

Trading Spaces: The Changing Role of the Executive in U.S. Trade Lawmaking

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ABSTRACT

Since the earliest days of the republic, the U.S. executive has wielded a significant but constitutionally bounded influence on the direction of U.S. trade law. In the twenty-first century, the growth of free trade agreements has led to an institutionalization of trade norms that permits the executive many more spaces for engagement with trading partners. In addition, other types of quotidian lawmaking extend the power of the executive in both public and hidden spaces beyond congressional delegation, even as that power remains substantially bounded by congressional control. This Article analyzes the dynamics between the branches that will direct future U.S. trade lawmaking.

INTRODUCTION

The first commercial treaty entered into by the United States began as a diary entry by John Adams. In 1776, Adams drafted clauses that would eventually form the Treaty of Amity and Commerce between the United States and France that was signed on February 6, 1778.¹ In addition to provisions that guaranteed mutual protection of vessels and measures to deal with contraband goods, the treaty featured articles that governed basic principles of trade between the two countries.² The United States would eventually withdraw from the French treaty in the

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1. Treaty of Alliance Between the United States and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1778, 8 Stat. 6 [hereinafter Treaty of Amity and Commerce]. See *French Alliance, French Assistance, and European Diplomacy During the American Revolution, 1778–1782*, U.S. DEPT OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1776-1783/french-alliance> (last visited Feb. 23, 2017).

2. Treaty of Amity and Commerce, *supra* note 1.

1790s, but that treaty nevertheless served as the first of a series of friendly trade and commerce treaties intended to facilitate the development of the new republic.

Since Adams' time, U.S. commercial and trade treaties have evolved, along with the world economy, though some of the same trade law principles that governed Adams' diary-penned treaty have survived. Most notable in that evolution is the fact that there are no longer any U.S. trade treaties concluded today. The most recent U.S. trade or commerce treaty entered into force in 1953.³ Before that, the most recent U.S. trade treaty was concluded in 1948.⁴ Since the end of the Second World War, U.S. foreign trade law took a different turn—or at least, a different form. No longer was the treaty seen as a suitable instrument for advancing U.S. trade interests.

Political and legal developments precipitated the use of a new tool in lieu of the treaty: the “congressional executive agreement” (CEA)—so named because of the congressional-executive joint process through which it is made. Trade CEAs, more commonly termed free trade agreements (FTAs), such as the North American Free Trade Agreement (NAFTA) have revolutionized the U.S. approach to international trade lawmaking and have played a pivotal role in redefining the balance of power between Congress and the executive in the area of foreign commercial matters.

This Article examines U.S. trade lawmaking and the changing role of the executive in that process. It does so by analyzing the three major legal tools through which the United States makes trade law: actions at the World Trade Organization (WTO); trade CEAs; and trade-related executive communications. I focus on the latter two activities, where the most interesting questions surrounding the separation of powers arise. I argue that the congressional-executive tug-of-war on trade law has had two important effects: (1) it has catalyzed a normative institutionalization that reaches beyond trade; and (2) it has created new spaces for executive authority while also strengthening congressional control over other spaces in U.S. trade lawmaking. These effects in the transnational lawmaking landscape have been little studied and little tested. The Trump Administration may change the latter; this piece seeks to change the former.

Outside the United States, trade lawmaking has traditionally and logically been a competence of the executive branch. This has been true

3. See Treaty of Friendship, Commerce and Navigation, Japan-U.S., Apr. 2, 1953, 4 U.S.T. 2063.

4. See Treaty of Friendship, Commerce, and Navigation, China-U.S., Nov. 29, 1948, 63 Stat. 1392. Certainly, there are many bilateral investment treaties that have entered into force since that time. Those will be differentiated below.

since early conceptions of trade in polities that predate the modern nation-state. Part I of this Article takes a critical look at how the United States' experience fits into this history. I argue that, as trade has changed, the trade lawmaking process has adapted to those changes. U.S. law and policymakers have accommodated new directions in trade by seeking to create functional instruments that allow the United States to maintain a leadership role.

Part II of the Article turns to the congressional-executive agreement, specifically examining its origins and effects. The use of the CEA to govern U.S. trade interactions has moved through three important stages to, as of the 2016 presidential election, a fourth stage. The first, experimental stage of the trade CEA facilitated the U.S. assent to the multilateral General Agreement on Tariffs and Trade (GATT), the precursor to the WTO. Next, the adolescent phase featured constitutional challenges to the CEA but ultimately facilitated the introduction of regional trade blocs. In their mature phase, trade CEAs have changed the larger international law landscape both with their regulatory power and their role as norm drivers. Now, at the start of 2017, the future of trade CEAs is once again in question. I maintain that the interaction between Congress and the executive in the United States in the next generation of trade lawmaking will direct the future form and substance of U.S. contributions to international law. The power balance characterizing their interaction is also likely to make or break U.S. success in shaping the international rules that govern the flow of goods and services.

Part III introduces what I call "quotidian trade lawmaking" by the executive, which has grown, in part, out of CEAs. Just as the trade CEAs have built institutions and delegated authority to those institutions, they have likewise created a managerial role for the executive that has broadened the range of instruments used in international trade law. Small, binding, subject-specific contracts that regulate the flows of goods and services in bilateral arrangements are negotiated and issued every day by agencies in the executive branch. These contracts are executed with little congressional scrutiny, pursuant to delegated authority, and make notable contributions to international trade flows with a more limited impact on the development of international trade law.

Finally, this Article picks up where other analyses leave off by asking what is the effect of the fusion of powers between the branches, particularly on international trade law. It examines the normative implications of today's two spheres of transnational engagement on trade: the plurilateral and the quotidian. To do so, it hones in on the

substance of each and, most importantly, the actors that guide each through the negotiation and conclusion processes.

I. TRANSNATIONAL TRADE LAW MANAGEMENT

International trade has been a focus of international law since before the sovereign state became the primary consumer and originator of international law as we know it today. Copper exchanges in ancient Sumer dating back to 3000 BC took the form of contract.⁵ Commercial interactions among quasi-sovereigns in the era of the Greeks contributed to the earliest known “international” trade agreements. Like the major U.S. agreements of today, it was customary among the ancients to bargain for more than just reduced duties on products that were traded in the conclusion of those classical agreements. Negotiators sought to increase power and cooperation across a range of issues. Thus, from the earliest days, trade-focused agreements regularly addressed issues beyond the prices of copper or grain, but also areas of executive province in modern times, such as the range of regulatory freedom. In this Part, I take up certain formative moments of international trade law, such as who contributed to its development as well as how the law formed before the dawn of modern international law and long before the establishment of the WTO in the twentieth century.

