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INTRODUCTORY NOTE TO AMENDMENTS TO THE CASE-ZABLOCKI ACT CONCERNING REPORTING AND PUBLICATION OF INTERNATIONAL AGREEMENTS AND RELATED REGULATIONS (U.S.)

BY CURTIS BRADLEY*

[December 2022 and October 2023]

Introduction

Congress recently enacted significant reforms to the laws governing the reporting and publication of international agreements in the United States. These reforms were adopted in December 2022 and took effect in September 2023, and the State Department issued regulations implementing them in early October 2023.

Article II of the Constitution provides that the President has the power to make treaties "by and with the advice and consent of the Senate . . . provided two thirds of the Senators present concur."[1] Starting early in U.S. history, presidents (as well as the executive branch more generally) have concluded many international agreements outside of this senatorial advice-and-consent process. Most of these "executive agreements" have been based on statutory authority, but some have been based on authority conferred either by an earlier treaty or by the President's independent constitutional powers.

The practice of concluding executive agreements grew over time, and since World War II they have constituted the vast majority of the international agreements concluded by the United States. According to a State Department calculation, in the fifty-year period from 1939 to 1989, the government concluded 702 Article II treaties and 11,698 executive agreements.[2] In recent years, the use of the senatorial advice-and-consent process has dropped significantly, which means that almost all binding international agreements are now being concluded by the government as executive agreements.[3]

Reporting and Publication of Executive Agreements

For the most part, Congress has not sought to restrict the making of executive agreements, and indeed it authorizes many of them. Instead, Congress has insisted on transparency. To that end, since 1972 the Case-Zablocki Act has required that the executive branch report to Congress all agreements other than Article II treaties. As originally enacted, the Act required that the Secretary of State transmit to Congress the text of any international agreement other than an Article II treaty "as soon as practicable after such [an] agreement has entered into force with respect to the United States but in no event later than sixty days thereafter."[4] When reporting agreements to Congress, the State Department would include a brief background statement for each agreement containing "a precise citation of legal authority."[5] These background statements were not, however, made public.

A related statute has long required the publication of executive agreements. This statute directs the Secretary of State to "cause to be compiled, edited, indexed, and published" a yearly compilation containing "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 other final formality has been executed, during each calendar year."[6] In a 1994 amendment, however, Congress allowed the State Department not to publish agreements when the Department determined that "the public interest in such agreements is insufficient to justify their publication."[7] In 2004, Congress amended the publication statute again to require that the Department publish on its website those agreements that were subject to publication within 180 days after the date on which they entered into force.[8]

Congress at various times has become concerned about late reporting and under-reporting of agreements under the Case-Zablocki Act, and it has repeatedly amended the Act to address these concerns. For example, a 1978 amendment required the President to submit to Congress a report every year on any agreements that were submitted late "explaining fully and completely the reasons for the late transmittal."[9] At times, Congress has even resorted to funding cutoffs in an effort to induce better compliance.[10]

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One reason often cited by the State Department for late and incomplete reporting is that the Department does not always receive timely notice of agreements from other departments and agencies within the executive branch. Congress has amended the Act at times to address this coordination issue. In 1977, for example, Congress amended the Act to require that "[a]ny department or agency of the United States Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than twenty days after such agreement has been signed."[11] In 1978, Congress amended the Act to provide that "an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State."[12]

In 2020, Oona Hathaway, Jack Goldsmith, and I published an assessment of the executive branch's compliance with the Case-Zablocki Act over an almost thirty-year period, from early 1989 to early 2017.[13] Pursuant to the Freedom of Information Act, we obtained thousands of background statements that the government had included in its reporting of agreements to Congress during this period. Cross-checking that information against other databases, and supplementing the data with qualitative interviews, we found that reporting to Congress had continued to be late and incomplete, notwithstanding Congress's amendments to the Act. We also found that the executive branch's claims of legal authority to conclude agreements were often debatable and sometimes highly doubtful. In addition, we found that a majority of the executive agreements being concluded were not being published by the State Department. Finally, we pointed out that the reporting and publication statutes had been interpreted by the executive branch not to apply to nonbinding international agreements, and we noted that this was a potentially large loophole in the transparency regime.[14]

The 2022 Amendments to the Act and the 2023 Regulations

In late 2022, Congress passed significant new amendments to the Case-Zablocki Act, which became effective in September 2023.[15] Under the amendments, the State Department is now obligated to transmit executive agreements to Congress on a monthly basis, along with detailed descriptions of the legal authority that the Secretary of State views as providing support for the agreement.[16] In addition, the Department is required to transmit to Congress "qualifying non-binding instruments," which are defined as nonbinding instruments that "could reasonably be expected to have a significant impact on the foreign policy of the United States" or are subject to a written request from the chair or ranking member of the congressional foreign affairs committees.[17] This reporting obligation does not apply, however, to a nonbinding instrument that "is signed or otherwise becomes operative or is implemented pursuant to the authorities relied upon by the Department of Defense, the Armed Forces of the United States, or any element of the intelligence community."[18]

The State Department is also now obligated to publish on its website the text of executive agreements and qualifying non-binding instruments "[n]ot later than 120 days after the date on which an international agreement enters into force."[19] It must also include the detailed descriptions of legal authority that it is required to include in its transmissions to Congress. There are several statutory exceptions to the publication requirement, including for classified agreements and for agreements "that address military operations, military exercises, acquisition and cross servicing, logistics support, military personnel exchange or education programs, or the provision of health care to military personnel on a reciprocal basis."[20]

The amendments also have provisions designed to enhance executive branch coordination. Executive departments and agencies are now required to report to the State Department any executive agreements or qualifying nonbinding instruments that they enter into withing fifteen days of concluding them, along with a detailed description of the legal authority that provides authorization for the agreement or instrument.[21] In addition, each agency or department that concludes such agreements or instruments must appoint a "Chief International Agreements Officer" to help ensure compliance with these obligations.[22]

In October 2023, the State Department issued regulations to take account of the amendments.[23] These regulations include, among other things, a list of factors to be considered in determining whether a nonbinding instrument "could reasonably be expected to have a significant impact on the foreign policy of the United States."[24] In addition, the regulations specify procedures for consultation between the State Department and executive branch departments and agencies with respect to the negotiation and conclusion of international agreements, and for

the transmission by departments and agencies of international agreements and qualifying nonbinding instruments to the Department.[25]

Conclusion

The recent statutory amendments reflect the most sweeping transparency reforms for international agreements to be adopted by Congress in the last fifty years. It is too early to know the extent to which these reforms will produce useful information for Congress and the public, but the State Department regulations appear to reflect a good-faith effort at compliance. It is possible that additional reforms might eventually be needed—for example, to better ensure the transparency of nonbinding agreements—but it will be useful to see how the current reforms are working before considering further changes. The United States is not alone in perceiving a need for greater transparency in the conclusion of international agreements by its executive branch, and the U.S. reforms may end up serving as a model for other countries.

ENDNOTES

1 U.S. Const. art. II, § 2.

2 *See* Congressional Research Service, Treaties and Other International Agreements: The Role of the United States Senate, S. Prt. 106-71, 106th Cong., 2d Sess. at 39 (Comm. Print 2001).

3 *See* Curtis Bradley, Jack Goldsmith, and Oona Hathaway, *The Death of Article II Treaties?*, Lawfare (Dec. 13, 2018), https://www.lawfaremedia.org/article/death-article-ii-treaties.

4 Pub. L. 92-403, § 1, 86 Stat. 619 (Aug. 22, 1972).

5 *See* 46 Fed. Reg. 35916, 35921, § 181.7(c) (July 13, 1981).

6 1 U.S.C. § 112a.

7 *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. 103-236, § 138, 108 Stat. 382, 397 (Apr. 30, 1994).

8 *See* Pub. L. 108–458, § 7121(a), 118 Stat. 3638, 3807 (Dec. 17, 2004).

9 Pub. L. 95-426, § 708, 92 Stat. 963, 993 (Oct. 7, 1978).

10 *See, e.g.*, Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub L. 100–204, § 139, 101 Stat. 1331, 1347 (Dec. 22, 1987).

11 Pub. L. 95–45, 91 Stat. 221, 224 (June 15, 1977).

12 Pub. L. 95–426, § 708, 92 Stat. 963, 993 (Oct. 7, 1978).

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

14 The three of us recently developed this point further in another empirical project. *See* Curtis A. Bradley, Jack Goldsmith, and Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. 1281 (2023).

