

AMCCC-PA (1 June 1997)
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INTERNATIONAL AGREEMENT OUTLINE

I. GENERAL

A. BACKGROUND

1. International Agreement is a LEGAL DOCUMENT

a. "International Agreement" means an Agreement between two or more nations or international organization that is intended to be legally binding and is governed by international law. See Restatement(Third) Foreign Relations Law of the United States, § 301(1).

DoD Directive 5530.3 - "International Agreement"

Any agreement concluded with one or more foreign governments (including their agencies, instrumentalities, or political subdivisions) or an international organization that:

- (1) Is signed or agreed to by personnel of any DoD component or by representatives of the US Government.
- (2) Signifies the intention of its parties to be bound in international law.
- (3) Is denominated as an international agreement.

b. The terminology used for international agreements is varied. Among some of the terms used are: treaty, convention, agreement, protocol, covenant, exchange of notes, agreed minute, memorandum of agreement, and memorandum of understanding.

c. An international agreement can include oral commitments. See 1 U.S.C. § 112b(a).

2. Under United States domestic law, international agreements are normally of two types: **TREATY or EXECUTIVE AGREEMENT.**

3. Case-Zablocki Act, 1 U.S.C. § 112b This Act requires the Secretary of

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State to transmit to the Congress the text of all international agreements, other than treaties, within 60 days of their entry into force. Each agency shall provide to the Department of State the text of such agreements not later than 20 days after signature.

See, section 139 Public Law 100-204 [101 Stat. 1347 (1987)] on the restriction on use of appropriated funds for failure to report international agreements to Congress.

B. TREATY

1. The President may make treaties with the advice and consent of the Senate, provided that two thirds of the Senators present concur. *Article II, Section 2, United States Constitution.*
2. Treaties are part of the supreme law of the land. They have the same legal status as federal statutes. See, *Article VI, Section 2, United States Constitution.*
3. "Treaty" is a general term that sometimes refers to all International Agreements.

The use of the word "treaty" in a statute does not necessarily mean an international agreement requiring the advice and consent of the Senate. Unless Congress specifically defines the word in that sense, courts may interpret treaties to mean an international agreement concluded between nations without Senate participation. Weinberger v. Rossi, 456 U.S. 25 (1982).

C. EXECUTIVE AGREEMENT

1. Almost all international agreements between DoD/DA and defense components of foreign governments are carried out as EXECUTIVE AGREEMENTS.
2. The United States Constitution does not expressly confer authority to make international agreements other than treaties, but such agreements have been common from our early history. The precise boundary between treaties and executive agreements are not firmly fixed. There is considerable discretion on the part of the Executive branch to pursue a treaty or an executive agreement to make an international commitment.

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3. Sources of Legal Authority for Executive Agreements.

- a. Existing federal statutes; joint Congressional resolutions; or subject to legislation to be enacted by Congress.
- b. Treaties.
- c. Presidential constitutional authority (*Article II, United States Constitution*):
 - i. Commander-in-Chief
 - ii. Chief executive to represent the nation in foreign affairs ["Sole Organ"].
 - iii. Authority to receive ambassadors and other public ministers.
 - iv. Presidential duty to "take care that the laws be faithfully executed".

4. Congress has the power to subject specific classes of executive agreements to Congressional approval.

C. LEGAL RELATIONSHIP OF TREATIES AND EXECUTIVE AGREEMENTS

1. Treaties and executive agreements are subject to constitutional limitations. Reid v. Covert, 354 U.S. 1, 16-18 (plurality opinion)
2. Treaties (unlike executive agreements) may supersede prior conflicting statutes. United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801).
3. Executive agreements cannot be inconsistent with federal statutes. United States v. Guy W. Capps, Inc., 204 F. 2d 655, (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955).
4. Executive agreements probably prevail over inconsistent federal regulations not based on statute.

FAR 1.405(c) - Any deviation from the FAR required to comply with an executive agreement is authorized unless the deviation would be

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inconsistent with FAR coverage based on law.

5. Executive agreements prevail over inconsistent state laws or policies. United States v. Belmont, 301 U.S. 324 (1937) and United Pink, 315 U.S. 203 (1942).

