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Status of Multilateral Space Agreements in International and United States Law[1]

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I. INTRODUCTION:

This paper addresses the status in international law and United States law of the constitutive documents underlying the multi-lateral agreements for an International Space Station project. I do this by first describing the relevant international and domestic laws relating to treaties so that the reader understands the framework that determines the status of the ISS instruments, and then apply them to these instruments to determine their status both in international and U.S. law.

When one considers multilateral space treaties, one naturally starts with the five United Nations space treaties, beginning with the 1967 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.*[i] These instruments all fit the definition of "treaty" as reflected in customary international law and codified in Article 2.1(a) of the Vienna Convention on the Law of Treaties[ii], the latter of which reads:

> 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

However, there are numerous other international instruments between governments or agencies of governments, mostly bilateral, which pertain to activities in outer space. These range from bilateral memoranda of understanding for the joint development of spacecraft to bilateral agreements for the establishment and operation of space tracking stations.[iii] However, in light of the specific subject matter of this session, this paper is confined to considering the status in international and U.S. law of the multilateral instruments which serve as the constitutive documents pertaining to the development, establishment, operation and use of the International Space Station ("ISS"), in particular, the Intergovernmental Agreement ("IGA") signed January 29, 1998, among the 15 Partner States, and the bilateral Memoranda of Understanding ("MOUs") between the U.S. "Cooperating Agency" (the National Aeronautics and Space Administration ("NASA")) and the Cooperating Agencies of Canada, Europe and the Russian Federation, and the Government of Japan.

The 1998 IGA entered in force 27 March 2001 for Canada, Japan, the Russian Federation and the United States. Although it has not, as of October 2002, entered into force for the European Partner States[iv], their participation in the ISS program continues pursuant to the 1998 "Interim Arrangement" signed by the Partner

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States at the time of signature of the IGA in 1998.[v]

In addition, there was an earlier, 1988, IGA[vi] concluded between all of the 1998 IGA Partner States, except for Russia, and which entered into force in 1992 for the United States and Japan. However, it has been replaced by the 1998 IGA, which provides, in Article 25.4, that upon its entry into force, the 1988 IGA shall cease to be in force.

II. FROM THE PERSPECTIVE OF INTERNATIONAL TREATY LAW:

As noted in the foregoing definition of "treaty" in the Vienna Convention, a treaty must be an agreement in writing and governed by international law. Furthermore, Article 2.2 of the Convention stipulates that the breadth of meaning given to the term "treaty" in the Convention is "without prejudice to the use of [the term] or to the meanings which may be given to [it] in the internal law of any State." This is important when considering the use of the term "treaty" in U.S. treaty law in view of the dichotomy in U.S. law between a "treaty" which under Article II of the U.S. Constitution is submitted to the Senate for its advice and consent prior to ratification ("Article II Treaty") and an "international agreement" which is not submitted to the Senate.

Article 5, extends the Convention to any treaty which is adopted within an international organization without prejudice to the any relevant rules of the organization.

Article 18 of the Convention imposes the obligation on a state that has signed a treaty or otherwise expressed its consent to be bound by the treaty pending its entry into force, "to refrain from acts which would defeat the object and purpose of the treaty", unless and until it communicates its intention not to become a party to the treaty.

Article 26 codifies the principle of *pacta sunt servanda* ("agreements must be kept") that every treaty in force "is binding upon the parties to it and must be performed by them in good faith."

Article 31 expresses the general rule of interpretation of treaties. Namely, they shall be interpreted

> "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

III. FROM THE PERSPECTIVE OF UNITED STATES TREATY LAW.

The status of "treaties" under United States law has its origin in Article VI, Sec. 2 of the Constitution:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, "treaties" are of equal status with the Constitution (although they must be consistent therewith) and the laws of the United States. However, there are Article II Treaties and there are "other international agreements". Both may be treaties under international law but are treated differently under U.S. law.