15 *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, § 5947, 136 Stat. 2395, 3476 (Dec. 23, 2022) (*amending* 1 U.S.C. § 112b). *See also* Curtis Bradley, Jack Goldsmith, and Oona Hathaway, *Congress Mandates Sweeping Transparency Reforms for Executive Agreements*, LAWFARE (Dec. 23, 2022), https://www.lawfaremedia.org/article/congress-mandates-sweeping-transparency-reforms-international-agreements.

16 *See* 1 U.S.C. § 112b(a).

17 *Id.* § 112(k)(5).

18 *Id.* § 112b(k)(5)(B).

19 1 U.S.C. § 112b(b).

20 *Id.* § 112b(b)(3).

21 *See* 1 U.S.C. § 112b(d).

22 *Id.* § 112b(e).

23 *See* Dep't of State, *Publication, Coordination, and Reporting of International Agreements: Amendments*, 88 Fed. Reg. 67643 (Oct. 2, 2023).

24 22 C.F.R. § 181.4(b)(3).

25 *See* 22 C.F.R. § 181.6; *id.* § 181.7.

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AMENDMENTS TO THE CASE-ZABLOCKI REPORTING ACT CONCERNING REPORTING AND PUBLICATION OF INT'L AGREEMENTS*
[December 2022]

Public Law 117–263
117th Congress

An Act

To authorize appropriations for fiscal year 2023 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

(a) IN GENERAL.—This Act may be cited as the ''James M. Inhofe National Defense Authorization Act for Fiscal Year 2023''. (b) REFERENCES.—Any reference in this or any other Act to the ''National Defense Authorization Act for Fiscal Year 2023'' shall be deemed to be a reference to the ''James M. Inhofe National Defense Authorization Act for Fiscal Year 2023''.

…

SEC. 5947. ENHANCING TRANSPARENCY ON INTERNATIONAL AGREEMENTS AND NON-BINDING INSTRUMENTS.

(a) SECTION 112B OF TITLE 1, UNITED STATES CODE.—

(1) IN GENERAL.—Section 112b of title 1, United States Code, is amended to read as follows:

''§ 112b. United States international agreements and non-binding instruments; transparency provisions

''(a)(1) Not less frequently than once each month, the Secretary shall provide in writing to the Majority Leader of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and the appropriate congressional committees the following:

''(A)(i) A list of all international agreements and qualifying non-binding instruments signed, concluded, or otherwise finalized during the prior month.

''(ii) The text of all international agreements and qualifying non-binding instruments described in clause (i).

''(iii) A detailed description of the legal authority that, in the view of the Secretary, provides authorization for each international agreement and that, in the view of the appropriate department or agency, provides authorization for each qualifying non-binding instrument provided under clause (ii) to become operative. If multiple authorities are relied upon in relation to an international agreement, the Secretary shall cite all such authorities, and if multiple authorities are relied upon in relation to a qualifying non-binding instrument, the appropriate department or

*This text was reproduced and reformatted from the text available on the U.S. Congress website (visited December 6, 2023), https://www.congress.gov/117/plaws/publ263/PLAW-117publ263.pdf. Because of the length of the Act in which the amendments appear, what follows is an extract of the relevant amendments.

agency shall cite all such authorities. All citations to the Constitution of the United States, a treaty, or a statute shall include the specific article or section and subsection reference whenever available and, if not available, shall be as specific as possible. If the authority relied upon is or includes article II of the Constitution of the United States, the Secretary or appropriate department or agency shall explain the basis for that reliance.

"(B)(i) A list of all international agreements that entered into force and qualifying non-binding instruments that became operative for the United States or an agency of the United States during the prior month.

"(ii) The text of all international agreements and qualifying non-binding instruments described in clause (i) if such text differs from the text of the agreement or instrument previously provided pursuant to subparagraph (A)(ii).

"(iii) A statement describing any new or amended statutory or regulatory authority anticipated to be required to fully implement each proposed international agreement and qualifying non-binding instrument included in the list described in clause (i).

"(b)(1) Not later than 120 days after the date on which an international agreement enters into force, the Secretary shall make the text of the agreement, and the information described in subparagraphs (A)(iii) and (B)(iii) of subsection (a)(1) relating to the agreement, available to the public on the website of the Department of State.

"(2) Not less frequently than once every 120 days, the Secretary shall make the text of each qualifying non-binding instrument that became operative during the preceding 120 days, and the information described in subparagraphs (A)(iii) and (B)(iii) of sub-section (a)(1) relating to each such instrument, available to the public on the website of the Department of State.

"(3) The requirements under paragraphs (1) and (2) shall not apply to the following categories of international agreements or qualifying non-binding instruments, or to information described in subparagraphs (A)(iii) and (B)(iii) of subsection (a)(1) relating to such agreements or qualifying non-binding instruments:

"(A) International agreements and qualifying non-binding instruments that contain information that has been given a national security classification pursuant to Executive Order 13526 (50 U.S.C. 3161 note; relating to classified national security information) or any predecessor or successor order, or that contain any information that is otherwise exempt from public disclosure pursuant to United States law.

"(B) International agreements and qualifying non-binding instruments that address military operations, military exercises, acquisition and cross servicing, logistics support, military personnel exchange or education programs, or the provision of health care to military personnel on a reciprocal basis.

"(C) International agreements and qualifying non-binding instruments that establish the terms of grant or other similar assistance, including in-kind assistance, financed with foreign assistance funds pursuant to the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) or the Food for Peace Act (7 U.S.C. 1691 et seq.).

"(D) International agreements and qualifying non-binding instruments, such as 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 or qualifying non-binding instrument that has been published in accordance with paragraph (1) or (2).

"(E) International agreements and qualifying non-binding instruments that have been separately published by a depositary or other similar administrative body, except that the Secretary shall

make the information described in subparagraphs (A)(iii) and (B)(iii) of subsection (a)(1), relating to such agreements or qualifying non-binding instruments, available to the public on the website of the Department of State within the timeframes required by paragraph (1) or (2).

"(c) For any international agreement or qualifying non-binding instrument for which an implementing agreement or arrangement, or any document of similar purpose or function to the aforementioned regardless of the title of the document, is not otherwise required to be submitted to the Majority Leader of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and the appropriate congressional committees under subparagraphs (A)(ii) or (B)(ii) of subsection (a)(1), not later than 30 days after the date on which the Secretary receives a written communication from the Chair or Ranking Member of either of the appropriate congressional committees requesting the text of any such implementing agreements or arrangements, whether binding or non-binding, the Secretary shall submit such implementing agreements or arrangements to the Majority Leader of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and the appropriate congressional committees.

"(d) Any department or agency of the United States Government that enters into any international agreement or qualifying non-binding instrument on behalf of itself or the United States shall—

"(1) provide to the Secretary the text of each international agreement not later than 15 days after the date on which such agreement is signed or otherwise concluded;

"(2) provide to the Secretary the text of each qualifying non-binding instrument not later than 15 days after the date on which such instrument is concluded or otherwise becomes finalized;

"(3) provide to the Secretary a detailed description of the legal authority that provides authorization for each qualifying non-binding instrument to become operative not later than 15 days after such instrument is signed or otherwise becomes finalized; and

"(4) on an ongoing basis, provide any implementing material to the Secretary for transmittal to the Majority Leader of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and the appropriate congressional committees as needed to satisfy the requirements described in subsection (c).

"(e)(1) Each department or agency of the United States Government that enters into any international agreement or qualifying non-binding instrument on behalf of itself or the United States shall designate a Chief International Agreements Officer, who shall—

"(A) be selected from among employees of such department or agency;

"(B) serve concurrently as the Chief International Agreements Officer; and

"(C) subject to the authority of the head of such department or agency, have department- or agency-wide responsibility for efficient and appropriate compliance with this section.

"(2) There shall be a Chief International Agreements Officer who serves at the Department of State with the title of International Agreements Compliance Officer.

"(f) The substance of oral international agreements shall be reduced to writing for the purpose of meeting the requirements of subsections (a) and (b).

"(g) Notwithstanding any other provision of law, an inter- national agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary. Such consultation may encompass a class of agreements rather than a particular agreement.

"(h)(1) Not later than 3 years after the date of the enactment of this section, and not less frequently than once every 3 years thereafter during the 9-year period beginning on the date of the enactment of this section, the Comptroller General of the United States shall conduct an audit of the compliance of the Secretary with the requirements of this section.

"(2) In any instance in which a failure by the Secretary to comply with such requirements is determined by the Comptroller General to have been due to the failure or refusal of another agency to provide information or material to the Department of State, or the failure to do so in a timely manner, the Comptroller General shall engage such other agency to determine—

"(A) the cause and scope of such failure or refusal;

"(B) the specific office or offices responsible for such failure or refusal; and

"(C) recommendations for measures to ensure compliance with statutory requirements.

