

Attached is the DAO 218-4.

DAO 218-4

Effective Date: January 14, 1972

TREATIES AND OTHER INTERNATIONAL AGREEMENTS

SECTION 1. PURPOSE.

.01 This Order prescribes Department policies, procedures, and responsibilities regarding the negotiation and conclusion of treaties and other international agreements, and the transmission of such agreements when concluded to the Department of State.

.02 This revision integrates the procedures described in prior Orders with those described in memoranda of the General Counsel issued December 5, 1978, August 21, 1980 and September 21, 1989; clarifies the role of the Office of the General Counsel (the "General Counsel") in the consultative process required by the Department of State in approving the negotiation and conclusion of international agreements; and represents a complete reissuance of this DAO. Therefore, text change highlighting is not shown.

SECTION 2. AUTHORITY.

This Order implements the requirements of the Case-Zablocki Act, 1 U.S.C. 112b (the "Act"), and regulations issued pursuant thereto by the Department of State and codified at 22 C.F.R. Part 181 (the "Regulations"). This Order also reflects related provisions of Department of State Circular 175, as amended, codified at Volume 11, Chapter 700 of the Foreign Affairs Manual (11 FAM 700) ("Circular 175").

SECTION 3. SCOPE.

.01 This Order applies to the negotiation and conclusion by Department personnel of treaties and other international agreements. Under the Act and the Regulations, certain international agreements are subject to prior authorization by the Secretary of State. Although the Act and Regulations do not expressly apply to treaties, this Order applies to both treaties and other international agreements, and the term "international agreements" applies herein to both treaties and other international agreements.

.02 This Order does not apply to:

a. discussions with foreign governments that are not negotiations. In general, negotiations are structured discussions intended to lead to an international agreement. When there is a question whether a discussion constitutes a negotiation for purposes of this Order, advice should be sought from the General Counsel.

b. negotiations led or chaired by another agency or agencies; and

c. negotiations approved by an interagency committee or council established for that purpose and of which the Department of State is a member.

SECTION 4. FUNDAMENTAL REQUIREMENTS.

.01 No Department official or employee shall initiate, negotiate, or enter into an international agreement without the prior authorization of a Secretarial Officer or head of an operating unit (as defined in DOO 1-1).

.02 The negotiation and conclusion of international agreements shall not be undertaken without prior coordination with the General Counsel as provided in this Order.

.03 Secretarial Officers and heads of operating units shall establish internal controls to ensure that these fundamental requirements are met.

SECTION 5. AUTHORIZATION TO NEGOTIATE AND CONCLUDE INTERNATIONAL AGREEMENTS.

.01 As far in advance as possible of the commencement of any negotiation with a foreign government or agency, Secretarial Officers and heads of operating units shall advise the General Counsel of the nature and scope of the intended negotiation and the Constitutional, statutory or treaty authority under which the negotiation will be conducted, and provide a draft text or summary of the proposed agreement. Such notification may be made through the appropriate program legal office.

.02 Where a proposed agreement will embody a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in a relevant approved budget, the Secretarial Officer or head of an operating unit proposing the agreement shall, in addition, transmit to the General Counsel a written statement of the arrangements that have been planned or carried out concerning consultations with the Office of Management and Budget for such commitment.

.03 The materials referred to in paragraph .01 of this Section shall be transmitted to the General Counsel prior to the commencement of any negotiation unless it is not feasible to do so. All of the material referred to in paragraphs .01 and .02 of this Section must be transmitted to the General Counsel as early as possible in the negotiating process, and in no event later than 60 days prior to the date on which the agreement is to be signed (see Section 7. of this order).

.04 The General Counsel shall make a preliminary determination. Based on the materials submitted, whether the proposed agreement constitutes an international agreement within the meaning of the Act or otherwise requires approval of the Department of State. In making this determination, the General Counsel shall apply the criteria summarized in Section 6. of this Order and more fully set forth at 181.2 of the Regulations.

a. If such preliminary determination is affirmative, the General Counsel shall promptly consult with the Secretary of State through the Office of the Assistant Legal Advisor for Treaty Affairs, in order to obtain authorization to negotiate and conclude the proposed agreement, and shall inform the Secretarial Officer or head of an operating unit in writing when such authorization is received.

b. If such preliminary determination is negative, or if the Secretary of State subsequently determines that the proposed agreement does not constitute an international agreement within the meaning of the Act or otherwise require approval of the Department of State, the General Counsel shall so inform the appropriate Secretarial Officer or head of an operating unit in writing.

.05 The procedures of this Section may encompass a specific class of agreements, rather than a single agreement, where a series of agreements of the same general type is contemplated, *i.e.*, where a number of agreements are to be negotiated according to a standard formula. Where consultations regarding such a class of agreements have been carried out, authorization to conclude an agreement within the specific class of agreements may, if not previously obtained, be obtained in accordance with the procedure described in paragraph 7.04 of this Order.

.06 Wherever possible, negotiation of an international agreement should not be commenced until the General Counsel has either:

a. advised the Secretarial Officer or head of an operating unit in writing that authorization to negotiate (or conclude) the agreement has been obtained from the Secretary of State; or

b. notified the Secretarial Officer or head of an operating unit in writing that the proposed agreement is not an international agreement within the meaning of the Act and does not otherwise require the Secretary of State's approval.

