American asylum seekers in Mexico.[2] In a surprising move, President Trump waved a folded piece of paper, claiming it was the undisclosed agreement. A Washington Post photographer captured a photo of the document and deciphered its content.[3] The supposed "secret deal" was a side deal to a joint statement announced earlier by the U.S. State Department regarding the deployment of the Mexican National Guard to the Guatemala border.[4] According to President Trump, the secret "deal" was a result of his threat to impose a five percent tariff on all Mexican imports if Mexico did not curb the uncontrolled flow of immigrants through their territory and into the United States.[5] Pundits from both countries rushed to interpret the so-called "agreement" and determine what Mexico had secretly committed to.

The photo by the Washington Post showed that the undisclosed deal was signed by Marik A. String, acting legal adviser in the U.S. State Department, and Alejandro Celorio Alcantara, a deputy legal

1. Michael D. Shear, *Trump Brags About Mexico Deal, but Reveals No Details*, N.Y. TIMES (June 11, 2019), https://www.nytimes.com/2019/06/11/us/politics/trump-mexico-deal.html.

2. *See* Aaron Blake, *Analysis | A Post Photographer Snapped an Image of Trump's Alleged Secret Mexico Deal. Here's What It Says.*, WASH. POST (June 11, 2019), https://www.washingtonpost.com/politics/2019/06/11/post-photographer-snapped-an-image-trumps-alleged-secret-mexico-deal-heres-what-it-says/.

3. *See id.*

4. *See id.*

5. *See* Shear, *supra* note 1; Blake, *supra* note 2.

adviser in Mexico's Ministry of Foreign Affairs.[6] Neither of them were elected officials, but rather two government lawyers acting on behalf of their countries.[7] Per the deal signed on June 7, 2019, the parties "agree[d] to [a number of] measures to address the current situation at the southern border of the United States."[8] The United States would refrain from introducing the five percent tariff for forty-five days, and in exchange, Mexico would "take all necessary steps under the domestic law" to modify regulations necessary for a potential future agreement.[9] The basis of the future agreement included a plan for third-party nationals to request asylum first in Mexico, and remain there before seeking asylum in the United States.[10] Mexico even agreed to a timeline for assessing the effectiveness of the changes agreed to in the secret deal.[11] In other words, Mexico, in addition to deploying troops to stop the migrant flow, would work on setting the legal framework to become a safe third-country, where asylum seekers would wait for their applications to be processed by the United States. The "deal" was eventually released, first by Mexico and days later by the United States by amending the original joint declaration to include the text of the agreement.[12]

The "deal" was a political victory for President Trump, but the subject of much criticism in Mexico.[13] The Mexican public believed that becoming a safe third-country was an abandonment of their long-standing policy of not criminalizing migration and a breach of the

6. *See* Joint Declaration and Supplementary Agreement Between the United States of America and Mexico, Mex.-U.S., June 7, 2019, T.I.A.S. No. 19-607 [hereinafter U.S.-Mexico Joint Declaration and Supplementary Agreement on Immigration].

7. *See Marik A. String*, WILMERHALE, https://2017-2021.state.gov/biographies/marik-string/ [https://perma.cc/9E6S-TZ78] (last visited Apr. 30, 2024); *Alejandro Celorio Alcántara*, GOB.MX, https://www.gob.mx/sre/prensa/the-foreign-ministry-announces-new-appointments?idiom=en [https://perma.cc/P2SD-RUJP] (last visited Apr. 30, 2024).

8. U.S.-Mexico Joint Declaration and Supplementary Agreement on Immigration, *supra* note 6.

9. *Id*.

10. *See id.*

11. *See id.*

12. *See* Rachel Withers, *Mexico Releases the Full Text of Trump's Immigration "Deal,"* VOX (July 15, 2019), https://www.vox.com/2019/6/15/18680129/us-mexico-immigration-deal-release-trump-tariff [https://perma.cc/V846-EDYP]; *see also* U.S.-Mexico Joint Declaration and Supplementary Agreement on Immigration, *supra* note 6.

13. *See* Jorge Ricardo, *Rechaza Batres plan de Tercer País Seguro*, REFORMA, https://www.reforma.com/rechaza-batres-plan-de-tercer-pais-seguro/ar1700629 [https://perma.cc/7AC3-RK8M] (last visited Feb 20, 2020).

country's sovereignty.[14] Mexico would become President Trump's "wall" to stop migrants from entering the United States.[15] Lost in political outcry lay the issue of the legal nature of the so-called "secret deal." A letter, signed by two non-elected officials, was setting the grounds for significant policy and legal repercussions in the United States and Mexico. The implications included the deployment of troops, supervision of thousands of asylum seekers, and expenditure of millions of dollars in resources and infrastructure—all agreed to without the consent of the legislative branches. Neither the Presidents nor the heads of the State Department and the Ministry of Foreign Affairs were part of the deal. Two signatures of two legal officers produced this agreement; two bureaucrats decided the fate of millions.

This event illustrates a broader trend in global governance, where traditional, formalized treaties are increasingly replaced by *deformalized agreements*—non-binding yet strategically significant arrangements such as Memorandums of Understanding (MoUs) and Letters of Intent. These agreements, while not subject to the same formal processes or public scrutiny, can have substantial policy and legal consequences, reflecting a shift away from the hyper-legalization of the 1990s. The research presented in this Article was sparked by several questions inspired by the rise of deformalized agreements: How often do the United States and Mexico sign agreements at the bureaucratic level that do not require congressional approval? What are the main topics involved in the agreements, and which agencies engage in this practice? What lessons can we draw from studying the legal nature and impact that these agreements have on foreign policy and international law more broadly?

As will be explained below, the President of the United States has to maintain an archive of executive agreements and report them to Congress.[16] The Case Act of 1972 laid the groundwork for transparency in executive agreements, but, as many scholars have noted, this has not

14. *See Insiste Trump en que México se convertirá en tercer país seguro*, ARISTEGUI NOTICIAS (July 26, 2019), https://aristeguinoticias.com/2607/mexico/insiste-trump-en-que-mexico-se-convertira-en-tercer-pais-seguro/ [https://perma.cc/A85F-77WH].

15. *See* David Agren, *"Mexico Has Become Trump's Wall": How Amlo Became an Immigration Enforcer*, THE GUARDIAN (Jan. 26, 2020), https://www.theguardian.com/world/2020/jan/26/mexico-immigration-amlo-enforcement-trump [https://perma.cc/Q63S-WVKR] (last visited Apr 30, 2024).

16. *See infra* Section I.A and I.B.

translated into more robust Congressional control until very recently.[17] Moreover, I argue in this Article that the type of treaties that are officially recorded do not encompass all the agreements signed between the United States and Mexico. The log that the U.S. State Department maintains on reported agreements, the Treaties and Other International Acts Series (TIAS), is not exhaustive and does not coincide with the number of agreements reported by the Mexican government from 2000 to 2021. The United States has reported significantly fewer.[18] Through three *freedom of information requests* (*solicitudes de acceso a la informacion*) I made in Mexico, I obtained a list of 1,900 agreements signed between U.S. and Mexican authorities between January 2000 and September 2021.[19] The US State Department only reported sixty-seven treaties and other agreements with Mexico for the same period.[20] Forty-nine of the sixty-seven reported agreements are executive agreements branded as MoUs or Letters of Intent, which are executive agreements based on broad

17. *See* Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, *Executive Agreements: International Lawmaking Without Accountability?*, JUST SEC. (Jan. 9, 2019), https://www.justsecurity.org/62180/executive-agreements-international-lawmaking-accountability/ [https://perma.cc/2A72-XCH2] [hereinafter *Executive Agreements: International Lawmaking*]; Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L. J. 140 (2009).

18. The list of agreements reported under the Case-Zablocki Act is listed in the website of the Office of the Legal Adviser of the U.S. Department of State.

19. Respuesta a la Solicitud de Acceso a la Información Pública folio 0000500117319, Oficio Num. UDT-3903/2019, Unidad de Transparencia de la Secretaria de Relaciones Exteriores, May 15, 2019 [hereinafter Mexican FOIA Response 1]; Respuesta a la Solicitud de Acceso a la Información Pública folio 0000500017221, Oficio Num. UDT-1019/2021, Unidad de Transparencia de la Secretaria de Relaciones Exteriores, Feb. 09, 2021 [hereinafter Mexican FOIA Response 2]; Respuesta a la Solicitud de Acceso a la Información Pública folio 330026821000114, Oficio Num. UDT-7039/2021, Unidad de Transparencia de la Secretaria de Relaciones Exteriores, Oct. 12, 2021 [hereinafter Mexican FOIA Response 3]; Respuesta a la Solicitud de Acceso a la Información Pública Folio 0000500213521, Oficio Num. UDT-6536/2021, Unidad de Transparencia de la Secretaria de Relaciones Exteriores, Sept. 21, 2021 [hereinafter Mexican FOIA Response 4].

20. The 67 TIAS reported by the State Department include 12 minutes and agreements of the binational water commission (not classified as interinstitutional agreements by Mexico), 2 agreements under the North American Development Bank (not classified as interinstitutional agreements by Mexico), 4 international treaties approved by Congress (not classified as interinstitutional agreements by Mexico), and 49 executive agreements, including MoUs and letters of intent by executive branch officials. Out of 49 executive agreements only 14 did not match up with the database in Mexico. That is, there were 14 executive/interinstitutional agreements that the Mexicans did not have in their database.

statutes that delegated the power to the President to engage in international treaty-making.[21]

Until very recently these interinstitutional agreements did not receive meaningful congressional review, nor were they fully disclosed or supervised by the executive branch.[22] As explained further below, Congress realized this fact, and in 2022 and 2023 passed amendments to the Case Act.[23] The efforts seek to improve the reporting and publication requirements of international agreements signed by the United States.[24] Since the U.S. State Department just issued its implementing regulations in October 2023, "it is [still] too early to know the extent to which these reforms will produce useful information for Congress and the public."[25] As will be explained further below, U.S. scholars call these agreements "non-binding international agreements," but in this Article I refer to them as "deformalized agreements" due to the fact that their legal nature in Mexico could imply binding obligations regardless of their denomination.[26] Under Mexican law, MoUs and Letters of Intent are considered interinstitutional agreements regulated by public international law.[27] According to a Mexican federal statute on the signing of international agreements, interinstitutional agreements must be recorded by the Ministry of Foreign Affairs and could even subject Mexico to the jurisdiction of international dispute resolution bodies.[28]

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21. *See* Hathaway, *supra* note 17; *Executive Agreements: International Lawmaking*, *supra* note 17.

22. *See Executive Agreements: International Lawmaking*, *supra* note 17. .

23. *See* Curtis Bradley, *Amendments to the Case-Zablocki Act Concerning Reporting and Publication of Int'l Agreements*, 63 INT'L LEGAL MATERIALS 275, 275 (2024) [hereinafter *Amendments to the Case-Zablocki Act*].

24. *See id.*

25. *Id.* at 277.

26. *See generally infra* Part II.

27. Under Mexican Law an "interinstitutional agreement" (*acuerdo interinstitucional* in Spanish) is a "written agreements regulated by public international law and signed by any agency or decentralized organization of the public administration at the federal, state or municipal level with one or many foreign governmental or international organization, regardless of their denomination, and regardless of the fact that the agreement originates or not from a preexisting treaty" (author's translation). Ley Sobre la Celebración de Tratados [LCT] art. 2.I, Diario Oficial de la Federación [DOF] 1-2-1992, Última Reforma DOF 20-05-2021 (Mex.) [hereinafter Mexico's Law on the Conclusion of Treaties] (author's translation).

28. *See id.* at art. 7 ("Departments and decentralized organisms of the Federal Public Administration, the Municipal or State level and the Attorney general of the Republic, shall maintain the Ministry of Foreign Affairs informed about any interinstitutional agreement they seek to conclude with other foreign governmental organisms or international organizations. The

As President Trump's "secret deal" demonstrates, *deformalized agreements* possess the power to modify state policies. Bureaucracies give MoUs and Letters of Intent great importance and work to fulfill the obligations outlined within them. The disclosed agreements between the United States and Mexico provide a snapshot of the variety of issues in which they are employed.[29] For example, the listed agreements include: efforts to address border crossing protocols, repatriation proceedings for Mexican nationals, sharing of information among agencies; environmental protection issues in shared water deposits and animal conservation; the disposal of nuclear waste material; common ecological and safety standards for offshore drilling; the use of radioelectric space; protocols for investigating money laundering, terrorism financing, and organized crime; coordination of joint police operations in border towns; among others.[30] The topics covered in these agreements are no small thing—they affect the lives of millions across the United States and Mexico, particularly those who live in border regions such as California and Baja California; Arizona and Sonora; New Mexico and Chihuahua; and Texas, which borders Coahuila, Nuevo Leon, and Tamaulipas.[31] Hence, this Article provides not only an analysis on the legal nature of deformalized agreements, but also evidence of the diverse ways in which they are employed.

Moreover, this Article also provides evidence on the importance and effectiveness of these agreements in guiding foreign policy and in modifying government behavior. I describe specific examples of the impact that these agreements have on U.S.-Mexico relations and domestic policy. I do so first by disclosing for the first time an official document from the Mexican government describing the key United States-Mexico cooperation activities, in which deformalized agreements represent forty-three percent of these activities.[32] Second, I

Ministry will produce a report on the powers to conclude them and, if its suitable, report it the Registry") (author's translation).

29. *See generally infra* Part I.

30. *See generally id.*

31. *See generally id.*

32. Through the same *freedom of information petitions* in Mexico, I was able to obtain a study ordered by the President of Mexico Enrique Peña Nieto (2012-2018) of all the critical cooperation mechanisms between Mexico and the U.S. In 2018, President Peña Nieto requested a national "Diagnosis of Key U.S.- Mexico Cooperation Activities." Peña Nieto commissioned the study with the goal being to show President Trump how intertwined and co-dependent the two countries actually are, through all the agreements they had signed with each other. Top Mexican officials planned to use the study as a bargaining chip, as a fall back in any event that

present two case studies: the arrest of Mexican General Cien Fuegos by U.S. authorities using intelligence gathered through an MoU,[33] and the homologation of regulatory policies by agencies based on the signing of interinstitutional agreements.[34]

In this Article, I build on the existing foreign relations law literature by showing the way bureaucracies employ executive agreements to advance their international agendas. Part I outlines the legal framework in U.S. and Mexican law of MoUs and Letters of Intent, and reviews current literature explaining their legal nature. Part II reviews the evidence of the bureaucratic engagement by analyzing the agreements disclosed by the Mexican government. Through review of the evidence, this Part illustrates how bureaucracies expand their powers in the shadow of an aggrandized presidency and highlights the collaborative nature of bilateral relationships at the bureaucratic level, which is often overlooked by politicians on the campaign trail. Part III delves into specific examples of collaboration to show how the agreements have concrete foreign policy implications in U.S.-Mexico relations and, in some cases, a trickle-down effect on the domestic legal system. In Part IV, I explore how traditional canons of public international law fail to capture the reality of deeply complex relationships like that of the United States and Mexico, and the lessons that we can draw from this fact. Part V concludes the article.

II. THE LEGAL NATURE OF THE LETTERS OF INTENT AND MEMORANDUMS OF UNDERSTANDING

According to international law, treaties are traditional tools of state diplomacy that aim to crystalize commitments for adjusting

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the U.S. decided to close the border because of the Central American migrant surge. In other words, if the U.S. actualized its threat to close the major artery of U.S.-Mexico relations, Mexico could retaliate by defaulting on the many agreements it had with the U.S. *See* Rodrigo Vera, *Peña Nieto ordena a su gabinete evaluar mecanismos de cooperación con EU*, PROCESO (Apr. 9, 2018), https://www.proceso.com.mx/529114/pena-nieto-ordena-a-su-gabinete-evaluar-mecanismos-de-cooperacion-con-eu [https://perma.cc/YQ8L-UZ64] (last visited Aug 7, 2019).

33. *See* Mary Beth Sheridan, *Former Mexican defense minister arrested on drug charges in U.S., officials say*, WASH. POST (Oct. 16, 2020), https://www.washingtonpost.com/world/former-mexican-defense-minister-arrested-on-drug-charges-in-us-officials-say/2020/10/16/25416d84-0f60-11eb-8a35-237ef1eb2ef7_story.html; for details of the role played by the MoU, see also *infra* Section II.C.

34. *See infra* Subsection IV.C.

government policies and laws.[35] In most legal systems, there is a hierarchy that allows international treaties, and in some cases even customary international law, to take precedence over legislation enacted by elected bodies.[36] The judiciary may prioritize international treaties over constitutional norms, depending on the type of constitution in place.[37] Because of their significance, treaties typically require ratification from another branch of government.[38] In the majority of democracies, treaties must be explicitly approved by elected bodies to override legislation and compel the state to modify its behavior.[39] Typically, the head of state, such as a president or prime minister, negotiates the treaty, and a congress or parliament ratifies it.[40]

As the world becomes more interconnected and bilateral relations, such as that between the United States and Mexico, deepen, the complexity of these relationships becomes increasingly apparent.[41]Along with coordinating high-level agendas, the relations face the challenges of collaborating on technical issues at the

35. *See* Vienna Convention on the Law of Treaties §1, art. 2(1), art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

36. *See* Tom Ginsburg, *Comparative Foreign Relations Law: A National Constitutions Perspective*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 62, 71–72 (Curtis A. Bradley ed., 2019).

37. *See* Mclachlan Campbell, *Five Conceptions of the Function of Foreign Relations Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 21, 29–32 (Curtis A. Bradley ed., 2019). To some scholars the hierarchy of international law at the constitutional level should be determined by domestic branches of government, and not by international courts or tribunals empowered to interpret the international agreements. *See generally* Michael Stoke Paulsen, *The Constitutional Power to Interpret international Law*, 118 YALE L. J. 1762 (2009) (arguing that the power to determine the content and force of international law for the U.S. lies among the three branches of government).