A. *Trade Comes to the Executive*

Beginning as early as Mesopotamia, trade exchanges became increasingly formalized. Although they had not yet arrived at a concept of organized states in free coexistence, the ancients possessed important elements of international law, including in the area of trade. Foremost of these were principles of juridical equality and reciprocity of nations that would later shape the reciprocity of trade among them. These principles were regularly practiced as a sort of customary international trade law, despite the lack of a systematized body of law.⁶

Fourth century Athens and Thessaly negotiated broad nonmilitary agreements that regulated their trade relations. The Greeks had a specialized word for international agreements involving mutual protection of commerce, or that otherwise regulated commercial relationships, just as CEAs today have become synonymous with trade

5. See WILLIAM J. BERNSTEIN, *A SPLENDID EXCHANGE: HOW TRADE SHAPED THE WORLD* 20–21 (2008).

6. See COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 60 (1911).

in the United States.⁷ The Greek trade agreements, in addition to covering a broad range of areas, frequently provided for the establishment of neutral tribunals to hear disputes arising out of such intercourse and to further develop the norms and practices among city-states.⁸ Rome likewise entered into commercial and maritime treaties, largely based on strict reciprocity of treatment, with nations possessing autonomy and independent personality.⁹ The commercial arrangements among city-states and empires were scripted from an early stage by the rulers, officials, and diplomats of that age.

Following the model of the ancients, later states would develop more complex agreements to govern their trade relations. In the late nineteenth century, France, Germany, and Britain negotiated bilateral trade treaties with each other and across Europe. The long interruption to the development of liberal trade regimes brought on by World War I and the Great Depression eventually came to an end to reinvigorate world trade in the late 1930s. However, it was not until after World War II that the reconstruction of the world economy would lead to the conclusion of the international-level or multilateral GATT, the precursor to the WTO. This transition proved to be a watershed moment in the movement from bilateral to multilateral trade governance.

Trade lawmaking in the United States accommodated this shift. In the early days, other than the Adams' model Friendship, Commerce, and Navigation (FCN) treaties negotiated by the executive, foreign commerce or "trade" lawmaking consisted principally of tariff setting.¹⁰ And tariff setting consisted primarily of congressional dictation of a singular tariff schedule. Hence the language of Article I, Section 8 of the U.S. Constitution, granting Congress the "Power To lay and collect . . . Duties . . . [and] To regulate Commerce with foreign Nations."¹¹ These two tools, tariffs as set by the Congress and FCN treaties as negotiated by the executive, were the major trade tools of the early years of the republic.

7. The Greeks had different kinds of treaties, each of which had a category: conventions, agreements/compacts, truces, covenants/contracts, and treaties of peace. *See id.* at 375–76.

8. *Id.* at 378.

9. *Id.* at 114.

10. Lester, Mercurio, and Bartels' history of the modern international trade regime begins with the tariff truce of 1860 with the Anglo-French Treaty of Commerce; prior to that time, tariff setting was a principal source of income for many states. *See* Simon Lester et al., *Introduction* to BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES 3 (Simon Lester et al. eds., 2d ed. 2015).

11. U.S. CONST. art. I, § 8. The drafters envisioned the regulation of commerce to consist of something other than simply laying duties, although that role was limited at that time.

The FCN treaty, with its basic reciprocal arrangements, served the United States' commercial interests for a century and a half.¹² Eventually, however, with multilateral institutions on the rise, a question arose as to what would serve as the vehicle for trade lawmaking in the new era. Trade agreements required domestic implementation and the president could not do that alone.¹³ The result was a blurry area of shared power assigned in one respect to Congress and in another to the executive and a doubt about whether the treaty or some other device could serve U.S. interests.¹⁴ If the regulation of foreign commerce is primarily for Congress and treaties are primarily for the executive, how would the government organize its position regarding a foreign agreement about commerce? The question was resolved with two important institutional steps: the creation of the Office of the U.S. Trade Representative in the Executive Office of the president and the implementation of "fast-track"/trade promotion authority (TPA) procedural rules for Congress and the executive to develop a congressional-executive trade agreement. I turn to these in greater detail next.

B. Executive Prerogative or Delegated Authority?

The first institutional change to accommodate shifting planes of international trade enhanced the executive branch's facility to participate in the multilateral world trade agenda. In the Trade Expansion Act of 1962, Congress called for the president to appoint a Special Representative for Trade Negotiations to conduct U.S. trade negotiations. This move elevated the position of those handling

12. While FCN treaties were the most prominent, they were not the only instrument in use during this period. For instance, trade reciprocity treaties with Canada and with Hawaii in the mid-nineteenth century were negotiated and ratified without regard to the differentiation in constitutional authority. See B.W. Patch, *The Tariff Power*, CQ RESEARCHER (May 10, 1945), <http://library.cqpress.com/cqresearcher/cqresrrre1945051000>; see also Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 174–75, 175 n.105 (2009) (describing the agreements negotiated by President Franklin Delano Roosevelt with congressional blessing).

13. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 250 (2001) (commenting that the President is not a lawmaker).

14. See *id.* at 240 (observing that the constitutional text enumerates a variety of powers bearing on foreign affairs that it delegates to one or the other political branch "without specifying how the enumerated powers are to be related to one another or organized into a coherent framework"); see also David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499, 500 (2012) (discussing the "limited text in the Constitution allocating power over foreign affairs between the branches of government").

international trade, reflecting the growing importance of trade negotiations on the world stage.¹⁵ The Special Representative was to lead an interagency trade organization established to make recommendations to the president. In 1963, President Kennedy created the Office of the Special Trade Representative (STR) in the Executive Office of the President, with chief responsibility for U.S. participation in the multilateral trade negotiations held under the auspices of GATT.¹⁶

In the 1970s, Congress substantially expanded the STR's responsibilities, but also kept tabs on its activities. The Trade Act of 1974 made the STR directly accountable to both the president and Congress for these and other trade responsibilities and elevated the Special Trade Representative to cabinet level.¹⁷ Executive Order 12188 of 1980 renamed the STR as the Office of the United States Trade Representative (USTR), centralizing U.S. government policy-making and negotiating functions for international trade.

Each of these institutional maneuvers ostensibly reflected a congressional interest in enhancing executive authority. Within that context, the importance of the creation of the USTR was the recognition from both branches that the multilateral trade stage demanded more than what was in place at the time, and that additional institution resided very close to the president within the Executive Office of the President.

The increased importance of international trade and international trade law occurred not just in agency creation and restructuring but also in the continuing debate on internal procedural mechanisms for designing trade relations. Parallel with the institutional expansion, a procedural framework then known as "fast track authority" was first contemplated in the Trade Act of 1974. This framework evolved from initiatives undertaken by Congress as early as 1890 to enable the United States to achieve certain policy goals.¹⁸

15. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, (codified as amended at 19 U.S.C. § 1801).