In respect to treaty-based international law, the legal system of the United States is in some respects a "dualist" system[vii] in that treaty-based international law remains separate from U.S. municipal law unless and until it is specifically incorporated ("executed")

into municipal law through one of several governmental processes. Thus, to automatically become part of U.S. municipal law, the treaty must be "executed.", whether it is an Article II Treaty or an international agreement not submitted to the Senate pursuant to Article II. To avoid confusion when discussing international treaties and their relationship to U.S. municipal law, it is less confusing to refer to them as "international agreements", whether they are submitted to the Senate for advice and consent pursuant to Article II of the Constitution or brought into force for the United States by the President pursuant either to specific congressional approval or a prior congressional authorization or to his plenary or inherent powers as President under Article II of the Constitution.[viii]

Once the international agreement has come into force for the United States, it may become part of municipal law in one of two ways. "[It] can sometimes be deemed to apply automatically as statute-like law in domestic U.S. courts" as a "self-executing" agreement. Or, if the agreement "cannot be deemed to be domestic law, ... [it] may require further governmental acts to be implemented [in domestic law]."[ix] To be a "self-executing" agreement, it must not require further action by the Congress (e.g., not require appropriation of funds or where the international agreement, itself, specifically requires the United States to take further legislative action). Whether it is an Article II Treaty or other international agreement, it "is self-executing when it can be directly applied by courts or executive agencies without the need of further measures."[x] If it is not "self-executing," then further legislative action must be taken by the Congress before the instrument becomes a part of U.S. municipal law, assuming the government wishes it to so become.[xi] The question of whether the treaty is self-executing or not does not, of course, affect the international obligation of the United States, once it has ratified the agreement, to carry it out under international law.

If the decision is made by the President not to submit an international agreement to the Senate for its advice and consent as an Article II Treaty, the agreement will then fall into one of three categories of "executive agreements" requiring (for two of those categories) congressional action.

The first of these categories is a "congressionally-*authorized* executive agreement" where Congress has previously delegated authority generally for the President to enter into international agreements in a certain area or with respect to a certain subject matter. For our purposes, a good example of this delegated authority is Section 205 of the National Aeronautics and Space Act of 1958, as amended (the "NASA Act".[xii] Section 205 reads:

> The Administration, under the foreign policy guidance of the President, may engage in a program of international cooperation in work done pursuant to this Act, and in the peaceful application of the results thereof, pursuant to agreements made by the President with the advice and consent of the Senate.

It is important to note that in the presidential signing statement accompanying the signing of the NASA Act in 1958, President Eisenhower singled out section 205 as raising "substantial constitutional questions":

> I regard this section merely as recognizing that international treaties may be made in this field, and as not precluding, in appropriate cases, less formal arrangements for

cooperation. To construe this section otherwise would raise substantial constitutional questions.

The second type of international agreement is a "congressionally-*approved* executive agreement." Once the agreement is negotiated by the executive, it must be submitted to the Congress for approval in the form of a joint resolution before it can enter into force for the United States. It is important to note that the President has plenary authority under Article II of the Constitution to negotiate agreements with foreign governments and need not, for constitutional reasons, first seek Congressional approval to undertake and conclude negotiations. However, for practical and political reasons, he will often coordinate with the relevant committees of Congress to keep them informed as to the progress of negotiations so as to facilitate later obtaining the necessary congressional approval to bring the agreement into force for the United States. This is especially the case with regard to multilateral trade agreement negotiations such as the the World Trade Organization (WTO) negotiations. The WTO agreement, as important as it was to the U.S. economy, was not submitted to the Senate as an Article II Treaty. Instead, it was treated as a "congressionally-approved executive agreement" for which the President, for political reasons, first obtained congressional authority to undertake the negotiations on the basis that when concluded, the agreement would be submitted to the Congress for approval by an up-or-down (i.e., no amendments) vote in both Houses.

The third type of international agreement is a "*presidential* executive agreement". It does not require congressional authorization or approval as long as the substance of the agreement is within the plenary or inherent powers of the President under the Constitution. An example is the President's authority as Commander-in-Chief of the armed forces. Another is with respect to his implicit authority to conduct diplomatic relations with foreign nations derived from his Article II power to "receive Ambassadors and other public Ministers."