38. *See* Jenny S. Martinez, *A Constitutional Allocation of Executive and Legislative Power Over Foreign Relations: A Survey*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 97, 99, 104–110 (Curtis A. Bradley ed., 2019); Campbell, *supra* note 37, at 29–32; Oona A. Hathaway, *A Comparative Foreign Relations Law Agenda: Opportunities and Challenges*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 78, 80, 91 (Curtis A. Bradley ed., 2019) [hereinafter Hathaway, *A Comparative Foreign Relations Agenda*].

39. *See* Martinez, *supra* note 38 at 104–110; Campbell, *supra* note 37, at 29–32; Hathaway, *A Comparative Foreign Relations Agenda*, *supra* note 38, at 80.

40. *See* Martinez, *supra* note 38, at 104–110.

41. *See generally* BINATIONAL COMMONS: INSTITUTIONAL DEV. AND GOVERNANCE ON THE U.S.-MEX. BORDER (Tony Payan & Pamela Cruz eds., 2020) (discussing the institutional complexity of U.S.-Mexico relations at the border). *See also* THE FUTURE OF U.S.-MEX. RELATIONS: STRATEGIC FORESIGHT, (Tony Payan et al. eds, 2020) (describing all of the relevant topics of cooperation in U.S.-Mexico relations, including trade, water, drugs, health, immigration, environmental issues and security).

administrative, state, and municipal levels. The extent and depth of bilateral ties make it functionally difficult for legislative bodies to deliberate over the details of every agreement reached as a part of an integrated and complex relationship. As such, heads of state use international agreements that are concluded by the executive power alone without legislative approval.[42] With the growth of the administrative state, the executive prerogative of sole agreements has translated into an expansion of bureaucratic diplomacy. Administrative diplomacy isolates key partnerships with other nations from political kidnapping and implements policies designed by experts to benefit specific technical agendas.[43] The research presented in this Article highlights this reality.

This Article is not the first to identify the use of nonbinding or interinstitutional international agreements to conduct international relations.[44] Early scholarship focused in the intersection of international relations and law identified these instruments as soft law commitments that have specific functions in regulating international

42. *See* Pierre-Huges Verdier & Mila Versteeg, *Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Suvery*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 135, 136–37 (Curtis A. Bradley ed., 2019); Martinez, *supra* note 38, at 104–110.

43. Whether the policies actually benefit the populations around the border, is a normative argument that we cannot make at this point. As stated further below, the lack of transparency on the existence of these agreements prevents us from objectively evaluating their impact. There are anecdotal examples that can be pulled from some of them, but there is no study available to make a normative argument of their actual impact on the ground.

44. *See generally* Curtis A. Bradley et al., *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. 1281 (2023) [hereinafter *The Rise of Nonbinding International Agreements*]; Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 745 (2014) (analyzing how administrative agencies employ "soft law agreements"); Harold Hongju Koh, *Twenty-First Century International Lawmaking*, 101 GEO. L.J. ONLINE 1, 6, 13–14 (2012) (describing the use of these instruments during the Obama administration to advance legal diplomacy); Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 510 (2009); Kal Raustiala, *The Architecture of International Agreements*, 43 VA. J. INT'L L 1, 22 (2002) (explaining how administrative agencies use non-legally binding "Memoranda of Understanding"); Michael Ramsey, *Evading the treaty power?: the Constitutionality of Nonbinding Agreements*, 11 FL. INT'L. U. L. REV. 371, 374 (2016) (arguing that as a constitutional matter the president can engage in non-binding agreements, but that in certain context in can lead to the President avoiding congressional checks on treaty-making powers); Oscar Schachter, *Editorial Comment: The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 297 (1977) (examining the uncertain place in international law of nonbinding agreements).

collaboration.[45] Depending on the issue at hand, these instruments might function to resolve collective action challenges such as the incapacity to reach a consensus for a final agreement text.[46] They might also serve as an initial mechanism to resolve uncertainty surrounding what is expected from each party without reaching a formal commitment at a particular time.[47] To these scholars, states chose between hard and soft law to advance different goals depending on the issues at hand.[48]

International doctrinal legal scholars challenge these agreements' classification as part of the international "legal" order.[49] In their view, for an agreement to be part of a legal order, it must contain obligations that are legally binding upon the parties. They might be a prequel to an international agreement, such as a draft agreement or an exchange of proposals; a mechanism to achieve "transgovernmental cooperation;" or a means of maintaining similar characteristics to legal instruments in shaping some state expectations.[50] However, to be part of the legal order, they are required to serve the function of a binding obligation enforceable by courts or legal advocates. The most extreme

45. *See generally* Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMPAR. L. Q. 787, 807 (1986); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495, 513 (1991); Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law: What Have We Learned?*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 4–5 (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2012).

46. *See* Schaffer and Pollack, *supra* note 45, at 5.

47. *See id.*

48. *See id.*

49. *See generally* Kal Raustiala, *Form and Substance in International Agreement*, 99 AM. J. INT'L L. 581 (2005); Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 167, 169 (1996); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 413–415 (1983).

50. *See* Kal Raustiala, *The Architecture of International Agreements*, *supra* note 44, at 22–23; Dinah Shelton, *Law, Non-Law and the Problem of "Soft Law"*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 4 (Dinah Shelton, ed., 2000); Andrew Guzman & Timothy L. Meyer, *International Common Law: the Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515 (focusing on the role of non-binding decisions from international tribunals that shape state expectations). (2010); Wolfgang Reinicke & Jan M. Witte, *Independence, Globalization and Sovereignty: The Role of Non-binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75–100 (Dina Shelton ed., 2000).

doctrinal views even argue that these soft law instruments are inconsequential.[51]

Regardless of whether the instrument is soft or hard law, or whether it's binding or in the process of becoming a binding instrument, the fact is that these instruments are a tool of international relations. These nontraditional efforts at legal diplomacy form part of what Professor Harold Hongju Koh terms "layered cooperation" because, in some cases, they operate in the backdrop of existing international agreements or customary international law.[52] Hence, they facilitate the evolution and implementation of traditional sources of international law, such as treaties and customs. Some of these agreements might also be part of what Professor Gregory Shaffer defines as a transnational legal process. Compared to traditional norm creation processes that rely on hierarchical legislative processes, in transnational legal processes international norms become standards or sources of regulation at the national level, or vice versa, domestic regulation might be "uploaded" into the international sphere through bureaucratic cooperation that crystalizes in the form of MoUs or Letters of Intent.[53] As such, a transnational legal process captures norm creation through the socialization of norms.

This Article departs from the conventional dichotomy between soft or hard law, or of binding and non-binding agreements. The Article instead suggest the use of the term *deformalized agreements*. The term

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51. *See* Richard Steinberg, *In the Shadow of Law and Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 340 (arguing that "most public international lawyers, realists and positivist, consider soft law to be inconsequential.").

52. *See* Harold Hongju Koh, *Twenty-First Century International Lawmaking*, *supra* note 44, at 13–14 (explaining how during his time in the State Department the Obama administration would constantly employ these nontraditional methods of legal cooperation to advance foreign policy).

53. *See generally* Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229 (2012) (analyzing the transactional legal process and cooperation in the Organization of Economic Cooperation and Development); *see also*, Harold Hongju Koh, *Why Transnational Law Matters*, 24 PA. STATE INT'L L. REV. 745 (2006) (defining transnational law and explaining its significance). Other scholars would argue that the engagement among bureaucrats has given birth to a new international administrative law. *See generally* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005) (discussing and identifying themes in global administrative law); Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 29 (2009) (arguing for a "'social fact' conception" of global administrative law). For an analysis of how soft law norms could be enforced by international tribunals, see generally Vera Korzun, *Enforcing Soft Law in International Investment Arbitration*, 56 VAND. J. TRANSNAT'L L. 1, 4 (describing how investment tribunals can enforce non-binding soft law regarding international environmental and sustainable development standards).

encourages the reader to recognize that the choice of level of formality in agreements is a strategic decision made by government officials. The reduction in the legal formality of the agreements offer distinct advantages. As explained further below, the classification of binding versus non-binding does not capture fully how states regulate them internally. It creates the false impression that, by being non-binding, these agreements lack legal character or are inconsequential. As the comparison between the U.S. and Mexican legal systems will show, this is not the case in all jurisdictions. The use of deformalized agreements allows officials to address common problems more efficiently, bypassing the consequences of classifying them formally as an international or executive agreement. The classic classifications that focus on the involvement of different branches, such as international and executive agreements, trigger formal procedures under chains of command, supervision by elected officials, and public scrutiny. The trend towards deformalized relations by distinct government actors at all levels who conduct their bilateral relations through less formalized categories of agreements reflects a reaction to the hyper-legalization and judicialization that characterized international relations in the 1990s. This trend suggests that we may now be seeing a continuous shift toward more flexible, less formalized methods of resolving conflicts and coordinating actions.

The expansion of deformalized agreements is also catching the attention of international juridical committees. International juridical committees are tasked with identifying the development of international law and proposing international agreements that crystalize custom and practice of states.[54] For example, the International Law Commission (ILC) included the topic of "Non-legally Binding International Agreements," in its long-term program

54. The Organization of American States created the Inter-American Juridical Committee (CJI) to be an advisory body on "juridical matters to promote the progressive development and codification of international law and to study the possibility of standardizing legislation across the countries of the Hemisphere." OEA & OAS, OAS-ORG. AM. STATES: DEMOCRACY FOR PEACE, SEC., AND DEV., https://www.oas.org/en/sla/iajc/inter-american_juridical_committee.asp [https://perma.cc/APL5-RMYZ] (last visited June 3, 2024). The United Nations General Assembly also created in 1947 the International Law Commission to undertake the mandate of the Assembly under article 13(1)(a) of the UN Charter to "initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification." *International Law Commission*, UNITED NATIONS, https://legal.un.org/ilc/ (last visited June 3, 2024).

work during its seventieth-third session in 2022 and appointed as special rapporteur for the topic Professor Mathias Forteau.[55] In its latest syllabus for the ILC research agenda on the topic, Professor Forteau explains that, even though these instruments are an old practice, past studies have not "clarified all contentious aspects relating to the nature and regime of such agreements."[56] Moreover, Professor Forteau identifies that the practice has grown considerably and become more complex and diversified.[57]

In 2020, another international body, the Inter-American Juridical Committee (IAJC), issued Guidelines on Binding and Non-binding Agreements. However, it also recognized that their guidelines do not resolve many of the issues involving the legal nature of the agreements.[58] The guidelines specifically seek to "alleviate current confusion and the potential for conflict among States and other stakeholders with respect to binding and non-binding agreements."[59] The guidelines, however, "no way aspire to a legal status on their own" nor are they "intended to codify international law nor offer a path to its progressive development."[60]

Recognizing the expansion of deformalized agreements and the potential legal conflicts they may generate, it becomes critically important to examine the frequency of their use, their legal status

55. *See Seventy-third Session (2022)*, UNITED NATIONS INT'L L. COMM'N (AUG. 4, 2023), https://legal.un.org/ilc/sessions/73/ [https://perma.cc/L3VY-N28V]; *Seventy-fourth Session (2023)*, UNITED NATIONS INT'L L. COMM'N. The Commission decided to include the topic "Non-legally binding international agreements" in its program of work and to appoint Mr. Mathias Forteau as Special Rapporteur. *See* Int'l Law Comm'n, Rep. on the Work of its Seventy-Fourth Session, U.N. Doc. A/787/10, at 109 https://legal.un.org/ilc/reports/2023/english/chp10.pdf [https://perma.cc/7AFX-FGY4].

56. Int'l Law Comm'n, Rep. on the Work of its Seventy-Third Session, U.N. Doc. A/77/10, at 353 ¶ 1.

57. *See id.* at 353 ¶ 2.

58. *See* INTER-AM. JURID. COMM., GUIDELINES ON BINDING AND NON-BINDING AGREEMENT 24 (2020) available at http://www.oas.org/en/sla/iajc/docs/Guidelines_on_Binding_and_Non-Binding_Agreements_publication.pdf [https://perma.cc/6M96-MCT4] (Accordingly, the guidelines "in several places they note areas where existing international law is unclear or disputed. The *Guidelines* leave such issues unresolved. Their aim is more modest–to provide a set of voluntary understandings and practices that Member States may employ among themselves (and perhaps globally) to improve understanding of how international agreements are formed, interpreted, and implemented, thereby reducing the risk of future disagreements or difficulties.")

59. *Id.* at 38.

60. *Id.* at 38.

within the domestic legal system, and their tangible impact on concrete relations.[61]

The next Sections engage in this effort and review some of the literature in the context of the U.S. and Mexican legal systems that has delved into these questions. Additionally, the evidence presented in the next Sections provides the reader with concrete examples of the use and impact of these instruments in specific government policies.

A. MoUs and Letters of Intent under the U.S. Legal System.

Much has been written about the expansion of the U.S. President's power to enter international agreements without congressional consent.[62] Oona Hathaway's work, for example, shows how, as a result of historical political advantage, the U.S. Congress implicitly decided to delegate the authority to the President to make international agreements.[63] The position of the United States in the international arena post-World War II required an executive power with the capacity to engage in international agreements without the need to ask for congressional approval.[64] The congressional delegation to the President to make international agreements was a "combination of institutional myopia and political incentives."[65] With a multiplicity of global agendas, the President of the United States required speed and flexibility to engage with other global actors.[66] The politics of reelection and the complexity of the agenda goals made Congress an inadequate body to supervise every deal being negotiated.[67] Hence, only a few agreements were left for Congress to review after they were negotiated by the President—mainly trade agreements that involved the

61. *See* Bradley et al., *supra* note 44, at 1286.

62. *See* Hathaway, *supra* note 17. *See generally* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L. J. 1236 (2008); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 89; Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L. J. 1; Curtis Bradley et al., *The Death of Article II Treaties?*, LAWFARE (Dec. 13, 2018), https://www.lawfareblog.com/death-article-ii-treaties; *Executive Agreements: International Lawmaking*, *supra* note 17; Ashley S. Deeks, *A (Qualified) Defense of Secret Agreements*, 49 ARIZ. STATE L.J. 713 (2017).

63. *See* Hathaway, *supra* note 17.

64. *See* Bradley et al., *supra* note 44, at 1295–96.

65. Hathaway, *supra* note 17 at 145.

66. *See id*.

67. *See id*.

majority in both houses of Congress. Professor Hathaway categorizes these types of agreements as *ex-post* congressional agreements.

Professor Hathaway, along with Professors Jack Goldsmith and Curtis Bradley, argues that as a consequence of delegation, the number of Article II treaties, signed by the President and ratified by the Senate, has reached a historic low.[68] According to official calculations by the State Department, from 1939 to 1989, the United States concluded 702 Article II treaties and 11,698 executive agreements.[69] Today up to 2019, the United States executed close to 100 international agreements through the process known as "congressional-executive agreements" authorized by both Congressional chambers through statute.[70] However, the vast majority are *ex-ante* congressional-executive agreements.[71] These differ from the *ex-post* agreements in that they are based on a purported *ex-ante* statutory authorization. *Ex-ante* congressional-executive agreements are based on statutes that allegedly delegated the President power to negotiate executive agreements without congressional after-the-fact review.[72] Many of these *ex-ante* agreements are signed by officials from different departments that engage in international relations with counterparts abroad. As explained below, these historically have received ineffective *ex-post* congressional approval or supervision. What is even more troubling is that many of them have not been supervised by the White House or even the State Department's legal counsel.

The *ex-ante* executive agreements have captured the attention of legal academics in the past years. As stated by Hathaway, Bradley, and

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68. *See* Bradley et al., *supra* note 62. According to Hathaway, Goldsmith, and Bradley, the

> "use of the Article II process dropped to historic post-World War II lows during the Obama administration. During his eight years in office, President Obama submitted only 38 treaties to the Senate, and the Senate approved only 15 of them. (Since Obama left office, the Senate has approved six more of the treaties he submitted.) In comparison, President George W. Bush submitted well over 100 treaties to the Senate during his two terms, and the Senate approved most of them. That rate puts Bush roughly on par with prior administrations in the twentieth century. Between 1930 and 1999, the Senate approved an average of just over 15 Article II treaties per year."

See id; see also CONG. RSCH. SERV., S. PRT. 106–71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 39 (2001).

69. *See* CONG. RSCH. SERV., S. PRT. 106–71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 39 (2001).

70. *See Executive Agreements: International Lawmaking*, *supra* note 17.

71. *See id.* Hathaway, *supra* note 17, at 155.

72. *See id.*

Goldsmith, "[a]dministrative regulations are governed by a complex administrative law framework, but *ex-ante* congressional-executive agreements are not governed by an administrate law or any other accountability framework beyond an incomplete and under-enforced reporting requirement."[73] The listing of agreements disclosed as part of this Article's research by the Mexican government pose a unique opportunity to study how the *ex-ante* executive congressional agreements operate in practice.

B. The Case Act

In 1972, the U.S. Congress adopted the Case-Zablocki Act (Case Act) as an effort to monitor, but not to limit, the expansion of executive agreements.[74] The Case Act demonstrated that Congress is willing to delegate the treaty-making powers to the executive branch, and the Act's reforms reflect an effort to bring more transparency about the existence of executive agreements.[75] As originally enacted, the Case Act required the Secretary of State to transmit to Congress the text of any international agreement, other than an Article II treaty, to which the United States is a party.[76] The President, through the Secretary of State, retains the power to classify agreements and, rather than transmitting them to Congress, send them to the minority and majority leaders in each chamber and to the Senate Committee on Foreign Relations and the House Committee on International Relations.[77] The Case Act also recognized that under certain circumstances, "department[s] or agencies of the United States Government" can also enter into an international agreement on behalf of the United States.[78] These bureaucracies must transmit the text of the instrument to the Department of State within fifteen days of the agreement being signed.[79] As such, the Case Act authorizes the agencies and

73. *Id.*

74. *See* The Case-Zablocki Act, 1 U.S.C. § 112b [hereinafter Case Act].