16. Exec. Order No. 11,075, 27 Fed. Reg. 473 (Jan. 15, 1963).

17. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2101-2497b).

18. The Tariff Act of 1890 was the first domestic legislation to grant the executive a license to negotiate agreements with foreign countries to reduce tariffs without seeking congressional approval of the agreements. The 1890 Act gave the president flexibility in the negotiations he would conduct, but prescribed the relevant duties he could impose. See *Historical Highlights: The McKinley Tariff of 1890*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/HistoricalHighlight/Detail/36160> (last visited Feb. 23, 2017). Shortly thereafter, the Tariff Act of 1897 authorized the president to reduce certain import duties for limited periods, though those agreements would still have required approval by the Senate and by the House. The Revenue Act of 1913 gave President Roosevelt power to negotiate "trade agreements with foreign nations

In its original conception, “fast track” or “TPA” was a carefully delineated but reasonably narrow procedural authorization to the president from the Congress. In general terms, TPA authorizes¹⁹ the president to initiate negotiations for an FTA with a trading partner.²⁰ TPA also sets out terms of engagement between the Congress and the executive throughout the negotiation process with the aim of keeping

wherein mutual concessions are made looking toward freer trade relations and further reciprocal expansion of trade and commerce” Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114, 192 (1913). Still, the agreements had to be “submitted to the Congress of the United States for ratification or rejection.” *Id.* The McKinley and Roosevelt administrations negotiated agreements with eight European countries, but these did not receive congressional approval and never came into effect. Then, in 1934, with the passage of the Reciprocal Trade Agreements Act (RTAA), Congress granted the executive the authority to “enter into foreign trade agreements with foreign governments,” that is, to conclude reciprocal tariff-reduction agreements to foster free and fair competition, without congressional approval. Act to Amend the Tariff Act of 1930, Pub. L. No. 73-316, § 350(a)(1), 48 Stat. 943, 943 (1934). This qualified executive authority served as a turning point in the executive’s control of trade policy in the United States. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 803 (1995) (describing how the president won the constitutional authority to substitute the agreement of both Houses for the traditional advice and consent of the Senate as an “historical triumph”). While delegating its authority, Congress did not surrender broader trade law-making authority and oversight. Still, the RTAA changed the U.S. approach to international trade law-making in ways that would create a permanent adjustment to executive-congressional collaboration in this area. For a more in-depth historical review, see generally Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After INS v. Chadha*, 18 N.Y.U. J. INT’L L. & POL. 1191 (1986) (examining by what devices Congress seeks to influence and oversee executive branch management of U.S. international trade policy).

19. I use the term “authorizes,” though the language is imprecise. Constitutionally, the president does not need congressional authorization to enter into negotiations. A better construction may be to say that Congress authorizes the president to enter into reciprocal trade agreements.

20. In the original 1974 Act, Congress urged the president “to take all appropriate and feasible steps within his power . . . to harmonize, reduce, or eliminate . . . barriers to (and other distortions of) international trade.” Trade Act of 1974 § 102(a). Congress then specifically authorized the president to enter into trade agreements for a short-term period of five years:

Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that the purposes of this Act will be promoted thereby, the President during the 5-year period beginning on the date of the enactment of this Act, may enter into trade agreements with foreign countries . . . providing for the harmonization, reduction, or elimination of such barriers (or other distortions) or providing for the prohibition of or limitations on the imposition of such barriers (or other distortions).

Id. §§ 101(a), 102(b).

Congress apprised of what the President, acting through the USTR, seeks to propose as well as the terms that are being negotiated.

At the conclusion of a negotiation governed by TPA, the president presents to Congress an implementing bill for the negotiated CEA without any opportunity for amendment to the agreement itself.²¹ The agreement is subject to a simple majority vote in each house of Congress, a step which is intended to proceed with some expediency, leading to the shorthand reference to “fast track.” Neither treaty nor tariff schedule, the agreement occupies a space of its own, though it retains a treaty-like status once concluded and implemented.²²

21. Although trade is known for its use of CEAs, CEAs have been employed for agreements in other areas, as well. *See, e.g.*, James J. Varellas, *The Constitutional Political Economy of Free Trade: Reexamining NAFTA-Style Congressional-Executive Agreements*, 49 SANTA CLARA L. REV. 717, 730 (2009) (documenting an “explosion of congressional-executive agreements” over the last seventy years). A public debate on the Iran Nuclear Agreement in 2015 was representative of the range of options employed by Congress and the executive. *See, e.g.*, James Fallows, *The Real Test of the Iran Deal*, THE ATLANTIC (Jul. 28, 2015), <https://www.theatlantic.com/international/archive/2015/07/the-iran-debate-moves-on/399713/>; NCC Staff, *Key Items in the Constitutional Debate Over Congress, Obama and Iran*, NAT'L CONSTITUTION CTR. (Mar. 11, 2015), <http://blog.constitutio ncenter.org/2015/03/key-items-in-the-constitutional-debate-over-congress-obama-and-iran/>.

22. *See* Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 677–80 (1944); Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 627–64 (1945); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 237 (1945). *See also* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001). For a discussion of the implications of Article I, 10, cl. 3 in which the founders acknowledged the existence of agreements or compacts other than treaties, see generally Charles Cheney Hyde, *Agreements of the United States Other Than Treaties*, 17 GREEN BAG 229 (1905); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999). The Restatement (Third) of Foreign Relations Law § 303 notes:

Since any agreement concluded as a Congressional-Executive agreement could also be concluded by treaty . . . either method may be used in many cases. The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance. Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty.

See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (Am. Law Inst. 1987) *But see* Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L.J. 1, 3 (2000) (arguing that the use of congressional-executive agreement has led to the construction of an “international branch” of constitutional concern).

Thus, in a significant and meaningful way, it was the transnational trade trends that precipitated a new instrument of trade law within the United States—one that carefully balances the congressional and executive interests in a delicate compromise.

II. BIRTH OF THE MEGAREGIONAL AGREEMENT & EMPOWERMENT OF THE EXECUTIVE

When the trade CEA first came on the scene, its purpose was largely instrumental. On the one hand, the United States was positioned to become an economic leader on the world stage. On the other hand, world trade was increasingly multilateral, in part due to U.S. influence. For the United States to participate in future rounds and agreements, it needed an appropriate international law instrument. The trade CEA grew out of the history set out above, blending congressional and executive prerogatives and ultimately empowering the executive to engage in significant policymaking in the trade space. The functional solution in the late 1940s and the decades that followed opened the door to large-scale regional agreements beginning in the 1990s.