D. LEGAL INSTRUMENTS THAT ARE NOT CONSIDERED TO BE AN INTERNATIONAL AGREEMENT FOR DOD DIRECTIVE 5530.3

1. Contracts made under the Federal Acquisition Regulations.
2. Foreign Military Sales - Letter of Offer and Acceptance (LOA).
3. Most Standardization Agreements.
4. Leases under 22 U.S.C. § 2796

NOTE: Loans for research and development under 22 U.S.C. § 2796d are considered to be an international agreement.

5. Agreements solely to establish administrative procedures.
6. Acquisitions or orders pursuant to cross-servicing agreements made under Chapter 138, Title 10, United States Code.

II. SUBSTANTIVE LEGAL AUTHORITY FOR INTERNATIONAL AGREEMENTS

A. 10 U.S.C. § 2350a

1. MOST COMMONLY used authority for International Cooperative Projects

Not Restricted to Nunn Funding - at one time Nunn funds were specifically appropriated, now they are submitted as part of the budget submission but included with other research & development funding.

2. Cooperative Research and Development Projects

a. Secretary of Defense may enter into an international agreement with one or more allies of the United States or NATO organizations for the purpose of conducting cooperative research and development projects on

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defense equipment and munitions. 10 U.S.C. § 2350a(a).

Major Ally of the United States Means - Under Title 10, United States Code

- i. NATO members (other than United States); or
- ii. a major non-NATO ally [Australia, Egypt, Israel, Japan, Jordan and Korea].

North Atlantic Treaty Organization -

Any NATO subsidiary body referred to in 10 U.S.C. § 2350(2) and any other NATO organization.

b. Secretary of Defense must determine that the proposed cooperative project will improve, through the application of emerging technology, the conventional defense capabilities of NATO or the common conventional defense capabilities of the United States and its major non-NATO allies. 10 U.S.C. § 2350a(b)(1).

- i. develop new conventional defense equipment and munitions; or
- ii. modify existing military equipment to meet United States military requirements.

3. Cost Sharing - - **EQUITABLE BASIS**

Each cooperative project shall require the sharing of the costs of the project (including the cost of claims) between the participants on an equitable basis. 10 U.S.C. 2350a(c).

4. Funding Restrictions

a. Funds made available for cooperative projects may not be used to procure equipment or services from any foreign government, foreign research organization, or other foreign entity. 10 U.S.C. § 2350a(d)(1).

b. A foreign participant may not use any military or economic assistance grant, or other funds provided by the United States for the purpose of making its contribution to the cooperative project. 10 U.S.C. § 2350a(d)(2).

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B. 22 U.S.C. § 2767

1. DOD preferred legal authority for defense international agreements. REQUIRED FOR USE OF THE SPECIAL LEGAL AUTHORITY CONTAINED IN 10 U.S.C. § 2350b.

2. International Cooperative Projects with Friendly Foreign countries.

a. The President may enter into a cooperative project agreement with NATO or with one or more NATO members. 22 U.S.C. § 2767(a).

b. The President may enter into a cooperative project agreement with any friendly foreign country not a member of NATO if the President determines that the cooperative project agreement with such country would be in the foreign policy or national security interests of the United States. 22 U.S.C. § 2767(j)(1).

Eligible countries include the major non-NATO countries and Sweden. Director DSAA makes initial designation. See, section 140106.B.3, page 1401-12 SAMM.

3. Definition of "COOPERATIVE PROJECT"

a. NATO - a jointly managed arrangement, described in a written agreement, which is undertaken in order to further the objectives of standardization, rationalization, and interoperability of the NATO armed forces and which provides

- i. for a sharing with the United States the costs of research on and development, testing, evaluation, or joint production (including follow-on support) of certain defense articles;
- ii. for concurrent production in the United States and in another NATO member of a defense article jointly developed; OR