In the case of the 1988 ISS IGA and MOUs, they were treated as congressionally-authorized executive agreements pursuant to the Congressionally-delegated authority under Section 205 of the Space Act and section 112 of the NASA Authorization Act of 1988.[xiii]

Also in the case of the 1988 IGA, it was first necessary to obtain specific Congressional legislation in regard to certain matters concerning intellectual property in order to make U.S. municipal law consistent with the U.S. obligations under Article 21.3 of the IGA concerning protection of the secrecy of patent applications. In as much as Article 21.3 was retained verbatim in the 1998 IGA, it too is consistent with U.S. municipal law, and no further congressional action is necessary in that regard.[xiv]

Whether to choose the Article II Treaty route or to proceed on the basis of an executive agreement is a political decision for the Executive Branch.[xv] If the President seeks to proceed and obtain Congressional approval for an executive agreement by way of a joint resolution of Congress, it requires only a simply majority vote of both Houses. If, instead, the agreement is submitted as an Article II Treaty to the Senate it requires an affirmative vote of 2/3rd of the

Senator present. Thus, except for certain categories of international agreements (e.g., disarmament agreements, tax treaties), the Executive generally chooses the congressional-approval route unless it appears that the Senate would not support a joint resolution. Likewise, in the case of the 1988 IGA, the "congressionally-authorized executive agreement" route was deemed the better approach because there was some doubt in 1988 whether a 2/3rd majority vote could be obtained in a timely fashion by going the Article II Treaty route in the Senate.

Within the Executive Branch of the U.S. Government, determination of whether an instrument concluded with a foreign government or an IGO is an international agreement rests with the Secretary of State pursuant to the Case-Zablocki Act of 1972, as amended.[xvi] The Act requires that significant international commitments of the U.S. Government be reduced to writing, and reported to the foreign relations committees of the Congress within sixty days of the entry into force of such commitments. The Act, its implementing State Department Regulations,[xvii] and Circular 175[xviii] define for the purposes of U.S. law what constitutes an international agreement. In addition, they detail the procedures to be followed with respect to negotiating and concluding such agreements and subsequently reporting them to Congress.

In addition to the Case-Zablocki Act, various other acts of Congress that authorize the President to negotiate international agreements, require the submission of such agreements to the relevant oversight committees of the Senate and the House. One such act in the case of NASA was the 1988 amendment to the NASA Act which required that the IGA and MOUs be submitted to the Senate Committee on Commerce, Science and Transportation, and the House Committee on Science, Space and Technology thirty days prior to their entry into force.[xix]

The State Department Regulation concerning coordination, reporting and publication of international agreements, sets forth five criteria to be applied in determining whether any undertaking of the United States constitutes an "international agreement" within the meaning of the Act and of 1 U.S.C. 112a, requiring the publication of significant international agreements. At the least, the first four criteria must be met in order for the undertaking to constitute an "international agreement." The criteria are:

1. *Identity and intention of the parties.*

The parties must be states, state agencies or IGOs. They must intend their undertaking to be legally binding and not merely of political or personal effect. They must intend the undertaking to to be governed by international law although this intent need not be manifested by any reference to third- party dispute settlement mechanisms or any express reference to international law. It will be presumed to be governed by international law in the absence of a choice of law clause.

2. *Significance of the arrangement.*

The undertaking must be significant, and in determining significance the entire context of the transaction as well as the expectations and intent of the parties must be considered.

Examples given in the regulation of arrangements that may constitute international agreements include those that constitute a substantial commitment of funds that would require new appropriations, and those that will require continuing and/or substantial cooperation in the conduct of a particular program or activity, such as scientific or technical cooperation.

3. *Specificity, including objective criteria for determining enforceability.*

Intent of the parties is the key factor in determining whether an arrangement is an international agreement. However, undertakings expressed in vague or very general terms with no objective criteria for determining enforceability or performance are not normally international agreements as they often reflect the intent not to be bound by the agreement.

4. *Necessity for two or more parties.*

Although unilateral commitments may at times be binding, they do not constitute international agreements. Furthermore, the requirement of "consideration" necessary in domestic contract law is not required in international agreements.

5. *Form.*

Although it deserves consideration, form as such is not an important factor. While failure to use the customary form may constitute evidence of a lack of intent to be legally bound, if the general content and context reveal an intention of the parties to enter into a legally binding arrangement the fact that the arrangement does not reflect customary form will not preclude it from being an international agreement.