Today, when we refer to “trade agreements,” we typically mean to refer to these large-scale trade CEAs (FTAs) concluded between two or more trading partners that cover a variety of subject matters. Then, as now, such agreements eliminating tariff barriers and opening new markets have remained at the center of U.S. trade relations, but they have also changed by expanding the engagement among trading partners into new sectors and new enforcement mechanisms. These agreements go much farther than John Adams’ diary. The large-scale agreements, also with dispute settlement mechanisms that leave open the possibility for additional normative development, are not just about trade in the traditional sense. Although the 1778 treaty with France was not limited to commerce (per the title, it also reflected the two states’ friendship), the latest generation of trade agreements includes elaborate provisions governing some areas typically considered to be domestic issues such as labor and environment. This is true not just for U.S. trade agreements, but also for some European and Asia-Pacific trade agreements as well.²³

The last twenty years of U.S. trade lawmaking have been characterized by the growth of regional and bilateral trade

23. See, e.g., Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam, E.U.-Viet., Feb. 1, 2016, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>; Comprehensive Economic and Trade Agreement Between Canada and the European Union, Can.-E.U., Oct. 28, 2016, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

agreements—many of which look alike, meaning that they share very similar provisions. In this Part, I argue that consistency in trade agreements has led to a trade law constitutionalization and to the creation of a node-and-spoke regime. That regime is characterized by constant motion. There are regular, analytic, diplomatic, and norm-building engagements among the executives within the regime. Taken together, the similarities across trade agreements create a web of what I term “management opportunities” for the trade executive. For the United States, the composition of the regime demonstrates that where Congress delegated agreement-making authority under TPA, it precipitated a highly-empowered executive.

A. *The Replicated Institution*

In fall 2015, the Obama Administration announced, together with ministers from Australia, Canada, New Zealand, Chile, Peru, Singapore, Japan, Vietnam, Brunei, Malaysia, and Mexico, the completion of the largest agreement of this generation of U.S. trade agreements: the TPP.

The road to the TPP was long, stretching across the whole of the Obama Administration and earlier.²⁴ Its roots stretch even deeper to the earliest U.S. FTAs.²⁵ It is precisely these clear roots that lead me to term the collection of U.S. trade agreements concluded in the last twenty years a “generation.”²⁶ Substantively, these agreements have

24. The precursor to the TPP, the Trans-Pacific Strategic Economic Partnership, was initiated in 2003 by Singapore, New Zealand, and Chile. Brunei joined negotiations in 2005, and the partnership among those states came into force in 2006. In March 2008, the United States joined the negotiations. See IAN F. FERGUSSON & BRUCE VAUGHN, CONG. RESEARCH. SERV., R40502, *THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 1*, (2011). See also Meredith Kolsky Lewis, *Expanding the P-4 Trade Agreement into a Broader Trans-Pacific Partnership: Implications, Risks and Opportunities*, 4 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 401, 403–05 (2009). The TPP would not be the first major regional trade agreement to fail, although it would be the most notable to fail at the legislative level. The touted Free Trade Agreement of the Americas struggled to reach conclusion the prior decade. See, e.g., Larry Rohter, *Bush Faces Tough Time in South America*, N.Y. TIMES (Nov. 2, 2005), <http://www.nytimes.com/2005/11/02/world/bush-faces-tough-time-in-south-america.html>.

25. Meredith Kolsky Lewis draws connections with an earlier Asia-Pacific agreement but notes the U.S. position that TPP would be negotiated on U.S. terms, not building off the Asia-Pacific agreement as a base. See Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing*, 34 *B.C. INT'L & COMP. L. REV.* 27, 28–38 (2011).

26. Jagdish Bhagwati refers to a “second period of regionalism” that coincides with my use of “generation.” See JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM* 31–47 (2008); see also Sungjoon Cho, *Defragmenting World Trade*, 27 *NW. J. INT'L L. & BUS.* 39, 53–58 (2006) (referring to a wave of “Neo-Regionalism”).

many features in common, irrespective of their diverse foreign representation. Procedurally, nearly all of these agreements were negotiated between the branches through the joint congressional-executive process known as fast track or TPA. Even reaching beyond the United States, at the global level, the present generation of international trade law instruments is characterized by the proliferation of bilateral and regional agreements of like character, enlarged scope, and common language.²⁷

The earliest bilateral trade agreements concluded through the TPA process were the U.S.-Israel FTA (1985) and the U.S.-Canada FTA (1988).²⁸ Shortly thereafter, the latter was superseded by the passage and implementation of the NAFTA (1993). Then, from 2001 through 2007, the United States concluded eight free trade agreements: the U.S.-Singapore (2003), U.S.-Chile (2003), U.S.-Australia (2004), U.S.-Morocco (2004), the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR) (2005), U.S.-Bahrain (2006), U.S.-Oman (2006), and U.S.-Peru (2007). Only the U.S.-Jordan agreement of 2001, negotiated by the Clinton Administration but implemented by the George W. Bush Administration, was negotiated and implemented without going through the TPA process. Three more agreements negotiated through the TPA process were implemented in 2011: the U.S.-Panama, U.S.-Colombia, and U.S.-South Korea agreements.²⁹

Alongside the proliferation of agreements to other trading partners, the content of U.S. agreements has expanded to cover subject areas designed to harmonize regulatory frameworks and remove regulatory barriers. The Colombia FTA, for example, has twenty-three chapters: fifteen chapters address trade, investment, and other commercial issues; six chapters address administrative issues; and two chapters covering labor and the environment respectively. The thirty-chapter

27. This development is motivated in no small part by the failure to complete the WTO rounds and the public backlash that dates back to WTO protests in Seattle in 1999. See, e.g., Gregory Messenger, *Anti-Fragmentation Strategies: The Curious Case of the EU and World Trade Law*, EJIL: TALK! (Feb. 20, 2015), <http://www.ejiltalk.org/anti-fragmentation-strategies-the-curious-case-of-the-eu-and-world-trade-law/> (describing how “institutional deadlock at the WTO has led to a number of free trade agreements being concluded globally”); Alex Tizon, *Monday, Nov. 29*, SEATTLE TIMES (Dec. 5, 1999), <http://community.seattletimes.nwsourc.com/archive/?date=19991205&slug=2999667> (discussing the public response to the WTO negotiations going on in Seattle that week).

28. I use FTA for all agreements to avoid confusion even though some agreements use the title “Trade Promotion Agreement” which would also go by the initials TPA.

29. The negotiations toward their completion were begun and signed within the timeframe set out by the 2002 TPA, which expired on July 1, 2007.

TPP featured six new chapters covering areas of regulatory cooperation and institutional accommodations.