"(3) The Comptroller General shall submit to the Majority Leader of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and the appropriate congressional committees in writing the results of each audit required by paragraph (1).

"(4) The Comptroller General and the Secretary shall make the results of each audit required by paragraph (1) publicly available on the websites of the Government Accountability Office and the Department of State, respectively.

"(i) The President shall, through the Secretary, promulgate such rules and regulations as may be necessary to carry out this section.

"(j) It is the sense of Congress that the executive branch should not prescribe or otherwise commit to or include specific legislative text in a treaty, executive agreement, or non-binding instrument unless Congress has authorized such action.

"(k) In this section:

"(1) The term 'appropriate congressional committees' means—

"(A) the Committee on Foreign Relations of the Senate; and

"(B) the Committee on Foreign Affairs of the House of Representatives.

"(2) The term 'appropriate department or agency' means the department or agency of the United States Government that negotiates and enters into a qualifying non-binding instrument on behalf of itself or the United States.

"(3) The term 'intelligence community' has the meaning given that term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)).

"(4) The term 'international agreement' includes—

"(A) any treaty that requires the advice and consent of the Senate, pursuant to article II of the Constitution of the United States; and

"(B) any other international agreement to which the United States is a party and that is not subject to the advice and consent of the Senate.

"(5) The term 'qualifying non-binding instrument'—

"(A) except as provided in subparagraph (B), means a non-binding instrument that—

"(i) is or will be under negotiation, is signed or otherwise becomes operative, or is implemented with one or more foreign governments, international organizations, or foreign entities, including non-state actors; and

"(ii) (I) could reasonably be expected to have a significant impact on the foreign policy of the United States; or

"(II) is the subject of a written communication from the Chair or Ranking Member of either of the appropriate congressional committees to the Secretary; and

"(B) does not include any non-binding instrument that is signed or otherwise becomes operative or is implemented pursuant to the authorities relied upon by the Department of Defense, the Armed Forces of the United States, or any element of the intelligence community.

"(6) The term 'Secretary' means the Secretary of State.

"(7)(A) The term 'text' with respect to an international agreement or qualifying non-binding instrument includes—

"(i) any annex, appendix, codicil, side agreement, side letter, 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; and

"(ii) any implementing agreement or arrangement, or any document of similar purpose or function to the afore- mentioned regardless of the title of the document, that is entered into contemporaneously and in conjunction with the international agreement or qualifying non-binding instrument.

"(B) As used in subparagraph (A), the term 'contemporaneously and in conjunction with'—

"(i) shall be construed liberally; and

"(ii) may not be interpreted to require any action to have occurred simultaneously or on the same day.

"(l) Nothing in this section may be construed—

"(1) to authorize the withholding from disclosure to the public of any record if such disclosure is required by law; or

"(2) to require the provision of any implementing agreement or arrangement, or any document of similar purpose or function regardless of its title, which was entered into by the Department of Defense, the Armed Forces of the United States, or any element of the intelligence community or any implementing material originating with the aforementioned agencies, if such implementing agreement, arrangement, document, or material was not required to be provided to the Majority Leader of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, or the appropriate congressional committees prior to the date of the enactment of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 2 of title 1, United States Code, is amended by striking the item relating to section 112b and inserting the following:

"112b. United States international agreements and non-binding instruments; transparency provisions.".

(3) TECHNICAL AND CONFORMING AMENDMENT RELATING TO AUTHORITIES OF THE SECRETARY OF STATE.—Section 317(h)(2) of the Homeland Security Act of 2002 (6 U.S.C. 195c(h)(2)) is amended by striking "Section 112b(c)" and inserting "Section 112b(g)".

(4) MECHANISM FOR REPORTING.—Not later than 270 days after the date of the enactment of this Act, the Secretary of State shall establish a mechanism for personnel of the Department of State who become aware or who have reason to believe that the requirements under section 112b of title 1, United States Code, as amended by paragraph (1), have not been fulfilled with respect to an international agreement or qualifying non-binding instrument (as such terms are defined in such section) to report such instances to the Secretary.

(5) RULES AND REGULATIONS.—Not later than 180 days after the date of the enactment of this Act, the President, through the Secretary of State, shall promulgate such rules and regulations as may be necessary to carry out section 112b of title 1, United States Code, as amended by paragraph (1).

(6) CONSULTATION AND BRIEFING REQUIREMENT.—

(A) CONSULTATION.—The Secretary of State shall consult with the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives on matters related to the implementation of this section and the amendments made by this section before and after the effective date described in subsection (c).

(B) BRIEFING.—Not later than 90 days after the date of the enactment of this Act, and once every 90 days thereafter for 1 year, the Secretary shall brief the Committee on Foreign Relations of the Senate, the Committee on Appropriations of the Senate, the Committee on Foreign Affairs of the House of Representatives, and the Committee on Appropriations of the House of Representatives regarding the status of efforts to implement this section and the amendments made by this section.

(7) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to the Department of State $1,000,000 for each of the fiscal years 2023 through 2027 for purposes of implementing the requirements of section 112b of title 1, United States Code, as amended by paragraph (1).

(b) SECTION 112A OF TITLE 1, UNITED STATES CODE.—Section 112a of title 1, United States Code, is amended—

(1) by striking subsections (b), (c), and (d); and

(2) by inserting after subsection (a) the following:
"(b) Copies of international agreements and qualifying non-binding instruments in the possession of the Department of State, but not published, other than the agreements described in section 112b(b)(3)(A), shall be made available by the Department of State upon request.".

(c) EFFECTIVE DATE OF AMENDMENTS.—The amendments made by this section shall take effect on the date that is 270 days after the date of the enactment of this Act.

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REGULATIONS IMPLEMENTING AMENDMENTS TO THE CASE-ZABLOCKI REPORTING ACT CONCERNING REPORTING AND PUBLICATION OF INT'L AGREEMENTS*
[October 2023]

DEPARTMENT OF STATE
22 CFR Part 181
[Public Notice: 12151]
RIN 1400–AF63
Publication, Coordination, and Reporting of International Agreements: Amendments
AGENCY: Department of State.
ACTION: Final rule; request for comment.

SUMMARY: The Department of State ("Department") finalizes regulations regarding the publication, coordination, and reporting of international agreements. Section 5947 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 made changes regarding the reporting to Congress and publication of the texts of international agreements and related information. The amendments include changes to the scope and deadlines associated with requirements to report international agreements and related information to Congress, and to publish the texts of international agreements in the Treaties and Other International Acts Series (TIAS). These amendments are intended to reflect and to implement the recently enacted changes to the reporting process.

DATES: *Effective date*: This rule is effective on October 2, 2023. *Comments due date*: The Department of State will consider comments submitted until November 1, 2023.

ADDRESSES: Interested parties may submit comments to the Department by any of the following methods:

- *Internet (preferred)*: At www.regulations.gov, you can search for the document using Docket Number DOS–2023–0024 or RIN 1400–AF63.

- *Email*: Michael Mattler, Office of the Legal Adviser, U.S. Department of State, treatyoffice@state.gov.

- All comments should include the commenter's name, the organization the commenter represents, if applicable, and the commenter's address. If the Department is unable to read your comment for any reason, and cannot contact you for clarification, the Department may not be able to consider your comment. After the conclusion of the comment period, the Department will publish a final rule (in which it will address relevant comments) as expeditiously as possible.

FOR FURTHER INFORMATION CONTACT:

Michael Mattler, Assistant Legal Adviser for Treaty Affairs, Office of the Legal Adviser, Department of State, Washington, DC 20520, (202) 647–1345, or at *treatyoffice@state.gov.*

SUPPLEMENTARY INFORMATION: The Department of State is implementing amendments to 22 CFR part 181 to reflect the enactment of Section 5947 of the National Defense Authorization Act for Fiscal Year (FY) 2023 (Pub. L. 117–263) ("the NDAA").

Section 5947 amends 1 U.S.C. 112a and 1 U.S.C. 112b, known as the Case-Zablocki Act, regarding the publication, coordination, and reporting to Congress of international agreements.

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Section 5947 expands the application of the Case-Zablocki Act's reporting and publication requirements to include "qualifying non-binding" instruments as defined in the statute. To implement these changes, the rule adds two new sections to 22 CFR part 181: one establishing criteria that will apply to the identification of qualifying nonbinding instruments (Section 181.4) and one regarding the process the Department of State will follow for assessing whether particular non-binding instruments constitute "qualifying non-binding instruments" within the meaning of the statute (Section 181.5). These sections follow the form and structure of existing Sections 181.2 and 181.3 which establish comparable criteria and procedures regarding the identification of international agreements.

