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General International and U.S. Foreign Relations Law

Legislation Enacted to Increase the Transparency of Binding and Non-binding International Agreements Entered into by the United States

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Calls for greater transparency in U.S. foreign relations prevailed when President Joseph R. Biden, Jr. signed into law the National Defense Authorization Act for Fiscal Year 2023 (NDAA) in December 2022.[1] Legislation in 1950 and 1972 (known collectively as the Case Act) had established requirements for the publication and transmittal to Congress of non-treaty international agreements (often called "executive agreements"), reflecting the shift in U.S. practice away from treaties during the twentieth century. But those rules covered only binding agreements, and in recent decades, the United States has increasingly entered into non-binding instruments.[2] The NDAA's Section 5947 creates a statutory regime for this new era, establishing for the first time rules for non-binding international agreements and tightening existing rules for binding ones.[3] Together, the revised Case Act provides opportunities for increased congressional oversight, public monitoring, and political accountability of U.S international agreement practice.

Some international agreements become public and are transmitted to Congress as a consequence of their approval processes. Agreements deemed "treaties" under U.S. law must receive the advice and consent of the Senate by a two-thirds vote.[4] Other agreements are approved subsequent to their negotiation by both the House and the Senate by majority votes. Most agreements, though, are not sent to Congress for approval, either because the president asserts an independent constitutional authority or the president claims authority (explicit or implicit) under existing laws, prior international agreements, prior practice, and/or constitutional mandates. Absent the need for congressional consent, only a statute or judicial decision can compel the executive branch to release an international agreement.

Two statutory regimes have governed the disclosure of international agreements—one entailing their publication and the other providing for their transmission to Congress. Current publication obligations stem from a 1950 law that required the issuance of "a compilation entitled 'United States Treaties and Other International Agreements', which shall contain all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any

[1] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395 (Dec. 23, 2022) [hereinafter 2023 NDAA].

[2] *See* Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. Chi. L. Rev. 1281 (2023).

[3] *See* 2023 NDAA, *supra* note 1, Sec. 5947. The adoption of Section 5947 was the result of extensive negotiations between the Senate Foreign Relations Committee and the executive branch, particularly the Department of State. *See* Enhancing Transparency on International Agreements and Non-Binding Instruments: A Report Prepared for the Use of the Committee on Foreign Relations United States Senate, 117th Cong., S. Prt. 117-26, at 2 n. 1 (Dec. 22, 2022) [hereinafter SFRC Report].

[4] *See* U.S. Const., Art. II, Sec. 2.

other final formality has been executed, during each calendar year."[5] A 1994 amendment exempted the "publication of certain categories of agreements," including when "the public interest in such agreements is insufficient to justify their publication."[6] The Case-Zablocki Act of 1972 required the transmission to Congress of "the text of any international agreement, other than a treaty, to which the United States is a party" within sixty days of its entry into force. [7] The State Department's Office of the Legal Adviser determines what constitutes an "international agreement" according to criteria set out in the Department's regulations.[8] One of these is that "[t]he parties must intend their undertaking to be legally binding, and not merely of political or personal effect."[9] The regulations also automatically exempt from publication sixteen categories of agreements (mostly concerning bilateral or national security matters).[10] The Case Act thus covered only a subset of international agreements (binding agreements), and exempted some of those. Compliance with the Case Act's requirements was not always optimal.[11]

Prior to the enactment of Section 5947, there was no uniform requirement for the sharing of non-binding agreements with Congress or the public (they did not require congressional approval and they were not subject to the Case Act), and so their disclosure was rare and ad hoc. On occasion, Congress enacted statutes requiring the disclosure of some specific instruments, such as the Iran Nuclear Agreement Review Act's requirement of congressional access to the Joint Comprehensive Plan of Action,[12] or categories of agreements.[13] And from time to time members of Congress requested the texts of non-binding agreements. But such methods are difficult and burdensome, and in the case of requests they depend on executive branch acquiesce, and so they have revealed only a tiny percentage of all non-binding agreements. Consequently, as non-binding agreements have proliferated, increasingly little is known outside of the executive branch of the nature and scope of the United States' international commitments. As a Senate Foreign Relations Committee (SFRC) report explained, Section 5947 "is intended to address this obvious gap in U.S. law."[14]

Section 5947 broadens the Case Act's rules for publicizing and transmitting to Congress binding international agreements that are not treaties and establishes an entirely new

[5] 64 Stat. 979, 980 (1950) (codified as amended at 1 U.S.C. § 112a). Previously, the Printing Act of 1895 required the secretary of state to publish in the Statutes at Large "all conventions, treaties, proclamations, and agreements." 28 Stat. 601, 615.