Many provisions within the subject-specific chapters are nearly identical from agreement to agreement. Looking at the TPP in particular, there are large sections where the language remains the same as the last trade agreement negotiated by the United States and each of the agreements negotiated before that one. In other words, for some chapters, the first draft template has been the only draft template. The agreements and the institutions they establish have been replicated multiple times over the last twenty years. Taken together, the institutionalization of U.S. trade law extends beyond any single agreement to create an entire regime or web of agreements through which the U.S. regulatory apparatus navigates and enforces international commitments.

One can anticipate a number of possible reasons for the consistency in these agreements. The repeated use of standardized text in an international agreement is not unique to the trade context. A model agreement may be desirable whether for efficiency in negotiations, consistency for civil servants and industry, or otherwise. But neither Congress nor the executive appears to have sought to develop a formal model or to have acknowledged that fact. A significant element of TPA is its time-limited nature that requires reinstitution every few years. Each TPA authorization has an end date, after which Congress has an opportunity to reevaluate negotiating objectives. Even with these time-bound opportunities, the substantive elements of TPA have perpetuated a *de facto* model. The fact that the template has been recycled at the negotiating table over the last twenty years suggests that, at a minimum, foreign partners may perceive it to be the U.S. “model.”³⁰

30. See Kolsky Lewis, *supra* note 24, at 32–33 (using the term “model”). The TPP early-stage agreement already in place among the four states that preceded the United States to the negotiating table was similar to NAFTA in many ways. For a description of some of those similarities, see *Make or Break: Obama Officials Start Trans-Pacific Partnership (TPP) Talks Today—First Obama Trade Deal?*, PUBLIC CITIZEN (Mar. 15, 2010), <http://citizen.typepad.com/eyesontrade/2010/03/make-or-break-obama-officials-start-trans-pacific-partnership-tpp-talks-today---first-obama-trade-deal.html> [hereinafter *Make or Break*]. According to David Gantz, the Singapore and Chile free trade agreements effectively became models for the other FTAs. David Gantz, *The “Bipartisan Trade Deal,” Trade Promotion Authority and the Future of U.S. Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 115, 122 (2008). Those, however, were based on and closely resemble the NAFTA. See Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?*, 10 J. INT’L ECON. LAW 571, 578 (2007) (stating that “[w]hen the United States or European Union tenders a draft PTA [preferential trade agreement] to a developing country, it expects the basic template of its proposal to be followed, and in some areas (such as investment rules or strengthening of IPRs protection), the possibilities for effective counterproposal are almost non-existent”); GARY CLYDE

In the course of the TPP negotiations, the “model” became a source of considerable criticism. As the Obama Administration forged ahead with TPP negotiations, Public Citizen claimed that “at issue is whether the new administration will use the TPP process to translate Obama’s many specific campaign trade reform commitments into a new approach—or whether the administration will fall back on the trade agreement model used by the previous Bush, Clinton and Bush administrations.”³¹ Senator Bernie Sanders took the Senate floor in 2015 to express his view that “what we are discussing with the TPP is not a new concept. . . . The truth is that we have seen this movie time and time and time again. Let me tell my colleagues that the ending of this movie is not very good. It is a pretty bad ending.”³² In 2016, both the Republican and Democratic presidential candidates in the U.S. presidential election took the position that the “model” was not working. Both made strong comments in opposition to the TPP. In a speech in August 2016, Secretary Hillary Clinton expressed her opposition in the strongest terms to date: “I will stop any trade deal that kills jobs or holds down wages—including the Trans Pacific Partnership. I oppose it now, I’ll oppose it after the election, and I’ll oppose it as president.”³³ Donald Trump reportedly referred to the TPP as a “disaster”³⁴ and made repeated claims that he would “renegotiate”³⁵ the NAFTA. After the election, President-Elect Donald Trump announced that “unsigned” the TPP was among the action items he planned to pursue on his first day in office.³⁶ These statements further emphasized to the public and to legislators the perceived failure of the “model” of the last twenty years.

But the TPP at the time of its finalization by the Obama Administration ultimately was very similar to prior agreements, and, like in those prior agreements, the parties were focused on more than

HUFBAUER & JEFFREY J. SCHOTT, *NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES* 56–57 (2005) (noting that the NAFTA provisions have served as precedents for the later FTAs and that successive agreements “have drawn heavily on their predecessors, with NAFTA serving as the primary template”).

31. *Make or Break*, *supra* note 30.

32. 161 CONG. REC. S2374, (daily ed. Apr. 23, 2015).

33. Jacob Pramuk, *Clinton and Trump Can Agree on at Least One Thing*, CNBC (Aug. 11, 2016, 4:26 PM), <http://www.cnbc.com/2016/08/11/trump-and-clinton-now-sound-similar-on-one-key-issue.html>.

34. *Id.*

35. See Kristen Walker, *Trump to Sign Executive Order on Plan to Renegotiate NAFTA With Mexico, Canada*, CNBC (Jan. 23, 2017, 7:49 AM), <http://www.cnbc.com/2017/01/23/trump-to-sign-executive-order-to-renegotiate-nafta-and-intent-to-leave-tpp.html> (“President Donald Trump is expected to sign an executive order as early as Monday stating his intention to renegotiate the free trade agreement between the United States, Canada and Mexico . . .”).

36. *Trump Says US to Quit TPP on First Day in Office*, BBC NEWS (Nov. 22, 2016), <http://www.bbc.com/news/world-us-canada-38059623>.

just the flow of goods. Despite the lack of strong justifications for the repetition and the recent backlash against it, the replication has led to normative entrenchment and has created a web of international commitments for executive bureaucrats to enforce.

B. How Free Trade Agreements as Institutions Empower the Executive

The newly constitutionalized trade law regime does far more than reduce tariffs.³⁷ These agreements take on added significance for governance and foreign relations. Today's FTAs are more than just multifunctional: they are law-creating, institution-building, foundational administrative agreements through which the executive creates new law by way of everyday engagements with foreign governments.

Each of the subject-specific chapters of the modern bilateral or multilateral trade agreement creates opportunities for interaction between the two or more countries that are managed by executive agencies. For example, take the CAFTA-DR Labor Chapter. This chapter provides for each party's effective enforcement of its labor laws, among other procedural guarantees the state must provide in respect of internationally recognized labor principles. In Article 16.4, the chapter creates a "Labor Affairs Council" comprised of "cabinet-level or equivalent representatives of the Parties, or their designees." The Council is intended to meet "to oversee the implementation of and review progress under this Chapter," including additional institutional arrangements set out in Article 16.5, and establishes "contact points" to serve as channels for and of communication on labor-related matters. Article 16.5 creates a "Labor Cooperation and Capacity Building Mechanism." The Mechanism is a means through which the contact points can build capacity related to labor issues. Specifically, Annex 16.5 provides that the Mechanism "may initiate bilateral or regional cooperative activities on labor issues." In addition to these already robust interactions, Article 16.6 also provides for cooperative labor consultations to discuss any matter arising under the chapter, and, under Article 16.7, the parties are obligated to work together to agree on members for a labor roster. Through these several initiatives, the executive entrenches its engagement with foreign partners. The same is

37. See, e.g., Federico Ortino, *Regional Trade Agreements and Trade in Services* (providing an overview of the expansion of trade agreements), in *BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES* 213, 213–14 (Simon Lester et al. eds., 2d ed. 2015). The principle underlying the inclusion of topics such as environment and labor is that lowering tariff and regulatory barriers could lead to a race to the bottom at the risk of endangering internationally recognized labor and environmental standards.

true for other chapters within the CAFTA-DR, and for other agreements.

