

GUIDANCE ON LEGAL DETERMINATIONS UNDER THE CASE-ZABLOCKI ACT (April 2014)

What is the Case-Zablocki Act?

The Case-Zablocki Act (Act) was enacted in 1972 in response to Congressional concern that the Executive Branch had negotiated a number of secret agreements that committed the United States to undertake significant obligations. See H-Rept. 92-130, 92 Cong. (1972). The Act is the primary federal law designed to ensure that Congress is informed of international agreements entered into by the United States. The Act also aims 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](#).

How has the State Department implemented the Case-Zablocki Act?

State Department regulations found at [22 CFR Part 181](#) set out procedures for compliance with the Case-Zablocki Act. 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.

How does NOAA comply with Case-Zablocki Act?

[Department of Commerce Administrative Order \(DAO\) 218-4](#) prescribes the Department’s policies, procedures and responsibilities for implementing the Case-Zablocki Act. The Department of Commerce General Counsel has, in most circumstances, delegated to the NOAA General Counsel the authority to determine as a threshold matter whether a proposed agreement is an “international agreement” for purposes of the Case-Zablocki Act.

If the NOAA General Counsel determines that the proposed agreement is an “international agreement” for purposes of the Case-Zablocki Act, then the consultation requirements are met through an interagency process managed by the Department of State called the [Circular 175 \(C-175\) Procedure](#).

If the NOAA General Counsel determines that the proposed agreement is not an international agreement, then the email containing that decision is forwarded to the DOC GC General Law Division that is reviewing the proposed agreement as that office may withhold clearance until it receives confirmation of compliance with the Case-Zablocki Act. (Note that the DOC GC has a [separate and independent process for reviewing proposed agreements](#) to assess whether adequate statutory authority exists for the activities contemplated and, where the transfer of funds is involved, adequate statutory authority exists for such transfer.)

What is the C-175 Process?

In place since 1955, the [C-175 Procedure](#) involves the preparation and distribution to, and review by, interested State Department bureaus and other appropriate USG agencies, of documents describing the proposed international agreement and the 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 the international agreement.

Do all agreements with foreign bodies constitute "international agreements" under the Case- Zablocki Act?

No. As detailed in the State Department 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.

Below are some examples of terms that may indicate legally binding versus non-binding intent:

Language that May Indicate an Intention to be Legally Bound	Language that May Indicate an Intention Not to be Legally Bound
Shall, will, agree, commit	Plan to, intend, expect, should
Commitment, agreement	Understanding, statement, declaration
Parties, party	Participants, countries, institutions, sides
Agreement, treaty, convention, protocol	Statement, arrangement, mechanism
Entry into force	Date activities commence, today's date

Additional guidance on language that may indicate an intention not to be legally bound can be found in the State Department's [Guidance on Non-Binding Documents](#).

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

As a first step, the lead NOAA program or staff office representative working on negotiating or concluding a proposed arrangement with a foreign entity is advised to consult with the NOAA GC Section that advises that program or staff office to determine whether the proposed arrangement would constitute an "international agreement" that is subject to the [C-175 Procedure](#).

The program or staff office representative is advised to provide their counsel with a brief explanation of:

- who the proposed arrangement would be with;
- what obligations would be assumed by each party;
- what activities would be conducted by each party;
- whether the parties intend the proposed arrangement to be binding under international law;
- whether the obligations to be assumed or activities to be conducted may be

- considered significant as a matter of law or policy;
- what federal law(s) authorize the obligations or activities that NOAA would assume or conduct;
- how much money or other resources would be involved; and
- how the proposed arrangement furthers a NOAA missions.

The program or staff office representative should also indicate whether the proposed arrangement 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.

In consultation with the program or staff office representative, and following the template below, the relevant NOAA GC Section staff attorney must prepare and send via email to the appropriate NOAA Deputy General Counsel a Case-Zablocki Act Notice and Recommendation in the form prescribed below. The NOAA Deputy General Counsel reviews the recommendation and forwards it to the NOAA General Counsel. The NOAA General Counsel makes the final determination and communicates it to the appropriate parties, thereby documenting compliance with the Case-Zablocki Act.

If the NOAA General Counsel determines that the proposed arrangement constitutes an international agreement for purposes of the Case-Zablocki Act, but that it is a routine scientific or technical agreement, the program or staff office representative is advised to work with their counsel to prepare the C-175 package for forwarding to the State Department in accordance with its [Supplementary Handbook on the C-175 Process: Routine Science and Technology Agreements](#). If the NOAA General Counsel determines that the proposed arrangement constitutes an international agreement under the Case-Zablocki Act, but is not a routine scientific or technical agreement, the program or staff office representative is advised to work with counsel to prepare the C-175 package in accordance with the [C-175 Procedure](#).

If the NOAA General Counsel determines as a threshold matter that the proposed arrangement does not constitute an international agreement for purposes of the Case-Zablocki Act, then formal consultation with the State Department is not required. However, the NOAA program or staff office representative may choose to consult with the State Department for policy or other reasons, such as to assure compliance with the consultation requirements under section 305(c) of the National Marine Sanctuaries Act, [16 U.S.C. § 1435\(c\)](#), section 202(e)(4) of the Magnuson-Stevens Fishery Conservation and Management Act, [16 U.S.C. § 1822\(e\)\(4\)](#), or section 608 of the High Seas Driftnet Fishing Moratorium Protection Act, [16 U.S.C. § 1826j](#).

**TEMPLATE FOR CASE-ZABLOCKI ACT NOTICE AND RECOMMENDATION
(for use by NOAA GC staff attorney)**

1. Identify the proposed arrangement, parties and purpose, and recommend whether it is, or is not, an international agreement for purposes of the Case-Zablocki Act.
2. In Background and Legal Authority section, identify the federal statutes authorizing the activities to be undertaken and briefly summarize how the activities under the proposed arrangement further a NOAA mission as set forth in the current NOAA Strategic Plan.
3. In Case-Zablocki Act Analysis section, briefly explain whether 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 proposed arrangement would be with, what activities would be conducted by each party, whether the parties intend the arrangement 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 draft text of the proposed arrangement, it must be attached.

**SAMPLE CASE-ZABLOCKI ACT NOTICE AND RECOMMENDATION – Not an
International Agreement (for use by NOAA GC staff attorney)**

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. § 1456c, Technical Assistance, and the National Marine Sanctuaries Act (NMSA), 16 U.S.C §1435. In addition, the Coast and Geodetic Survey Act, 33 U.S.C. § 883a - 883j, 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' under 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 (for use by NOAA GC staff attorney)

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 U.S.C. § 313, 49 U.S.C. § 44720, 15 U.S.C § 2921 *et seq.* and 33 U.S.C. § 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.