In accordance with 1 U.S.C. 112b(k)(5), among the elements for determining whether a non-binding instrument is a "qualifying non-binding instrument" for the purposes of the statute is whether the instrument "could reasonably be expected to have a significant impact on the foreign policy of the United States." Amended 22 CFR 181.3(b)(3) establishes factors for consideration when assessing the significance of a non-binding instrument on the foreign policy of the United States. These factors reflect considerations cited by the Congressional sponsors of section 5947 in.connection with Congress's consideration of the legislation. These factors include whether, and to what extent, the instrument is of importance to the United States' relationship with another country, such as by addressing a significant new policy or initiative (rather than ongoing activities or cooperation); affects the rights or responsibilities of U.S. citizens, U.S. nationals, or individuals in the United States; impacts State laws; has budgetary or appropriations impact; requires changes to U.S. law to satisfy commitments made therein; presents a new commitment or risk for the entire Nation; and is of Congressional or public interest.

The procedures set out in 22 CFR 181.4(b) for assessing whether particular non-binding instruments could reasonably be expected to have a significant impact on the foreign policy of the United States provide for such assessments to be made in the first instance by the State Department bureau for instruments negotiated by the Department of State or the U.S. Government agency responsible for negotiating the instrument. On a monthly basis a list of instruments identified by State Department bureaus and U.S. Government agencies as reasonably expected to have a significant impact on the foreign policy of the United States will be submitted to the Under Secretary of State for Political Affairs for approval for transmittal to the Congress in accordance with the Case-Zablocki Act.

Amendments to 22 CFR 181.6 update the procedures by which U.S. Government agencies consult with the Secretary of State regarding international agreements proposed for negotiation or conclusion to reflect developments in practice and technical clarifications since 22 CFR 181.6 was last updated. Amendments to this section also reflect recommendations from the Government Accountability Office designed to facilitate the identification and monitoring of international agreements containing fiscal contingencies that could give rise to future financial losses or other costs for the United States or U.S. Government agencies in amounts that could be material for the purposes of reporting on annual financial statements.

Amendments to 22 CFR 181.7 consolidate in a single section guidance previously contained in other sections of the regulations regarding transmittal by U.S. Government agencies to the Department of State of international agreements and related material. They also include new guidance on the transmittal of qualifying non-binding instruments and related material to reflect new requirements contained in section 5947 of NDAA 2023, as well as updated deadlines for the transmittal of materials reflected in that section.

Amendments to 22 CFR 181.8 implement changes made by Section 5947 in.the categories of information required to be transmitted to the Congress related to international agreements and qualifying non-binding instruments. The new provisions are drawn from the text of the relevant statutory requirements.

Amendments to 22 CFR 181.9 implement changes made by section 5947 of NDAA 2023 regarding requirements for the publication of international agreements. They reflect new requirements to publish the texts of qualifying non-binding instruments as well as information regarding legal authorities relied upon to enter into international agreements and qualifying non-binding instruments, and any new legislative or regulatory authorities needed to implement such agreements and instruments. Amendments to this section also reflect changes made by section 5947 to categories of international agreements that are exempt from requirements to be published and to deadlines for publication. The amended language in this section is drawn from the text of section 5947.

Regulatory Analysis

Administrative Procedures Act

The Department is issuing this rule as a final rule, asserting the "good cause" exemption to the Administrative Procedure Act (5 U.S.C. 553(b)). The Department finds that public comment would be impractical prior to the effective date of this rulemaking, given the short deadline provided by Congress to implement this rule, and the imminent effective date of the statute itself. See *Sepulveda v. Block*, 782 F.2d 363 (2d Cir. 1986). Section 5947(a)(5) requires "the President, through the Secretary of State [to] promulgate such rules and regulations as may be necessary" to implement the changes to 1 U.S.C. 112b, not later than 180 days after the date of statute's enactment. Section 5947(c) provided that the amendments "shall take effect on the date that is 270 days after the date of the enactment of this Act." The NDAA was signed by the President on December 23, 2022, resulting in a deadline for the finalization of the required rules of June 21, 2023, and the statute itself became effective on September 19, 2023. However, the Department will consider relevant public comments submitted up to 30 days after publication.

Regulatory Flexibility Act/Executive Order 13272: Small Business

This rulemaking is hereby certified as not expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

Congressional Review Act

This rulemaking does not constitute a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking.

The Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of $100 million or more by State, local, or tribal governments, or by the private sector. This rule will not result in any such expenditure nor would it significantly or uniquely affect small governments.

Executive Orders 12372 and 13132: Federalism and Executive Order 13175, Impact on Tribes

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of national government. Nor will the regulations have federalism implications warranting the application of Executive Orders 12372 and 13132. This rule will not have tribal implications, will not impose costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Executive Orders 12866 and 14094; 13563: Regulatory Review

This rule has been drafted in accordance with the principles of Executive Order 12866, as amended by Executive Order 14094, and 13563. The rulemaking is mandated by a Congressional statute; therefore, Congress determined that the benefits of this rulemaking outweigh the costs. This rule has been determined to be a significant rulemaking under section 3 of Executive Order 12866, but not economically significant.

Executive Order 12988: Civil Justice Reform

This rule has been reviewed in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

The Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulation. This rule contains no new collection of information requirements.

List of Subjects in 22 CFR Part 181

Treaties.

■ For the reasons set forth above, the State Department revises 22 CFR part 181 to read as follows:

PART 181—COORDINATION, REPORTING AND PUBLICATION OF INTERNATIONAL AGREEMENTS

Sec.

181.1 Purpose and application.

181.2 Criteria with respect to international agreements.

181.3 Determinations with respect to international agreements.

181.4 Criteria with respect to qualifying non-binding instruments.

181.5 Determinations with respect to qualifying non-binding instruments.

181.6 Consultations with the Secretary of State.

181.7 Fifteen-day rule for transmittal of concluded international agreements and qualifying non-binding instruments to the Department of State.

181.8 Transmittal to the Congress.

181.9 Publication of international agreements and qualifying non-binding instruments.

181.10 Definition of "text"

Authority: 1 U.S.C. 112a, 112b; and 22 U.S.C. 2651a.

§ 181.1 Purpose and application.

(a) The purpose of this part is to implement the provisions of 1 U.S.C. 112b, popularly known as the Case-Zablocki Act (hereinafter "the Act"), on the reporting to Congress and publication of international agreements and qualifying non-binding instruments and related coordination with the Secretary of State. This part applies to all agencies of the U.S. Government whose responsibilities include the negotiation and conclusion of international agreements and qualifying non-binding instruments. This part does not, however, constitute a delegation by the Secretary of State of the authority to engage in such activities. Further, it does not affect any additional requirements of law governing the relationship between particular agencies and the Secretary of State in connection with international negotiations and agreements, or any other requirements of law concerning the relationship between particular agencies and the Congress. The term "agency" as used in this part means each authority of the United States Government, whether or not it is within or subject to review by another agency.

(b) Pursuant to the key legal requirements of the Act—full and timely disclosure to the Congress of all concluded international agreements and qualifying non-binding instruments, publication of international agreements and qualifying non-binding instruments, and consultation by agencies with the Secretary of State with respect to proposed international agreements—every agency of the U.S. Government is required to comply with each of the provisions set out in this part in implementation of the Act. Nevertheless, this part is intended as a framework of measures and procedures which, it is recognized, cannot anticipate all circumstances or situations that may arise. Deviation or derogation from the provisions of this part will not affect the legal validity, under United States law or under international law, of international agreements concluded, will not give rise to a cause of action, and will not affect any public or private rights established by such agreements, Similarly, any such deviation will not affect the status or effectiveness of any non-binding instrument.

(c) To facilitate coordination with the Department of State in the implementation of the Act, agencies whose responsibilities include the negotiation and conclusion of international agreements or qualifying non-binding instruments shall notify the Department of State of the official designated as the agency's Chief International Agreements

Officer in accordance with 1 U.S.C. 112b(e) promptly upon that official's designation, and shall promptly inform the Department of any changes in the official designated.

(d) For the Department of State, the Deputy Legal Adviser with supervisory responsibility over the Office of Treaty Affairs will be designated as the Department's Chief International Agreements Officer in accordance with 1 U.S.C. 112b(e), and will have the title of International Agreements Compliance Officer.

§ 181.2 Criteria with respect to international agreements.