Thus, today's agreements are managerial trade agreements in at least two respects. First, they manage relations between sovereigns at the substantive and normative level. Second, they empower the executive branch to take on managerial responsibilities in ways likely unforeseen by the legislative branch, occasionally prompting legislators to rein in their delegation. These agreements are both institution-creating and institutions themselves that manage broad sectors of the global economy, resulting from and contributing to international trade law.

In addition to the regularly scheduled engagements between executives, the executive also has broad authority to take enforcement actions under the now several enforceable commitments the agreements include. An additional important element of the dispute settlement chapters of these trade agreements is their extension to matters on the trade periphery, as I have termed it, allowing the executive to enforce commitments related to labor and environment, for example. In the newest trade agreements, nearly all the chapters are subject to dispute settlement, meaning that one party can bring a case to enforce the commitments in those chapters against the other party or parties.³⁸ The executive takes the decision on whether to bring such a case, manages the submissions process and to some degree the rules and players, but, importantly, it also delegates decision-making authority to an arbitral panel. If the complaining party is successful, the agreement empowers the executive to take binding trade-related action across a wide spectrum of areas. These enforceable commitments further lend these agreements to careful management and administration by the executive and enable the executive to create new law through dispute settlement panels. They have a continuous lawmaking effect.

Although an elaborate and delicate balance governs the making of our trade agreements, the institutions that result provide the executive with considerable latitude and additional tools in the everyday management of U.S. trade relations. Although the executive once had a reasonably minor role in foreign commerce, the executive currently supervises and uses various procedural tools to enact more law. This is

38. See, e.g., Free Trade Agreement Between the United States of America and the Republic of Korea, U.S.-Kor., ch.22, Mar. 15, 2012, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta>; United States-Colombia Trade Promotion Agreement, Colom.-U.S., ch. 21, Nov. 22, 2006, https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file227_10190.pdf; Dominican Republic-Central America-United States Free Trade Agreement, Costa Rica-Dom. Rep.-El Sal.-Guat.-Nicar.-U.S., ch. 20, Aug. 5, 2004, https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file85_3940.pdf.

described in greater detail in the next Part. The current literature has not taken full note of the emergence and evolution of the managerial U.S. trade law regime. Most studies of our foreign trade law view the agreement-making process as the epiphenomenal result of a complex executive-legislative architecture rather than as an institutionalization. From treaties to agreements to institutions, the U.S. contribution to international trade law has transformed.

III. QUOTIDIAN EXECUTIVE LAWMAKING

While the focus of the public eye has been on FTAs, they are not the only instruments through which Congress and the executive make trade law on behalf of the United States. This Part elaborates on the areas through which the executive capitalizes on that institutional regime. These moves implicate questions of delegation or perceived delegation and executive exploitation of institutional openings. This Part also introduces an additional area of U.S. trade lawmaking that has received even less attention in the media and in scholarship.

The first way through which the U.S. executive maximizes its delegated authority in the multilateral trading environment is through its participation in the WTO. Most international law textbooks focus on the workings of the WTO, but few contextualize the work of the executive in that context. The WTO is not just a conglomeration of international agreements making up fundamental free trade rules. It is a highly complex secretariat with numerous committees on which Members engage.

The WTO committees serve as fora for WTO members to air grievances and make statements with respect to the regulatory measures of other WTO members.³⁹ They also provide an environment through which WTO members can build cooperation and capacity in areas relevant to trade.⁴⁰ Officials from the U.S. executive actively participate on behalf of the United States in these committees and working groups just as executive branch officials represent the United States in other international organizations. In the statements they make, representatives of the United States at the WTO contribute to normative development by reinforcing, reiterating, and introducing the U.S. position on various, relevant international commitments. This work arguably falls well within the president's foreign affairs power, but

39. For an overview of the committee structure and background, see *Committees*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev2_e.htm (last visited Feb. 26, 2017).

40. *See id.*

it does so in a way that has a direct impact on the U.S. contribution to multilateral trade law.

Another type of trade lawmaking occurs farther from the public eye: bilateral subject-specific contracts between executive agencies on behalf of their governments. Such quotidian instruments, as I call them because of their frequent creation and use, which govern substantial movements of goods and services have received little to no attention by the public or by the scholarly community. Not only do these exchanges of letters and other agreements move products, but they also constitute international legal instruments that shape trade. International trade lawmaking happens far more frequently through these inter-executive handshakes—small-scale bilateral instruments concluded without public scrutiny. These agreements fall under the authority of the USTR and other agencies to negotiate.

The range of trade-related topic areas covered by these agreements is vast. In agriculture, for example, quotidian trade contracts abound. Trade in beef and beef products is one such area that has been the subject of attention for informal lawmaking. A recent letter exchange with Brazil provides an illustration: On August 1, 2016, the U.S. Department of Agriculture (USDA) announced that it had reached an agreement with Brazil's Ministry of Agriculture, Livestock and Food Supply "to allow access for U.S. beef and beef products to the Brazilian market for the first time since 2003." In a separate decision announced in the same press release, the USDA's Food Safety and Inspection Service (FSIS) determined that Brazil's food safety system governing meat products is equivalent to that of the United States and that fresh (chilled or frozen) beef can be safely imported from Brazil. According to the announcement, the determination followed a multi-year, science-based review consistent with U.S. food safety regulations. The result was that FSIS amended the list of eligible countries and products authorized for export to the United States to allow fresh (chilled or frozen) beef from Brazil. Before that time, only cooked and canned beef products could be imported from Brazil.