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- iii. for procurement by the United States of a defense article or defense service from a NATO country or procurement by the United States of munitions from a NATO organization. 22 U.S.C. § 2767(b)(1).
 - b. OTHER FRIENDLY COUNTRIES - a jointly managed arrangement, described in a written agreement among the parties, which is undertaken in order to enhance the ongoing multinational effort of the participants to improve the conventional defense capabilities of the participants which provides -
 - i. for a sharing with the United States the costs of research on and development, testing, evaluation, or joint production (including follow-on support) of certain defense articles;
 - ii. for concurrent production in the United States and another participant of a jointly developed defense article; OR
 - iii. for procurement by the United States of a defense article or defense service from another participant to the agreement. 22 U.S.C. § 2767(b)(2).
4. **EQUITABLE Share of Costs - 22 U.S.C. § 2767(c).**
- a. Each agreement shall provide that the United States and each of the other participants will contribute its equitable share of the full costs of the cooperative project and will receive an equitable share of the results of such cooperative project.
 - b. The full costs of the cooperative project shall include overhead costs, administrative costs, and costs of claims.
 - c. The United States and the other participants may contribute their equitable shares of the full costs of such cooperative project in funds or in defense articles or defense services needed for such cooperative project.
 - d. Military assistance and financing received from the United States may not be used by any other participant to provide its share of the cost of any cooperative project.
 - e. No requirement shall be imposed by a participant for worksharing or other industrial or commercial compensation that is not in accordance with

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the agreement for the cooperative project.

5. Contractual or Other Obligations

The President may enter into contracts or incur other obligations for a cooperative project on behalf of the other participants, without charge to any appropriation or contract authorization, if each of the other participants agree to pay its equitable share of the contract or other obligation, to make such funds available in such amounts and at such times as may be required by the contract or other obligation, and to pay any damages and costs that may accrue from the performance of or cancellation of the contract or other obligation in advance of the time such payments, damages, or costs are due. 22 U.S.C. § 2767(d).

6. Waiver of FMS Charges

The President may reduce or waive the charge or charges which would otherwise be considered appropriate under 22 U.S.C. § 2761(e) in connection with FMS sales when such sales are made as part of such cooperative project, if the other participants agree to reduce or waive corresponding charges. 22 U.S.C. § 2767(e)(1).

7. Congressional Notification Before Signature of Agreement.

Not less than 30 days before a cooperative project agreement is signed on behalf of the United States, the President shall provide certification with specified information on the cooperative project to selected Congressional committees. 22 U.S.C. § 2767(f).

C. 10 U.S.C. § 3013(b)(4)

1. GENERAL LEGAL AUTHORITY for Secretary of the Army to equip the Army through research and development.

2. No SPECIFIC AUTHORIZATION to conduct international cooperative projects. However, this Section is the legal authority cited for Data Exchange Arrangements and Canadian Defense Development Sharing Projects

D. 10 U.S.C. § 2358

1. GENERAL LEGAL AUTHORITY for Secretary of Defense and the Secretary of a Military Department to engage in basic research, applied

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research, advance research, and development projects that are necessary to the responsibilities of each military department in the field of research and development, and that either relate to weapon systems and other military needs or are of potential interest to the DoD.

2. No reference to international agreements among the authorized means to perform research and development - by contract, cooperative agreement, or grant (in accordance with Chapter 63 of title 31), through one or more military departments, by using employees and consultants of DoD, or by mutual agreement with another federal agency. See 10 U.S.C. § 2358(b).

3. Notwithstanding omission of reference to international agreements, Section 2358 has been used by other Services and some Defense Agencies as legal authority for international agreements. It is not a normal practice for the Army to use Section 2358 as legal authority for international agreements.

E. 22 U.S.C. § 2796d - Research and Development Loans
Section 65, Arms Export Control Act

1. GENERAL LOAN AUTHORITY for international cooperative programs.

a. The Secretary of Defense may loan to a country that is a NATO or major non-NATO ally materials (other than strategic and critical material), supplies, or equipment for the purpose of carrying out a program of cooperative research, development, testing, or evaluation. In addition, the Secretary may accept as a loan or gift from such allies materials, supplies or equipment for similar purposes.