SECTION 6. INTERNATIONAL AGREEMENTS SUBJECT TO THE ACT OR OTHERWISE REQUIRING STATE DEPARTMENT APPROVAL.

.01 In making a preliminary determination whether a document, set of documents, undertaking or oral agreement constitutes an international agreement that is within the meaning of the Act or is otherwise subject to State Department approval, the General Counsel shall consider the criteria set forth in 181.2 of the Regulations. These criteria are summarized as follows; however the language of 181.2 shall in each instance control:

a. the identity and intention of the parties; for example, each party must be a state, a state agency, or an intergovernmental organization, and must intent its obligation to be legally binding;

b. the significance of the arrangement, with particular regard to whether the potential agreement would:

be of political significance ;

involve substantial grants or loans of funds;

constitute a substantial commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations; or

involve continuing or substantial cooperation in the conduct of a particular scientific, technical or other activity, including the exchange or receipt of information or the pooling of data (however, individual research grants and contracts do not ordinarily constitute international agreements);

e. the specificity of the obligations assumed and the provision of objective criteria to ensure the enforce ability of those obligations;

f. the bilateral or multilateral nature of the agreement (as opposed to a unilateral undertaking); and

g. the form or title given to an agreement (although decisions will generally be made on the basis of the substance of the arrangement rather than its form or denomination).

.02 Agreements that extend or modify existing international agreements, or that serve to implement an underlying agreement, are frequently themselves international agreements within the meaning of the Act. Oral agreements that meet the criteria of an international agreement are subject to this Order and must be reduced to writing so that the requirements of the Act may be met.

SECTION 7. ADDITIONAL STEPS PRECEDING AUTHORIZATION TO CONCLUDE INTERNATIONAL AGREEMENTS.

.01 This Section applies where:

a. authority to negotiate an international agreement has been granted under Section 5. Of this Order, but authority to conclude the agreement has been withheld; or

b. authority to conclude an international agreement has been previously granted but the agreed-upon (negotiated) text of the proposed agreement differs materially from that previously approved.

.02 As soon as possible during or after the negotiation of an agreement described in subparagraphs .01a. or .01b. of this Section, but in no event later than sixty (60) days prior to the anticipated date for signing the agreement, a Secretarial Officer or head of an operating unit shall transmit the agreed-upon text and any other relevant materials to the General Counsel. If unusual circumstances prevent compliance with the sixty-day requirement with respect to the agreed-upon text, the Secretarial Officer or head of an operating unit shall nevertheless transmit the text as early as possible prior to the

anticipated date for signing the proposed agreement, together with a written explanation of the reasons for the inability to meet the sixty-day requirement.

.03 The General Counsel shall transmit the proposed text, and such additional materials as may be appropriate, to the Secretary of State as early as possible, but in no event later than fifty (50) days prior to the anticipated date for signing the agreement (except where a written explanation is proffered). The General Counsel shall conduct the required consultations with the Secretary of State to obtain authorization to conclude the agreement.

.04 Where a Secretarial Officer or head of an operating unit wishes to conclude a particular agreement within a specific class of agreements about which consultations with the Department of State have previously been held in accordance with paragraph 5.05 of this Order, the Secretarial Officer or head of an operating unit shall provide the draft text of the proposed agreement to the General Counsel as early as possible, but in no event later than thirty (30) days prior to the anticipated date for signing the agreement. The General Counsel shall transmit the proposed agreement to the Department of State as early as possible, but in no event later than twenty (20) days prior to the anticipated date for signing the particular agreement.

.05 No international agreement shall be concluded, nor any oral commitments made in respect thereof, without the written advice of the General Counsel that all required consultations with the Department of State have been completed and the necessary authorization has been obtained.

SECTION 8. TRANSMISSION OF CONCLUDED INTERNATIONAL AGREEMENTS TO THE SECRETARY OF STATE.

.01 The Secretarial Officer or head of an operating unit shall, within ten (10) days after concluding an international agreement, transmit to the General Counsel the signed or initialed original text (or, if the original is unavailable, a certified copy), together with all accompanying papers, including agreed minutes, exchanges of notes or side letters, and the text in all languages in which the agreement has been signed or initialed, plus two additional copies of the agreement.

.02 In the event a certified copy of the agreement is to be transmitted, the certification must conform to the requirements of 181.6 of the Regulations. When in doubt regarding these requirements, Secretarial Officers and heads of operating units should consult the General Counsel.

.03 The General Counsel shall transmit the original agreement (or certified copy) and accompanying documents to the Department of State for receipt not later than twenty (20) days after the agreement is signed.

SECTION 9. MONITORING CASE ACT COMPLIANCE.

.01 The General Counsel shall maintain, in the Office of the Assistant General Counsel for Legislation and Regulation, a repository for copies of all treaties and international agreements entered into by the Department.

.02 The General Counsel shall monitor compliance by the Department of Commerce with the requirements of the Act.

SECTION 10. EFFECT ON OTHER ORDERS.

This Order supersedes Department Administrative Order 218-4, dated May 4, 1974.

(Signed) Secretary of Commerce

Office of Primary Interest

Office of the General Counsel