75. *See* Bradley, *Amendments to the Case-Zablocki Act*, *supra* note 23, at 1 (arguing that "[f]or the most part, Congress has not sought to restrict the making of executive agreements, and indeed it authorizes many of them. Instead, Congress has insisted on transparency").

76. *See* Case Act § 112b(a)(1).

77. *See id.*

78. *See id.* at § 112b(d) ("Any department or agency of the United States Government that enters into any international agreement or qualifying non-binding instrument on behalf of itself or the United States shall—").

79. *See id.* at § 112b(d)(2).

departments to engage in international treaty-making powers. The only requirement for the agencies is to consult the Secretary of State before concluding any international agreement.[80] In exchange, the Secretary of State must submit annually to Congress a report with the index of all international agreements and a summary of each. In a few words, the Case Act aims to increase the transparency of the executive agreements signed by the President or departments of the executive branch.

As has been recognized by other scholars in the field, the Case Act in operation has been a weak mechanism of Congressional control.[81] First, the agreements are signed by the executive branch officers and subsequently reported to Congress. Regardless of the internal review process of the agreement, and even if Congress disagrees with the contents of the agreements, the United States has already triggered international obligations.[82] Under the Vienna Convention on the Laws of Treaties of 1969, when a state signs an agreement, the government commits to "refrain from acts which would defeat the object and purpose of a treaty."[83] Second, if any members of Congress disagree with the contents of the signed executive agreement, a majority vote in each house—subject to a presidential veto—would be required to withdraw the United States from the international agreement.[84] Hence, as Professor Hathaway explains, the Case Act reflects an effort by Congress to shift power away from itself towards the President. The result is the emergence of international agreements that lack any meaningful veto process.[85]

The lack of control was exacerbated by a set of decisions by the U.S. Supreme Court to weaken Congressional power over the President's executive discretion in foreign affairs.[86] In *Dames & Moore*

80. *See id.*

81. *See* Hathaway, *supra* note 17, at 168.

82. "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." Vienna Convention, *supra* note 35, at art. 18, § 1.

83. *Id.*

84. *See* Hathaway, *supra* note 17, at 167.

85. *See id.* at 168.

86. *See* Dames & Moore v. Regan, 453 U.S. 654, 678–79 (1981) (noting that congressional inaction may imply acceptance of executive actions); INS v. Chadha, 462 U.S. 919, 944 (1983) (emphasizing the importance of clear legislative action to override executive decisions);

v. Regan, the Supreme Court diminished Congressional control over executive agreements that impacted private claims and assets in the United States.[87] In *Dames*, President Reagan, through a sole executive agreement with Iran, nullified judicial attachments, transferred frozen assets, and suspended claims brought in U.S. courts against Iran.[88] The companies that were seeking relief in U.S. courts appealed president's Regan's decision and the case reached the U.S. Supreme Court.[89] The Supreme Court upheld the President's decision by concluding that, as long as Reagan's action was closely related to enacted legislation, there was "legislative intent to accord the President broad discretion."[90] Moreover, the Court added that, as long as "there [was] no contrary indication" of the legislative branch to prevent President Reagan's actions, the assumption was that the executive was acting "with the acceptance of Congress."[91] Congress needed to explicitly react to the President's actions through legislation to limit his power; otherwise, silence could be interpreted as "congressional acquiescence."[92] In other words, when interpreting statutorily delegated authority to the President in the context of foreign affairs powers, it must be assumed that Congress has minimal *ex-ante* control. Congress must explicitly restrict the President from engaging in such conduct; otherwise, as long as the negotiated agreement is "closely related" to legislation enacted by Congress that recognizes the President's discretion, the executive may execute the agreement.[93] The *ex-ante* congressional control is virtually nonexistent.

In *INS v. Chadha*, the Court almost eliminated any *ex-post* Congressional control over executive actions.[94] *INS v. Chadha* dealt with the legality of the "legislative veto" over administrative regulations or actions.[95] Instead of allowing the Senate or House to exercise a veto power on executive actions, the Court held that a one-house veto would violate the separation of powers.[96] According to the

87. *See* 453 U.S. 654.
88. *See id.*
89. See id.
90. *Id.* at 678.
91. *Id.* at 678.
92. *See id.* at 678–79.
93. *Id.* at 679.
94. *See* INS v. Chadha, 462 U.S. 919 (1983); Hathaway, *supra* note 17, at 196.
95. 462 U.S. at 923.
96. *Id.* at 945-6.

Court, legislative power is vested in both houses.[97] Because Congress delegated authority to the President through the Case Act, the only constitutional way to override an executive branch decision is to subject the veto to the constitutional requirements of bicameral passage.[98] In essence, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."[99] Although *INS v. Chadha* involved an immigration decision by the Attorney General, it resulted in unicameral *ex-post* vetoes becoming unconstitutional.[100] For international agreements, the effect was to render the requirement of disclosure to Congress ineffectual. As explained by Professors Hathaway, Bradley, and Goldsmith, "[e]ven if [Congress] objected to an agreement, there was almost nothing Congress could do about it." [101] The only way to withdraw from an agreement without consequences would involve "assembling veto-proof majorities in both houses, a near-impossible feat."[102] Hence, for all practical purposes, Congress does not hold the necessary power to override an inter-institutional agreement signed by the President.

When it comes to interpreting the powers of the U.S. President to engage with international actors, the Supreme Court has intervened consistently "to tip the balance of foreign-policy-making power in favor of the president."[103] As a direct consequence, Congress was forced "to choose between examining and approving each agreement individually or instead delegating even more unprecedented authority to the President."[104] The impracticality of reviewing and shaping each agreement forced Congress to broaden its delegation of authority.

C. The Case Act Disclosure Requirement in Practice

If Congress' power to repeal the agreements is almost nonexistent, then does the President's duty to report agreements result in any control over the expansion of the executive agreements? The answer is no. The

97. *Id.*
98. *Id*. at 956.
99. *Id*. at 955.
100. *Id*. at 952–55.
101. *Executive Agreements: International Lawmaking*, *supra* note 17.
102. *Id.*
103. HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 134 (1990).
104. Hathaway, *supra* note 17, at 194.

duty to report has been inherently flawed and, thus, an insufficient accountability mechanism. To implement the Case Act, the State Department issued Circular 175 which seeks to regulate the internal procedure for the negotiation and signing of international agreements by U.S. officers.[105] According to the Circular 175 procedure, before negotiating or concluding an agreement the agencies must consult with the Secretary of State.[106] The Office of the Legal Adviser is responsible for determining whether a particular agreement falls within the scope of the Case Act.[107] The State Department procedures also recognize that there might be instruments not intended to create legal obligation, but these also should be reviewed by the Office of Treaty Affairs to make sure that they do not contain language reserved for legally binding international agreements.[108] The State Department, however, is not consistent in collecting all of the agreements signed by different bureaucracies. Several scholars who have analyzed the reported agreements have found that they appear to be incomplete and there appear to be several "secret" executive agreements.[109]

Even assuming that the signed agreements by bureaucracies are not binding under international law, either because the text clearly specifies so or because the State Department determines that its content is not binding, these agreements do generate domestic legal and policy changes that might lead to normative commitments. As documented by Bradley, Goldsmith, and Hathaway's latest work, regardless of whether the text imposes a clear international legal duty, these agreements "can serve as the basis for or precursor to binding instruments made later; provide interpretative guidance for binding agreements; clarify or

105. *See Circular 175 Procedure*, U.S. DEP'T STATE, https://2009-2017.state.gov/s/l/treaty/c175/index.html [https://perma.cc/L2FR-4SR8] (last visited Sept. 2, 2020); *Ratification of international treaties, a comparative law perspective*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (July 2020) (According to the State Department, Circular 175 aims to "facilitate[] the application of orderly and uniform measures to the negotiation, conclusion, reporting, publication, and registration of U.S. treaties and international agreements, and facilitate[] the maintenance of complete and accurate records on such agreements.").

106. *See Treaty Procedures*, U.S. DEP'T STATE, https://www.state.gov/treaty-procedures/ [https://perma.cc/TN3W-ZG8M](last visited Mar. 17, 2020).

107. *See id.*

108. *See id.*

109. *See* ELIZABETH GOITEIN, THE NEW ERA OF SECRET LAW 6 (Brennan Center for Justice, 2016). In the realm of international trade agreements, see generally Kathleen Claussen, *Trade Transparency: A Call for Surfacing Unseen Deals*, 122 COLUM. L. REV. F. 1, 1–17 (2022).

expand upon the requirement of binding obligations; be embedded or incorporated into a binding obligation or instrument; and influence the development of customary international law."[110] Moreover, the fact that the United States might not recognize the agreements as legally binding does not necessarily correspond to how the other states might classify them.

The interinstitutional agreements between the United States and Mexico depict this paradigm of lack of control by the U.S. State Department. Between January 2000 and September of 2021, the U.S. government disclosed that it signed 68 agreements with Mexico.[111] Meanwhile Mexico disclosed 1,900 agreements signed with U.S. authorities for the same period.[112] The list of agreements disclosed by Mexico also includes agreements signed by local authorities on both sides of the border, including those signed between local U.S. governments and Mexican federal agencies.[113] However, after subtracting those from the 1,900 reported agreements, Mexico still reported 315 agreements signed between Mexican federal agencies and U.S. federal agencies—247 agreements more than the United States reported, a staggering discrepancy in numbers.[114]

The United States might classify several agreements signed with Mexico as nonbinding, and, prior to the 2023 amendments to the Case Act, reporting them was not required. Other agreements might be considered classified by the State Department, and thus not reported to the public. However, from the list of disclosed agreements by Mexico, it is easy to identify agreements that do not qualify as posing a danger to national security.[115] For example, in 2013, the United States reported no agreements with Mexico, while the Mexican government disclosed 14 agreements, including:

1. An MoU and a Joint Principles Declaration between the Mexican Ministry of Interior and the National Security Agency (NSA) (signed in Washington, D.C., on April 17, 2013).

110. Bradley et al., *supra* note 44, at 1290–91. Bradley, Goldsmith, and Hathaway recognize that the MoUs and Letters of Intent generally do not codify binding legal obligations, but they recognize the importance of these nonbinding agreements, and document their expansion as the most common method to conduct international relations todays. *See id.*

111. *See* list of publicly disclosed TIAS of the U.S. State Department.

112. *See* Mexican FOIA response 1; *see also* Mexican FOIA Response 4.

113. *See id.*

114. *See id.*

115. *See id.*

2. An MoU between the Mexican Ministry of Interior and the NSA for the safe, humane, and orderly repatriation of Mexican nationals (signed in Washington, D.C., on April 17, 2013).

3. An MoU between the Mexican Institute for Intellectual Property and the U.S. Patent and Trademark Office for the protection of industrial intellectual property (signed in Alexandria, Virginia on April 22, 2013).

4. An amendment to the letter of understanding on narcotics control and justice collaboration between the United States and Mexico (signed in Mexico City, on April 30, 2013).

5. An MoU between the U.S. North Command and the Mexican Department of Defense for intelligence signal sharing (signed in Mexico City on June 18, 2013).

6. An Agreement for Cooperation between the U.S. Securities and Exchange Commission and the Mexican National Banking and Securities Commission with regards to international inquires, cooperation, and exchange of information related to the supervision of transnational regulated entities (signed on July 3 and 22, 2013).

7. An Agreement between the United States and Mexico for the procedures and guidelines for the operations of a cross-border network of public safety communications along the joint border area (signed in Matamoros, Tamaulipas, Mexico, on July 23, 2013).

8. A Letter of Agreement between the Ministry of Foreign Affairs and the U.S. National Labor Relations Board (signed in Washington, D.C., on July 23, 2013).

9. An MoU regarding the sharing of information on the exports of fresh tomatoes between the Mexican Ministry of the Economy and the U.S. Department of Commerce (signed in Mexico City, on April 23, 2013).

There are no public elements to conclude why these agreements should not have been classified or been unreported on the U.S. side under the Case Act. Mexico considers them international agreements. As explained below, the fact that the agreements were included in the list of disclosed interinstitutional agreements is evidence that their classification under Mexican law is that of an international agreement subject to public international law.[116]

116. *See infra* Section I.E.

D. The 2022 Amendments and 2023 Regulations to the Case Act

In 2022, Congresses recognized that the Case Act needed reform. The amendments and their 2023 implementing regulations by the State Department had four distinct effects on the way non-Article II agreements are reported to the U.S. Congress. First, the State Department now must transmit executive agreements monthly. The transmission must also be accompanied by a detailed description of the legal authority that the Department views as supporting the agreement.[117] Thus, the agreements are reported more consistently.

Secondly, the Case Act now requires the State Department to transmit "qualifying non-binding instruments" that are defined as those instruments that "could reasonably be expected to have a significant impact on the foreign policy of the United States."[118] The State Department regulations published in October 2023 include a list of factors that agencies and departments must consider to determine whether the MoU or Letter of Intent might have a significant impact on U.S. foreign policy.[119] These include the importance to the U.S. relationship to the other country such as "addressing a significant new policy or initiative;" whether the agreement "[a]ffects the rights or responsibilities of U.S. citizens, U.S. nationals, or individuals in the U.S.;" whether it impacts state laws, and budgets or appropriations; whether it "[r]equires changes to U.S. law to satisfy commitments made therein;" whether it presents "a new commitment or risk for the entire Nation;" and whether it is of "Congressional or public interest."[120] Hence, the Case Act now recognizes that MoUs and Letters of Intent could have a significant impact, regardless on their bindingness to the United States under international law. An exception to the reporting requirement applies to agreements signed by the Department of Defense, the Armed Forces, or any element of the intelligence community.[121]

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117. *See* Case Act § 112b(a).

118. *Id.* at § 112b(k)(5). The other circumstance in which the state must transmit a non-binding agreement is when there is a written request from the chair or ranking member of the congressional foreign affairs committees. *See id.*

119. *See* Publication, Coordination, and Reporting of International Agreements: Amendments, 88 Fed. Reg. 67643 (Oct. 2, 2023).

120. 22 C.F.R. § 181.4(b)(3) (2023).

121. *See* Case Act at § 112(k)(5)(b).

The third advancement adopted by the amendment is an obligation to publish on the State Department's website the text of the executive and non-binding agreements no later than one hundred and twenty days after they enter into force.[122] The publication must include a detailed description of the legal authority that was transmitted to Congress. An exception again applies to issues related to military operations, exercises, programs, logistics, and personnel exchange or education programs.[123]

The fourth amendment to the Case Act involves an effort to enhance coordination among the executive departments and agencies regarding the agreements' signing of. The executive departments are now required to report to the State Department any MoU or Letter of Intent, along with a description of their legal authority, within fifteen days of concluding them.[124] For purposes of coordinating this effort, each department or agency must appoint a Chief International Agreements Officer.[125] Additionally, the State Department's regulations set a series of procedures for consultation with the State Department to determine whether the agreement might be non-binding or an executive agreement.[126]

These reforms reflect an effort from Congress to enhance transparency in the adoption of interinstitutional agreements. However, as stated by Professor Bradley, "[i]t is too early to know the extent to which these reforms will produce useful information for Congress and the public."[127] It is also unclear whether the amendments could serve as a platform for other countries to draw upon. As this Article shows, the use of interinstitutional agreements, regardless of whether one country considers them binding, are instruments that impact foreign policy and are preferred over traditional international agreements.[128] The next Section describes how the Mexican legal system deals with

122. *See id.* at § 112b(b).

123. *See id.* at § 112b(b)(3).

124. *See id.* at § 112b(d).

125. *See id.* at § 112b(e).

126. *See* 22 C.F.R. §§ 181.6–181.7.

127. Bradley, *Amendments to the Case-Zablocki Act*, *supra* note 23, at 3. Prof. Bradley also recognizes that "[t]he United States is not alone in perceiving a need for greater transparency in the conclusion of international agreements by its executive branch and the U.S. reforms may end up serving as a model for other countries." *See id.*

128. For a review on how other nations engage with interinstitutional agreements, see Bradley et al., *supra* note 44, at 1335–46.

the same instruments, and the tensions that arise when two states attach different legal meaning to them.

E. MoUs and Letters of Intent under the Mexican Legal System

Under Mexican law, Letters of Understanding and MoUs signed with foreign authorities are classified as international legal instruments regulated by public international law principles. These instruments, however, do not have the same constitutional hierarchy as international treaties signed by the Mexican President and ratified by the Senate. The legal recognition of these diplomatic tools emerged in the early 1990s as part of the North American integration project with the United States, that culminated in the signing of the North American Free Trade Agreement with Canada and the United States (NAFTA).[129]

In 1992, the Mexican federal government was in the process of internationalizing its relations. The Mexican President, Carlos Salinas de Gortari (1988–1994), sincerely believed in the capacity of federal agencies to cooperate with international actors and sign agreements that involved domestic regulatory changes.[130] At the time, Mexico was actively negotiating and lobbying its acceptance into the Organization of Economic Co-operation and Development (OECD).[131] For Mexico to become a global economic player, it needed its various ministries to promote Mexico's potential in the international arena.[132]

Furthermore, the years of tension between the United States and Mexico—resulting from the torture and murder of DEA agent Enrique "Kiki" Camarena while he was working in Mexico—seemed to subside.[133] President George Bush actively fostered a deeper

129. *See* North American Free Trade Agreement, Can.-Mex.-U.S., art. 605(a), Dec. 17, 1992, 32 I.L.M. 289 & 605 [hereinafter NAFTA]; *see also* Ricardo J. Sepúlveda Iguiniz, *Análisis Constitucional de la Ley sobre la Celebración de Tratados*, 18 REVISTA DE INVESTIGACIONES JURÍDICAS 237 (1994) (Mex.). *See generally* Ricardo Méndez Silva, *Ley de 1992 sobre la Celebración de Tratados, Modernización del Derecho Mexicano*, *in* MODERNIZACIÓN DEL DERECHO MEXICANO. REFORMAS CONSTITUCIONALES Y LEGALES 1992 323 (1993) (Mex.).

