

## **GUIDANCE ON LEGAL DETERMINATIONS UNDER CASE-ZABLOCKI ACT**

### What is the Case-Zablock Act?

The Case-Zablocki Act was enacted to ensure that all international agreements are entered into in consultation with the Secretary of State. “[N]otwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.” 1 USC 112b.

<http://www.state.gov/g/oes/rls/rpts/175/1447.htm>

### How does NOAA comply with Case-Zablocki Act?

Regulations found at 22 CFR Part 181 set out procedures for compliance with the Case-Zablocki Act. <http://www.state.gov/g/oes/rls/rpts/175/1448.htm> They make clear that the requirement for consultation with the Secretary of State extends to agreements entered into in the name of the U.S. Government (USG) or in the name of any USG agency. Department of Commerce Administrative Order (DAO) 218-4 prescribes Commerce’s policies, procedures, and responsibilities for implementing the Case-Zablocki Act. Those procedures require consultation with the Department of Commerce General Counsel regarding whether a contemplated agreement falls within the definition of an international agreement under the Case-Zablocki Act and therefore requires compliance with the consultation requirements of the Act. Those consultation requirements are met through an interagency process managed by the Department of State called the Circular 175 (C-175) process.

### What is the C-175 Process?

In place since 1955, the C-175 process involves the preparation and distribution to, and review by interested DOS bureaus and other appropriate USG agencies, of documents describing the proposed international agreement and the reasons why it should be and reasons why it should be entered into. This interagency review process culminates in a decision by the Secretary of State or the Secretary’s designee to approve or disapprove a) the negotiation; b) conclusion; c) negotiation and conclusion; or d) termination of a particular international agreement or class of international agreements.

### Do all agreements with foreign bodies constitute “international agreements” under the Case-Zablocki Act?

No. As detailed in the implementing regulations, for Case-Zablocki Act purposes an international agreement is defined as an agreement of significance and specificity between two or more states, state agencies or intergovernmental organizations which is intended to be legally binding and governed by international law. 22 CFR Part 181.2. Legally binding international agreements are distinguishable from arrangements that are not legally binding and even from contracts that may be legally binding under a state’s domestic laws rather than under international law.

### How do I comply with DAO 218-4 and the Case-Zablocki Act?

As a first step, the lead program official working on negotiating or concluding an international agreement should consult with the NOAA/GC office that advises that line office to determine whether a proposed agreement would constitute an “international agreement” that is subject to the C-175 process. The program official should provide their counsel with a brief explanation of: who the agreement would be with, what activities would be conducted by each party, whether the parties intend the agreement to be binding under international law, whether the obligations are considered significant as a matter of law or policy, what statutes authorize the conduct of such international activities and obligations, and how much money or other resources are involved. The program official should also indicate whether the agreement is a “routine scientific or technical agreement,” because the procedures for routine scientific or technical agreements are more streamlined than those for other kinds of international agreements. A “routine scientific or technical agreement” is a scientific or technical agreement that, while meeting the criteria for an “international agreement,” does not have such significant budgetary, legal or political implications as to warrant high level review and approval. The program official should also explain how the agreement furthers a NOAA mission.

In consultation with the program official, and following the template below, the relevant counsel should prepare and send via email to the NOAA Deputy General Counsel with responsibility for international matters (currently Jane Chalmers) a Case-Zablocki Act Notice and Recommendation in the form described below. The Deputy General Counsel will review the recommendation and forward it to the DOC General Counsel. The purpose of the Notice and Recommendation is to obtain an official determination from the DOC General Counsel as to whether the agreement constitutes an international agreement under the Case Zablocki Act. If immediate action is necessary, the e-mail should so indicate. Based on past practice, obtaining DOC GC approval generally takes no more than a few days.

If the DOC/GC determines the agreement constitutes an international agreement under the Case Zablocki Act, but is a routine scientific or technical agreement, the program official should work with their counsel to prepare the C-175 package for forwarding to DOS in accordance with the Supplemental Handbook for S&T Agreements. <http://www.state.gov/g/oes/rls/rpts/175/>

If the DOC/GC determines the agreement constitutes an international agreement under the Case-Zablocki Act, but is not a routine scientific or technical agreement, the program official should work with counsel to prepare the C-175 package in accordance with the C-175 Handbook which is reprinted for your convenience in Appendix A of the Supplemental Handbook for S&T Agreements

<http://www.state.gov/g/oes/rls/rpts/175/1319.htm><http://www.state.gov/g/oes/rls/rpts/175/1445.htm> See also Appendix B for Responsibilities of State under 22 USC 2656d

<http://www.state.gov/g/oes/rls/rpts/175/1445.htm>

and Appendix C for a reprinting of the Case Zablocki Act 1 USC 112b.

<http://www.state.gov/g/oes/rls/rpts/175/1447.htm>

If the DOC General Counsel determines the agreement does not constitute an international agreement, then formal consultation with DOS is not required by the Case Zablocki Act. However, the program official may choose to consult with DOS for program or other reasons.