The Regulations provide that an agency level arrangement can constitute an international agreement if it meets the above criteria, or at least the first four.[xx] In addition, an implementing arrangement may constitute an international agreement if its underlying agreement is general in nature and the implementing arrangement is detailed and meets at least the first four of the above criteria.[xxi]

IV. THE STATUS OF THE ISS IGA AND MOUs IN INTERNATIONAL LAW.

The rights, obligations and responsibilities of the respective Parties to the IGA are expressed in a hierarchy of three instruments: the IGA, the individual MOUs between NASA and each foreign Cooperating Agency (in the case of Japan, the Government of Japan), and a number of subsequent implementing arrangements (IAs). The MOUs are subject to the IGA, and the IAs must be consistent with and subject to the MOUs.[xxii]

A. THE IGA...

The Preamble to the IGA, concludes by stating the intent of the parties to form an international cooperative effort:

> Convinced that working together on the [ISS] will further expand cooperation through the establishment of a long-term and mutually-beneficial relationship, and further promote cooperation in the exploration and peaceful uses of outer space...[the Parties] have agreed as follows :

Article 1.1 establishes a "long-term international cooperative framework among the Partners, on the basis of a genuine partnership" to build, operate and utilize a permanently inhabited international space station for peaceful purposes "in accordance with international law." The IGA further provides for "mechanisms and arrangements designed to ensure that its object is fulfilled."

The IGA "specifically defines" not only the ISS Program, but also the "nature of this partnership" including the respective rights and obligations of the Partners in this cooperation. Hence the intent is to promote cooperation in outer space by working together in the ISS, in a form of contractual intergovernmental venture as opposed to a separate international entity such as an intergovernmental organization. Furthermore, the intent is to do this on the basis of a "genuine partnership" but without creating a partnership-type entity.

Article 2 of the IGA, provides that the Partners will "join their efforts, under the lead role of the United States for overall management and coordination to create and integrate the [ISS]." Thus, the United States, besides contributing the elements identified in the Annex to the IGA, serves as the project manager and coordinator, a necessary role in such a "partnership" established without the creation of a separate "partnership" entity.

As a result, we have an international joint undertaking expressed as a "genuine partnership" by a group of states pursuant to an agreement to be governed by international law. It is an agreement with a singular, defined purpose in which the Partners various rights and obligations are set forth in considerable detail.

However, unlike agreements for the establishment of commercial joint ventures and partnerships, there are no financing mechanisms such as capitalization requirements and a "capital call" provision in the IGA for the ISS program. Instead, each Partner is to develop and fund its own Space Station elements and activities; i.e., there is to be generally no exchange of funds. However, the fulfillment of each Partner's financial responsibilities is made subject to "its funding procedures and the availability of appropriated funds", with the important proviso that

> recognizing the importance of the Space Station cooperation, each Partner undertakes to make its *best efforts* to obtain approval for funds to meet those obligations consistent with its respective funding procedures.[xxiii] (Emphasis added).

This leads to the question of whether the IGA and MOUs are legally binding instruments.

In the case of the United States, this provision limiting the government's fiscal obligation to no more than a "best efforts" obligation, avoids the strictures of "Anti-Deficiency Act"[xxiv] which requires appropriations to be made in advance of the commitment of funds by the federal government. From the fiscal standpoint, this clause makes the IGA consistent with existing U.S. Government fiscal laws thereby avoiding the need for congressional approval of the IGA as well as the appropriation of funds before the IGA could enter into force for the United States.

However, this "best efforts" clause, while not inconsistent with the Anti-Deficiency Act, nevertheless raises other issues with respect to internal U.S. fiscal procedures. In particular, each

Partner "undertakes to make its best efforts to obtain approval for funds ... *consistent with its respective funding procedures.*" (Emphasis added). In the case of the United States, the funding approval procedure starts in the Executive Branch. Each year, generally in February, the President submits his budget to the Congress for the next fiscal year. Hearings are then held by various committees of the House and Senate, budget resolutions are adopted, authorization bills are considered and in many cases adopted and finally, by the beginning of the new fiscal year (October 1st), appropriation acts are enacted (or, more often, continuing resolutions are passed in order to avoid a shutdown of those departments and agencies for whom appropriations have not been made). But for present purposes, the key starting point for the Executive is the submission of its budget. And it is the President who has the responsibility to see that the international obligations of the United States are carried out, including those under the 1988 IGA, which is in force for the U.S. and Japan, and the 1998 Interim Arrangement which is in force for all the signatories to the 1998 IGA pending entry into force of the 1998 IGA. In addition, there is the obligation on States, generally, under international law "to refrain from acts which would defeat the object and purpose of a treaty" prior to its entry into force.[xxv]

Moreover, international law requires states to carry out their international obligations in "good faith". "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[xxvi] And it has been said that this principle could also extend to non-legally-binding agreements:

> However, because good faith applies generally in the legal relations between states, the principle will often continue to be relevant to situations arising from non-legally binding agreements, if those situations are themselves governed by or reducible to, legal rules. For example, factual reliance, perhaps over a long period, on a non-legal agreement may give rise to a legal claim based upon estoppel. More questionably, even insistence on the legal right to disregard a non-legally binding agreement might be challenged as an abuse of right.[xxvii]

Thus, issue of the fiscal obligations of the Partner under IGA Article 15 is centered on when the "best efforts" must first be made. In the case of the United States this is when the executive authority of the United States (the President) presents the budget for the fiscal year in question to the Congress. If the appropriating or approval body (the Congress, in the case of the United States) later fails to approve the necessary funds, the Article 15 obligation of the Partner is excused under the "subject to appropriations" clause of Article 15 to the extent of the lack of funding. However, without the request in the President's budget the chances of obtaining an appropriation of the necessary funds are considerably reduced.

What is meant by "best efforts" in the context of Article 15? It is clear that the U. S. Government could not, consistent with its internal fiscal restraints, permit the IGA to enter into force for it without the "subject to appropriations" clause, i.e., a "condition precedent" to its performance. And since this was likely the case with the other Parties, it was in their mutual interest to seek some greater commitment to avoid the practical appearance of an illusory arrangement, i.e., one in which a Party was committed only if it later obtained

funding. Furthermore, reliance just on the principle of good faith and the rule of *pacta sunt* servanda may have been considered, both diplomatically and programatically, too implicit (or, perhaps, under the circumstances, insufficient) for the purposes of an international undertaking of the magnitude and duration of the ISS program. Therefore, just as in commercial contract law where an absolute commitment or assurance of satisfactory performance is impractical for legal, professional or other reasons, greater assurance that necessary funding would be forthcoming on a timely basis to meet programmatic goals, was found in the undertaking of each party to "make its best efforts" to obtain approval of funds to meet its obligations under the IGA.

The phrase "best efforts" has been defined in a municipal law context as

> a standard that has *diligence* as is essence and is imposed on those contracting parties that have undertaken such performance.[xxviii]

From an international law perspective, the *Harvard Research* commented on the principle of "good faith" in fulfilling a treaty engagement as

> requir[ing] that its stipulations be observed in their spirit as well as according to their letters and that what was promised be performed ... honestly *and to the best of the ability* of the party which made the promise.[xxix]

While these criteria – "diligence" and "to the best of the ability" – may appear to overlap, the former is more of an objective criterion, the later being subjective as to the party's ability. Therefore, the "best efforts" criterion appears to be a stronger admonition than relying only on the principle of "good faith", at least in the context of Article 15 of the IGA.

B. The MOUs...

The four MOUs in the ISS Program constitute the first layer of arrangements implementing the provisions of the IGA. Each one is a more comprehensive description of the programmatic undertakings and obligations set forth in the IGA. Pursuant to the Interim Arrangement of January 29, 1998, each MOU will enter into force after signature by the respective representatives of each Party thereto and notification by each Party of that it has completed all necessary domestic procedures for its entry into force.[xxx] At that time, the 1998 MOU is deemed to replace the respective 1988 MOU in the case of two of the MOUs.[xxxi] Furthermore, in three of the MOUs the respective Parties "agree to abide by the relevant terms of the IGA, to the fullest extent possible consistent with applicable domestic laws and regulations."[xxxii]

Pursuant to Article 4 of the IGA, each MOU has as its purpose the establishment of arrangements between the parties to the bilateral MOU implementing the provisions of the IGA on the basis of genuine partnership for peaceful purposes "*in accordance with international law.*"[xxxiii] The specific objectives of the MOUs are: (a) to provide the basis for cooperation of the parties to each MOU; (b) to detail their roles and responsibilities, taking into account those of the parties to each of the other MOUs; (c) to establish the management structure and necessary interfaces to ensure effective planning and coordination of the work and

activities in the ISS program; (d) to provide a basis for cooperation that maximizes the total capability of the ISS, accommodates users needs and ensures that the ISS is operated in a safe, efficient and effective manner for both the users and operators; and (e) to provide a general description of the ISS and its elements.[xxxiv]