(a) *General*. The following criteria are to be applied in deciding whether any undertaking, oral agreement, document, or set of documents, including an exchange of notes or of correspondence, constitutes an international agreement within the meaning of the Act. Each of the criteria except those in paragraph (a)(5) of this section must be met in order for any given undertaking of the United States to constitute an international agreement within the meaning of the Act.

(1) *Identity and intention of the parties*. A party to an international agreement must be a state, a state agency, or an intergovernmental organization. The parties must intend their undertaking to be legally binding, and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements. An example of the latter is the Final Act of the Helsinki Conference on Cooperation and Security in Europe. In addition, the parties must intend their undertaking to be governed by international law, although this intent need not be manifested by a third-party dispute settlement mechanism or any express reference to international law. In the absence of any provision in the arrangement with respect to governing law, it will be presumed to be governed by international law. This presumption may be overcome by clear evidence, in the negotiating history of the arrangement or otherwise, that the parties intended the arrangement to be governed by another legal system. Arrangements governed solely by the law of the United States, or one of the states or jurisdictions thereof, or by the law of any foreign state, are not international agreements for these purposes. For example, a foreign military sales loan agreement governed in its entirety by U.S. law is not an international agreement.

(2) *Significance of the arrangement*. Minor or trivial undertakings, even if couched in legal language and form, are not considered international agreements within the meaning of the Act. In deciding what level of significance must be reached before a particular arrangement becomes an international agreement, the entire context of the transaction and the expectations and intent of the parties must be taken into account. The duration of the activities pursuant to the undertaking or the duration of the undertaking itself shall not be a factor in determining whether it constitutes an international agreement. It remains a matter of judgment based on all of the circumstances of the transaction. Determinations are made pursuant to § 181.3. Examples of arrangements that may constitute international agreements are agreements that:

(i) Are of political significance;

(ii) Involve substantial grants of funds or loans by the United States or credits payable to the United States;

(iii) Constitute a substantial commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations;

(iv) Involve continuing and/or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment, or the pooling of data. However, individual research grants and contracts do not ordinarily constitute international agreements.

(3) *Specificity, including objective criteria for determining enforceability*. International agreements require precision and specificity in the language setting forth the undertakings of the parties. Undertakings couched in vague or very general terms containing no objective criteria for determining enforceability or performance are not normally international agreements. Most frequently such terms reflect an intent not to be bound. For example, a promise to "help develop a more viable world economic system" lacks the specificity essential to constitute a legally binding international agreement. However, the intent of the parties is the key factor. Undertakings as general as those of, for example, Articles 55 and 56 of the United Nations Charter have been held to create internationally binding obligations intended as such by the parties.

(4) *Necessity for two or more parties*. While unilateral commitments on occasion may be legally binding, they do not constitute international agreements. For example, a statement by the President promising to send money to Country Y to assist earthquake victims would not be an international agreement. It might be an important undertaking, but not all undertakings in international relations are in the form of international agreements. Care should be taken to examine whether a particular undertaking is truly unilateral in nature, or is part of a larger bilateral or multilateral set of undertakings. Moreover, "consideration," as that term is used in domestic contract law, is not required for international agreements.

(5) *Form*. Form as such is not normally an important factor, but it does deserve consideration. Documents which do not follow the customary form for international agreements, as to matters such as style, final clauses, signatures, or entry into force dates, may or may not be international agreements. Failure to use the customary form may constitute evidence of a lack of intent to be legally bound by the arrangement. If, however, the general content and context reveal an intention to enter into a legally binding relationship, a departure from customary form will not preclude the arrangement from being an international agreement. Moreover, the title of the agreement will not be determinative. Decisions will be made on the basis of the substance of the arrangement, rather than on its denomination as an international agreement, a memorandum of understanding, exchange of notes, exchange of letters, technical arrangement, protocol, note verbale, aide-memoire, agreed minute, or any other name.

(b) *Agency-level agreements*. Agency-level agreements are international agreements within the meaning of the Act if they satisfy the criteria discussed in paragraph (a) of this section. The fact that an agreement is concluded by and on behalf of a particular agency of the United States Government, rather than the United States Government, does not mean that the agreement is not an international agreement. Determinations are made on the basis of the substance of the agency-level agreement in question.

(c) *Implementing agreements*. (1) An implementing agreement, if it satisfies the criteria discussed in paragraph (a) of this section, may itself be an international agreement within the meaning of the Act, depending upon how precisely it is anticipated and identified in the underlying agreement it is designed to implement. If the terms of the implementing agreement are closely anticipated and identified in the underlying agreement, only the underlying agreement is considered an international agreement. For example, the underlying agreement might call for the sale by the United States of 1,000 tractors, and a subsequent implementing agreement might require a first installment on this obligation by the sale of 100 tractors of the brand X variety. In that case, the implementing agreement is sufficiently identified in the underlying agreement, and would not itself be considered an international agreement within the meaning of the Act. Project annexes and other documents which provide technical content for an umbrella agreement are not normally treated as international agreements. However, if the underlying agreement is general in nature, and the implementing agreement meets the specified criteria of paragraph (a) of this section, the implementing agreement itself might well be an international agreement within the meaning of the Act. For example, if the underlying agreement calls for the conclusion of "agreements for agricultural assistance," but without further specificity, then a particular agricultural assistance agreement subsequently concluded in "implementation" of that

obligation, provided it meets the criteria discussed in paragraph (a) of this section, would constitute an international agreement independent of the underlying agreement.

(2) Although the considerations discussed in this paragraph generally are to be applied to determine whether an implementing agreement is itself an international agreement within the meaning of the Act, the Act specifies some circumstances in which an implementing agreement may be subject to the requirements of the Act for reasons independent of the considerations in this paragraph. For example, the Act defines the "text" of an international agreement to include "any implementing agreement or arrangement . . . that is entered into contemporaneously and in conjunction with the international agreement," and further provides, subject to some exceptions, that the Secretary shall submit to specified members of Congress the text of implementing agreements not otherwise covered by the Act not later than 30 days after receipt of a request from the Chair or Ranking Member of the Senate Foreign Relations Committee or the House Foreign Affairs Committee for the text of such implementing agreements.

(d) *Extensions and modifications of agreements*. If an undertaking constitutes an international agreement within the meaning of the Act, then a subsequent extension or modification of such an agreement would itself constitute an international agreement within the meaning of the Act.

(e) *Oral agreements*. Any oral arrangement that meets the criteria discussed in paragraphs (a)(1) through (4) of this section is an international agreement and, pursuant to section (f) of the Act, must be reduced to writing by the agency that concluded the oral arrangement. In such written form, the arrangement is subject to all the requirements of the Act and of this part. Whenever a question arises whether an oral arrangement constitutes an international agreement, the arrangement shall be reduced to writing and the decision made in accordance with § 181.3.

§ 181.3 Determinations with respect to international agreements.

(a) Whether any undertaking, document, or set of documents constitutes or would constitute an international agreement within the meaning of the Act shall be determined by the Legal Adviser of the Department of State, a Deputy Legal Adviser, or in most cases the Assistant Legal Adviser for Treaty Affairs. Such determinations shall be made either on a case-by-case basis, or on periodic consultation, as appropriate.

(b) Agencies whose responsibilities include the negotiation and conclusion of international agreements are responsible for transmitting to the Assistant Legal Adviser for Treaty Affairs, for decision pursuant to paragraph (a) of this section, the text, as defined in § 181.10, of any document or set of documents that might constitute an international agreement. The transmittal shall be made prior to or simultaneously with the request for consultations with the Secretary of State required by subsection (g) of the Act and § 181.6.

(c) Agencies to which paragraph (b) of this section applies shall consult periodically with the Assistant Legal Adviser for Treaty Affairs in order to determine which categories of arrangements for which they are responsible are likely to be international agreements within the meaning of the Act.

§ 181.4 Criteria with respect to qualifying non-binding instruments.

(a) *General*. Pursuant to 1 U.S.C. 112b(k)(5), a qualifying non-binding instrument is a non-binding instrument that:

(1) Is or will be under negotiation, is signed or otherwise becomes operative, or is implemented with one or more foreign governments, international organizations, or foreign entities, including non-state actors; and
(2) (i) Could reasonably be expected to have a significant impact on the foreign policy of the United States; or

(ii) Is the subject of a written communication from the Chair or Ranking Member of the Committee on Foreign Relations of the Senate or the Committee on Foreign Affairs of the House of Representatives to the Secretary.

