



# International Agreements (Part III): Transparency Measures

September 29, 2023

This Legal Sidebar discusses legislative measures to increase transparency into the United States' international commitments. It is the third installment in a three-part series on international agreements in the U.S. legal system. [Part I](#) introduces the primary forms of international instruments and the process for making them. [Part II](#) examines options for Congress to influence international instruments. For more information on these topics, see *International Law and Agreements: Their Effect upon U.S. Law*.

## Background

[Section 5947](#) of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (FY2023 NDAA), which went into effect on September 19, 2023, expands the transparency framework governing international agreements and non-binding instruments. Pre-FY2023 laws require the executive branch to publish binding agreements ([1 U.S.C. § 112a](#)) and transmit executive agreements to Congress ([1 U.S.C. § 112b](#)). The FY2023 NDAA amends these statutes to address gaps in the transparency regime and align the executive branch's reporting obligations with modern international practice.

## Pre-FY2023 NDAA Requirements

### Publication: [1 U.S.C. § 112a](#)

Originally [enacted](#) in 1950, [1 U.S.C. § 112a](#) requires the Secretary of State to compile and publish annually a [list](#) of all treaties and executive agreements to which the United States is a party. Congress [amended](#) the statute in 1994 to lessen the publication burden on the State Department, which [lacked the resources](#) to publish agreements promptly. The 1994 amendment [permits](#) the State Department to exclude categories of executive agreements from the publication requirement when public interest in the agreements is insufficient to justify their publication. The State Department later issued regulations listing [sixteen exempt categories](#) of agreements that will not be published. A [2004 amendment](#) to Section 112a requires [online publication](#) in addition to annual written compilations.

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## Transmittal to Congress: 1 U.S.C. § 112b

Concerned about [secret international commitments](#) during the Nixon Administration, Congress enacted legislation in 1973 commonly called the Case-Zablocki Act or Case Act ([1 U.S.C. § 112b](#)). The Case-Zablocki Act required the Secretary of State to transmit executive agreements to Congress no later than 60 days after their entry into force. If immediate public disclosure of an agreement would, in the President's opinion, prejudice U.S. national security, the Act allowed the agreement to be submitted only to the Senate Foreign Relations Committee (SFRC) and House Foreign Affairs Committee (HFAC) under an injunction of secrecy. When transmitting agreements to Congress, State Department [regulations](#) required a background statement explaining the agreement and a "precise citation of legal authority."

A [1978 amendment](#) to the Case-Zablocki Act allowed the Secretary of State to determine whether an arrangement constitutes an international agreement subject to the Act's transmittal and reporting mandates. State Department [regulations](#) set criteria for this determination, which excluded several categories of instruments from the Act's requirements. Excluded categories included [non-binding commitments](#), arrangements that lack "[precision and specificity](#)," and "[\[m\]inor or trivial undertakings, even if couched in legal language](#)." Although these exclusions narrowed the Case-Zablocki Act's scope, the State Department [struggled in the past](#) to meet the 60-day transmittal requirement for executive agreements. Congress prohibited use of federal funds to implement late-submitted executive agreements in [1988 and 1989](#) and again in [2005 through 2007](#), but those appropriations restrictions expired.

## Context-Specific Requirements

Apart from the general transparency mandates in 1 U.S.C. §§ 112a and 112b, Congress has occasionally [enacted](#) agreement-specific or context-specific disclosure requirements. The statutory report-and-wait frameworks discussed in [Part II](#) of this series, for example, require disclosure to Congress before an agreement enters into force.

## FY2023 NDAA Amendments

In [Section 5947](#) of the FY2023 NDAA, Congress enacted its first comprehensive set of transparency measures for international instruments since the Case-Zablocki Act. Using Freedom of Information Act lawsuits, researchers obtained new data revealing large numbers of [unpublished](#) international agreements, [late-reported agreements](#), and agreements submitted [without background statements](#). In addition, the pre-FY2023 NDAA transparency statutes do not apply to non-binding instruments. As outlined in [Part I](#) of this Sidebar series, non-binding commitments have become prominent tools in modern American diplomacy, and the lack of transparency mandates for these instruments led to [diminished congressional visibility](#) into the United States' international commitments. The FY2023 NDAA seeks to address these issues through comprehensive reform and modernization of the executive branch's transparency obligations.

## Qualifying Non-Binding Instruments

The FY2023 NDAA requires, for the first time, the executive branch to transmit and publish [qualifying non-binding instruments](#). The statute defines this term as instruments with foreign governments, international organizations, or foreign entities (including non-state actors) that could reasonably be expected to have a significant impact on U.S. foreign policy. The term is also defined to include any instrument that is the "[subject of a written communication](#)" from the chair or ranking member of SFRC or HFAC to the Secretary of State requesting the instrument's text. Instruments concluded or implemented based on authorities relied on by the Department of Defense, the Armed Forces, or the intelligence community are [exempt](#) from the definition.