The subject matter of the various articles of the MOUs in many cases correspond to those of of articles in the IGA, although often going into much greater detail, e.g., the provisions on Management and Crew. In other corresponding articles the language is more similar and one MOU article (Article 15) merely incorporates by reference the so-called "legal articles" (i.e., articles 16 through 22) of the IGA. Of note however, is MOU Article 16, *Financial Arrangement,* which appears nearly verbatim in each MOU and with certain exceptions, is substantively the same as Article 15 of the IGA. One major exception, however, is sub-Article 16.2 in each MOU which, while retaining the subject-to-availability-of-appropriations requirement as a broad excuse from performance, omits the "best efforts" proviso of Article 15.2 of the IGA. Instead, the MOUs, in their respective sub-Article 16.3 requiring notification and consultation by a Partner in the event it incurs "funding problems", add a final sentence in which the MOU Parties

> undertake to grant *high priority* to their Space Station programs in developing their budgetary plans. (Emphasis added).

In view of the fact that the MOU Parties are, except for Japan, governmental space agencies and not the governments, themselves, this distinction between the IGA and the MOUs appears reasonable, since it is the executive heads of government and not the heads of government agencies which control the submission of budgets to the respective legislative bodies for approval. What the "high priority" language provides is an added mutual assurance at the heads of agency level (and at the executive level in the case of Japan) of the fiscal importance to be given their Space Station programs. As in the case of the "best efforts" clause in Article 15 of the IGA, this "high priority" clause in the MOUs serves to enhance the legally binding nature of the MOUs.

Also, it is noted that in the international arena NASA uses the term "MOU" for "significant agreements binding under international law" and which are procedurally consistent with the Case-Zablocki Act and its implementing regulations. NASA considers cooperative activities to be significant which have "major budget impact, are long-term, or have a high degree of programmatic, policy, or political importance. The examples given by NASA expressly refer to the ISS program, as an example of "[a]ctivities that are complex, involve multiple parties, or have unusual organizational arrangements (e.g., ISS)."[xxxv]

V. CONCLUSION.

1. As to the IGA....

On the international plane, the IGA meets the definition of "treaty" in Article 1 of the *Vienna Convention on the Law of Treaties.* It is a written agreement concluded among states in which they have expressed their collective intent that it be governed by international law.

Under United States law, the IGA is treated as a "congressionally-authorized executive agreement pursuant to Section 205 of the NASA Act of 1958, as amended and Section 112 of the NASA Authorization Act, Pub. L. No. 100-147 (1987). It meets all five of the criteria of for an international agreement under the Case-Zablocki Act and Section 181.2 of its implementing State Department Regulation. (1) The Parties to the IGA are states; they have expressed the intent that the agreement be governed by international law, and from its terms taken in context with and in light of its object and purposes, reveals an implicit intent that it be legally binding under international law; (2) It is a significant agreement for a major scientific and technical undertaking in the field of space science costing many tens of billions of U.S. dollars to develop, operate and utilize over an elapsed period measured in decades; (3) its terms have considerable specificity including as to the intent to which the Parties are bound under the agreement at international law; (4) it is a multi-party agreement; and (5) it follows the customary form of international agreements and is denominated as an "intergovernmental agreement."

As to the matter of the status of the IGA provisions in U.S. municipal law, the writer is not aware of whether the Executive Branch has determined that provisions of the IGA are self-executing or if not should be "executed". No legislation has been enacted to do so with respect to the provisions of the Agreement other than as described below. The "legal provisions" (Articles 16 through 22) were considered to be consistent with existing federal law with one exception concerning patent secrecy, Article 21.3. In that case, and legislation was enacted to make U.S. law consistent on that issue. As for the Article 16 regime on cross-waivers of liability, NASA did in 1991 promulgate a regulation pursuant to its broad statutory authority under the NASA Act, implementing these with regard to the 1988 IGA.[xxxvi] Some changes were made to Article 16 in the 1998 IGA, and presumably NASA will in time address whether any changes to its regulation are needed as a result of such changes.

2. As to the MOUs...

The MOUs are not "treaties" on the international plane as that term in defined in the Vienna Convention since they are not agreement concluded between states. Instead, each is an agreement concluded between governmental agencies (except the NASA-Japan MOU which is concluded between a government agency and a foreign state. Nevertheless, they are agreements implementing the provisions of the IGA "in accordance with international law."

Under U.S. law, the MOUs are "agency-level" agreements and would appear to meet the five criteria of 22 CFR sec. 181.2(a) thereby making them international agreements under the Case-Zablocki Act. They do not appear to have been published pursuant to sec. 112b of the Act in the U.S. Government's annual publication, *Treaties in Force*, which also includes other significant international agreements in force for the United States. Moreover, the NASA Procedures and Guidance (NPG 1051.1) expressly confirms this conclusion as to the status of the MOUs as international agreements binding under international law.