(3) Consistent with 1 U.S.C. 112b(k)(5)(B), any non-binding instrument that is signed or otherwise becomes operative or is implemented pursuant to the authorities relied upon by the Department of Defense, the Armed Forces of the United States, or any element of the intelligence community does not constitute a qualifying non-binding instrument.

(4) As outlined in further detail in this part, requirements under 1 U.S.C. 112b regarding the transmittal to Congress and publication of qualifying nonbinding instruments and related information apply only to qualifying non-binding instruments that have been signed, concluded, or otherwise finalized, and do not apply to instruments under negotiation prior to being signed, concluded, or otherwise finalized.

(b) *Significant foreign policy impact non-binding instruments*. The criteria set out in the following paragraphs are to be applied in deciding whether any undertaking, document, or set of documents, including an exchange of notes or of correspondence, constitutes a non-binding instrument that could reasonably be expected to have a significant impact on the foreign policy of the United States within the meaning of section 112b(k)(5)(A)(ii)(I) of the Act.

(1) *Legal character*. Non-binding instruments are intended to have political or moral weight, rather than legal force. An instrument is not a nonbinding instrument if it gives rise to legal rights or obligations under either international law or domestic law.

(2) *Participants*. Consistent with 1 U.S.C. 112b(k)(5)(A)(i), a qualifying nonbinding instrument may be concluded between the United States (or an agency thereof) and one or more foreign governments (or an agency thereof), international organizations, or foreign entities, including non-state actors.

(3) *Significance*. (i) Consistent with 1 U.S.C. 112b(k)(5)(A)(ii)(I), and except for a non-binding instrument referred to in 1 U.S.C. 112b(k)(5)(B), a non-binding instrument that could reasonably be expected to have a significant impact on the foreign policy of the United States, and that meets the other elements set out in 1 U.S.C. 112b(k)(5), is a qualifying non-binding instrument within the meaning of the Act. The degree of significance of any particular instrument requires an objective wholistic [sic] assessment; no single criterion or factor by itself is determinative. In deciding whether a particular instrument meets the significance standard, the entire context of the transaction, including the factors set out below and the expectations and intent of the participants, must be taken into account. Factors that may be relevant in determining whether a non-binding instrument could reasonably be expected to have a significant impact on the foreign policy of the United States include whether, and to what extent, the instrument:

(A) Is of importance to the United States' relationship with another country, such as by addressing a significant new policy or initiative (rather than ongoing activities or cooperation);

(B) Affects the rights or responsibilities of U.S. citizens, U.S. nationals, or individuals in the United States;

(C) Impacts State laws;

(D) Has budgetary or appropriations impact;

(E) Requires changes to U.S. law to satisfy commitments made therein;

(F) Presents a new commitment or risk for the entire Nation); and

(G) Is of Congressional or public interest.

(ii) In applying these criteria, neither the form or structure of the instrument nor the number of participants involved shall be determinative of whether the instrument meets the significance standard. Similarly, neither the duration of the activities pursuant to the instrument nor the duration of the instrument itself shall be determinative of whether the instrument meets the standard. An instrument that is technical in nature could meet the standard if, for example, it was of particular importance to a bilateral relationship, or if it satisfied other of the criteria set out in this section.

(iii) In the context of these considerations, non-binding instruments concluded as part of the regular work of international organizations and fora such as the United Nations and its specialized agencies, the G–20, and similar multilateral or regional groupings and that are made public within 30 days of their conclusion in most instances will not be submitted to Congress pursuant to 1 U.S.C. 112b(k)(5)(A)(ii)(I). Similarly, instruments memorializing general outcomes of meetings between senior U.S. officials and foreign counterparts and that are made public within 30 days of their conclusion in most instances will not be submitted to Congress pursuant to 1 U.S.C. 112b(k)(5)(A)(ii)(I).

(iv) In the context of these criteria, non-binding instruments concluded for the purposes of facilitating routine sharing of information (including personally identifiable information of U.S. citizens, U.S. nationals, or other individuals in the United States) in a manner authorized by U.S. law for the purposes of law enforcement cooperation, will not, on that basis alone, be regarded as expected to have a significant impact on the foreign policy of the United States.

(c) *Non-binding instruments requested by Congress*. In accordance with section 112b(k)(5)(A)(ii)(II) of the Act, and except for instruments referred to in section 112b(k)(5)(B) of the Act, a non-binding instrument that is the subject of a written communication from the Chair or Ranking Member of either of the appropriate congressional committees defined in the Act as the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs, to the Secretary is a qualifying non-binding instrument.

§ 181.5 Determinations with respect to qualifying non-binding instruments.

(a) *In general*. Whether a non-binding instrument constitutes a qualifying nonbinding instrument for the purposes of the Act shall be determined in accordance with this section and 1 U.S.C. 112b(k)(5)(B), as referenced in § 181.4(a).

(b) *Significant foreign policy impact non-binding instruments*. (1) Department of State bureaus whose responsibilities include the negotiation of non-binding instruments, or the oversight of negotiation of non-binding instruments by posts abroad, shall designate an official no lower than the rank of Deputy Assistant Secretary to be responsible for the identification of instruments, except for instruments referred to in section 112b(k)(5)(B) of the Act, that could reasonably be expected to have a significant impact on the foreign policy of the United States. In identifying such instruments, bureaus shall take into account the considerations set out in § 181.4.

(2) As provided in § 181.7(a)(2), Department of State bureaus whose responsibilities include the negotiation of non-binding instruments, or the oversight of negotiation of non-binding instruments by posts abroad, shall notify the Bureau of Legislative Affairs and the Office of the Assistant Legal Adviser for Treaty Affairs within 15 days of the signature, conclusion, or other finalization of a qualifying nonbinding instrument that they have identified as one that could reasonably be expected to have a significant impact on the foreign policy of the United States. Bureaus shall also indicate whether the instrument has already been published, or whether it is anticipated to be published, either on the website of the Department of State or by a depositary or other similar administrative body.

(3) As provided in § 181.7(a)(2), agencies whose responsibilities include the negotiation and conclusion of nonbinding instruments shall transmit to the Department via a memorandum addressed to the Department's Executive Secretary the text of any qualifying nonbinding instrument that they, applying the

criteria in § 181.4(b), determine could reasonably be expected to have a significant impact on the foreign policy of the United States within 15 days of its signature, conclusion, or other finalization. Upon receipt, such documents shall be transmitted to the Bureau of Legislative Affairs and the Office of the Assistant Legal Adviser for Treaty Affairs.

(4) On a monthly basis, the Bureau of Legislative Affairs and the Office of the Assistant Legal Adviser for Treaty Affairs shall compile a list of qualifying non-binding instruments received in accordance with paragraphs (b)(2) and (3) of this section and shall submit the list to the Under Secretary of State for Political Affairs for his or her approval for transmittal to the Congress in accordance with the procedures set out in § 181.8.

(5) State Department bureaus and U.S. Government agencies are encouraged to identify qualifying non-binding instruments that could reasonably be expected to have a significant impact on the foreign policy of the United States at the earliest possible stage during the negotiating process and to advise of their expected conclusion in advance of the deadlines specified in paragraphs (b)(2) and (3) of this section, in order to facilitate timely compliance with the Act.

(c) *Qualifying non-binding instruments requested by Congress*. The Department of State's Bureau of Legislative Affairs shall be responsible for receiving on behalf of the Secretary communications related to non-binding instruments from the Chair or Ranking Member of either of the appropriate congressional committees (see § 181.4(a)(2)(ii)) in accordance with the Act. Upon receipt of such a communication, the Bureau of Legislative Affairs shall immediately notify the Department of State bureau or U.S. Government agency responsible for the negotiation and conclusion of any qualifying non-binding instrument that is the subject of the communication, with a view to receiving the text of any such qualifying non-binding instrument and associated information in accordance with § 181.7(a)(2) for transmittal to the requesting member in accordance with § 181.8.

§ 181.6 Consultations with the Secretary of State.

(a) The Secretary of State is responsible, on behalf of the President, for ensuring that all proposed international agreements of the United States are fully consistent with United States foreign policy objectives. In accordance with 1 U.S.C. 112b(g), no agency of the U.S. Government may sign or otherwise conclude an international agreement, whether entered into in the name of the U.S. Government or in the name of the agency, without prior consultation with the Secretary of State or the Secretary's designee. At an early stage in the development and negotiation of non-binding instruments, agencies should also consult as appropriate with the Department of State to facilitate identification at an early stage of instruments that may constitute qualifying non-binding instruments for the purposes of the Act, and to ensure that the intended nonbinding character of such instruments is appropriately reflected in their drafting. . .