130. *See* Iguiniz, *supra* note 128, at 327.

131. *See id.*

132. *See id.*

133. *See* Benjamin Schenk, *Deconstructing the Camarena Affair and the Militarized United States-Mexico Border*, 5 CORNELL INT'L AFF. REV. 62 (2012) (describing the tensions in the binational relation that emerged after the Camarena affair).

partnership with Mexico, originating in trade.[134] The 1990s was also characterized as the decade in which U.S.-Mexico relations became decentralized. The multidimensional aspects of the joint challenges faced by U.S.-Mexico in areas such as migration, law enforcement, organized crime, the environment, shared rivers and natural resources, and economic interdependency, makes the binational relation one that has both domestic and international dimensions. Or, as described by Jorge Dominguez and Rafael Fernandez de Castro, the multidimensionality makes it an "intermestic" relation.[135] It is not only simply another diplomatic affair that impacts U.S. foreign interests, but a relation that has direct impacts on domestic politics. Hence, U.S. actors that were typically involved exclusively in domestic policymaking, such as the Treasury Department, the Environmental Protection Agency, and the Department of Health and Human Services, began engaging with their Mexican counterparts. They initiated cooperation efforts, established coordination offices, and organized high-level meetings between secretaries and department heads. These officials, who would normally focus on domestic affairs, were now participating in international collaboration.[136]

As such, the Mexican Congress began to regulate the internationalization of its authorities and passed the Law on the Conclusion of Treaties (LCT).[137] According to the legislative history of the LCT, the law had three primary objectives.[138] First, the LCT

134. For an example of the switch in the relationship, see Mexico-United States Joint Statement, November 27, 1990, available at: https://www.presidency.ucsb.edu/documents/mexico-united-states-joint-statement [https://perma.cc/97VY-TDY5].

135. *See* Bayless Manning, *The Congress, the Executive, and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFF. 306, 309 (1977). Jorge Dominguez and Rafael Fernandez de Castro borrows the terms from Bayless manning to describe international affairs in which the domestic affairs are prominent in the shaping of foreign policy. RAFAEL FERNANDEZ DE CASTRO & JORGE I. DOMINGUEZ, SOCIOS O ADVERSARIOS? MÉXICO-ESTADOS UNIDOS HOY 154 (Oceano de Mexico ed., 2001).

136. *See* FERNANDEZ DE CASTRO & DOMINGUEZ, *supra* note 134, at 154–75 (describing the multiplication of actors involved in the binational relations and the of coordination mechanism at different levels).

137. *See* Mexico's Law on the Conclusion of Treaties, *supra* note 27.

138. *See* Centro de Estudios Internacionales Giberto Bosques, Análisis del Proyecto de Ley General sobre Celebración y Aprobación de Tratados – Senado de la República LXII Legislature 5, formato PDF, https://centrogilbertobosques.senado.gob.mx/docs/serieapuntesderecho1.pdf [https://perma.cc/B3WN-U9JN](consultada el enero de 2025) (Mex.).

aimed to tackle the lack of "fluid and solid" communication between the federal executive branch and the Mexican Senate during the negotiation process of international treaties.[139] Second, it aimed to implement adequate internal regulations for the adoption of international treaties, including the "proliferation of international interinstitutional agreements that generate a diversity of duties to the Mexican States, some of which exceed the powers assigned to each entity or department in the three levels of government that celebrate these agreements."[140] Third, it resolved the necessity to distinguish international economic agreements from other international treaties.[141]

The law first distinguishes traditional treaties from interinstitutional agreements.[142] The former are defined as "an agreement regulated by public international law, concluded in writing between the Government of the United Mexican States and one or several subjects of Public International Law [. . .] in which the United Mexican States assumes commitments."[143] The law also specifies that these international agreements require Senate ratification and will receive the rank of supreme law of the land under article 133 of the Mexican constitution.[144] As such, "treaties" under the LCT share the same classification as Article II celebrated agreements under the U.S. Constitution.[145]

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139. *See id.*

140. *Id.* (The text in Spanish reads: "proliferación de acuerdos interinstitucionales que generan diversas obligaciones al Estado mexicano, los cuales en algunas ocasiones rebasan el ámbito de las atribuciones propias de las entidades y dependencias de los tres órdenes de gobierno que los celebran" (author's translation).

141. *See id.*

142. *See* Mexico's Law on the Conclusion of Treaties, *supra* note 27, at art. 2.

143. *Id*. at art. 2.I (the full translation of text is: "'[T]reaty:' an agreement regulated by public international law, concluded in writing between the Government of the United Mexican States and one or several subjects of Public International Law, regardless of whether for its implementation it requires a conclusion of agreements in specific subject, regardless of its title, in which the United Mexican States assumes commitments." (author's translation).

144. *See id.* at art. 2.1 ¶ 2 ("[I]n accordance with section I of article 76 of the Political Constitution of the United Mexican States, treaties shall be approved by the Senate and will be Supreme Law of the Union when they are celebrated in accordance with it, in the terms established by article 133 of the Constitution." (author's translation); Constitución Política de los Estados Unidos Mexicanos, CP, art. 76, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 2015; *see also* Mexico 1917 (rev. 2015), Constitution of 1917 with Amendments Through 2015, CONSTITUTE PROJECT (last visited Jan. 2, 2025) https://www.constituteproject.org/constitution/Mexico_2015 [https://perma.cc/A3CE-VQHM][hereinafter Mexican Constitution].

145. *See supra subsection* II.A.

The LCT also recognizes the existence of "interinstitutional agreements" that are written agreements "regulated by public international law."[146] These agreements, however, are "signed by any agency or decentralized organization of the public administration at the federal, state or municipal level with one or many foreign governmental or international organization, regardless of their denomination, and regardless of the fact that the agreement originates or not from a preexisting treaty."[147] The LCT restricts the authority to engage in the conclusion of these agreements to the powers recognized by law to each subdivision. That is, the government subdivisions can only sign agreements connected to their statutorily recognized functions.[148]

According to Article 7 of the LCT, Mexican authorities must notify the Ministry of Foreign Affairs of any interinstitutional agreement they sign. In contrast with U.S. State Department's Circular 175, there is no prerequisite to consult with the Ministry of Foreign Affairs before signing the agreement. Once the interinstitutional agreement is signed and notified, the Ministry of Foreign Affairs validates the power of the Mexican representative to enter such agreement, and if permitted, proceeds to register it.[149] The 1,900 listed agreements analyzed in this article were released by the Ministry of Foreign Affairs as part of its obligation to keep a record of interinstitutional agreements under Article 7 of the LST.

The recognition that interinstitutional agreements are regulated by public international law is an unorthodox departure from regular canons of international treaty law. Customary and international treaties only recognize the exitance of agreements signed among states, not those signed by their subdivisions. Subdivisions may bind the state to international obligations if authorized by the proper central authorities. However, they would then be speaking on behalf of the state, even if the subdivision has the greatest interest or bears the legal obligation enshrined in the agreement. Hence, by recognizing that interinstitutional agreements are regulated by public international law,

146. Mexico's Law on the Conclusion of Treaties, *supra* note 27, at art. 2.II.

147. *Id*.

148. *See id.* (the full text states "[R]egarding the subject matter of the institutional agreements, these shall exclusively be limited to the attributions of each department and decentralized organism of each level of government that celebrates them . . . " (author's translation)).

149. *See id.* at art. 7.

the LCT implicitly recognizes the capacity of subdivisions to engage in the creation of international legal obligations of the Mexican State. These subdivisions encompass federal departments, independent agencies, and state and municipal authorities. The latter is not without controversy, because, similar to Article I, Section 10 of the U.S. Constitution, Article 117, Section 1 of the Mexican Constitution prohibits states from signing agreements with foreign powers.[150]

The possibility of binding the Mexican State to international obligations through interinstitutional agreements is reaffirmed in Article 8 of the LST.[151] In Article 8 the LST recognizes that interinstitutional agreements can bind the Mexican government to international dispute resolution mechanisms, such as international courts or arbitral proceedings, involving other governments or individuals.[152] The LCT even recognizes in Article 11 that the awards, decisions, and resolutions from international tribunals empowered to resolve disputes arising from interinstitutional agreements shall be "effective and will be recognized in the Republic, and can be used as evidence for national cases."[153] Hence, the LCT makes the decisions of dispute resolution bodies created under interinstitutional agreements binding and enforceable at the domestic level.

In sum, under Mexican federal law, all MoUs and Letters of Intent are considered interinstitutional agreements that hold the potential of generating international obligations for Mexico. These agreements are not subject to the hierarchy of international treaties, and consequently, do not trump federal or state law. Still, they represent obligations under

150. *See* Mexican Constitution, *supra* note 143, at art. 117 (according to the text of Article 117 "[I]n no case shall the states: I. Conclude alliances or coalitions, or make treaties with any other state or foreign government."). The U.S. uses very similar language to prevent states from engaging in international treaty makings. *See* U.S. Const. art. I, § 10, cl. 1 ("No states shall enter into any Treaty, Alliance, or Confederation.").

151 Mexico's Law on the Conclusion of Treaties, *supra* note 27, at art. 8 (Article 8 regulates the conditions under which an interinstitutional agreement may "contain international dispute resolution mechanisms for legal disputes in which the federal government, or Mexican natural or moral persons, are involved in with foreign governments, natural or moral persons or international organizations.").

152 *See id.*

153. *Id.* at art. 11 (The translation of the text of Article 11 is the following "[T]he sentences, arbitral awards, and other jurisdictional resolutions that arise out of the application of the international legal dispute resolution mechanism to which article 8 makes reference, shall be effective and recognized in the Republic, and, and can be used as evidence for national cases that are situated in the same legal situation, in accordance with the Federal Code of Civil Proceedings and applicable treaties." (author's translation)).

"public international law" that can be subjected to judicial resolution in international forums.[154] In public international law terms, the state actors, by signing these agreements, must adapt their domestic legislation to comply with the international obligations established under the agreement's terms.[155]

III. THE GOVERNMENT AUTHORITIES BEHIND THE 1,900 INTERINSTITUTIONAL AGREEMENTS

The previous Part reviewed the legal nature of deformalized agreements in the U.S. and Mexican legal systems.[156] It explained how each legal system attaches different legal hierarchy and requirements to their signing.[157] However, the fact that government officers are authorized to conclude agreements with their counterparts does not translate to officers engaging in such a practice. This Part reviews the database obtained through freedom of information requests in Mexico regarding agreements signed between January 2000 and September 2021.[158] The objective of the analysis is to identify the actors behind the signing of these agreements, the subject matter of the agreements, the frequency of their conclusion, and their interaction with different presidential administrations during the twenty-year period.

According to data obtained from the Mexican Ministry of Foreign Affairs, Mexican authorities (federal, state, and municipal) signed 1,900 interinstitutional agreements with US authorities from January 2001 to September 2021.[159] As Graph 1 indicates, these types of agreements have become increasingly popular, peaking in 2016 with 201 agreements.[160] Most of the agreements signed during this time were under the administration of President Enrique Peña Nieto (2012–2018). President Peña Nieto's term overlapped with President Barrack Obama's second term and President Donald J. Trump's first term. The months leading up to the 2016 U.S. presidential campaign resulted in the signing of the greatest number of agreements. Moreover, until the

154. *See id.*

155. *See* Vienna Convention, *supra* note 35, at art. 27 (Under international law "A party may not invoke the provisions of its internal law as justifications for its failure to perform a treaty.")

156. *See generally supra* Part II.

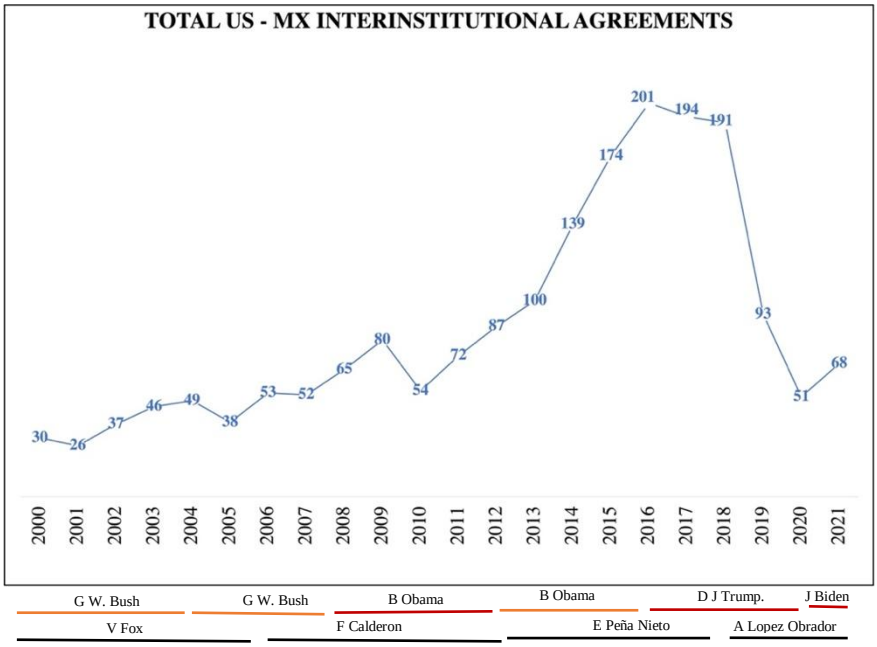
157. *See id.*

158. Mexican FOIA response 4, *supra* note 111.

159. Guillermo J. Garcia Sanchez, US-MX Agreements Graphs (on file with the Fordham International Law Journal).

160. *Id*.

Mexican presidential elections of 2018, the total number of agreements increased annually, but the changes in administration on the Mexican federal government led to a steep decline in the annual number of signed agreements.

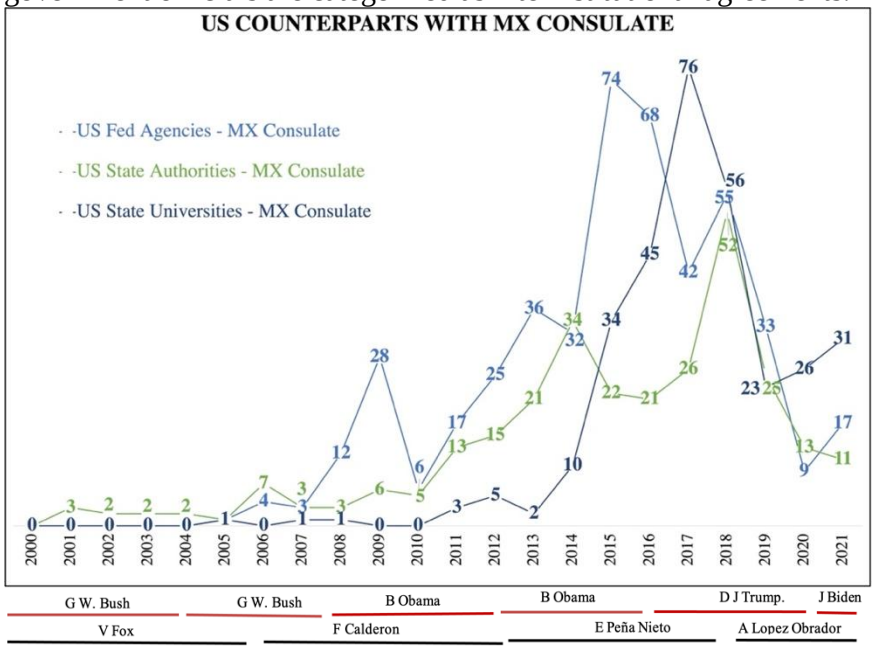


Graph 1: Total Interinstitutional Agreements signed between Mexico and the U.S. from 2000 to 2021 and Presidential terms.

Out of the 1,900 signed agreements, Mexican consulates are the most active authorities engaging with U.S. government officials through 1,063 agreements. The second most active Mexican officials are federal agencies that signed 457 agreements.[161] Mexican state and municipal authorities signed a total of 298 agreements, primarily focused on sister cities and border state collaboration agreements (271), with a few involving U.S. state universities (16). Additionally, Mexican state universities have signed 79 academic or research-oriented agreements with U.S. state universities.

161. Guillermo J. Garcia Sanchez, US-MX Agreements Graphs (on file with the Fordham International Law Journal).

A noteworthy aspect of these agreements is the broad definition employed by the Mexican Ministry of Foreign Affairs, which classifies public universities and publicly funded or chartered think tanks, such as the Wilson Center, as public entities.[162] Consequently, any agreements signed by publicly chartered academic institutions with government officials are categorized as interinstitutional agreements.



