

Nonbinding International Agreements:

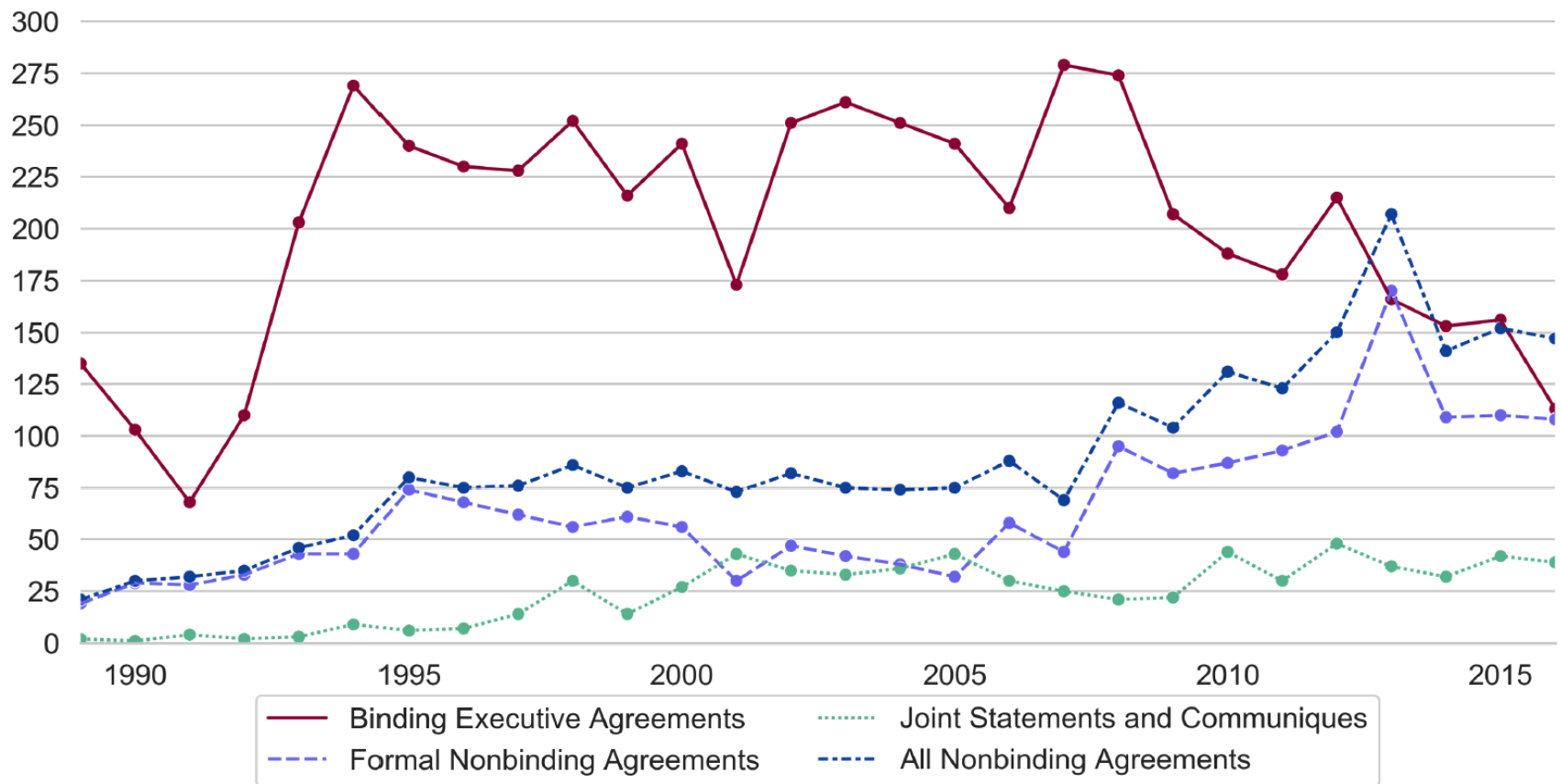
**“Circumvention” of treaty procedures
and good practices of risk mitigation**



Professor Oona A. Hathaway

United States Practice

FIGURE 3: AGREEMENTS, BY DATE CONCLUDED



From Curtis Bradley, Jack Goldsmith, and Oona Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis* (Chicago Law Review, 2023)

Why might negotiators prefer to use binding international agreements?