## **TEMPLATE FOR CASE ACT NOTICE AND RECOMMENDATION:**

1. Identify the agreement, parties, purpose and recommend whether it is an international agreement for purposes of the Case-Zablocki Act.
2. In Background and Legal Authority section, identify the statutes authorizing the activities to be undertaken and briefly summarize how the activities under the agreement further a NOAA mission as set forth in the NOAA Strategic Plan.
3. In Case-Zablocki Act Analysis section, briefly explain whether or not it is an “international agreement” under the Case-Zablocki Act (see 1 U.S.C. 112b.), whether it is a routine scientific or technical agreement, and why. Include a brief explanation of: who the agreement would be with, what activities would be conducted by each party, whether the parties intend the agreement to be binding under international law, whether the obligations are considered significant as a matter of law or policy, and how much money or other resources are involved. If there is a text of the proposed agreement, it should be attached.

## **SAMPLE CASE ACT NOTICE AND RECOMMENDATION – Not an International Agreement**

Attached please find a draft MOU between NOS and the Caribbean Environmental and Health Initiative establishing a framework for cooperation on marine and coastal environment issues. For the reasons stated below, I recommend you find this is not an international agreement for purposes of the Case-Zablocki Act. Please let me know whether you agree.

### Background and Legal Authority

The general purpose of this Agreement is to foster cooperation between NOAA, CEHI and its member states in addressing issues of mutual interest in the marine and coastal environment. NOAA and CEHI will be providing technical assistance related to waste management and monitoring the effects of pollution. In furtherance of the previously approved MOA 2003-139/1036 with UNEP/GPA, NOAA and CEHI will develop and implement several pilot demonstration projects in the Wider Caribbean that would be the subject to the review and approval of subsequent Annexes to this MOA.

The NOAA activities to be conducted under this agreement are expressly authorized by the Coastal Zone Management Act (CZMA), 16 U.S.C. section 1456c, Technical assistance, and the National Marine Sanctuaries Act (NMSA), 16 U.S.C section 1435. In addition, the Coast and Geodetic Survey Act, 33 U.S.C. 883a-j, authorizes NOAA to receive funds associated with surveys, observations of tides and currents, and research in geophysical sciences (including geodesy, oceanography, seismology, and geomagnetism).

### Case-Zablocki Act Analysis

The intended agreement is not an "international agreement" for purposes of the Case-Zablocki Act, 1 U.S.C. 112b. This agreement is a minor undertaking and should not be considered a significant arrangement. While the cooperation with CEHI may be helpful to accomplishing mutual objectives in the marine environment, the agreement is not considered to be politically significant. No funds will be obligated under the agreement. The demonstration projects that

would be the subject of subsequent review and approval of the annexes to the agreement by DOC/GC would be about \$20,000 - \$30,000 for each demonstration project and would not likely exceed a total of \$90,000. This agreement expressly provides that "[t]he Parties do not intend this Agreement to be a legally binding 'international agreement' as defined in the Case-Zablocki Act. Their intent is solely to foster cooperation on activities of mutual interest. To the extent any provisions in this Agreement are considered to be obligations, the Parties do not intend them to be subject to international law." Art.10 C. For these reasons, I recommend a finding that this agreement is not an international agreement for Case-Zablocki Act purposes.

#### **SAMPLE CASE ACT NOTICE AND RECOMMENDATION** – International Agreement – Routine Scientific or Technology Agreement

Attached please find a draft agreement between NOAA, NASA, EUMETSAT and CNES. For the reasons stated below, I recommend you find that while this agreement is an international agreement for purposes of the Case-Zablocki Act, it is a routine scientific or technical agreement and can be processed in accordance with the streamlined procedures applicable to such agreements. Please let me know whether you concur.

#### Background and Legal Analysis

This agreement will be entered into by NOAA and NASA for the U.S., and EUMETSAT, and CNES (the French Space Agency for the Government of France). The purpose of the agreement is to spell out the terms and conditions under which the parties will cooperate with respect to a satellite based ocean surface topography mission (OSTM). This future mission will serve as a continuation of the present TOPEX/Poseidon and Jason missions and will collect measurements of sea surface height, significant wave height and wind speed across the surface of the Earth's oceans. This mission is a priority of the meteorological, climatological and oceanographic scientific communities.

NOAA is authorized to enter into this agreement pursuant to 15 USC 313, 49 USC 44720, 15 USC 2921, et seq and 33 USC 883d.

#### Case-Zablocki Act Analysis

Because this agreement involves a significant commitment of resources by both NOAA and NASA, and because the parties intend this agreement to be binding under international law, it meets the definition of an "international agreement" within the meaning of the Case-Zablocki Act. However, it should be considered a routine S&T agreement since it does not have such significant budgetary, legal or political implications to warrant extensive high review and approval within the USG. Accordingly, I recommend a determination that the proposed agreement is an international agreement within the meaning of the Case-Zablocki Act, but that it is a routine scientific or technical agreement subject to the streamlined procedures for C-175 approval.