NOTE: The definition of “major non-NATO countries” are different for security assistance. See section 517 FAA [22 U.S.C. § 2321k] - New Zealand is the only additional country than the ones for Title 10

NOTE: A "loan" is considered, by definition, to be at no cost; a "lease", on the other hand, is for cost (normally, measured through a value for depreciation). General lease authority is provided in 22 U.S.C. § 2796 - [a waiver of the lease cost for cooperative research and development is found at 22 U.S.C. § 2796(a)].

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b. Each loan under Section 2796d must be provided under the terms of an written agreement. These agreements are considered International Agreements under 1 U.S.C. § 112b.

c. The loan of materials, supplies, or equipment may be included in a program of testing or evaluation solely for the purpose of standardization, interchangeability, or technical evaluation if a country agrees to provide the results of such testing or evaluation to the United States without charge.

d. The materials, supplies, or equipment loaned may be expended or otherwise consumed in connection with any testing or evaluation, without a requirement for reimbursement, if the Secretary determines that the success of the research, development, test, or evaluation depends upon expending or otherwise consuming the materials, supplies, or equipment loaned to the country AND approves the expenditure or consumption of such materials, supplies, or equipment.

2. The President is authorized to extend the loan authority under 22 U.S.C. § 2796d to those "Partnership for Peace" countries to be designated under Section 203(d) of Public Law 103-447 [108 Stat. 4696 (1994)]. Those countries are likely to include Poland, Hungary, the Czech Republic, and Slovakia.

F. Section 1082, Public Law 104-201 [110 Stat. 2672-2673 (1996)]

Authority to enter into International Agreements for the exchange of Defense personnel.

III. PROCEDURAL ASPECTS

A. GENERAL GUIDANCE

Except as authorized by DoD Directive [5530.3], Army Regulation [550-51], or by designated DoD/Army officials, Army personnel shall neither initiate nor conduct negotiation of an international agreement, nor request another United States Government organization to negotiate an international agreement.

B. PROCESS - - AUTHORITY TO NEGOTIATE

1. International Cooperative Research and Development Agreements

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a. Policy for development and approval for these Agreements are set out in DoD Directive 5530.3 and Deputy Secretary Defense memorandum of 14 September 1994, as amended on 13 February 1995 and 26 May 1995.

b. Request for Authority to Develop (RAD)

c. **INITIATION** - A paper known as the Summary Statement of Intent (SSOI) starts the RAD process.

i. The SSOI contains information covering an overview of the proposed project, operational requirement, partner nation(s), legal authority, project management, benefits/risks to the United States of conducting the project, potential industrial base impacts, funding availability and requirements, procurement, information security/technology transfer issues, and the proponent's point of contact.

ii. A concise document, but containing sufficient information so that reviewing offices can make informed judgment on the proposed project.

iii. No longer is there a requirement to submit the proposed text of the Agreement.

iv. SSOI staffed through DA, then a silence procedure is in affect within OSD. Concurrence is assumed unless comment provided within specified time period (normally 21 days).

2. Other International Agreements - OLDER PROCEDURE CONTAINED IN DOD DIRECTIVE 5530.3.

NOTE: This procedure may be applicable to international agreements other than for international cooperative research and development, like security assistance co-production MOUs.

a. Seeking the authority for the development and conclusion of all other international agreements remains the Request for Authority to Negotiate/Request for Authority to Conclude (RAN/RAC) process.

b. The RAN process involves the submission of the proposed text of the Agreement, and the following separate documents: fiscal memorandum,

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legal memorandum, Technology Assessment and Control Plan, and Industrial Base Factors Analysis. This process requires full coordination [no silence procedure].

C. Development/Negotiation of Agreement.

1. SSOI - after OSD approval to institute project, a text of the proposed agreement is drafted based on the DoD International Agreement Generator.

2. Substantive discussions on the program scope, and terms and commitments of the agreement with the foreign government. Each United States commitment must be based on substantive legal authority. DA/OSD principals should be briefed on a periodic basis on progress of negotiations and major issues should be brought to them for resolution.