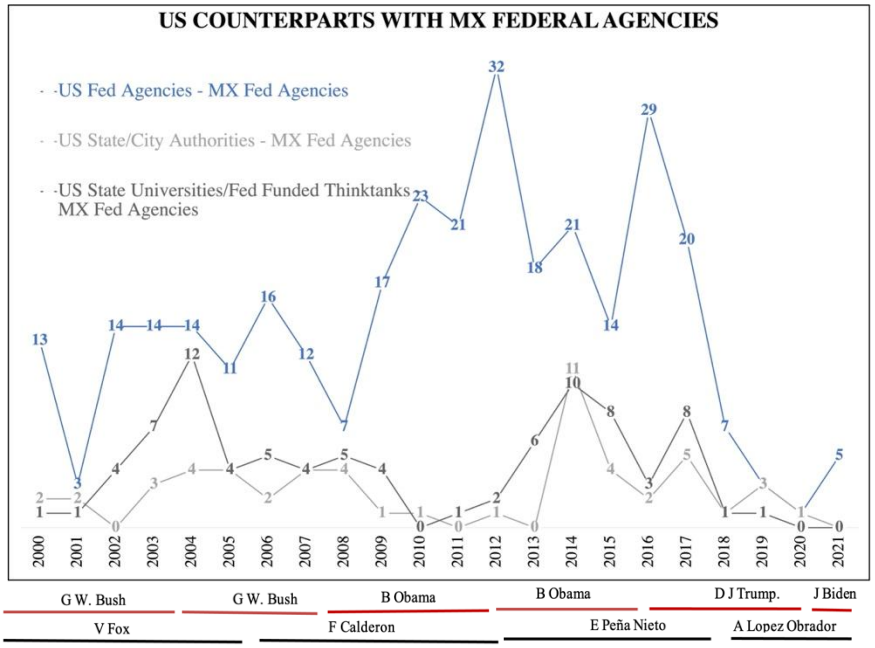
Graph 2: U.S. government counterparts that signed an agreement with Mexican Consulates between 2000 and 2021 and presidential terms.

The majority of agreements signed by Mexican Consulates involved cooperation or coordination with U.S. federal agencies (462), followed by collaboration agreements with state authorities (287), and

162. The Wilson Center is a think tank chartered by the U.S. Congress to price "nonpartisan counsel and insights on global affairs to policy makers through deep research, impartial analysis, and independent scholarship." *About the Wilson Center*, WILSON CTR., https://www.wilsoncenter.org/about [https://perma.cc/PA6J-VYGW] (last visited June 4, 2024). Another example of a chartered academic institution is the U.S.-Mexican Commission for Educational and Cultural Exchange (COMEXUS), which was created through an international treaty signed between Mexico and the U.S. on November 27, 1990, with the goal of promoting mutual understandings between Mexico and the United States by means of educational and cultural exchanges. COMEXUS receives funding from both the U.S. and Mexican governments. See *COMEXUS*, FULBRIGHT COMEXUS, www.comexus.org.mx/acerca.php [https://perma.cc/GTS7-2XBK] (last visited June 4, 2024).

lastly, U.S. state universities or educational authorities (314). The high number of agreements involving consulates reflects their pivotal role in fostering bilateral cooperation at various governmental levels. These agreements cover a wide range of areas, including cultural exchanges, educational partnerships, immigration enforcement collaboration, and public health initiatives.

Of the 457 agreements signed by Mexican federal agencies' agreements, 315 involved U.S. federal agency counterparts (see Graph 3).[163] That is, most of these agreements involve federal-to-federal inter-agency cooperation. Nonetheless, Mexican federal agencies also signed 55 agreements with state or local U.S. authorities and 87 agreements with U.S. state universities, government-funded think tanks, or research centers.[164]



Graph 3: U.S. government counterparts that signed an agreement with Mexican federal agencies and changes in executive power 2000-2021.

163. Guillermo J. Garcia Sanchez, US-MX Agreements Graphs (on file with the Fordham International Law Journal).

164. *Id*.

The findings of the engagement of Mexican federal agencies with U.S. counterparts provide a glimpse on the level of internationalization of U.S. government officials at the state level. Even though the majority of agreements signed by Mexican authorities involved federal counterparts, twelve percent of the agreements signed by the Mexican federal government with U.S. authorities involved actors at the local level. This demonstrates that U.S. state and local authorities engage in international relations—albeit informally—with foreign governments. This Article does not analyze in detail the content of those agreements or their legal status under U.S. law. However, it is worth noting that this phenomenon has been documented by other scholars due to its foreign affairs and constitutional law implications.[165]

A. Federal – Federal Cooperation

Cooperation among federal agencies and departments reached its peak between 2008 and 2012, during the first term of the Obama administration and the last four years of the Calderón administration.[166] This collaboration saw a slight decline in 2015 toward the end of President Obama's second term, but spiked again in 2016.[167] The signing of agreements notably increased between 2010 and 2012, during Calderón's final years and the beginning of Obama's second term.[168] This heightened collaboration continued through into the start of the Peña Nieto administration in December of 2012, but stalled between 2013 and 2014.[169] As the 2016 U.S. presidential election approached, the number of agreements surged to a high of 29. Notably,

165. *See* Ryan M. Scoville, *The International Commitments of the Fifty States*, 70 UCLA L. REV. 310 (2023) (analyzing he legality of agreements signed by subnational entities and the efforts in Congress to regulate them). On the Mexican side, scholars have documented the role of the local Mexican authorities in guiding U.S.-Mexico relations. *See* JORGE A. SCHIAVON, LA INTERNACIONALIZACIÓN DE LOS GOBIERNOS LOCALES EN MÉXICO (2021). *See generally* Samuel Lucas McMillan & Jorge A. Schiavon, *The Future of US-Mexico Relations: The Role of Sub-State Governments*, *in* THE FUTURE OF US-MEXICO RELATIONS (Tony Payan, et al. eds., 2020).

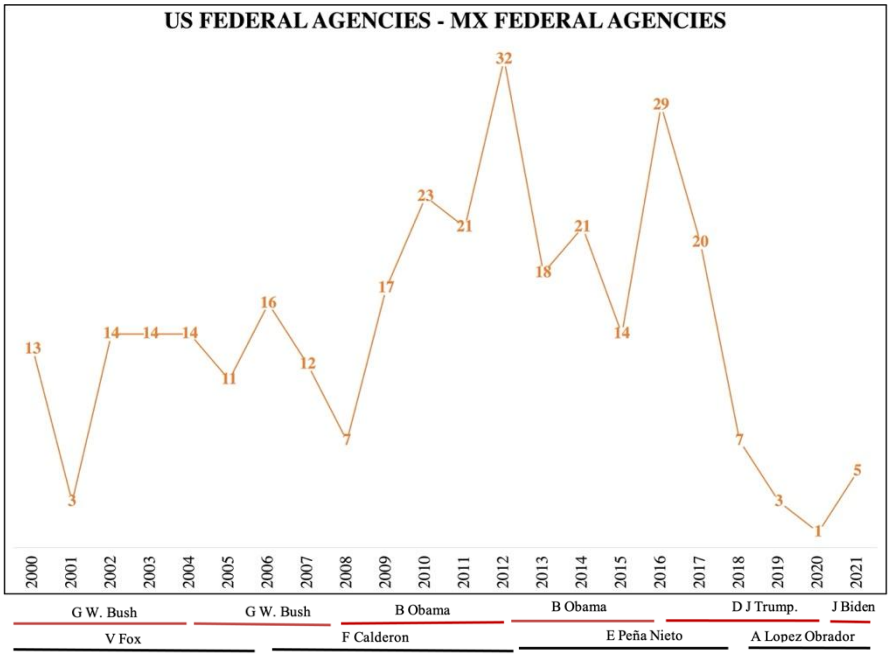
166. For a complete list of Mexican presidential terms, see *List of Presidents of Mexico*, BRITANNICA, https://www.britannica.com/event/Mexican-Revolution [https://perma.cc/H8NL-YFP2] (last visited June 4, 2024). For a list of U.S. presidential terms, see *The Presidents Timeline*, The White House HIST. ASS'N, https://www.whitehousehistory.org/the-presidents-timeline [https://perma.cc/5QBG-GJRR] (last visited June 4, 2024).

167. *See* Guillermo J. Garcia Sanchez, US-MX Agreements Graphs (on file with the Fordham International Law Journal).

168. *Id*.

169. *Id*.

the only electoral year in which no spike in agreements occurred was the 2020 presidential election between President Trump and President Biden.



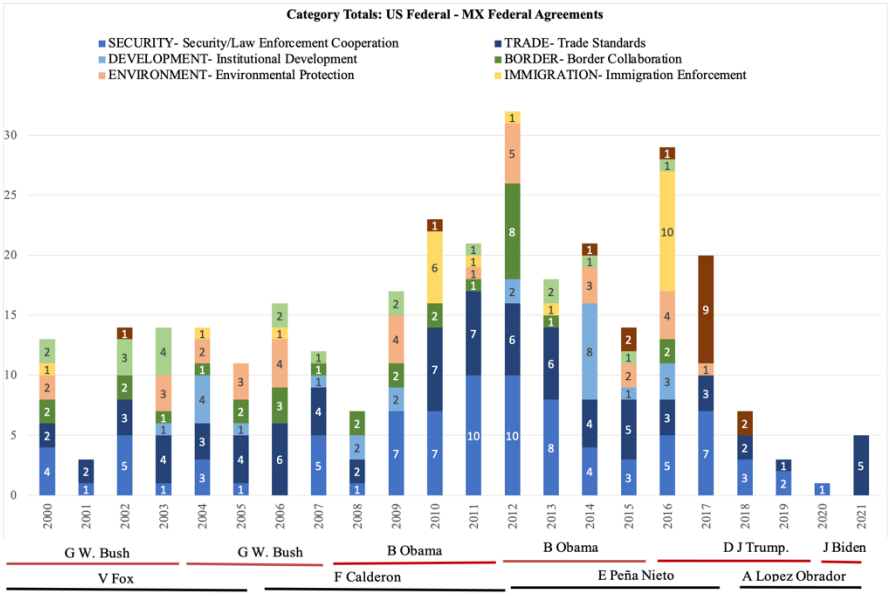
Graph 4: U.S. and Mexican governments federal counterparts that signed an agreement and changes in executive power 2000-2021.

Of the total 315 interinstitutional agreements, 28.39% (88) are directly related to security and law enforcement cooperation. Trade standards adoption and institutional development tied to trade and financial services account for 33% (104) of the agreements, with 25% (79) focusing on trade and 7.9% (25) on institutional development.[170] Border collaboration on transportation and border-cities coordination efforts make up 9.52% (30), environmental protection actions 10.79% (34), immigration enforcement collaboration 6.98% (22), and scientific research collaboration 6.34% (20).[171]

This data highlights the dynamic nature of U.S.-Mexico federal agency collaboration, reflecting shifts in political climates and administrative priorities. The significant focus on security, trade, and

170. *Id.*
171. *Id.*

institutional development underscores the strategic importance of these areas in the bilateral relationship. The fluctuations in agreement activity also reveal how electoral cycles and leadership transitions can influence the pace and nature of international cooperation. Further empirical analysis through interviews or surveys could identify the role of elections in the signing of these agreements, specifically whether officials feel pressured to finalize agreements before potential changes in administration. In other words, whether the signing of interinstitutional agreements serves as a tool to bind future administrations to established collaboration practices with their counterparts. While the data suggests a change in dynamics during electoral cycles, it does not provide evidence of the motivations behind these changes.



Graph 5: U.S. and Mexican governments federal counterparts, subject matter of the agreements, and changes in executive power 2000-2021

It is important to note that there may be other security-related agreements that have not been disclosed by the Mexican government. In the first Mexican FOIA request, the Mexican government included one listed agreement entitled "21st Amendment/update to the Letter of

Agreement for the Merida Initiative originally signed in April 2013."[172] However, the Letter of Agreement for the Merida Initiative did not appear in any other previous or subsequent years. Through an additional Mexican FOIA request, I solicited information on the original letter and all subsequent amendments. The Ministry of Foreign Affairs denied the request, classifying them as reserved because they could jeopardize U.S.-Mexico relations, "particularly in the context of the current [Trump] administration in the U.S. government."[173] Hence, the security agreements disclosed by the Ministry, as presented in this Article, do not reflect the full spectrum of existing agreements. Only those not considered as reserved by the Ministry are disclosed, as reserved agreements could either involve national security or put into danger existing diplomatic negotiations.

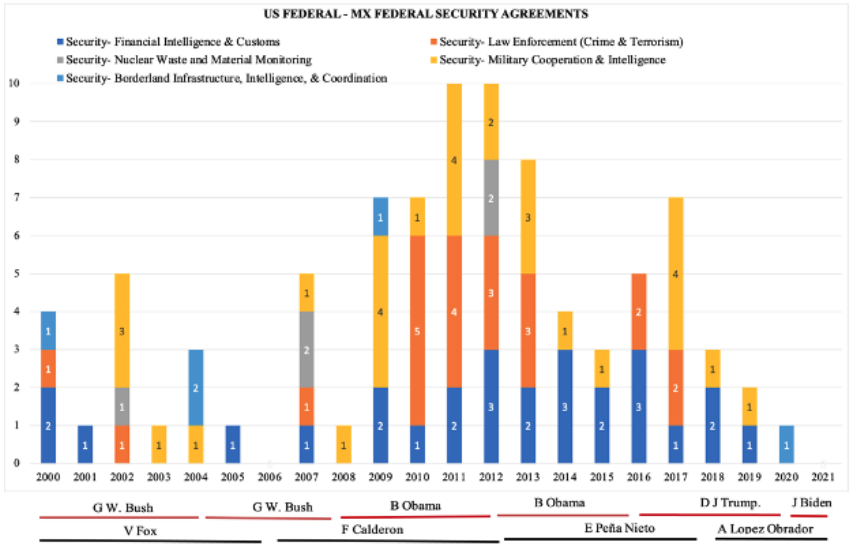
B. Security-Related Agreements

For classification purposes, the database employs a broad definition of security. It includes not only the obvious law enforcement-related agreements but also those connected to financial intelligence and security-related infrastructure. Following this approach, the database classifies five types of security-related cooperation agreements: 1) financial intelligence and customs cooperation; 2) law enforcement crime and anti-terrorism cooperation; 3) military cooperation and

172. Respuesta a la Solicitud de Acceso a la Información Pública, Secretaría de Relaciones Exteriores folio: 0000500059020, 4-5, 07-04-2020 (Mex.), formato PDF.

173. *See id.* The full response also mentions the effect that the document's publicity could have on national security and the global public order ("The information is reserved because its publicity could affect the adequate functioning of the institutional framework built by both countries to take care of their common interest in the cooperation of international security, due to the fact that the assigned monetary amounts given by the united states government are previously evaluated and approved by the U.S. Congress. As such, we consider that disclosing the reserved information could reduce the amounts approved by the U.S. Congress for security cooperation with Mexico, particularly in the context of the current administration in the U.S. government. The publicity of the '21st Amendment/update to the Letter of Agreement for the Merida Initiative between the U.S. government and the Mexican government,' could weaken the conduction of the U.S.-Mexico bilateral relations, due to the fact that the points agreed by both States in the Letter of Agreement for the Merida Initiative between the U.S. and the Mexican governments, are modified annually by mutual understanding, its availability could imply an infringement on the international public order by the Mexican State due to the fact that it would contradict the principles of reciprocity and good faith in the conduction of its proceedings and it would overstep the limits set to subjects of international law. The disclosing of the 21st Amendment/update to the Letter of Agreement for the Merida Initiative between the U.S. government and the Mexican government,' represent a damage to the public interests, as defined in article 111 of the LFTAIP, as related to article 104 of the LGTAIP . . ." (author's translation).

intelligence; 4) borderland infrastructure, intelligence, and coordination; and 5) nuclear waste and material monitoring. As the chart below shows, law enforcement and military cooperation are not the only areas of consistent collaboration between Mexico and the United States. Starting in 2008, there has been an increase in financial intelligence sharing, and a constant effort to monitor and treat nuclear material. The latter includes not only preventing nuclear material used in the energy or medical industries from harming civilians but also preventing its potential use in constructing explosive devises.[174]



Graph 6: U.S. and Mexican security related agreements at the federal levels signed between 2000 and 2021 and changes in executive power.

174. The need to have a stronger collaboration on nuclear material monitoring was highlighted in 2013 when criminals stole a vehicle containing radioactive material in Mexico. The U.S. feared that the material could eventually be transported by criminals into its territory. *See* Mónica Ortiz Uribe, *After Mexico Scare, How Secure Is US Radioactive Waste?*, KJZZ (Dec. 9, 2013), https://kjzz.org/content/9313/after-mexico-scare-how-secure-us-radioactive-waste [https://perma.cc/EX9X-UXWD]. The importance of this topic in the bilateral relation was highlighted by the fact that Mexico and the U.S. signed an agreement for the cooperation in peaceful uses of nuclear energy that entered into force in 2022. *See U.S.-Mexico Civil Nuclear Cooperation Agreement Enters into Force*, UNITED STATES DEP'T STATE (Nov. 3, 2022), https://www.state.gov/u-s-mexico-civil-nuclear-cooperation-agreement-enters-into-force/ [https://perma.cc/W57P-9BBP]. For a complete review of earlier collaboration agreements and efforts, see DIEGO CANDANO, SARAH RIEDEL, & RICHARD GOOVERICH, NUCLEAR ENERGY AND THE UNITED STATES-MEXICO 123 AGREEMENT 9 (2019).

Regarding federal-to-federal agreements, collaboration peaked during the last three years of the Calderón administration (2009–2012) and the first four years of the Obama administration (2008–2012). During this period, law enforcement and financial intelligence cooperation agreements were most common.[175] Financial intelligence cooperation remained steady over the next ten years, whereas law enforcement agreements decreased in 2014 and did not surge again until the 2016 U.S. presidential election.[176] Military cooperation agreements reached their highest levels between 2011 to 2013.[177] The lowest point of cooperation coincided with the start of the López Obrador administration in 2018.[178]

C. Trade and Development

Another area of agreements that continues to see growth is trade and institutional development, which aims to further integrate the economies of both nations. This realm is not limited to agreement directly connected to traditional commercial activities but also involves collaboration in agriculture, health, labor, central banking, government-related financial institutions, and consumer-related sectors. In other words, trade and development reflect deep collaboration in standardizing how U.S. and Mexican markets operate. Additionally, many programs funded by the U.S. government aim to strengthen Mexican institutions involved in NAFTA/USMCA-related trade.[179] For example, the U.S. government assists in building human capital and knowledge in Mexican customs, central banks, financial intelligence units, and agricultural inspections departments.[180] Moreover, with the entry into force of the United States, Mexico, Canada Agreement (USMCA), labor standards have become a focal

175. *See* Guillermo J. Garcia Sanchez, US-MX Agreements Graphs (on file with the Fordham International Law Journal).