- *Pacta sunt servanda*: they want a directly enforceable commitment. Even if there is little prospect of direct legal enforcement, such an agreement may trigger reputational costs & reciprocal penalties.
- Domestic law and domestic enforcement: they may want to harness the domestic courts at home or abroad.
- Signaling: States may want to signal their commitment through making a binding agreement.
- If a state is making a significant up front commitment, it may want a binding agreement to increase the chance of performance by its partner.
- Negotiators may want predictability that a binding agreement provides.

Why might negotiators prefer to use nonbinding instruments?

- They do not want to subject themselves to the possibility of international enforcement or to the direct legal obligation that a binding agreement might entail.
- Domestic law may create major procedural, political, and legal hurdles to a binding agreement. Put simply, a nonbinding can be easier to make. (And partners may request or even require the arrangement be nonbinding.)
- States may see a nonbinding instrument as a starting point for building a deeper relationship. They may be able to take more risks.
- An agreement with iterated performance may not require legal enforcement. Mutual performance is enough of an incentive.
- Negotiators may want to keep the agreement secret.
- Negotiators may want greater flexibility or need to act quickly.

- The more challenging the process for making a binding agreement, the greater the incentive to shift to a nonbinding instrument.
- Areas with fast-moving technology may be better suited to nonbinding agreements.
- States may prefer nonbindings for politically sensitive topics.
- Agreements that entail ongoing performance—for example, information sharing agreements—don't require binding commitments.

When is “circumvention” a problem?

- When a nonbinding is used to avoid internal checks (including within the executive).
 - A particular concern is that nonbinding instruments might not be distributed even within the executive.
- When a nonbinding is used to avoid appropriate democratic scrutiny.
- When a nonbinding is used to avoid international law or domestic law constraints.
- When it is not made clear to the foreign partner that the agreement is, in fact, nonbinding.

Note that many of these problems can be addressed through appropriate transparency.

How different are binding and nonbinding agreements?

FIGURE 1: IS IT EXPRESSLY NONBINDING?