[6] Pub. L. 103–236, § 138 (Apr. 30, 1994), 108 Stat. 382, 397 (amending 1 U.S.C. § 112a).

[7] Pub. L. 92–403 (Aug. 22, 1972), 86 Stat. 619 (codified as amended at 1 U.S.C. § 112b).

[8] 22 C.F.R. §§ 181.2(a), 181.3(a).

[9] 22 C.F.R. § 181.2(a)(1).

[10] *See* 22 C.F.R. § 181.8(a).

[11] *See* Oona A. Hathaway, Curtis A. Bradley & Jack Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629 (2020).

[12] *See* Pub. L. 114–17, Sec. 2 (May 22, 2015), 129 Stat. 201, 201 (codified at 42 U.S.C. § 2160e(a)(1)). The statute did not specify the Joint Comprehensive Plan of Action by name, but the intent was clear.

[13] *See, e.g.*, 16 U.S.C. § 1823(a) (international fishery agreements); 42 U.S.C. § 2153(d) (nuclear cooperation agreements). *See generally* Congressional Research Service, Treaties and Other International Agreements: The Role of the United States Senate 236 tbl. X-3 (2001).

[14] SFRC Report, *supra* note 3, at 6.

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framework for what the statute calls "qualifying non-binding instruments" (QNI).[15] Changes include:[16]

- requiring the executive branch to provide a list of all international agreements and QNIs and their texts to Congress within a month of their conclusion and also their entry into force (previously binding international agreements were submitted sixty days after entry into force);[17]
- requiring the submission to Congress of a "detailed description of [all] the legal authorit[ies] that . . . , in the view of the appropriate department or agency, provides authorization for each [international agreement and QNI] . . . to become operative," including "specific" citations and an explanation of any reliance on Article II of the Constitution (previously there was no statutory requirement);[18]
- requiring the publication of the texts of international agreements and QNIs, and the description of the legal authorities for their becoming operative, within 120 days, unless an exception applies (previously international agreements had to be published within 180 days of entry into force absent an exception and there was no statutory requirement for the publication of legal authorities);[19]
- requiring congressional access, upon request, to any implementing agreement or arrangement for international agreements and QNIs (previously there was no requirement);[20]
- requiring that all executive branch department and agencies that negotiate international agreements and QNIs provide the State Department with the texts, as well as the "detailed description of the legal authority that . . . provides authorization" for the QNI, within fifteen days of conclusion (previously there was no requirement);[21]
- requiring those departments and agencies to designate a chief international agreements officer to have "responsibility for efficient and appropriate compliance" (previously there was no requirement);[22]
- establishing an auditing process of State Department compliance conducted by the comptroller general of the United States (previously there was no auditing process);[23]
- establishing a mechanism for State Department personnel to report instances when, to their knowledge or belief, the requirements of the Case Act "have not been fulfilled" (previously there was no mechanism);[24]

[15] QNIs are defined as: "a non-binding instrument that . . . with one or more foreign governments, international organizations, or foreign entities, including non-state actors" and either "could reasonably be expected to have a significant impact on the foreign policy of the United States" or "is the subject of a written communication from the Chair or Ranking Member of [the Senate Foreign Relations Committee or the House Committee on Foreign Affairs]." 2023 NDAA, *supra* note 1, Sec. 5947(a)(1) (to be codified at 22 U.S.C. § 112b(k)(5)).

[16] This list is based on the comparison included in SFRC Report, *supra* note 3, at 9–11. Section 5947 replaces the entirety of 22 U.S.C. § 112b and all of 22 U.S.C. § 112a except for paragraph (a).

[17] *See* 2023 NDAA, *supra* note 1, Sec. 5947(a)(1) (to be codified at 22 U.S.C. § 112b(a)(1)(A) & (B)).