D. PROCESS - - AUTHORITY TO CONCLUDE

1. Request for Final Approval. DA/OSD approval of the results of negotiations, including Department of State, Department of Commerce, or Department of Treasury and, when necessary, Congressional notification.

a. 1 U.S.C. § 112b(c). No international agreement may be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.

b. 22 U.S.C. § 2767(f). For any international agreement conducted pursuant to Section 27, a certification (containing specified information) must be provided to Congress not less than 30 days before a cooperative project agreement is to be signed on behalf of the United States.

2. 10 U.S.C. § 2531 - **DEPARTMENT OF COMMERCE** consultation requirement.

a. In the negotiation, renegotiation, and implementation of any existing or proposed defense international agreement relating to research, development, or production of defense equipment, or to the reciprocal procurement of defense items, the Secretary of Defense shall-

- i. consider the effects of such existing or proposed agreement on the defense technology and industrial base of the United states; and
- ii. regularly solicit and consider comments and recommendations

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from the Secretary of Commerce with respect to the commercial implications of such agreements and the potential effects of such agreements on the international competitive position of United States industry.

- iii. After consultation, the Secretary of Commerce can request inter-agency review of any existing or proposed defense international agreement if he has reason to believe that such agreements has or threatens to have a significant adverse effect on the international competitive position of United States industry.
- b. Presidential Resolution - 10 U.S.C. § 2531(c).

IV. LEGAL AUTHORITY FOR SELECTED COMMON TOPICS - INTERNATIONAL AGREEMENTS

A. INTELLECTUAL PROPERTY

- 1. Technical Data
 - a. 10 U.S.C. § 2320. Statutory basis for DoD acquisition of technical data.
 - i. **ESSENTIALLY NO OWNERSHIP OF TECHNICAL DATA - only rights to use [unlimited rights, Government purpose license rights, and limited rights].**

NOTE: Always a need to insure that USG has sufficient legal authority to transfer technical data to foreign governments.

- ii. Where technical data is developed exclusively at private expense and with restrictions on use, DoD may release or disclose such technical data (other than detailed manufacturing or process data) to a foreign government that is in the interest of the United States and is required for evaluation or informational purposes. 10 U.S.C. § 2320(a)(2)(D)(i)(II).
- b. DFARS Subpart 227.71 - Rights in Technical Data.

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2. 10 U.S.C. § 2386 - - Acquisition authority -
 - a. Copyrights, patents, and applications for patents.
 - b. Licenses under copyrights, patents, and applications for patents.
 - c. Technical data and computer software.
 - d. Releases for past infringement of patents or copyrights or for unauthorized use of technical data or computer software.

3. Patents

- a. 35 U.S.C. § 207(a)(2) - legal authority for Department of Army to grant patent licenses.
- b. Executive Order No. 10096 - patent policy for USG employee's inventions.

4. Copyright

17 U.S.C. § 105 - no copyright protection for any work of the United States Government (a work prepared by an officer or employee of United States Government as part of that person's official duties).

B. TECHNOLOGY TRANSFER - - **Prohibitions**

1. 10 U.S.C. § 4542 [STRATTON AMENDMENT]. Prohibition on transfer of Technical Data Packages for large-caliber cannon except under certain conditions.
2. 10 U.S.C. § 2532(b). Prohibition on international agreements that would require transfer of United States defense technology to foreign governments in connection with an offset arrangement where implementation of international agreement would significantly and adversely affect the defense industrial base of the United States and would result in a substantial financial loss to United States firm.

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C. THIRD PARTY TRANSFER

1. 22 U.S.C. § 2753(a)(2). While primarily directed to security assistance, the section is considered to be general expression of USG policy - - not to transfer title or possession to anyone other than an officer, employee or agent of the recipient and not to use for a purpose other than those which furnished without prior USG consent.

