

**NOAA International Affairs Council
Law of the Sea Convention Working Group**

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Case-Zablocki Act Process

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Case-Zablocki Act

- The [Case-Zablocki Act of August 22, 1972, 1 U.S.C. § 112b](#), requires that all international agreements entered into by the U.S. Government receive prior approval by the Secretary of State.
- The Act applies to agreements concluded by and on behalf of a particular agency of the United States Government, rather than the United States Government. 22 C.F.R. § 181.2(a)(5)(b).

Three Types of Agreements

- Agreement for a cooperative activity with a foreign party that is not an “international agreement” as defined by Case-Zablocki
- Routine international science and technology agreement that qualifies for an abbreviated Department of State review
- International agreement requiring full Department of State review

C-Z Act - Compliance Criteria

- Compliance with the Act begins with a determination whether the particular agreement is an “international agreement.”
- This determination is based on five criteria:
 - Identity and intention of the parties;
 - Significance of the arrangement;
 - Specificity, including objective criteria for determining enforceability;
 - Two or more parties; and
 - Form.

22 C.F.R. § 181.2(a)(1)-(a)(5).

C-Z Act - Compliance Criteria

- Criterion 1
 - A party must be a state, state agency, or an intergovernmental organization.
 - The parties must intend their undertaking to be legally binding and governed by international law. In the absence of a provision in the arrangement with respect to governing law, it will be presumed to be governed by international law.

C-Z Act - Compliance Criteria

Intent

The intention to be legally bound is a key criterion in international agreements. This criterion is not found in political statements or undertakings or contracts.

Certain terms are generally viewed as indicative of legally binding versus non-binding intent.

Intention to be Legally Bound

Shall, will, agree, commit

Commitment, agreement

Parties, party

Agreement, treaty, convention, protocol

Entry into force

Intention Not to be Legally Bound

Plan to, intend, expect, should

Understanding, statement, declaration

Participants, countries, institutions, sides

Statement, arrangement, mechanism

Date activities commence, today's date

C-Z Act - Compliance Criteria

- Criterion 2 – Minor undertakings, even if couched in legal language and form, are not considered international agreements. Factors that are considered include:
 - Political significance
 - Amount of funding, loans, or credit payable to U.S.
 - Whether the funding arrangement extends beyond the fiscal year or would be the basis for an appropriation request
 - Continued and/or substantial cooperation

C-Z Act - Compliance Criteria

- Criterion 3 – International agreements require precision and specificity in the language setting forth the undertakings. Undertakings couched in vague or general terms or lacking criteria for determining enforceability or performance are not normally considered international agreements.

C-Z Act - Compliance Criteria

- Criterion 4 – Two or more parties are necessary. Unilateral commitments might be legally binding but they are not international agreements.
- Criterion 5 – Form is not determinative but can be a significant factor. Failure to use the customary format may be evidence of a lack of legally binding intent.

C-175 Process

- The original “Circular 175” (C-175) was a 1955 Department of State Circular prescribing a process for prior coordination and approval of treaties and international agreements. This title has been retained in the applicable procedures now referenced at 22 C.F.R. § 181.4.
- The C-175 process involves the preparation and distribution to, and review by, interested Department of State bureaus and other appropriate U.S. Government agencies, of documents describing the proposed international agreement and the reasons why it should be entered into.
- Review process culminates in a decision by the Secretary of State 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.
- Supplementary Handbook on the C-175 Process: Routine Science and Technology Agreements (1/01), prescribes the streamlined and expedited C-175 process for routine international science and technology agreements.

Department of Commerce Administrative Order

- DAO 218-4, Treaties and Other International Agreements (1/14/92), prescribes policies, procedures, and responsibilities. The fundamental requirements are:
 - May not initiate, negotiate, or enter into an international agreement without prior authorization of a Secretarial Officer or head of an operating unit.
 - Negotiation and conclusion may not be undertaken without prior coordination with the General Counsel.
 - Secretarial Officers and heads of operating units shall establish internal controls to ensure that the fundamental requirements are met.

Applicable Clearance Processes

- Line office clearance process
- General Counsel determination – international agreement
 - Department of State makes final determination
- General Counsel clearance of agreement terms
- International Affairs Council process

Line Office Process

- Each line office has its own internal process for processing agreements.
- For agreements with international parties, staff should work closely with the appropriate international affairs office.
- Other procedures applicable to the review and clearance of all agreements must be followed.
 - Line office management approval
 - WebCIMS for DOC General Counsel clearance

General Counsel Determination

- DAO 218-4, Sec. 5, requires the General Counsel be notified prior to the commencement of any negotiation with a foreign government or agency. This notification may be made through the appropriate program legal office.
- Negotiations should not be commenced until:
 - Authorization to negotiate (or conclude) the agreement has been obtained from the Secretary of State; or
 - The General Counsel of Commerce has issued a determination the agreement is not an international agreement within the meaning of the Act.
- The NOAA General Counsel issues the determination for agreements less than \$1M that do not raise significant policy or diplomatic issues. (May 26, 2011, memo from DOC GC)

General Counsel Clearance

- All agreements with international parties involving resource commitments are subject to the same review and clearance process by the DOC General Law Division (Assistant General Counsel for Administration) as used for domestic agreements.
- The appropriate NOAA Office of General Counsel section must be consulted to obtain a determination whether the agreement is an international agreement pursuant to the Act.

International Affairs Council Process

- Composed of representatives from the line offices, the NOAA General Counsel, goal teams, and other NOAA offices.
- Notified of proposed agreement by the appropriate line office member/international affairs office.
- Reviews agreement to identify policy issues, coordinates intra-agency review, and advises the Senior Advisor for International Affairs.
- <http://www.international.noaa.gov/about.htm>

Watch List

- Inconsistent Language
- Indemnification and Hold Harmless Clause
- Jurisdiction and Venue Clause
 - International Law
 - U.S. Law
- Cross-Waiver of Liability Clause

Watch List (continued)

- Supporting Programmatic and Transactional Authority
- Country-to-Country Science and Technology Agreements
- Intellectual Property Provisions
- Binding Arbitration Clause Not Allowed

References

Department of State Supplementary Handbook on C-175
Process: Routine Science and Technology Agreements

<http://www.state.gov/e/oes/rls/rpts/175/>

Department of State Circular 175 Procedure

<http://www.state.gov/s/l/treaty/c175/>

Department of State Guidance on Non-Binding Documents

<http://www.state.gov/s/l/treaty/guidance/>

U.S. Department of State Foreign Affairs Manual Volume 11 -
Political Affairs, Part 720 - Negotiation and Conclusion

<http://www.state.gov/documents/organization/88317.pdf>

Department of Commerce Administrative Order 218-4, Treaties
and Other International Agreements (Jan. 14, 1992)

http://www.osec.doc.gov/opog/dmp/daos/dao218_4.html

References

NOAA Office of General Counsel International Section Website

<http://www.gc.noaa.gov/international-office.html>

NOAA Guidance on Legal Determinations Under the Case-Zablocki Act (April 2014)

<http://www.gc.noaa.gov/documents/082604-faq-case-act-2p.pdf>

NOAA Office of the General Counsel Case-Zablocki Act Website

http://www.gc.noaa.gov/gc_case_zablocki.html

NOAA Office of General Counsel International Section –
Authorities and Mandates

http://www.gc.noaa.gov/gcil_mandates.html