[18] *Id.* (to be codified at 22 U.S.C. § 112b(a)(1)(A)(iii) & (B)(iii)).

[19] *See id.* (to be codified at 22 U.S.C. § 112b(b)). The exceptions are specified in note 27 *infra*.

[20] *See id.* (to be codified at 22 U.S.C. § 112b(c)). This requirement is limited by *id.* (to be codified at 22 U.S.C. § 112b(l)((2)).

[21] *Id.* (to be codified at 22 U.S.C. § 112b(d)).

[22] *Id.* (to be codified at 22 U.S.C. § 112b(e)).

[23] *See id.* (to be codified at 22 U.S.C. § 112b(h)).

[24] *Id.*, Sec. 5947(a)(4).

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- requiring ongoing consultations between the SFRC, the House Committee on Foreign Affairs (HCFA), and the State Department on implementation;[25] and
- authorizing the appropriation of $1,000,000 for implementing these new requirements.[26]

Beyond bringing non-binding agreements within the scope of the Case Act, particularly noteworthy modifications of the prior statutory framework include: the expansion of the requirement to publish binding international agreements (significantly reducing prior carveouts);[27] a broad definition of what constitutes the "text" of agreements and QNIs;[28] the required submission and publication of "detailed description[s] of the legal authority" for entering agreements and QNIs; the consolidation and reinforcement of the State Department's role within the executive branch as the hub for all international agreement-making; and the establishment of a system of accountability for the implementation of Case Act through centralization of authority at the State Department, appointment throughout the executive branch of Chief International Agreements Officers, and the institution of a series of audits, enhancing the program's likely effectiveness.

There are still gaps and uncertainties in the Case Act's updated transparency regime. The statute does not specify the difference between binding and non-binding agreements, a distinction that matters given their varying treatment.[29] Additionally, non-binding agreements entered into by the Department of Defense, the Armed Forces of the United States, or any element of the intelligence community are exempted, thereby excluding a significant number of QNIs.[30] There is also ambiguity in the definition of QNIs, which are described as non-binding agreements that "could reasonably be expected to have a significant impact on the foreign policy of the United States" or those requested by the chair or ranking member of the SFRC or the HCFA.[31] The SFRC anticipated that the State Department will issue a regulation or provide informal guidance regarding the criteria for assessing a non-binding agreement's "significant impact" and therefore whether the agreement is a QNI.[32] The

[25] *See id.*, Sec. 5947(a)(6).

[26] *See id.*, Sec. 5947(a)(7).

[27] Exceptions apply to agreements that: are classified; "address military operations, military exercises, acquisition and cross servicing, logistics support, military personnel exchanges or education programs, or the provision of health care to military personnel on a reciprocal basis"; "establish the terms of grant or other similar assistance, including in-kind assistance, financed with foreign assistance funds"; "project annexes and other similar instruments, for which the principal function is to establish technical details for the implementation of a specific project undertaken pursuant to another agreement"; and "have been separately published by a depositary or other similar administrative body." *Id.*, Sec. 5947(a)(1) (to be codified at 22 U.S.C. § 112b(b)(3)).

[28] "Text" is defined to include: "any annex, appendix, codicil, side agreement, side letter or any document of similar purpose or function to the aforementioned" and "any implementing agreement or arrangement, or any document of similar purpose or function to the aforementioned regardless of the title of the document, that is entered into contemporaneously and in conjunction with the international agreement or qualifying non-binding instrument." *Id.* (to be codified at 22 U.S.C. § 112b(k)(7)).

[29] State Department regulations provide some guidance. *See* 22 C.F.R. § 181.2(a). The State Department's Office of Treaty Affairs previously issued "Guidance on Non-Binding Documents." *See* Guidance on Non-Binding Documents, *at* https://2009-2017.state.gov/s/l/treaty/guidance/index.htm [https://perma.cc/FDJ8-V3Z4].

[30] *See id.* (to be codified at 22 U.S.C. § 112b(k)(5)(B)). The SFRC noted that "this carveout was necessary in order for section 5947 to be enacted." SFRC Report, *supra* note 3, at 7.