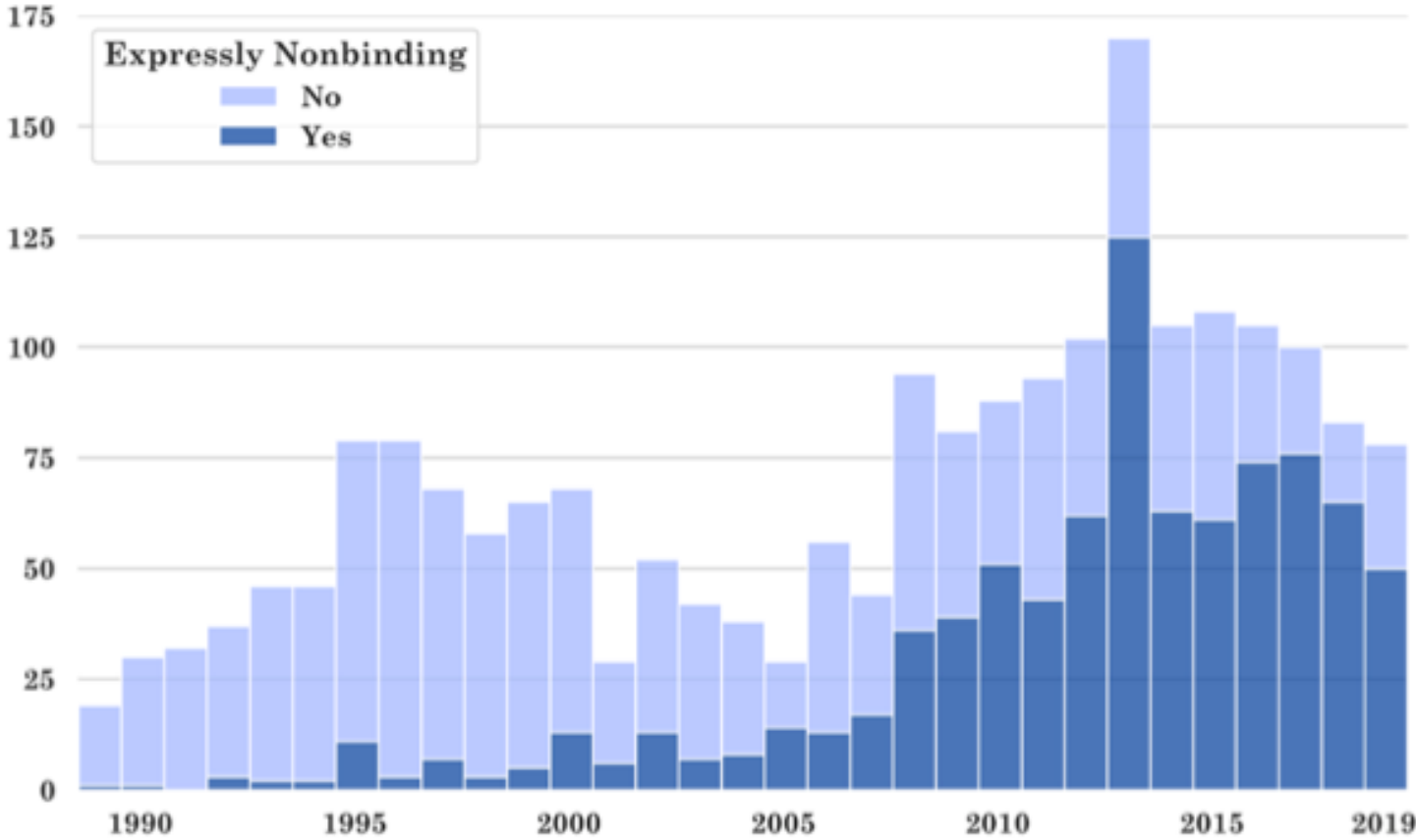


TABLE 4: USE OF TERMS IN FORMAL NONBINDING AGREEMENTS
RECOMMENDED AGAINST BY THE DEPARTMENT OF STATE

Terms	Total Agree- ments	All Agree- ments (%)	Expressly Nonbind- ing Agree- ments (%)	Not Ex- pressly Non- binding Agree- ments (%)
will	1641	69%	66%	71%
agreement	1520	64%	55%	70%
shall	1078	45%	31%	56%
parties	1062	44%	36%	50%
party	1011	42%	38%	46%
agree	764	32%	20%	41%
enter into force	451	19%	2%	31%
done at	370	16%	3%	24%
entry into force	331	14%	6%	19%
undertake	288	12%	9%	14%
treaty	261	11%	4%	16%
undertak- ing	157	7%	10%	4%
done in	140	7%	3%	8%
concluded	176	7%	4%	9%
agreeing	19	1%	1%	1%

TABLE 5: FEATURES FOUND IN FORMAL NONBINDING AGREEMENTS

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

TABLE 7: PRIMARY SUBJECT AREAS

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



FACT SHEET: DHS AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR

INTRODUCTION:

There is an ongoing humanitarian and security crisis at the Southwest border due to historic levels of irregular migration and human smuggling. Over 72% of all the migrants apprehended at the Southwest border through August of Fiscal Year 2019 were from the countries of the northern region of Central America, El Salvador, Honduras, and Guatemala. In recognizing the push and pull factors which cause irregular migration to the U.S., DHS has entered into agreements and arrangements with each of these countries to further expand asylum capabilities and improve safety, security, and prosperity throughout the region. With these agreements and arrangements, the U.S. is committed to being a good partner to its Central American neighbors and will work to develop an economically vibrant region. Together, DHS and its partners are developing a safer and more prosperous region so that Central Americans can feel confident in creating futures in their home countries, rather than putting their lives in the hands of smugglers and criminal organizations to make the dangerous journey across the U.S. border.