176. *Id*.

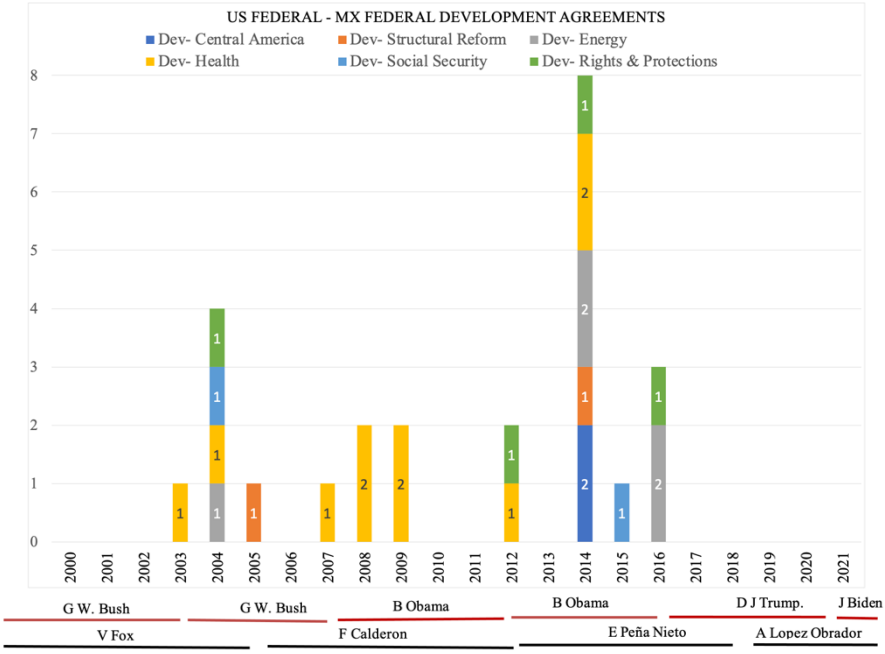
177. *Id*.

178. *Id*.

179. *See 2024 U.S.-Mexico High-Level Economic Dialogue Mid-Year Review Fact Sheet*, UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2024/april/2024-us-mexico-high-level-economic-dialogue-mid-year-review-fact-sheet [https://perma.cc/U2VU-JC8A] (last visited Apr. 29, 2024).

180. *See 5 USAID-Sponsored Programs in Mexico*, BORGEN PROJECT, https://borgenproject.org/usaid-sponsored-programs-in-mexico/ [https://perma.cc/2PMY-MNCK] (last visited Apr 29, 2024).

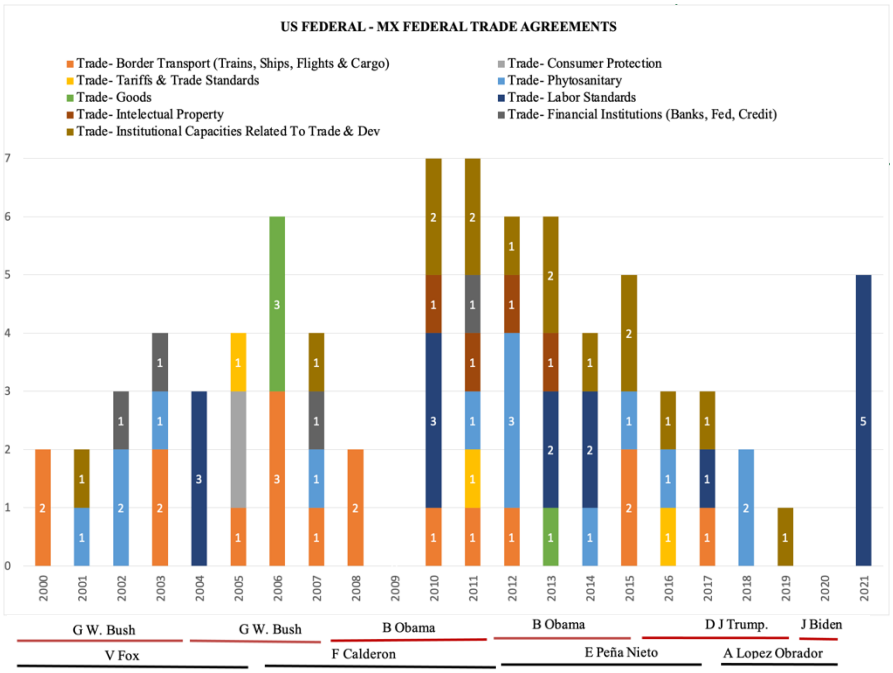
point of cooperation between the two nations.[181] This emphasis is not surprising, given that one of the most significant changes between NAFTA and the USMCA was the creation of enhanced enforcement mechanisms for labor standards in the region.[182]



Graph 7: U.S. and Mexican trade- related agreements at the federal levels signed and changes in executive power 2000-2021.

181. *See* Alvaro Santos, *Reimagining Trade Agreements for Workers: Lessons from the USMCA*, 113 AM. J. INT'L L. UNBOUND 407, 407 (2019).

182. *See id.*



Graph 8: U.S. and Mexican security, institutional building, and development-related agreements at the federal levels signed between 2000 and 2021 and changes in executive power.

If we disaggregate the types of agreements and focus solely on traditional trade-related cooperation, we find that during the 2000–2001 period, Mexico and the United States signed 74 agreements. Standard trade-related cooperation includes issues that could traditionally be part of free trade agreements. This data aligns with findings by other scholars, such as Kathleen Claussen, who have identified undisclosed "mini" or "missing" trade agreements by the U.S. government.[183]

The empirical evidence presented demonstrates that government entities on both sides of the border have relied on interinstitutional agreements, rather than traditional treaties, to guide their relationship. However, this evidence does not indicate whether these agreements

183. *See* Kathleen Claussen, *Trade's Mini-Deals*, 62 VA. J. INT'L L. 315, 315 (2021); *see also* Claussen, *Trade Transparency*, *supra* note 108.

effectively modify government policies or influence important policy discussions. Defining the legal hierarchy of these agreements or their binding nature under domestic or international law does not help assess their effectiveness. The following Part seeks to provide insight, at least from the Mexican side, into their importance in determining policy options.

IV. DEFORMALIZED AGREEMENTS IN ACTION

The previous Part illustrates the density on collaboration among U.S. and Mexican government agencies, departments, and ministries. The timing of these agreements also provides insight into the role of electoral cycles in their signing, as the number of signed agreements tends to increase as elections approach. However, the disclosed list of agreements does not provide evidence of how these agreements shape specific policies or the level of importance that government officials assign to them.

As stated in Part I, some scholars argue that these soft law instruments are inconsequential due to their lack of legal bindingness.[184] The next subsections challenge this assumption. The case studies provide evidence that these mechanisms are considered strategic for guiding the U.S.-Mexico relationship. Furthermore, by examining specific examples, this section sheds light on events in the binational relationship where these *deformalized agreements* influenced policy and legal outcomes. While not all interinstitutional agreement significantly impact government policies, it is incorrect to dismiss their effectiveness solely because they are not classified as traditional treaties or binding agreements.

A. The Strategic Areas of Collaboration.

On April 4, 2018, President Trump announced plans to deploy the U.S. National Guard to the Mexican border to "crack down" on illegal immigration. [185] According to the White House, the measure was warranted since Mexico was doing nothing to stop the illegal flow of

184. *See* Steinberg, *supra* note 51, at 340.

185. *See* Seung Min Kim, *Trump Is Sending National Guard Troops to the U.S.-Mexico Border*, WASH. POST (Apr. 4, 2018), https://www.washingtonpost.com/politics/trump-to-sign-proclamation-to-send-national-guard-troops-to-the-us-mexico-border/2018/04/04/9f9cd796-3838-11e8-acd5-35eac230e514_story.html.

migrants from Central America.[186] In contrast, Mexico considered the militarization of the border as a direct threat to its national sovereignty.[187] In a nationally televised address, President Peña Nieto directly rebuked President Trump's plans and threatened to stop cooperation with the United States on security and migration issues.[188] As part of his strategy, President Peña Nieto ordered the creation of a "Diagnosis of Key U.S.-Mexico Cooperation Activities," requiring federal agencies to report all critical areas of cooperation with the United States.[189] In other words, the Mexican government wanted to show President Trump that the United States needs Mexico just as much as Mexico needs the United States. President Peña Nieto wanted to showcase the many instances in which Mexico was a cooperative partner, and a significant player for Washington in many sectors, particularly in addressing security threats.[190] However, the report was never made public, and President Peña Nieto left office eight months later.

In response to the Mexican FOIA filed as part of this Article's research, the Ministry of Foreign Affairs released the Peña Nieto diagnosis, along with the list of MoUs and Letters of Understanding described above, on June 20, 2019.[191] The diagnosis of key cooperation activities is incredibly indicative of the level of bureaucratic involvement driving the bilateral relationship between the United States and Mexico. The diagnosis includes not only the interinstitutional legal instruments employed but also the types of meetings and official interactions that take place.[192] Furthermore, the list reveals that very few of these cooperation mechanisms actually involve international treaties. Rather, they primarily represent the

186. *See id.*

187. *See* Joshua Partlow, *Mexican president rebukes Trump over border threats*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/world/the_americas/mexican-president-rebukes-trump-over-border-threats/2018/04/05/99b8a49a-3914-11e8-af3c-2123715f78df_story.html.

188. *See id.*

189. *See* Vera, *supra* note 32.

190. Partlow, *supra* note 186.

191. *See* Mexican FOIA Response 1.

192. The role played by meeting and engagements with counterparts is partly recognized also by Bradley, Hathaway, and Goldsmith. They, however, codified in their research the joint statements and communiques that emerge after the meetings of government officials take place, instead of the instruments that created the working groups. *See* Bradley et al., *supra* note 44, at 1287.

informal networks of cooperation and interinstitutional agreements that are shaping legal obligations.

The report presented by the Mexican Ministry of Foreign Affairs includes 331 active "agreements or mechanisms" of cooperation with the United States in 2018, which Mexico considers the "primary activities of collaboration."[193] In other words, we can safely assume that these were ongoing activities of high relevance for both nations. The report highlighted the participation of 20 federal government ministries, departments, and agencies. This does not include the judiciary, congress, state authorities, or autonomous agencies. Thus, the mechanisms described below fall directly under the federal executive's purview. Of these 331 agreements, 143 are interinstitutional agreements.[194] That is, 43% of the priority cooperation activities between the United States and Mexico rely on MoUs and Letters of Intent rather than on traditional international treaties or executive agreements. Notably, few of these agreements are recorded or disclosed by the U.S. State Department under the Case Act of 1972.[195]

The report includes five types of collaboration mechanisms: international treaties, inter-institutional agreements (MoUs and Letters of Agreement), joint programs/protocols, bilateral official commissions, and binational groups (high-level dialogues, regular meetings among officials, informal collaboration mechanisms, joint reports, and yearly summits). As the graph below shows, the vast majority of the collaboration mechanisms are interinstitutional agreements. These soft legal instruments serve as the primary method for interagency cooperation.[196]

193. *See* Mexican FOIA Response 1. For a discussion on the soft law classification, *see supra* Part II.

194. *See* Guillermo J. Garcia Sanchez, MX Data Base (on file with the Fordham International Law Journal).

195. Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended as the Case Act at 1 U.S.C. § 112b)

196. Some scholars have referred to these type of agreements as soft law due to the fact that they do not contain concrete legal obligations. *See, e.g.*, Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 201–21 (2010); Dinah L. Shelton, *Soft Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68 (David Armstrong ed., 2008).

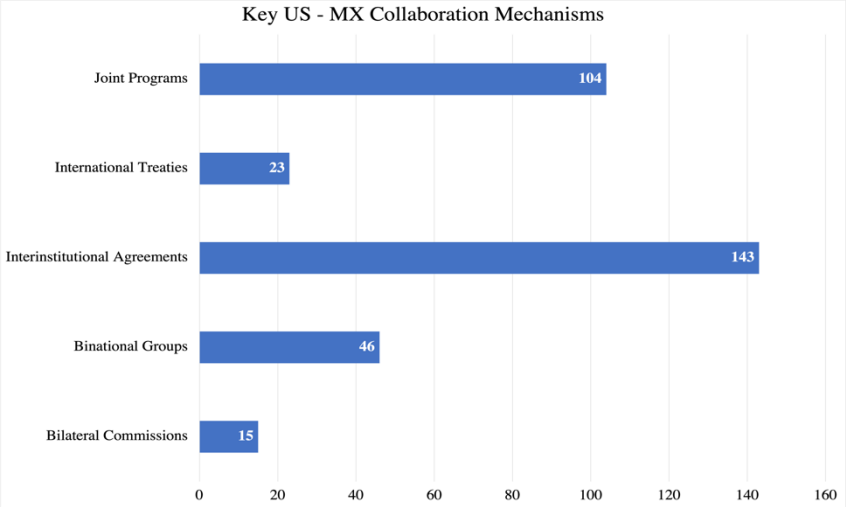


Table 1: Key U.S.-Mexico collaboration mechanism disclosed by the Pena Nieto Administration.

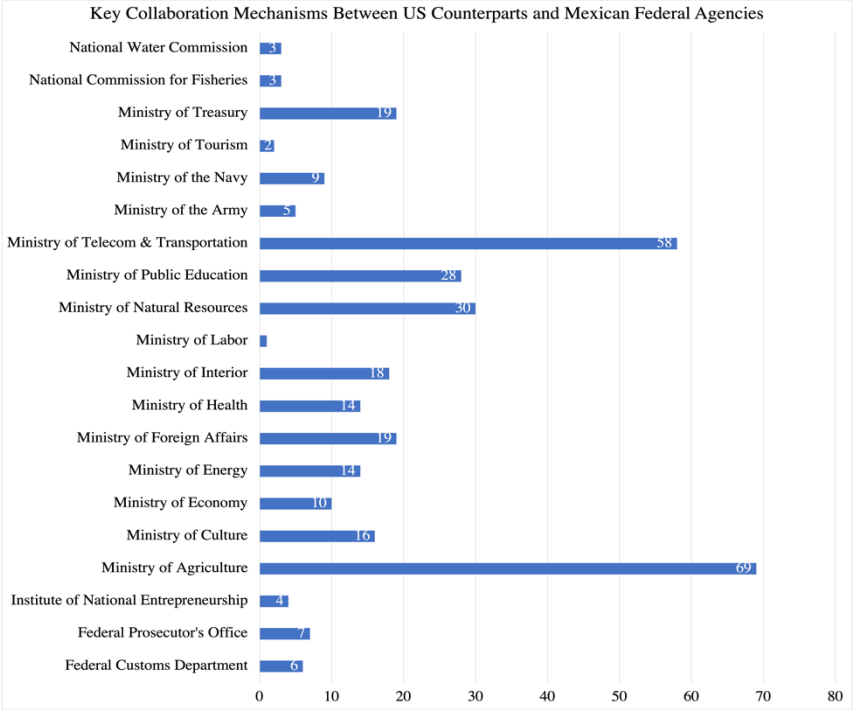


Table 2: Key U.S.-Mexico collaboration mechanism by agencies and departments at the Mexican federal level disclosed by the Pena Nieto Administration.

B. Working Groups and Commissions

Binational groups and commissions hold significant influence in shaping bilateral relations. They often lead to joint statements or communiques, interinstitutional agreements, and can lay the ground for high-level formal agreements negotiations.[197] While these mechanisms do not create binding international legal obligations, they are crucial for coordinating joint policies and sharing information.[198] Scholars such as Bradley, Hathaway, and Goldsmith have documented how joint statements and communiqués memorialize agreements following commission and working group meetings.[199] These statements clarify expected behavior and outline mutually agreed-upon actions.[200]

As described in the Introduction, the agreements between the Trump administration and the Mexican government on policies to address the Central American migrant surge was initially reported in a joint statement.[201] President Trump later revealed that both governments had, in fact, signed an interinstitutional agreement during the meeting to address the issue.[202] This example highlights how joint statements can precede formal agreements or summarize the key points of undisclosed interinstitutional agreement.

The importance of bilateral commissions and working groups is also evident in the "Key Collaboration Mechanisms" list disclosed by the Mexican government.[203] Below are some examples of these mechanisms, along with descriptions provided by Mexican officials:

197. *See* Bradley et al., *supra* note 44, at 1315.

198. *See id.* at 1304.

[199] *See id.* According to Bradley, Hathaway, and Goldsmith a joint statement and communique is "a joint text issued by representatives of at least two sovereign states after a meeting or a conference that memorializes what the national representatives agreed to, their intended subsequent courses of action on matters of mutual concern, or their common positions growing out the meeting." *Id.*

200. *Id*.

201. *See supra* Introduction.

202. *See id*.

203. *See* Mexican FOIA Response 1, *supra* note 19.