2. NOTE DOD Policy on "**End-User Certificates**" DOD Directive 2040.3 and DFARS 225.802-71.

D. FINANCIAL

1. 10 U.S.C. § 2350i.

a. Whenever the United States participates in a cooperative project with a friendly foreign country or NATO on a cost-sharing basis, any contribution received by the United States from that foreign country or NATO to meet its share of the costs of the project may be credited to appropriations. A statutory exception to the Miscellaneous Receipts Statute - 31 U.S.C. § 3302.

b. The contribution received shall be available only for the payment of the share of the project expenses allocated to the foreign country or NATO making the contribution. Payments for which such amount is available include the following:

i. payments to contractors and other supplies (including DoD and other participants acting as suppliers) for necessary articles and services.

ii. payments for any damages and costs resulting from the performance or cancellation of any contract or other obligation.

iii. payments or reimbursements of other program expenses, including program office overhead and administrative costs.

iv. refunds to other participants.

2. 10 U.S.C. § 2350a(d)(1). NUNN Fiscal Restrictions

a. Funds made available for cooperative research and development projects may not be used to procure equipment or services from any foreign

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government, foreign research organization, or any other foreign entity.

b. Foreign countries may not use any military or economic assistance grant, loan, or other funds provided by the United States for making their contribution to the cooperative research and development program.

E. CLAIMS/LIABILITY

1. 10 U.S.C. § 2350a(c) and 22 U.S.C. § 2767(c) provide GENERAL authority for sharing of claims costs in cooperative projects.

2. NATO SOFA [4 UST 1792, TIAS 2846]

a. Some foreign countries QUESTION THE APPLICATION OF NATO SOFA to cooperative research and development projects.

b. COST SHARE: Host - 25% / Sending - 75%

3. Other Claims Statutory Authority

a. 10 U.S.C. § 2734a. When the United States is a party to an international agreement which provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of an armed force of the United States done in the performance of official duty, or arising out of any other act, omission, or occurrence for which an armed force of the United States is legally responsible under the law of another party to the international agreement, and causing damage in the territory of such party, the Secretary of Defense or designee may reimburse or pay the party pro rata share of the claim.

b. 10 U.S.C. § 2734b. When the United States is a party to an international agreement which provides for the settlement or adjudication by the United States under its laws and regulations, and subject to agreed pro rata reimbursement, of claims against another party to the agreement arising out of the acts or omissions of a member or civilian employee of an armed force of that party done in the performance of official duty, or arising out of any other act, omission, or occurrence for which that armed force is legally responsible under United States law, and causing damage in the United States, those claims may be settled by the United States in accordance with the agreement.

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F. CUSTOM DUTIES

1. Except as provided in law, importation made by or for the account of any agency or office the United States Government are subject to the usual Customs entry and examination requirements. 19 C.F.R. § 10.100.
2. Unless the agency obtains an exemption, any shipments are also subject to duty. Schedule 8 of the Harmonized Tariff Schedule of the United States lists supplies for which exemptions from duty may be obtained when imported into the custom territory of the United States. See, FAR subpart 25.6.
3. Subheading 9808.00.30 is the exemption for military departments. It provides for duty free entry of "[m]aterials certified to the Commissioner of Customs by the authorized procuring agencies to be emergency war material purchased abroad."

G. LOAN

1. 22 U.S.C. § 2796d
2. 22 U.S.C. § 2767(c). The United States and other participants may contribute their equitable shares of the full cost of such cooperative project in defense articles - implicit authority to loan items.

H. PROCUREMENT

1. 10 U.S.C. § 2350b(e). Secretary of Defense may authorize another participant (other than United States) to make a contract for requirements of the United States under the cooperative project if the Secretary determines that such a contract will significantly further standardization, rationalization, and interoperability. The Secretary shall ensure that such contract will be made on a competitive basis and that United States sources will not be precluded from competing under the contract. The foreign government may follow its own procedures relating to contracting.

NOTE: Substantive legal authority for the international agreement must be 22 U.S.C. § 2767.

2. 10 U.S.C. § 2304(c)(4). Statutory exception for Competition in Contracting Act - permits a sole source when required by terms of an international agreement.

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I. DISPOSAL OF JOINTLY ACQUIRED PROPERTY

10 U.S.C. § 2350b(f) Authority to dispose of property that is jointly acquired by parties to a cooperative project without regard to United States laws. Disposal of such property may include a transfer of the interest of the United States in such property to another party or the sale of such property.

NOTE: Substantive legal authority for the international agreement must be 22 U.S.C. § 2767.