AGREEMENT TYPES:

Asylum Cooperative Agreements (ACAs):

These agreements with Guatemala, El Salvador, and Honduras, once brought into force, will allow migrants to seek protection within the region by facilitating cooperation between the U.S. and host nation governments or international organizations to expand their systems for offering humanitarian protections.

Border Security Arrangements:

The purpose of these arrangements is to deploy officials from U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement to advise and mentor host nation police, border security, immigration, and customs counterparts.

Biometric Data Sharing Program (BDSP) Arrangements:

These arrangements aim to enhance cooperation between DHS and Northern Triangle countries to prevent and combat crime and other threats to public security, by expanding biometric data collection and information sharing. The exchange of biometrics and identity data will enable DHS and Northern Triangle countries to more easily verify the identities of irregular migrants in order to detect the activities of transnational criminal organizations, human smugglers, and wanted criminals.

Temporary Agricultural and Non-agricultural Workers Programs Agreements:

Department of Labor agreement to improve non-immigrant visa program operations and implementation. These agreements strengthen bilateral cooperation between the U.S. and Northern Triangle countries. This is key to ensuring that vulnerable populations are not victimized as they seek legal temporary employment by further establishing safe and lawful recruitment, employment, and working conditions.



GUATEMALA



Border Security Arrangement (Guatemala Arrangement on Irregular Migration):

Signed: May 31, 2019

"Memorandum of Cooperation between the Department of Homeland Security of the United States of America and the Ministry of Government of the Republic of Guatemala on Security Activities that Make it Possible to Address Irregular Migration"

***H2A Agreement:**

Signed: June 30, 2019

"Agreement between the United States of America and the Republic of Guatemala concerning a Temporary Agricultural Workers Program"

Asylum Cooperative Agreement:

Signed: July 26, 2019

"Agreement between the Government of the United States and the Government of the Republic of Guatemala on Cooperation in the Examination of Protection Claims"

Biometrics Data Sharing Program Arrangement:

Signed: Aug. 22, 2019

"Memorandum between the Government of the United States of America and the Government of the Republic of Guatemala on Enhancing Border Security through the Exchange of Information"

HONDURAS



Asylum Cooperative Agreement:

Signed: Sept. 25, 2019

"Agreement between the Government of the United States and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims"

Border Security Arrangement:

Signed: Sept. 27, 2019

"Memorandum of Cooperation between the Department of Homeland Security of the United States of America and the Ministry of Government of the Republic of Honduras on Security Activities that Make it Possible to Address Irregular Migration"

Biometrics Data Sharing Program Arrangement:

Signed: Sept. 27, 2019

"Memorandum between the Government of the United States of America and the Government of the Republic of Honduras on Enhancing Border Security through the Exchange of Information"

***H2A and H2B Agreement:**

Signed: Sept. 27, 2019

"Agreement Concerning the Temporary Agricultural and non-Agricultural Workers Programs"

**Note: These agreements were signed between the U.S. Department of Labor and Honduras, not DHS.*

EL SALVADOR



Asylum Cooperative Agreement:

Signed: Sept. 20, 2019

"Agreement between the Government of the United States and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims"

Border Security Arrangement:

Signed: Oct. 28, 2019

"Memorandum of Cooperation between the Department of Homeland Security of the United States of America and the Ministry of Justice and Security of the Republic of El Salvador on Security Activities that Make it Possible to Address Irregular Migration"

Biometrics Data Sharing Program Arrangement:

Signed: Oct. 28, 2019

"Memorandum between the Government of the United States of America and the Government of the Republic of El Salvador on Enhancing Border Security through the Exchange of Information"



**Homeland
Security**

- Because nonbinding instruments are generally less transparent and entail fewer political and legal requirements, they *can* be used to circumvent the democratic process.
- That certainly does not mean that they *always* are used in this way. Indeed, nonbinding instruments are an important tool in the negotiator's toolkit.

“good practices of risk mitigation”

Best Practices

Transparency is critical

- Both *internal* transparency and *external* transparency

One of the impediments to transparency is concerns about embarrassing negotiating partners—hence, collaboration is important.