Examples of Key Binational groups and commissions		
Ministry	**Mechanism**	**Description**[204]
Foreign Affairs	XXI Century Border	Binational coordination mechanism for economic development, security, and the facilitation a safe and efficient flux of people and goods. The mechanism is divided into working groups (infrastructure, safe influx and security, and justice) and is supervised by a bilateral executive committee (CEB). It operates through specialized subcommittees that implement annual working plans.
Foreign Affairs	Bilateral Working Group on Cyber policies	This is the only channel to attend to bilateral cyber issues and to strengthen bilateral cooperation and explore areas of opportunity in the area.
Foreign Affairs	Trilateral Meetings on Human trafficking	The objective of the meetings is to combat human trafficking in all of its modalities, including to strengthen services to victims, improve criminal prosecutions, and promote prevention activities.
Foreign Affairs	Prevention of Violence at the Border Group	A group responsible for making policy decisions to prevent border violence incidents through collaboration efforts, joint public participation campaigns, increased transparency, and sharing best practices.

204. The activities description is a direct translation into English from what was reported by the officers.

Foreign Affairs	Informal mechanism for the revision of high visibility cases involving civil rights violations against Mexican national	Reviews high visibility cases involving the violation of civil rights of Mexican nationals in the United States, including the use of lethal force, excessive force, hate crimes, labor exploitation, discrimination, and human trafficking.
Ministry of Interior and Department of Homeland Security	Executive Committee SEGOB-DHS	The committee focused on bilateral cooperation in national security, public security, social peace, and prosperity on both sides of the border. Also combats illicit transnational activities
Ministry of Interior	Bilateral Security Cooperation Group U.S.-Mexico	Strategic engagement in decision-making processes and coordination of national security policies
Ministry of the Navy	Strategic Dialogue for Trilateral Security Cooperation (Mexican Navy-US Coast Guard-Colombian Navy-NORTHCOM-SOUTHCOM)	Cooperation mechanism for security in the region
Ministry of Defense	Trilateral Defense Working Group	Forum for officials at the rank of defense undersecretaries and below to establish cooperation mechanisms between the Mexican Ministry of Defense and the U.S. Department of Defense on security and national defense.
Ministry of Defense	U.S.-Mexico Border	A mechanism for commanders to discuss joint challenges at the U.S.-Mexico

	Commanders Junta	border, strengthen relations among the army forces, and foster the exchange of information and know-how of activities deployed by the armed forces of both nations to implement better mechanisms at the joint border
Office of the Attorney general	Bilateral group for the prevention and control of the traffic of weapons	An information-sharing mechanism that promotes actions for mutual cooperation and the prevention of the illicit transportation of weapons, ammunition, parts, and explosives to Mexico.
Office of the Attorney general	U.S.-Mexico Bilateral Group on Fugitives and Legal Affairs	A working group for specific cases and challenges arising from extradition and judicial assistance proceedings.
Ministry of Tourism	Working group for Statistics	Working group with the United States and Canada focused on developing joint statistics methodology for the tourism industry.
Ministry of the Environment and Natural Resources	Commission on Environmental Cooperation (CEC)	Principal forum for environmental cooperation with North America. The biannual cooperation program administers trilateral projects for the five-year priorities (2015-2020): climate change adaptation and mitigation, green growth, and sustainable communities and ecosystems. Current cooperation issues include monarch butterfly, blue carbon emission, ANPs [Protected Natural Areas], ECA [Environmental Cooperation

		Agreement], and more.[205] Also oversees development of projects in different areas: marine pollution, COA/RETC reports, organic waste, adaptation to climate change, chemical substances.[206]
Ministry of the Environment and Natural Resources	Joint Consulting Committee (JCC) for the improvement on air quality in basin of Ciudad Juarez, Chihuahua/El Paso, Texas County/ Doña Ana, New Mexico	The General Directorate of Air Quality Management and Registry of Emissions and Transfer of Pollutants (DGGCARETC in Spanish acronym) is the co-president of the JCC, which serves as the organization that supervises the improvement process aimed at achieving cleaner air in the region of El Paso del Norte (Chihuahua, Texas, and New Mexico).
Ministry of Communication and Transportation	Joint Working Committee for Cross border Transport	Bilateral mechanism for cross-border transportation to discuss strategies and actions to speed cargo transport transit between both countries, such as measuring waiting times, traffic segmentation, methods for cargo inspection, analysis of binational flux of cargo; among others. Two MoUs involved; 1) for the

205. The ANPs are protected areas due to their environmental and biodiversity importance. *See Áreas Naturales Protegidas*, GOBIERNO DE MÉXICO (Oct. 8 2024), https://www.gob.mx/conanp/documentos/areas-naturales-protegidas-278226 [https://perma.cc/9A59-MQEQ].

206. Under Mexican legislation the annual operation permit (*cédula de operación anual* in Spanish, or COA) is a reporting mechanism of annual emissions and pollution transmissions. The RTC is the national registry of the emissions and pollution transmissions reported in the CEO by each company or individual (*registro de emisiones y trasnferencia de contaminantes* in Spanish). Article 8 regulates the conditions under which an interinstitutional agreement may "contain international dispute resolution mechanisms for legal disputes in which the federal government, or Mexican natural or moral persons, are involved in with foreign governments, natural or moral persons or international organizations."

		coordinated planning of transport along all the border and 2) to reinforce the working relationship developed across time.
Ministry of Health	Agreement to Create a Border Health Commission between U.S. and Mexico	A binational organization created with the goal of identifying and evaluating health problems that affect population living along the border. Also facilitates actions for the care of the population through the exchange of resources and the collaboration of talents from both nations.
Ministry of Health	Binational forum on emerging diseases transmitted by mosquitoes along the U.S.-Mexico border	The forum is tasked to revise and improve the communication and cooperation mechanisms to detect, prevent, and control the emergence of infectious diseases transmitted by mosquitoes on both sides of the border.
Ministry of the Treasury	Bilateral Public-Private Banking Working Group	Collaborates between the public and private sector to identify tendencies, priorities, and strategies that help combat the illicit transnational finance flux.
Ministry of the Treasury	Strategic Dialogue on Illicit Finance	Safeguards the economies and financial systems of both nations from illicit finance flux

Table 3: Key U.S.-Mexico collaboration mechanisms disclosed by the Peña Nieto Administration.

The above-described working groups and commissions may derive from preexisting treaties, such as the Commission on Environmental Cooperation created under NAFTA, while others are formed through interinstitutional agreements.[207] What they all share is

207. The CEC was created by the North American Agreement on Environmental Cooperation (NAAC) with the objective of enforcing environmental standards in the region. The

their significant impact on shaping public policy, both domestically and in bilateral relations. These groups coordinate agencies, set collaboration agendas, and manage the deployment of personnel and resources to strengthen the bilateral relationship. The next two Sections provide specific examples of the substantial impact of these agreements, working groups, and commissions.

C. Law Enforcement Collaboration: the Cienfuegos Affair.

While non-binding in nature, *deformalized agreements* have a substantial influence on international law enforcement cooperation, as evidenced by the actions taken by U.S. officials in the *Cienfuegos* case. These agreements enable states to engage in critical, high-stakes collaboration without requiring formal treaty ratification. In October 2020, General Salvador Cienfuegos, Mexico's former Secretary of Defense (2012–2018), was apprehended at Los Angeles International Airport on charges of alleged drug trafficking. Cienfuegos was a key strategist in anti-drug initiatives during the Enrique Peña Nieto administration.[208]

Despite his role in anti-drug strategies, U.S. law enforcement agents alleged that Cienfuegos was involved in money laundering activities and drug trafficking operations for the Beltrán-Leyva cartel.[209] The allegations included accusations of shielding the cartel by orchestrating operations against rival cartels and facilitating the transportation of drugs into the United States.[210]

NAAEC came into force as a side agreement to NAFTA. For a history of the CEC, NAFTA, and its operation, see Bradly J. Condon, *NAFTA and the Environment: A Trade-Friendly Approach*, 14 NORTHWEST J. INT'L L. BUS. 528 (1994); John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L. Q. 1 (2001). For a review of how the USMCA integrated the environmental protections and the work of the CEC, see Brice Armel Simeu, *Free Trade 2.0: How USMCA Does a Better Job than NAFTA of Protecting the Environment*, CONVERSATION (SEPT. 24, 2020), http://theconversation.com/free-trade-2-0-how-usmca-does-a-better-job-than-nafta-of-protecting-the-environment-146384 [https://perma.cc/62SH-RCRE].

208. *See* Sheridan, *supra* note 33.

209. According to the indictment against Cienfuegos, the General "knowingly and intentionally conspire to manufacture and distribute one or more controlled substances, intending, knowingly and having reasonable cause to believe that such substances would be unlawfully imported into the United States." Indictment CR 19–366, U.S. v. Salvador Cienfuegos Zepeda, E.D.N.Y., August 14, 2019, p. 1.

210. *See* Sheridan, *supra* note 33.

Critical to the U.S. indictment against Cienfuegos were intercepted cellphone calls, obtained through surveillance conducted by DEA agents operating in Mexico.[211] These agents had been granted special visas by the Mexican government, allowing them to carry out intelligence operations under the terms of an MoU.[212] Under the interinstitutional agreement, U.S. agents were obligated to share information gathered in Mexico with their Mexican counterparts—a provision that was notably overlooked by DEA agents in the *Cienfuegos* case.

Following Cienfuegos' detention in Los Angeles, the Mexican Minister of Foreign Affairs dispatched a diplomatic memorandum to then-U.S. Attorney General Bill Barr, threatening to suspend Mexican cooperation and recall all DEA agents due to breaches of the 1999 MoU.[213] In a surprising turn of events, Barr chose to drop the charges against Cienfuegos to preserve "the United States' relationship with Mexico and cooperative law-enforcement efforts" concerning "narcotics trafficking and public corruption."[214] In its reversal, the DOJ explained that "the United States . . . determined that sensitive and important foreign policy consideration outweigh the government's

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211. *See id.*

212. Lineamientos que regulan la relación de servidores públicos con agentes extranjeros, DOF: 14-01-2021, Ciudad de México, available at: https://dof.gob.mx/nota_detalle.php?codigo=5609826&fecha=14/01/2021#gsc.tab=0 [https://perma.cc/HG76-8ULY] (*see* articulo Transitorito Segundo where it states that "The provisions that conflict with what is established in these Guidelines are hereby repealed. For the particular case of the United States of America, and since it does not conflict with these Guidelines, the validity of the Memorandum of Understanding signed between the government of the United States of America and the government of the United Mexican States regarding cooperation procedures in matters of law enforcement activities, signed in Mérida, Yucatán, on February 15, 1999, is recognized. Its objective is to implement the steps outlined in the Letter signed by the Attorney General of each government during the meeting held on July 2, 1998, in Brownsville, Texas, to coordinate and foster cooperation between both countries in activities related to justice cooperation that affect both nations. The 1999 Memorandum of Understanding and the 1998 Brownsville Letter are jointly referred to as the "Brownsville-Mérida Agreement." In particular, the validity of the bilateral commitment to provide prior communication, conduct consultations, and report on the activities of Foreign Agents, as contemplated in the SIXTH Guideline of this instrument, is recognized.") (author's translation).

213. Tim Golden, *Dropping the Charges Against General Cienfuegos was William Barr's Call*, PROPUBLICA (Dec. 8, 2022), https://www.propublica.org/article/william-barr-mexico-cartels-cienfuegos-case [https://perma.cc/4CPC-N988].

214. Tim Golden, *The Cienfuegos Affair: Inside the Case That Upended America's Drug War*, PROPUBLICA (Dec. 8, 2022), https://www.propublica.org/article/mexico-drug-cartels-cienfuegos-case-dea [https://perma.cc/XM4C-NNMN].

interest in pursuing the prosecution of the defendant."[215] Subsequently, Cienfuegos returned to Mexico, where, after a brief investigation by Mexican authorities, the charges were dismissed.

The fallout from the Cienfuegos scandal prompted a comprehensive review of all bilateral interinstitutional agreements on law enforcement involving foreign agents in Mexico. This review culminated in a 2021 presidential decree requiring government agents to regularly report to a high-level executive branch task force about communications and data sharing with foreign agents. Importantly, the decree reaffirmed the commitment to collaboration and cooperation with the United States, as stipulated in the 1999 MoU.

The *Cienfuegos* case underscores the reliance on non-ratified interinstitutional agreements in crucial law enforcement and national security activities.[216] These agreements, though lacking formal legislative ratification, facilitate investigations in high-profile cases, involving various law enforcement agencies, thereby delineating the boundaries and contours of their overseas operations.[217] Despite their non-binding nature, the breach of these interinstitutional agreements provided the basis for the Mexican government to advocate for a change in prosecutorial discretion in the United States, ultimately influencing Bill Barr's decision to drop the charges against Cienfuegos.[218] Consequently, the absence of these agreements within formal international treaties or containing binding obligations does not diminish their effectiveness in shaping bilateral relationships.

D. Regulatory Harmonization in the Energy Sector

On February 26, 2016, regulators from Mexico and the United States met in Galveston, Texas, to discuss the future development of

215. United States v. Salvador Cienfuegos Zepeda, Criminal Docket No. 19-366 (CBA), Motion Requesting Dismissal of the Indictment, at 1.

216. For scholarship related to the role of law enforcement agencies in shaping foreign affairs and bilateral relations, see generally Steven Arrigg Koh, *Othering Across Border*, 70 DUKE L. J. ONLINE 161 (2021) [hereinafter Koh, *Othering Across Border*]; Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340 (2019) [hereinafter Koh, *Foreign Affairs Prosecutions*].

217. *See* Koh, *Othering Across Border*, *supra* note 215, at 180–81.

218. *See* Golden, *supra* note 213.

joint transboundary hydrocarbon deposits in the Gulf of Mexico.[219] During a conversation held as part of an academic symposium, authorities on both sides recognized the value of a 2015 letter of intent between the Mexican National Agency for Industrial Safety and Environmental Protection of the Hydrocarbons Sector and the U.S. Bureau of Safety and Environmental Enforcement.[220] The letter of intent expressed the countries' desire to continue "cooperation in the environmental and hydrocarbons sector." The materialization of the effort included the following activities:[221]

- Periodic information and experience exchanges.
- The organization of bilateral events and delegation visits.
- The participation as observers in activities related to their authorities.
- Conducting joint studies and research.
- Training of staff.

The results of the letter of intent were palpable in the remarks made by the regulators at the Galveston Symposium. The interinstitutional agreement led to cooperation in harmonizing important pieces of regulation, particularly on safety and environmental management systems for the hydrocarbons industry operating in the Gulf of Mexico.[222] The value of such cooperation

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219. *See* Guillermo J. Garcia Sanchez, *Mexico's Energy Reform and the 2012 U.S.-Mexico Transboundary Agreement: An Opportunity for Efficient, Effective and Safe Exploitation of the Gulf of Mexico*, 9 SEA GRANT L. POL'Y J. 1,1 (2018).

220. *See* Letter of Intent Between the National Agency for Industrial Safety and Environmental Protection of the Hydrocarbons Sector of the United Mexican States and the Bureau of Safety and Environmental Enforcement – United States Department of Interior, signed in Washington, D.C., Oct. 20, 2015, available at https://www.bsee.gov/sites/bsee.gov/files/statement//bsee-asea-loi-signed-10-20-15-english.pdf.

221. *See id.* Terms of Cooperation.

222. In the words of the ASEA representative:

> For ASEA it will be easier to draft regulations that cover the whole Gulf of Mexico that are in harmony with US GOM Regulation. So, in this first effort to harmonize regulations, ASEA decided to establish a conversation with BSEE. BSEE has reviewed and provided input to our draft and hosted a workshop for ASEA in Washington, D. C. ASEA's delegation learned much about BSEE's SEMS, and they got a chance to see the challenges and where BSEE was going with its next SEMS rules. We are pleased to say that our elements of SEMS requirements are quite compatible with BSEE's SEMS. This is a first example of successful cooperation in trying to harmonize a very important piece of regulation. The next step is to harmonize the procedures of the SEMS. We worked with BSEE because both parties were willing, but there is no formal agreement to continue this effort. We do not have

agreements was reinforced a year later when both regulators signed an MoU expanding their regulatory cooperation to include more specific areas and actionable modalities of collaboration.[223] For example, the MoU explicitly established cooperation mechanisms such as periodic exchanges of information, exchange of best practices, lessons learned, and sharing of expertise. It also included the organization of bilateral events, workshops, and delegation visits, and provisions for staff exchanges and access to training courses for technical staff and inspectors.[224]

In a few words, the MoU serves as a mechanism for Mexico and the United States to harmonize regulation on the exploitation of hydrocarbon fields in the Gulf of Mexico.[225] From a practical perspective, the agreement is consistent with an effort to provide a common standard for industries that operate in similar circumstances. Mexico and the United States might have different regulatory agencies

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> a permanent framework or agenda, nor a pilot group, to work to determine what regulations should be harmonized, and so we have an opportunity to get this in place and that would lead us to be successful. It is important that we adopt and have mandatory compliance of national and international standards as well as the adoption of industry's best practices.

See Transcript from the Symposium on Improving Cooperation for a Sustainable Gulf of Mexico After the 2014 Mexican Energy Reform, 9 SEA GRANT L. POL'Y J. 1, 11–12 (2018). The same sentiment was echoed by the U.S. BSEE representative,

> The Vice President of the United States and Secretary of Interior just met with a delegation from Mexico, and we have a broader agreement that has just been put in place. We have other similar agreements. BSEE's priorities are on the Americas, so that means Canada, Mexico, and soon Cuba. We also look at the Caribbean and mid and South America. We stage meetings annually with all of the regulators that want to get together. There is a social component to the meetings that helps identify who our counterparts are and allows for meaningful dialogue as we get to know each other better. This kind of dialogue is as important as a formal Letter of Intent.

Id. at 12.

223. Memorandum of Understanding Between the Bureau of Safety and Environmental Enforcement of the Department of Interior of the United States of America and the National Agency for Industrial Safety and Environmental Protection of the Hydrocarbons Sector of the Secretariate of the Environment and Natural Resources of the United Mexican States on Cooperation Regarding Oversight, and Enforcement of Safety and Environmental Regulations for Development of Offshore Hydrocarbon Resources, signed in Washington, D.C. on Oct. 4, 2016, available at https://www.bsee.gov/sites/bsee.gov/files/mou_-_2016bsee-asea.pdf [https://perma.cc/4NWK-DP7Z].