The announcement garnered considerable press in industry-specific publications. Agriculture and beef media outlets commented on the export potential and value of the beef market in South America for the U.S. beef community: "U.S. beef/beef variety meat exports to South America increased from just \$6 million in 2003 to a record of \$118.45 million in 2014, before slipping to \$94.7 million in 2015."⁴¹ The

41. Joe Schuele, *What to Expect When U.S.-Brazil Beef Trade Resumes*, BEEF MAG. (Sept. 8, 2016), <http://www.beefmagazine.com/beef-exports/what-expect-when-us-brazil-beef-trade-resumes>. Brazilian Agriculture Minister Blairo Maggi said exports could begin in 90 days once paperwork was completed. He said an initial quota of 60,000 tons of Brazilian

agreement was reached between the two countries following protracted engagement between each country's executive branch representatives. Brazilian Agriculture Minister Blairo Maggi came to Washington, DC, to "nail down the agreement."⁴² The "agreement" appears to have taken the form of an exchange of letters. However, the letters are not readily available to the public. They do not appear to have been reported to Congress through the State Department as they are not available in the State Department's collection.⁴³ Unlike trade CEAs, these executive exchanges are not always an accessible part of the public repertoire of trade agreements.

Although Brazil is the world's largest beef exporter, it was not the only country on the "target" list for an exchange of letters by the USDA. In 2016 alone, these efforts have led to the reopening of the Saudi Arabian and Peruvian markets for U.S. beef, the South Korean market for U.S. poultry, and the South African market for U.S. poultry, pork, and beef, to name a few. Take, for example, the letter exchange, similar to the Brazilian exchange, between Colombia and the United States concluded in early 2016 that lifted restrictions previously placed on U.S. beef products entering Colombia.⁴⁴ In this exchange, the United States and Colombia agreed to new requirements for approval of beef products destined for Colombia. In total, between 2015 and 2016, the USDA and USTR negotiated new beef access arrangements with sixteen countries, gaining additional market access for U.S. beef in Colombia, Costa Rica, Egypt, Guatemala, Iraq, Lebanon, Macau, New Zealand, Peru, Philippines, Saint Lucia, Singapore, South Africa, Ukraine, Vietnam, and, now, Brazil.

In many respects, the quotidian nature of these agreements counsel in favor of executive prerogative to complete them without the bureaucratic red tape that may come with inter-branch cooperation. It makes sense that such agreements would not require substantial congressional oversight or approval. Nevertheless, the content and meaning of these agreements should not go unnoticed. As in the example above, the opening of a previously restricted market for a major

beef should enter the United States in 2016. Anthony Boadle, *U.S. Opens Up to Brazil Fresh Beef Imports*, REUTERS (Aug. 1, 2016, 4:33 PM), <http://www.reuters.com/article/us-brazil-usa-beef-idUSKCN10C358>.

42. Boadle, *supra* note 41.

43. See *Texts of International Agreements to Which the US Is a Party (TIAS)*, U.S. DEP'T OF STATE <https://www.state.gov/s/l/treaty/tias/index.htm> (last visited Feb. 27, 2017).

44. See Chris Gillis, *U.S., Colombia Enhance Beef Trade*, AM. SHIPPER (Jan. 28, 2016), http://www.americanshipper.com/Main/News/US_Colombia_enhance_beef_trade_62817.aspx#hide. The 2016 agreement is also not available to the public, although the 2006 prior arrangement is available through the State Department collection.

U.S. export such as beef is no small feat. Executive-led quotidian agreements can have a major impact on the U.S. economy.

Note how some of these letters were concluded under the auspices of an FTA regime. The agreement between Peru and the United States, for example, includes at least three side letters available on the USTR website in the area of agriculture that refer to the relationship created under the FTA.⁴⁵ The institutional framework established under the agreement serves as the foundation through which the executive authorities engage on product-specific binding arrangements.

Others of these seemingly small instruments govern far more than beef. Similar exchanges to organize other agricultural issues are just the tip of the iceberg. They extend to governance of procurement, labeling, and a range of issues relevant to trade. Typically, however, they address a discreet bilateral issue. They focus on a single industry or issue between two partners. The 2005 Agreement in the Form of an Exchange of Letters Between the United States of America and the European Community on Matters Related to Trade in Wine uses the term “agreement,” even if it was conducted through an exchange of letters as the title suggests.⁴⁶ The agreement amends and operationalizes an agreement that the two countries concluded two months earlier with initials.

On the topic of labeling, the USDA’s organics arrangements are representative of executive agreements taking on a nontraditional agreement form. In the case of organics, the Congress passed The Organic Foods Production Act of 1990 (OFPA),⁴⁷ which set up a National Organic Program (NOP) to be administered by the USDA. The NOP manages the U.S. organics production and sale regulations. These regulations include rules regarding labeling as well as which products may use the USDA organics label or sticker. The NOP also has a role in upward and downward management of regulations related to organic products. That is, the NOP oversees the interaction between the federal organic program and the state organic programs.⁴⁸ Likewise, the NOP,

45. See, e.g., Letter Exchange on Beef SPS Issues for United States-Peru Trade Promotion Agreement, Peru-U.S., Oct. 6, 2006, <https://ustr.gov/sites/default/files/October-SPS-Exchange-of-Letters.pdf>.

46. Agreement in the Form of an Exchange of Letters Between the United States of America and the European Community on Matters Related to Trade in Wine, E.U.-U.S., Nov. 23, 2005, <https://www.ttb.gov/wine/wineagreement.pdf>.

47. Title 21 of the Food, Agriculture, Conservation, and Trade Act of 1990 (codified at 7 U.S.C. ch. 94, 7 U.S.C. § 6501 et seq.).

48. See U.S. DEP’T OF AGRIC., NATIONAL ORGANIC PROGRAM, STATE PROGRAMS—PREAMBLE, <https://www.ams.usda.gov/sites/default/files/media/NOP%20State%20Programs%20Preamble.pdf> (“The Act provides that each State may implement an organic program for agricultural products that have been produced and handled within the State, using organic methods that meet

together with the USTR, facilitates the import and export of USDA organics-labelled food.

At the international level, the USTR together with the NOP concludes “organic arrangements” with other countries. Called “trade and organics equivalency arrangements,” the United States has concluded them with Canada, the European Union, India, Israel, Japan, New Zealand, Korea, Switzerland, and Taiwan to govern the import or export of organic products from those countries.⁴⁹ For example, the United States has an organic equivalence arrangement with Korea for organic processed foods. This means that, as long as the terms of the arrangement are met, certified organic operations in Korea or in the United States may sell their products as organic in either country. The equivalency arrangement that put this program into effect for Korea in July 2014 exists in the form of an exchange of letters. The letters provide, in relevant part:

The United States Department of Agriculture (USDA), in coordination with the United States Trade Representative (USTR), has reviewed the Republic of Korea’s program for certification of organic agricultural products produced and handled in accordance with Korea’s Act on Promotion of Environmentally-friendly Agriculture and Fisheries and Management and Support for Organic Food (hereinafter “Korean Organic Food Act”) and its regulations. Based on that review, USDA has determined pursuant to the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. §§ 6501 et seq.), under authority delegated to the Secretary of Agriculture by the President, that certain processed food products produced and handled in accordance with the Korean Organic Food Act and its regulations, as in effect on July 1, 2014, are produced and handled under an organic certification program that provides requirements and standards governing the production and handling of such products that are at least equivalent to the requirements of OPFA.

the requirements of the Act and these regulations. The Act further provides that a State organic program (SOP) may contain more restrictive requirements for organic products produced and handled within the State than are contained in the National Organic Program (NOP). All SOP’s and subsequent amendments thereto must be approved by the Secretary.”)