Another challenge is *defining* “nonbinding international agreements,” “nonbinding instruments,” or “non-legally binding agreements.” How do we distinguish nonbinding from binding instruments?

Example: Recent changes to U.S. law.

- The law applies new transparency requirements to both binding executive agreements and “**qualifying non-binding instruments.**”
- **Qualifying non-binding instruments** are defined as nonbinding instruments that “could reasonably be expected to have a significant impact on the foreign policy of the United States” or that are the subject of a written request from the chair or ranking member of the congressional foreign affairs committees.

The statute mandates better reporting and publication for both binding agreements and nonbinding instruments:

- Reporting to Congress must be done within the month after the agreements are concluded rather than the old requirement of 60 days after the agreements took effect.
- The Department of State must also disclose the executive branch's legal authority for concluding a binding agreement.
- The agreements and instruments, unless classified or within certain other exceptions, must be published online within 120 days after they become operative, along with the legal authority.
- There are carveouts for nonbinding agreements made by the U.S. Department of Defense, the armed services, and the intelligence community.

The legislation also provides for **better executive branch coordination:**

- Departments and agencies of the executive branch are required to report agreements they make to the State Department within 15 days after concluding them.
- Each agency that makes international agreements must appoint an officer responsible for reporting to State.
- State must have its own compliance officer to oversee this.
- There will be audits by the Comptroller General.



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Qualifying Non-binding Instruments

Below are the texts of qualifying non-binding instruments published pursuant to 1 USC 112b(b)(1).

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Information described in 1 USC 112b(a)(1)(A)(iii) and (B)(iii) relating to Qualifying Non-binding Instruments

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Information described in 1 USC 112b(a)(1)(A)(iii) and (B)(iii) relating to qualifying non-binding instruments reported to Congress on June 28, 2024, as having become operative.

Unless otherwise indicated, all listed instruments became operative upon being signed, concluded, or otherwise finalized.

Unless otherwise indicated, the following statement of legal authority in accordance with 1 USC 112b(a)(1)(A)(iii) applies to all listed instruments: The authority to enter into non-binding instruments with foreign states and other foreign actors in connection with the conduct of foreign relations derives from the President's powers under Article II of the Constitution. The President has authority under Article II to represent the nation in foreign affairs, including the authority to communicate with foreign governments and to determine the form and manner in which the Executive engages in diplomacy. As applied to the entry into non-binding instruments with foreign states and other foreign actors in connection with the conduct of foreign relations, these authorities are exercised on a day-to-day basis by the agencies and departments of the executive branch under the general supervision of the President as Chief Executive, and in consultation with the Secretary of State.

Unless otherwise indicated, no new or amended statutory or regulatory authority is anticipated to be required to implement the listed instruments.

Case Act #	Details
2024-0027QN	Czech Republic: Memorandum of Understanding on Countering Foreign Disinformation Between the U.S. Department of State and the Ministry of Foreign Affairs of the Czech Republic. Signed at Prague May 30, 2024.
2024-0028QN	European Space Agency: Joint Statement Between the National Aeronautics and Space Administration and the European Space Agency Concerning Lunar Cooperation. Signed May 6 and 8, 2024.
2024-0029QN	Honduras: Women and Children Protection Partnership Between the Government of the United States of America and the Government of the Republic of Honduras to Address All Forms of Violence Against Women and Girls, Boys, and Adolescents in Honduras. Signed at Tegucigalpa May 22, 2024.
2024-0030QN	Intl Organization for Migration: Creation and Implementation of an IOM Field Education Program. Exchange of Notes at Washington April 3 and May 2, 2024.
2024-0031QN	Kenya: Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Kenya on the Construction of the Runway at Manda Bay. Signed May 23, 2024.
2024-0032QN	Spain: Memorandum of Understanding Between the United States Department of State and the Ministry of Foreign Affairs, the European Union, and Cooperation of Spain on Countering Foreign State Information Manipulation. Signed at Washington May 10, 2024.

This is a step forward for transparency of “significant” nonbinding instruments. But there remains room for improvement.

Nonbinding International Agreements



Professor Oona A. Hathaway