224. *See id.*

225. *See* Guillermo J. Garcia Sanchez & James W. Coleman, *North American Energy in the Crossfire*, 55 CORNELL INT'L L.J. 215, 249–55 (2022) (arguing that in order to integrate the north American energy markets the U.S. and Mexico require further agreements on common regulatory policies).

and constitutional frameworks for developing hydrocarbon deposits, but they share a common geological and maritime space in the Gulf of Mexico.[226] Forcing companies, especially those operating in transboundary fields, to comply with different and sometimes competing standards could result in less safe operational environments or even dangerous scenarios for people working in the deep sea.[227] The MoU allows the regulators to harmonize regulations without going through congressional or political bodies, thereby avoiding delays in establishing common standards.

V. NORMATIVE CONSEQUENCES OF THE EXPANSION OF DEFORMALIZED AGREEMENTS.

The increasing reliance on deformalized agreements reflects a broader shift in international governance. By using these mechanisms, governments can address complex challenges without the procedural delays and oversight that often accompany formal treaties, thereby creating a more adaptable framework for international cooperation. What are the consequences of their expansion? There are two main lessons, amongst many others. First, from an international law perspective, the traditional accountability mechanisms that once regulated the executive branch's foreign relations powers have been diminished with the expansion of these agreements.[228] It is one thing for the president to engage in international treaty-making without much congressional supervision.[229] However, it is quite another for different agencies to participate in international norm creation without precise

226. *See generally* Guillermo J. Garcia Sanchez & Richard J. Mclaughlin, *The 212 Agreement on the Exploitation of Transboundary Hydrocarbon Resources in the Gulf of Mexico: Confirmation of the Rule or Emergence of a New Practice?*, 37 HOUS. J. INT'L L. 681, 686–87 (2015) (reviewing the importance of international agreements regulating transboundary fields).

227. *See id.*

228. *See generally* JACK L. GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (1st ed. ed. 2012) [hereinafter Power and Constraint]; Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359 (2013); Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395 (2019); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139 (2018); Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces That Entrench Executive Power*, 110 AM. J. INT'L L. 680 (2016).

229. *See* Ingber, *The Obama War Powers Legacy and the Internal Forces That Entrench Executive Power*, *supra* note 227 at 685–87 (explaining how the president can act without political control in the conduction of foreign affairs).

and transparent regulatory procedures.[230] Traditional regulatory oversight relies heavily on the outdated classification of their level of bindingness. This approach fails to capture the fact that even those classified as non-binding have direct consequences on international state engagement and policy.[231] MoUs or Letters of Intent classified as non-binding can be just as effective in shaping government policies as those with robust enforcement mechanisms and legal obligations.[232] In Mexico, even non-binding agreements are considered administrative norms binding upon the officials who signed them, thus greatly influencing governing powers.[233] Mexican legislation regulating MoUs and Letters of Intent acknowledges their internal legal hierarchy, enabling bureaucrats to frame their decisions as international commitments made with foreign counterparts. In other words, these agreements modify government policies justified as international obligations. Thus, regardless of classification as binding or non-binding, these deformalized agreements exert considerable influence over government policies.

One could argue that the uncoordinated signing of the agreements and the lack of clarity on their legal hierarchy as irrelevant from the policy perspective. Ultimately, the work gets done, states' relationships continue in good health, and bureaucrats achieve their internal policy goals.[234] The problem, however, lies in the fact that it is virtually impossible to measure the value of the agreements in the governing process without a clear understanding of their value within the internal system of government. If the United States does not consider these agreements as important enough to report, then why sign them at all? Why, as the evidence shows, do cycles of internationalization of commitments between bureaucrats correspond with election cycles? At the very least, these instruments hold signaling value of among countries.[235] These agreements create expectations, and increase binational engagement levels and accountability.[236] A process of

230. *See id.* at 31.

231. *See* Bradley et al., *supra* note 44, at 24.

232. *See id.*

233. *See supra* at Section II.3.

234. GOLDSMITH, *supra* note 227; Ingber, *supra* note 227.

235. As documented by Bradley, Goldsmith and Oona, the practice is commonly extended around the globe. *See* Bradley et al., *supra* note 44, at 1335–46.

236. During a webinar at the Baker Institute on the subject, former Mexican ambassador Geronimo Gutierrez, and former U.S. ambassador to Mexico, Cristopher Landau, shared their

reporting these commitments, coupled with more robust supervision mechanisms, would give the governing powers, and potentially the public at large, the ability to determine whether the agreements are efficient. Additionally, it would also provide other branches of government knowledge of what is being negotiated by all government actors.[237]

Moreover, from an international relations perspective, a head of State is not fully prepared to engage and negotiate with another government if they ignore the actions of bureaucracies. President Peña Nieto's efforts to create a database of key collaboration mechanisms with the United States highlight the frustration of a government that lacks a clear understanding of its bureaucratic engagement levels. A well-structured foreign policy involves having a skeletal understanding of every mechanism that connects governments, especially in the case of the United States and Mexico. [238] Otherwise, it is easy to have the wrong understanding of what other states are doing to benefit or affect a neighboring nation.[239]

Second, the expansion of nontraditional methods of State engagement with international law can yield positive results for binational relationships. Research by Abraham and Antonia Chayes, later expanded by Anne-Marie Slaughter, regarding the power of networks in the expansion, creation, and definition of international law confirms this theory.[240] Government officials who interact, collaborate,

views on the importance of the institutional architecture of the relationship and how the lack of a deep understanding of it frustrates the work of ambassadors in conducting foreign policy. In the words of U.S. Ambassador to Mexico Christopher Landau

> It is critical . . . to have this type of database just that there is some sort of institutional memory . . . as you can imagine that kind of nuts and bolt agreements it is not generally very controversial, it may be controversial when its being negotiated but then it takes care of itself, there is a bureaucracy in each country that knows what the terms of each agreement are and follow the terms of that agreement.

Webinar: What Can and Cannot Be Done: Agreements that Frame the U.S.-Mexico Relationship, BAKER INST. PUB. POL'Y (Oct. 13, 2021), https://www.bakerinstitute.org/events/2252/ [https://perma.cc/5QJ7-MPMY].

237. *See id.*

238. *See id.*

239. *See id.*

240. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2005); Anne-Marie Slaughter, *Liberal Theory of International Law*, 94 PROC. ASIL ANN. MEETING. 240 (2000); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (New Edition ed. 2009); Harold Hongju Koh et al., *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997).

and draft interinstitutional agreements implement international law at the ground level. They shape and follow it daily, even without robust enforcement mechanisms attached to the agreements. Dismissing these agreements as "administrative international law" or "soft law" does not make them less efficient in their application.[241] For those who believe that compliance with international obligations has a positive normative consequence, the research presented here is reassuring. However, I maintain a less optimistic view. As I explained in my earlier work, I do not believe that international law compliance constantly yields the desired normative results.[242] I believe that international law, like any other governing norms, is the reflection of competing power dynamics. At times its implementation, masked as a positive for humanity and world order, generates unintended consequences at the domestic level.[243]

Focusing on the case at hand, is it desirable that Mexican and U.S. bureaucrats are implementing agreements signed with their counterparts without any objections or supervision? From a liberal perspective of international law, the answer is yes. Even from a positivist perspective, regardless of whether these are soft law agreements, *pacta sunt servanda* should be the primary principle guiding the result.[244] However, if one takes the position that these

241. *See generally* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, L. CONTEMP. PROBS. 15 (2005); Sabino Cassese, *Administrative Law without the State - The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. POL. 663 (2004); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2. J. LEGAL ANALYSIS 171, 201–21 (2010); Dinah L. Shelton, *Soft Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68 (David Armstrong ed., 2008).

242. *See generally* Guillermo J. Garcia Sanchez, *To Speak with One Voice: The Political Effects of Centralizing the Legal Defense of the State*, 34 ARIZ. J. INT'L COMPAR. L. 557 (arguing that by centralizing the defense of the state in the executive branch leads to the manipulation of the arguments made in international judicial bodies to get a decision that might impact other political branches domestically); Guillermo J. Garcia Sanchez, *A Critical Approach to International Investment Law, the Hydrocarbons Industry, and Its Relation to Domestic Institutions*, 57 HARV. INT'L L.J. 475 (2016) (arguing that international investment arbitration awards have domestic political agenda impact that is not captured in the literature that seeks to evaluate the effectiveness of investment law in shaping state behavior); Guillermo J. Garcia Sanchez, *Defrosting Regulatory Chill*, 45 U. PENN. J. INT'L L. 597 (2024) (describing how government have an incentive to drag international arbitral proceedings to avoid having to avoid having to face the consequences of their policies).

243. *See* Sanchez, *The Political Effects of Centralizing the Legal Defense of the State*, *supra* note 241.

244. *See* Vienna Convention, *supra* note 35, at art. 26 ("every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

agreements are avenues for underrepresented interest groups in the United States or Mexico to push their agendas in the open public and take action at the bureaucratic level, then the answer might be different. President Trump's "secret deal" with Mexico exemplifies skepticism toward the liberal perspective. A photograph by a reporter is the only reason we were able to see the agreement, otherwise the U.S. and Mexican public likely would have remained in the dark about its contents. What the agreement shows is the imposition of a particular agenda by the United States meant to be harmful to Mexico. This was achieved through a letter of intent because it is a cleaner approach to binational cooperation—free of the opinions, politics, and complications often encountered in formal treaties or agreements.[245]

Lastly, this Article departed from the traditional categories of soft law, administrative law, and transnational law by proposing a new concept: *deformalized agreements*. This concept provides a framework for understanding the growing global trend of avoiding formal, legally-binding agreements. Actors increasingly view the formal processes associated with international agreements—such as executive agreements or treaties—as cumbersome and restrictive. Instead, they opt for informal mechanisms like mutual understandings, letters of intent, and non-binding agreements. These tools function as signaling devices that set expectations for behavior and guide future cooperation. While informal, these mechanisms are still "legal" in the sense that they operate within the scope of statutory authority granted to the relevant government actors. However, they do not trigger the public international law doctrinal categories traditionally associated with formal agreements. Crucially, the choice to deformalize relations is intentional and strategic.

Furthermore, the deformalization of relations expands the range of actors involved in international cooperation, enabling entities like local governments, consular officials, and state agencies to engage in global coordination and collaboration. By utilizing deformalized agreements, these actors circumvent the constitutional and public international law constraints that typically limit their ability to participate in foreign affairs. By classifying their commitments as "non-binding," they avoid the heightened scrutiny and central oversight that formal agreements entail. This allows them to pursue their objectives, such as behavioral coordination with foreign

245. *See supra* Introduction.

counterparts, without triggering the legal processes that could slow down or obstruct their efforts.

On a broader level, this Article demonstrates that the deformalization of international relations does not necessarily lead to diminished compliance with international commitments, whether formal or informal. Ultimately, states are composed of branches of government, agencies, and individuals who engage in policy-making. When these actors engage in deformalized relations, the evidence presented in this article shows that such practices can still shape policy outcomes. In fact, these agreements are often considered essential for maintaining and shaping bilateral relations, as seen in cases where lack of compliance leads to diplomatic repercussions—such as the *Cienfuegos* case.

In sum, deformalized agreements serve as effective tools for advancing international cooperation, expanding the range of actors involved, and shaping policy outcomes, even without formal legal bindingness.

VI. CONCLUSION

As demonstrated throughout this Article, *deformalized agreements* are not merely administrative conveniences but powerful tools for shaping bilateral cooperation and influencing policy. Their rise signals a new era of international relations where flexibility and pragmatism often supersede formal, legally binding agreements. This Article suggests that bureaucrats are the driving forces of international agreements through the deformalization of United States-Mexico relations. While we no longer have an expansion of traditional multilateral treaties, we have a decline of conventional Article II bilateral treaties as a way of regulating complex relationships.[246] For highly integrated nations, the expansion of bureaucratic deformalized agreements is a contemporary way of building international bilateral norms. Article II treaties are rendered obsolete by complexity. Is this a positive consequence? It will depend on the agenda. We cannot evaluate the full effect until we have an understanding of how effectively the treaties modify bureaucrats' behavior at the local level. But this Article provided evidence of concrete moments in which these

246. *See* Bradley et al., *supra* note 44.

deformalized agreements impacted public policy and set the grounds for future research on the topic.

For United States-Mexico relations, the Article probes that both nations cooperate at the bureaucratic level more than the media or political debates in the United Sates and Mexico might suggest. what is usually reported in the media or in political debates on both sides of the border.[247] The Article confirms the complexity of the relationship and how it is rarely talked about as being as intense and strategic. This is clear compared to the way the mainstream narrative conveys the "special relationship" between the United States and United Kingdom. [248] The U.S.-Mexico relationship is less spotlighted and mainly lead by bureaucratic engagement at different agencies, departments, and levels of government.

The relationship is also highly involved at the state and municipal levels.[249] Even though this Article did not detail the types of agreements signed between state authorities, it shows that local governments know the importance of collaborating and cooperating with their Mexican counterparts.[250] International relations scholars have recognized the role of local actors in shaping foreign policy, but legal scholarship on

247. *See* Greg Grandin, *Opinion | The Republicans Who Want to Invade Mexico*, N.Y. Times (Nov. 1, 2023), https://www.nytimes.com/2023/11/01/opinion/sunday/republican-war-mexico.html (the comments of U.S. legislator's on the need to "invade" Mexico due to its lack of cooperation on drug enforcements); *see also* Elías Camhaji González Isabella, *Mexico Launches US Campaign to Defend Its Reputation: 'We Will Not Allow Ourselves to Be Pushed Around,'* EL PAÍS ENGLISH (Mar. 15, 2023), https://english.elpais.com/international/2023-03-15/mexico-launches-us-campaign-to-defend-its-reputation-we-will-not-allow-ourselves-to-be-pushed-around.html [https://perma.cc/6BK3-BAMR].

248. U.S. & U.K. Special Relationship. GEORGE W. BUSH PRESIDENTIAL LIBRARY, https://www.georgewbushlibrary.gov/research/topic-guides/us-uk-special-relationship#:~:text=The%20term%20%E2%80%9Cspecial%20relationship%E2%80%9D%20was,States%20and%20the%20United%20Kingdom [https://perma.cc/UJ9Q-R4XD] (last visited June 6, 2024). *See also* POLICY & HISTORY, U.S. EMBASSY & CONSULATES IN THE UNITED KINGDOM, https://uk.usembassy.gov/our-relationship/policy-history/ [https://perma.cc/U38L-AYGZ] (last visited June 6, 2024); Eliot Wilson, *The Future of the 'Special Relationship': What Can Britain Offer America?*, THE HILL (June 3, 2024), https://thehill.com/opinion/international/4699639-the-future-of-the-special-relationship-what-can-britain-offer-america/ [https://perma.cc/QKT6-FXBL].

249. As explained above Mexican state and municipal authorities signed 298 agreements in the studied period. *See* Graph 1, *supra* Part III.

250. For a deeper understanding of the power and role of local authorities in guiding U.S.-Mexico relations, see Jorge A. Schiavon, LA INTERNACIONALIZACIÓN DE LOS GOBIERNOS LOCALES EN MÉXICO (2021), *see also* Samuel Lucas McMillan & Jorge A. Schiavon, *The* Future of U.S.-Mexico Relations: *Role of Sub-State Governments*, *in* THE FUTURE OF US-MEXICO RELATIONS 67 (Tony Payan et al. eds., 2020).

the matter has just begun.[251] The paper sets the ground for future legal research on the matter.

A second lesson from comparing agreements between the United States and Mexico is that bureaucratic engagement appears sensitive to political cycles, and deformalized agreements are one instrument that isolates policy from electoral politics. I do not argue that there is causation between elections and the signing of these agreements, but the data does suggest that during electoral cycles, there is an increase in the signing of the agreements. Further empirical research would be required to conclude whether the instruments are mechanisms to shield specific commitments at the bureaucratic level from political transitions. The data presented here suggest that that could be the case.

This Article also confirms several views presented by other scholars.[252] On the U.S. side, there have been historically few accountability mechanisms on *ex-ante* executive agreements signed by bureaucrats. Even within the executive branch, until very recently, few control mechanisms effectively kept track and supervised the level of international treaty-making efforts by bureaucrats. The current efforts by the State Department to supervise bureaucratic international law are too narrow in their interpretation of what constitutes a binding international agreement.[253] However, the reforms also recognize that these agreements have an impact on foreign policy and, therefore, require better coordination and transparency in their signing.

Mexico's system of reporting interinstitutional agreements is not perfect, but does provide greater transparency. The Mexican Ministry of Foreign Affairs seems to register all agreements, regardless of how the other side classifies them. Moreover, under the Mexican legal system, the registry of the agreements is subject to disclosure under transparency laws.

In conclusion, as formal treaties decline and bureaucratic actors take center stage, deformalized agreements offer a pragmatic and flexible alternative for managing critical issues, from security to trade. While these agreements may operate outside the formal treaty system, they have proven to be powerful tools for ensuring continuity and collaboration, even in politically charged situations. The Trump administration's "secret deal" with Mexico over immigration policy is

251. For a recent example of legal scholarship focusing on the state level, see Ryan M. Scoville, *supra* note 164.

252. *See* Bradley et al., *supra* note 44.

253. *See supra* Section I.V.

a striking example of how such agreements can quietly guide state behavior, often escaping public scrutiny while having profound policy implications. As the U.S.-Mexico relationship continues to evolve, these deformalized mechanisms will undoubtedly play a pivotal role in navigating the challenges ahead, offering a valuable template for understanding modern international governance.