(b) Consultation with the Secretary of State (or the Secretary's designee) regarding proposed international agreements, including to obtain authority to negotiate or conclude an international agreement, shall be done pursuant to Department of State procedures set out in Volume 11, Foreign Affairs Manual, Chapter 700 (Circular 175 procedure). Officers of the Department of State shall be responsible for the preparation of all documents required by the Circular 175 procedure.

(c) Any agency wishing to commence negotiations for a proposed international agreement or to conclude an international agreement shall transmit to the interested bureau or office in the Department of State, or to the Office of the Legal Adviser, for consultation pursuant to this section, the following:

(1) A draft text of the proposed agreement or a detailed summary of the proposed agreement if the text is not available (where authority to negotiate a proposed agreement is sought) or the text of the agreement proposed to be concluded (where authority to conclude an agreement is sought).

(2) A detailed description of the Constitutional, statutory, or treaty authority proposed to be relied upon to negotiate or to conclude the agreement. If multiple authorities are relied upon, all such authorities shall be cited. All citations to the Constitution of the United States, a treaty, or a statute shall include the specific article or section and subsection reference whenever available and, if not available, shall be as specific as possible. If the authority relied upon is or includes article II of the Constitution of the United States, the basis for that reliance shall be explained.

(3) Other relevant background information, including:

(i) If a proposed agreement embodies a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in an approved budget, the agency proposing the agreement shall state what arrangements have been planned or carried out concerning consultation with the Office of Management and Budget for such commitment. The Department of State should receive confirmation that the relevant budget approved by the President provides or requests funds adequate to fulfill the proposed commitment, or that the President has made a determination to seek the required funds.

(ii) If a proposed agreement embodies a commitment that could reasonably be expected to require (for its implementation) the issuance of a significant regulatory action (as defined in section 3 of Executive Order 12866), the agency proposing the agreement shall state what arrangements have been planned or carried out concerning timely consultation with the Office of Management and Budget (OMB) for such commitment. The Department of State should receive confirmation that OMB has been consulted in a timely manner concerning the proposed commitment.

(iii) If a proposed agreement contains fiscal contingencies that could give rise to material future financial losses or other costs for the United States (or an agency thereof), the agency proposing the agreement shall identify the contingency and indicate what arrangements have been planned for monitoring the contingency and for meeting any expenses that may arise from it.

(d) The Department of State will endeavor to complete the consultation process in respect of a proposed international agreement in most cases within 30 days of receipt of a request for consultation pursuant to this section and of the information specified in paragraph (c) of this section. The negotiation or conclusion (as the case may be) of a proposed international agreement may not be undertaken prior to the completion of the consultation process.

(e) Consultation may encompass a specific class of agreements rather than a particular agreement where a series of agreements of the same general type is contemplated; that is, where a number of agreements are to be negotiated according to a more or less standard formula, such as, for example, Public Law 480 Agricultural Commodities Agreements. Any agency wishing to conclude a particular agreement within a specific class of agreements about which consultations have previously been held pursuant to this section shall transmit a draft text of the proposed agreement to the Office of the Legal Adviser as early as possible but in no event later than 20 days prior to the anticipated date for concluding the agreement.

(f) The consultation requirement shall be deemed to be satisfied with respect to proposed international agreements of the United States about which the Secretary of State (or the Secretary's designee) has been consulted in the Secretary's capacity as a member of an interagency committee or council established for the purpose of approving such proposed agreements. Such consultation should encompass both policy and legal issues associated with the proposed agreement. Designees of the Secretary of State serving on any such interagency committee or council are to provide as soon as possible to the interested offices or bureaus of the Department of State and to the Office of the Legal Adviser copies of draft texts or summaries of such proposed agreements and other background information as requested.

(g) Before an international agreement containing a foreign language text may be signed or otherwise concluded, a signed memorandum must be obtained from a responsible language officer of the Department of State

or of the U.S. Government agency concerned certifying that the foreign language text and the English language text are in conformity with each other and that both texts have the same meaning in all substantive respects. The signed memorandum is to be made available to the Department of State upon request.

§ 181.7 Fifteen-day rule for transmittal of concluded international agreements and qualifying non-binding instruments to the Department of State.

(a) This rule, which is required by section 112b(d) of the Act, is essential for purposes of permitting the Department of State to meet its obligations under the Act to transmit concluded international agreements and qualifying non-binding instruments to the Congress by the end of the month following their conclusion, and to report on international agreements and qualifying non-binding instruments that entered into force or became operative by the end of the month following the date on which they entered into force or became operative.

(1) *International agreements*. Any agency, including the Department of State, that concludes an international agreement within the meaning of the Act, whether entered into in the name of the U.S. Government or in the name of the agency, must transmit the following documents and certification to the Office of the Assistant Legal Adviser for Treaty Affairs at the Department of State in accordance with the procedures set out in Volume 11, Foreign Affairs Manual, Chapter 700, as soon as possible and in no event to arrive at that office later than fifteen (15) days after the date the agreement is signed or otherwise concluded:

(i) Signed or initialed original texts constituting the agreement, together with all accompanying papers, including any annex, appendix, codicil, side agreement, side letter, 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 agreement, and any implementing agreements or arrangements 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 agreement. (See § 181.10.) The texts transmitted must be accurate, legible, and complete, and must include the texts of all languages in which the international agreement was signed, or initialed;

(A) Where the original texts of concluded international agreements are not available, certified copies must be transmitted in the same manner as original texts. A certified copy must be an exact copy of the signed original.

(B) When an exchange of diplomatic notes between the United States and a foreign government constitutes an international agreement or has the effect of extending, modifying, or terminating an international agreement, a properly certified copy of the note from the United States to the foreign government, and the signed original or the note from the foreign government to the United States, must be transmitted.

(C) If in conjunction with the international agreement signed, other diplomatic notes are exchanged (either at the same time, beforehand, or subsequently), properly certified copies of the diplomatic notes from the United States to the foreign government must be transmitted with the signed originals of the notes from the foreign government.

(D) Copies may be certified either by a certification on the document itself, or by a separate certification attached to the document.

(1) A certification on the document itself is placed at the end of the document, either typed or stamped, and states that the document is a true copy of the original text signed or initialed by (insert full name of signatory), and is signed by the certifying officer.

(2) A certification on a separate document is typed and briefly describes the document being certified and states that it is a true copy of the original text signed or initialed by (insert full name of signatory), and is signed by the certifying officer.

(ii) A signed memorandum of language conformity obtained pursuant to § 181.6(g), as applicable;

(iii) A statement listing the names and titles/positions of the individuals signing or initialing the international agreement for the foreign government as well as for the United States, unless clear in the texts being transmitted;

(iv) A statement identifying the Circular 175 authorization pursuant to which the international agreement was concluded, so that the sources of legal authority relevant to the agreement's conclusion and implementation may be readily identified for inclusion in reporting to Congress under the Act; and (v) the exchange of diplomatic notes bringing an international agreement into force, as applicable.

(2) Qualifying non-binding instruments. (i) When a Department of State bureau identifies a non-binding instrument that is not covered by section 112b(k)(5)(B) of the Act as one that could reasonably be expected to have a significant impact on the foreign policy of the United States pursuant to § 181.5(b), the bureau shall provide to the Bureau of Legislative Affairs and the Office of the Assistant Legal Adviser for Treaty Affairs within 15 days of the conclusion of the qualifying nonbinding instrument the documents and information specified in paragraph (a)(1)(iv) of this section.

(ii) When an agency other than the Department of State, applying the criteria in § 181.4(b), determines that a non-binding instrument (other than a non-binding instrument covered by section 112b(k)(5)(B) of the Act) could reasonably be expected to have a significant impact on the foreign policy of the United States, the agency shall transmit to the Department via a memorandum addressed to the Department's Executive Secretary within 15 days of the conclusion of the qualifying non-binding instrument the documents and information specified in subparagraph iv.

(iii) When a Department of State bureau or an agency receives from the Department of State's Bureau of Legislative Affairs notice of a written communication related to a qualifying non-binding instrument from the Chair or Ranking Member of either of the appropriate congressional committees in accordance with § 181.5(c), the bureau or agency shall provide to the Bureau of Legislative Affairs and the Office of the Assistant Legal Adviser for Treaty Affairs within 15 days the documents and information specified in subparagraph iv.