49. See *International Trade Partners*, U.S. DEP’T OF AGRIC., <https://www.ams.usda.gov/services/organic-certification/international-trade> (last visited Apr. 23, 2017).

Accordingly, subject to the conditions set forth in Appendix 1 of this letter, certain processed food products produced and handled in conformity with the Korean Organic Food Act and its regulations, as in effect on July 1, 2014, are deemed by the USDA to have been produced and handled in accordance with the OFPA and the USDA's organic regulations under the National Organic Program (NOP) (7 CFR part 205). These products may be sold, labeled, or represented in the United States as organically produced, including by display of the USDA organic seal as well as the organic seal of Korea's Ministry of Agriculture, Food and Rural Affairs (MAFRA), under the conditions set forth in Appendix 1. The United States is also pleased to acknowledge Korea's recognition of the U.S. National Organic Program in its letter of June 30, 2014. The USDA's Agricultural Marketing Service and Foreign Agricultural Service and USTR are committed to working with Korea's MAFRA and Ministry of Trade, Industry, and Energy to carry out the terms of the determination as described in this cover letter and in Appendix 1 and the arrangement regarding an Organics Working Group described in Appendix 2.⁵⁰

Thus, further to the congressional delegation, the executive executes international trade-related agreements related to the flow of organic products. No further congressional approval is required.

There are also other regimes that the U.S. executive has enacted to maintain control over trade lawmaking. For example, over the last twenty years, the United States has developed what I will term "regional agreements-lite" in the form of what are known as "Trade and Investment Framework Agreements" (TIFAs). According to the USTR, these TIFAs "provide strategic frameworks and principles for dialogue on trade and investment issues between the United States and the other parties."⁵¹ They do not afford the trading partner all the benefits of the

50. Letter from Anne L. Alonzo, Administrator, Agricultural Marketing Service, U.S. Department of Agriculture, & Sharon Bomer Lauritsen, Assistant U.S. Trade Representative, Agricultural Affairs and Commodity Policy, Office of the U.S. Trade Representative, to the Hon. Choi, Hee-jong, Deputy Minister for Food Industry Policy, Ministry of Agriculture, Food and Rural Affairs, Republic of Korea (June 30, 2014) (available at <https://www.ams.usda.gov/sites/default/files/media/NOP%20Letter%20to%20Korea.pdf>).

51. *Trade & Investment Framework Agreements*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/trade-investment-framework-agreements> (last visited Apr. 23, 2017).

model trade agreement discussed above, but they do afford the U.S. executive a mechanism through which to consult with and, where necessary, apply pressure to trade relationships with a view to enhancing opportunities for trade and investment.

Some scholars have seen the use of the TIFA as a forerunner to a full regional free trade agreement. Cherie O'Neal Taylor has written that TIFAs have been used "sequentially to prepare a country or a region for closer economic integration with the U.S. market. TIFAs are used at the beginning of the process to set out the mutual goals of the United States and its partner countries on trade and investment. If a country is willing to make firm investment commitments, it then signs a BIT [bilateral investment agreement] or agrees to such disciplines as part of a free trade agreement."⁵² While not always the case, TIFAs have been used in this way. More important for the purpose of this Article is that TIFAs provide a further executive-led regime for normative change in international trade law.

Other "trade law" instruments concluded by the USTR include non-enforceable jointly agreed action plans, memoranda of understanding, and other multi-nominal documents concluded by U.S. executive agencies in negotiation with foreign agencies.

For example, the USTR and the Colombia Ministry of Labor concluded in 2011 a "Colombian Action Plan related to labor rights" as an initiative to memorialize the countries' commitments to improving the status of labor issues in Colombia despite the entry into force of the U.S.-Colombia free trade agreement.⁵³ This initiative came from the executive: "President Obama insisted that a number of serious and immediate labor concerns be addressed before he would be willing to send the Agreement to Congress. These concerns included violence against Colombian labor union members; inadequate efforts to bring perpetrators of murders of such persons to justice; and insufficient protection of workers' rights in Colombia."⁵⁴ The result of that engagement among the USTR, the U.S. Department of Labor (DOL), and the Colombian executive authorities was the Action Plan that included major concrete steps for the Colombian government to take. The USTR commented that successful key elements of the Action Plan were a "precondition for the Agreement to enter into force."⁵⁵ Since the entry into force of the agreement, the USTR and the DOL have issued

52. C. O'Neal Taylor, *Regionalism: The Second-Best Option?*, 28 ST. LOUIS U. PUB. L. REV. 155, 161 (2008).

53. *U.S.-Colombia Trade Agreement: Increasing American Competitiveness*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/uscolombiatpa/labor> (last visited Apr. 1, 2017).

54. *Id.*

55. *Id.*

regular reports on the status of implementation of the Action Plan. In each update, the executive agencies comment on the additional scrutiny the conclusion of the Action Plan has provided them.

For the functioning of U.S. trade law, there is no shortage of instruments regularly used by the executive. These quotidian instruments, some of which grow out of the underlying congressionally blessed institutional framework, and others of which do not, represent a claimed competence that the U.S. executive has developed since the Second World War. Most of the time, the executive refers back to the constitutional or delegated authority through which it exercises its prerogative. Where it does not, other elected officials or members of the public may be surprised, and they may wish to revisit the delicate balance of powers that holds U.S. trade lawmaking constant. That said, in my view, these moves by the executive are not the result of its intentional aggrandizement of authority, but rather, for the most part, are the result of its maximizing empowerment legally delegated to it.

CONCLUSION

Although Congress seeks to rein in its delegated trade law authorities,⁵⁶ the existing tapestry of trade agreements and quotidian arrangements afford the executive considerable managerial responsibilities. As a result, micronormative movements in U.S. trade law remain firmly within executive control. As this Article goes to press on the dawn of the Trump Administration, the expanse of executive authority in international trade may undergo a new round of testing. One thing is certain: as President Trump seeks to make reforms he discussed during his campaign, the environment is ripe for him to have a major impact on U.S. management of its own trade law architecture, trade flows, and the principles that make up international trade law.

56. *Id.*

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