[31] 2023 NDAA, *supra* note 1, Sec. 5947(a)(1) (to be codified at 22 U.S.C. § 112b(k)(5)).

[32] *See* SFRC Report, *supra* note 3, at 6. The SFRC expressed its view that such determinations must be based on "the totality of the facts and circumstances," and it "strongly encourages the executive branch to apply the standard liberally and err on the side of inclusion and engagement." *Id.* at 6–7. On October 2, 2023, the State Department

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"significant impact" standard reduces the Act's coverage and consequence and provides significant discretion to the State Department in the Act's implementation.

Section 5947's revision of the Case Act comes amid renewed tensions between Congress and the executive branch regarding what international agreements require congressional approval and the disclosure of draft agreements during negotiations.[33] Information revealed through increased Case Act reporting may have implications for these inter-branch discussions.

International Economic Law

The United States and Taiwan Sign Trade Agreement and Congress Enacts Law to Regulate the Negotiation and Approval of Taiwan Trade Agreements

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The United States and Taiwan have entered into the first of multiple anticipated trade deals under the framework of the U.S.-Taiwan Initiative on 21st Century Trade.[1] Signed on June 1, 2023, the one-year anniversary of the Initiative's launch, the First Agreement covers: administration and trade facilitation; good regulatory practices; services domestic regulation; anti-corruption; and small and medium-sized enterprises.[2] According to the Office of the United States Trade Representative (USTR), under the deal, "U.S. businesses will be able to bring more products to Taiwan and Taiwanese customers, while creating more transparent and streamlined regulatory procedures that can facilitate investment and economic opportunities in both markets, particularly for small- and medium-sized enterprises."[3] Several issues are slated for further negotiations, including agriculture, standards, digital trade, labor,

issued final regulations amending 22 C.F.R. part 181 to reflect the enactment of Section 5947. *See* 88 Fed. Reg. 67,643 (Oct. 2, 2023). The regulations include criteria, which reflect the views of the SFRC, for deciding what constitutes a non-binding agreement "that could reasonably be expected to have a a significant impact on the foreign policy of the United States." *See id.* at 67,643, 67,647 (adding 22 C.F.R. § 181.4(b)); SFRC Report, *supra* note 3, at 6–7.

[33] *See* Jacob Katz Cogan, Contemporary Practice of the United States, 117 AJIL 702, 707 (2023).

[1] *See* Office of the U.S. Trade Representative Press Release, USTR Announcement Regarding U.S.-Taiwan Trade Initiative (May 18, 2023), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/may/ustr-announcement-regarding-us-taiwan-trade-initiative [https://perma.cc/SM2G-TM83] [hereinafter First Agreement Announcement]. Negotiations began in August 2022. *See* Office of the U.S. Trade Representative Press Release, United States and Taiwan Commence Formal Negotiations on U.S.-Taiwan Initiative on 21st Century Trade (Aug. 17, 2022), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/august/united-states-and-taiwan-commence-formal-negotiations-us-taiwan-initiative-21st-century-trade [https://perma.cc/5VUX-D49D]; U.S.-Taiwan Initiative on 21st-Century Trade: Negotiating Mandate (Aug. 17, 2022), *at* https://ustr.gov/sites/default/files/2022-08/US-Taiwan%20Negotiating%20Mandate%20(Final).pdf [https://perma.cc/E9MN-HT42] [hereinafter Negotiating Mandate].

[2] *See* Agreement Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States Regarding Trade Between the United States of America and Taiwan (June 1, 2023), *at* https://ustr.gov/sites/default/files/2023-05/AIT-TECRO%20Trade%20Agreement%20May%202023.pdf [https://perma.cc/9BNF-C4UZ] [hereinafter First Agreement]; *see also* Office of the U.S. Trade Representative Press Release, Statement from USTR Spokesperson Sam Michel on U.S.-Taiwan Initiative on 21st Century Trade Signing Ceremony (June 1, 2023), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/june/statement-ustr-spokesperson-sam-michel-us-taiwan-initiative-21st-century-trade-signing-ceremony [https://perma.cc/KE2L-TVDA] [hereinafter USTR Statement].

[3] First Agreement Announcement, *supra* note 1.