(iv) The documents and information to be provided pursuant to paragraphs (a)(2)(i), (ii), and (iii) of this section are as follows:

(A) The text of the qualifying nonbinding instrument (the signed original instrument need not be submitted), together with all accompanying papers, including any annex, appendix, codicil, side agreement, side letter, 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 instrument, and any

implementing agreements or arrangements 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 instrument (See section 181.10);

(B) A detailed description of the Constitutional, statutory, or treaty authority relied upon to conclude the qualifying non-binding instrument. If multiple authorities are relied upon, all such authorities shall be cited. All citations to the Constitution of the United States, a treaty, or a statute shall include the specific article or section and subsection reference whenever available and, if not available, shall be as specific as possible. If the authority relied upon is or includes article II of the Constitution of the United States, the basis for that reliance shall be explained;

(C) A description of any new or amended statutory or regulatory authority anticipated to be required to implement the instrument for inclusion in reporting to Congress under the Act; and

(D) An indication of whether the text has been published on the website of the Department of State or of another U.S. Government agency, or by a depositary or other similar administrative body.

(b) On an ongoing basis, State Department bureaus and U.S. Government agencies shall promptly provide to the Bureau of Legislative Affairs and the Assistant Legal Adviser for Treaty Affairs any implementing materials related to an international agreement or qualifying non-binding instrument needed to respond to a request from the Chair or Ranking Member of the Committee on Foreign Relations of the Senate or the Committee on Foreign Affairs of the House of Representatives for such materials in accordance with 1 U.S.C. 112b(c). State Department bureaus and U.S. Government agencies shall provide to the Bureau of Legislative Affairs and the Assistant Legal Adviser for Treaty Affairs materials responsive to the congressional communication within 15 days of being informed of such communication.

(c) In the event the text of an international agreement or qualifying non-binding instrument changes between the time of its conclusion and the time of its entry into force or effect, State Department bureaus and U.S. Government agencies shall provide to the Assistant Legal Adviser for Treaty Affairs the revised text of the agreement or qualifying non-binding instrument within 15 days of its entry into force or effect so that the Department is able to provide the revised text to Congress within the statutorily-required time period.

§ 181.8 Transmittal to the Congress.

(a) Not less frequently than once each month the Assistant Legal Adviser for Treaty Affairs shall transmit to the Majority Leader of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives the following:

(1) A list of all international agreements and qualifying non-binding instruments signed, concluded, or otherwise finalized during the prior month;

(2) The text of all international agreements and qualifying non-binding instruments described in subparagraph (a)(1) of this section;

(3) For each international agreement and qualifying non-binding instrument transmitted, a detailed description of the legal authority relied upon to enter into the international agreement or qualifying non-binding instrument;

(4) A list of all international agreements that entered into force and qualifying non-binding instruments that became operative for the United States or an agency of the United States during the prior month;

(5) The text of all international agreements and qualifying non-binding instruments described in paragraph (a)(4) of this section if such text differs from the text of the agreement or instrument previously provided pursuant to paragraph (a)(2) of this section; and (6) A statement describing any new or amended statutory or regulatory authority anticipated to be required to fully implement each international agreement and qualifying non-binding instrument included in the list described in paragraph (a)(1) of this section.

(b) If any of the information or texts to be transmitted pursuant to paragraph (a) of this section is or contains classified information, the Assistant Legal Adviser for Treaty Affairs shall transmit such information or texts in a classified annex.

(c) Pursuant to section 12 of the Taiwan Relations Act (22 U.S.C. 3311), any agreement entered into between the American Institute in Taiwan and the governing authorities on Taiwan, or any agreement entered into between the Institute and an agency of the United States Government, shall be transmitted by the Assistant Legal Adviser for Treaty Affairs to the President of the Senate and to the Speaker of the House of Representatives as soon as practicable after the entry into force of such agreements, but in no event later than 60 days thereafter. Classified agreements entered into by the Institute shall be transmitted by the Assistant Legal Adviser for Treaty Affairs to the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs.

§ 181.9 Publication of international agreements and qualifying non-binding instruments.

(a) *Publication of international agreements*. Not later than 120 days after the date on which an international agreement enters into force, the Office of the Assistant Legal Adviser for Treaty Affairs shall be responsible for making the text of the agreement, as that term is defined in § 181.10, available to the public on the website of the Department of State, unless one of the exemptions to publication in paragraph (d) of this section applies.

(b) *Publication of qualifying nonbinding instruments*. Not less frequently than once every 120 days, the Assistant Legal Adviser for Treaty Affairs shall provide to the Bureau of Administration and the Bureau of Administration shall publish on the website of the Department of State the text, as that term is defined in § 181.10(c), of each qualifying nonbinding instrument that became operative during the preceding 120 days, unless one of the exemptions to publication in paragraph (d) of this section applies. In the case of a qualified non-binding instrument that is the subject of a communication from the Chair or Ranking Member of either of the appropriate congressional committees pursuant to section 112b(k)(5)(A)(ii)(II) of the Act, the Bureau of Legislative Affairs, in coordination with the Assistant Legal Adviser for Treaty Affairs, shall provide the text of the instrument, as that term is defined in § 181.1(c), to the Bureau of Administration for publication on the website of the Department of State, unless one of the exemptions to publication in paragraph (d) of this section applies.

(c) *Publication of information related to international agreements and qualifying non-binding instruments*. With respect to each international agreement published pursuant to paragraph (a) of this section and each qualifying non-binding instrument published pursuant to paragraph (b) of this section, and with respect to international agreements and qualifying non-binding instruments that have been separately published by a depositary or other similar administrative body in accordance

with paragraph (d)(i)(v) of this section, the Assistant Legal Adviser for Treaty Affairs shall provide to the Bureau of Administration for publication on the website of the Department of State within the timeframes specified in those subsections a detailed description of the legal authority relied upon to enter into the agreement or instrument, and a statement describing any new or amended statutory or regulatory authority anticipated to be required to implement the agreement or instrument.

(d) *Exemptions from publication*. (1) Pursuant to 1 U.S.C. 112b(b)(3), the following categories of international agreements and qualifying non-binding instruments will not be published:

(i) International agreements and qualifying non-binding instruments that contain information that has been given a national security classification pursuant to Executive Order 13526 (50 U.S.C. 3161 note; relating to classified national security information) or any predecessor or successor order, or that contain any information that is otherwise exempt from public disclosure pursuant to United States law. "Information that is otherwise exempt from public disclosure pursuant to United States law" includes information that is exempt from public disclosure under the Freedom of Information Act pursuant to one of the exemptions set out in 5 U.S.C. 552(b)(1) through (9);

(ii) International agreements and qualifying non-binding instruments that address military operations, military exercises, acquisition and cross servicing, logistics support, military personnel exchange or education programs, or the provision of health care to military personnel on a reciprocal basis;

(iii) International agreements and qualifying non-binding instruments that establish the terms of grant or other similar assistance, including in-kind assistance, financed with foreign assistance funds pursuant to the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) or the Food for Peace Act (7 U.S.C. 1691 et seq.);

(iv) International agreements and qualifying non-binding instruments, such as 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 or qualifying non-binding instrument that has been published in accordance with 1 U.S.C. 112b(b)(1) or (2);

(v) International agreements and qualifying non-binding instruments that have been separately published by a depositary or other similar administrative body, except that the information described in § 181.8(a)(3) and (6) relating to such international agreements and qualifying non-binding instruments shall be made available to the public on the website of the Department of State in accordance with paragraph (c) of this section; and

(vi) any international agreements and qualifying non-binding instruments within one of the above categories that had not been published as of September 19, 2023, unless, in the case of such a non-binding instrument, the instrument is the subject of a written communication from the Chair or Ranking Member of either the Committee on Foreign Relations of the Senate or the Committee on Foreign Affairs of the House of Representatives to the Secretary in accordance with 1 U.S.C. 112b(k)(5)(A)(ii)(II).

(2) Pursuant to 1 U.S.C. 112a(b), any international agreements and qualifying non-binding instruments in the possession of the Department of State, other than those in paragraph (d)(1)(i) of this section, but not published will be made available upon request by the Department of State.

(3) Pursuant to 1 U.S.C. 112b(l)(1), nothing in the Act may be construed to authorize the withholding from disclosure to the public of any record if such disclosure is required by law.

§ 181.10 Definition of "text".

(a) In accordance with 1 U.S.C. 112b(k)(7), the term "text" with respect to an international agreement or qualifying non-binding instrument includes:

(1) Any annex, appendix, codicil, side agreement, side letter, 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; and

(2) 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.

(b) 1 U.S.C. 112b(k)(7) further provides that, as used in this definition, the term "contemporaneously and in conjunction with":

(1) Shall be construed liberally; and

(2) May not be interpreted to require any action to have occurred simultaneously or on the same day.

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