## Publication Requirements

Section 5947 of the FY2023 NDAA overhauls the publication mandates in 1 U.S.C. § 112a and consolidates them within 1 U.S.C. § 112b. Section 5947 [requires](#) the Secretary of State to publish the text, authorizing authority, and implementing authority for each instrument on its website within 120 days of entering into force or becoming operative. The FY2023 NDAA [removes](#) the Secretary of State's [authority](#) to determine which instruments have insufficient public interest to justify publication. In place of the public interest exception (and the [sixteen categories](#) of exempt agreements based upon it), the FY2023 NDAA exempts [five sets](#) of instruments from its publication requirement. Exempted instruments are those that contain classified information or information exempt from public disclosure, address certain military matters, establish the terms for certain foreign assistance, establish technical details for existing projects, or have been published separately.

## Transmission and Reporting Requirements

Along with the overhauled publishing obligations, Section 5947 [requires](#) the Secretary of State to provide monthly written reports containing the material listed in the **text box** below to the majority and minority leaders of the House and Senate and of the foreign affairs committees. Whereas the Case-Zablocki Act [required](#) transmission of executive agreements only after entry into force—which can occur long after an agreement is negotiated and signed—the FY2023 NDAA's transparency provisions require reporting both when an instrument is “signed, concluded, or otherwise finalized” and when it enters into force.

### Congressional Reporting Requirements in the FY2023 NDAA

Section 5947 of the FY2023 NDAA [requires](#) the Secretary of State to provide the following each month:

**List:** A list of all international agreements and qualifying non-binding instruments that were signed, concluded, or otherwise finalized or that entered into force or became operative in the prior month.

**Text:** The text of each agreement and instrument, including any implementing material, annex, appendix, side letter, or similar document entered into contemporaneously and in conjunction with the underlying agreement or instrument.

**Authorizing authority:** A detailed description of the legal authority that the executive branch views as authorizing the agreements and instruments. All citations to the Constitution, treaties, and statutes must include the specific article, section, or subsection that the executive branch relies upon. If the relied-upon authority includes Article II of the Constitution, the executive branch must explain the basis for its reliance.

**Implementing authority:** A statement of any new or amended statutory or regulatory authority anticipated to be necessary to implement a listed agreement or instrument that entered into force or became operative.

## Other Oversight and Transparency Provisions

Other provisions in the FY2023 NDAA facilitating congressional oversight of and transparency into international instruments include the following.

### *Implementing Agreements*

The Secretary of State [must submit](#) implementing agreements or arrangements not otherwise required to be provided to Congress under the FY2023 NDAA upon request from a chair or ranking member of the foreign affairs committees. In response, the Secretary must provide the implementing agreements or arrangements to the majority and minority leaders of the House and Senate and of the foreign affairs committees within 30 days.

### *Oral Agreements*

All oral agreements must be [reduced to writing](#) to fulfill reporting and publication requirements.

### *Congressional Consultations and Briefings*

The Secretary of State **must consult** the House and Senate foreign affairs committees on matters related to implementing the FY2023 NDAA's transparency provisions before and after the law's enactment. The Secretary **must also brief** these committees on the Administration's implementation efforts 90 days after the law's enactment and once every 90 days for the next year.

### *Audits and Non-Compliance*

The Comptroller General is **required** to conduct and publish a triennial audit of the executive branch's compliance with its transparency obligations. The Secretary of State must **establish a mechanism** for the State Department personnel to report non-compliance with the law's transparency requirements to the Secretary of State.

### *Internal Executive Branch Processes*

The FY2023 NDAA creates new administrative procedures the executive branch must follow when negotiating and concluding international instruments. When any executive branch agency concludes an international instrument, it **must provide** the Secretary of State with the text and a statement of authorizing authority within 15 days after the date of conclusion. Agencies **may not conclude** binding international agreements without consulting the Secretary of State. Any agency that enters into an international instrument **must appoint** a chief international agreements officer to ensure compliance with statutory obligations.

### *Sense of Congress*

The FY2023 NDAA **includes** a "sense of Congress" that "the executive branch should not prescribe or otherwise commit to or include specific legislative text in a treaty or executive agreement unless Congress has authorized such action."

## **Considerations for Congress**

Congressional oversight of the United States' international commitments is of perennial interest, and Congress may wish to monitor implementation of the FY2023 NDAA. One area of interest is how the State Department implements the new transparency requirements for qualifying non-binding instruments. Only those non-binding instruments that are expected to have a "**significant impact**" on U.S. foreign policy will be subject to the FY2023 NDAA unless designated Members of Congress specifically request an instrument. In a 2022 committee report, SFRC **expressed the view** that the "significant impact" analysis should be based on the totality of the circumstances and should assess the instrument's political significance, congressional or public interest, and the effect of implementation. The FY2023 NDAA gives the President, acting through the Secretary of State, **rulemaking authority**, and the State Department could elaborate on the "significant impact" standard through rulemaking or by providing guidance.

Congress may also wish to monitor the exceptions to the FY2023 NDAA's transparency and reporting requirements. Some **observers** have argued that an **exemption** for non-binding defense- and intelligence-related instruments will undercut the benefits of the FY2023 NDAA's new transparency regime. Additionally, in the anticipation of increased volumes due to greater reporting, Congress may wish to ensure that the legislative branch has adequate personnel and resources to review transmitted materials effectively.

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