[i] 18 UST 2410, TIAS 6347, 610 UNTS 205 (1967). (Hereinafter, the Outer Space Treaty). The other four treaties are: *Convention on International Liability for Damages Caused By Space Objects*, 24 UST 2389, TIAS 2262, 961 UNTS 187 (1971); *Convention on the Registration of Objects Launched into Outer Space*, 28 UST 695, TIAS 8480, 1023 UNTS 15 (1976); *Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space*, 19 UST 7570, TIAS 6599, 672 UNTS 119 (1968); and the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* , 1363 UNTS 3, 18 ILM 1434 (1984).

[ii] U.N. Doc. A/CONF. 39/27 (1969), 8 I.L.M. 679 (1969), entered into force 27 January 1980. ("Vienna Convention").

[iii] E.g., *Memorandum of Understanding for joint development of the TOPEX/POSEIDON (oceanographic satellite) project*, 1987, TIAS 12207. *Agreement providing for the establishment and operation of a lunar and planetary spacecraft tracking facility on Ascension Island*, 1965, 16 UST 1183, TIAS 5864, 551 UNTS 221.

[iv] Article 25.3(b) of the IGA provides that the IGA shall not enter into force for a European Partner State before it enters into force for the European Partner, which cannot occur until at least four European signatory or acceding States have deposited their instruments of ratification, acceptance or approval "and, in addition, a formal notification by the Chairman of the ESA Council" has been made to the Depositary Government (United States). http://www.state.gov/s/l/13897.htm . Pursuant to its internal rules, the ESA notification will not be made until the governments of its three largest Member States signatory to the IGA (France, Germany and Italy) have completed their procedures. As of 18 October 2002, only Germany and Italy had completed their procedures.

[v] Agreement Concerning Application of the Space Station Intergovernmental Agreement Pending its Entry into Force, signed and entered into force January 29, 1998. (the "1998 Interim Arrangement"). http://www.state.gov/www/global/legal_affairs/treaty_actions_1998.html Article 3 sets forth the Parties "desire to pursue cooperation as provided for in the [1998 IGA] to the fullest possible extent" pending their completion of necessary domestic approvals. The Parties, in Article 4, "undertake, to the fullest extent possible consistent with their domestic laws and regulations, to abide by the terms of the [1998 IGA] until it enters into force or becomes operative with respect to each of them." Article 5 provides that a Party may withdraw from this arrangement upon 120 days' written notice to the others.

[vi] Agreement on cooperation in the detailed design, development, operation and utilization of the permanently manned civil space station, with annex. Done at Washington September 29, 1988; entered into force January 30, 1992, together with bilateral MOUs) concluded between NASA and the Cooperating Agencies of Canada,and Europe and the Government of Japan.

[vii] Henkin, Pugh, Schachter and Smit, *International Law – Cases and Materials,* 153-154 (3 ed., 1993). ("Dualists (or pluralists) regard international law and municipal law as separate legal systems which operate on different levels. International law can be applied by municipal courts only when it had been "transformed" or "incorporated" into municipal law.")

[viii] Specifically, under Article II, Sec. 2, Clauses 1 and 3. In pertinent part they read:

Clause 1: The President shall be Commander in Chief of the Army and Navy of the United States....

Clause 3: ....he shall receive Ambassadors and other Public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

[ix] J.H. Jackson, *The World Trading System – Law and Policy of International Trade Relations,* 63 (MIT Press, 1989).

[x] Y. Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, Va. J. Int'l L, 627 (1986).

[xi] See, *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 314, 7 L.ed. 415 (1828) in which Chief Justice Marshall formulated the distinction between self-executing and non-self-executing treaties. "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, wherever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department: and the

legislature must execute the contract, before it can become a rule for the court." See, also, RESTATEMENT 3rd, *Foreign Relations Law of the United States*, § 111(4), comment h., and Reporter's Note 5.

[xii] 42 U.S.C. § 2475.

[xiii] See, *infra.*, fn 17 and accompanying text.

[xiv] In this connection and as a related matter, U.S. Patent Law prior to the enactment of the Patent of Space Act, 35 U.S.C. § 105 (1990) was confined to the territories of the United States. The Act extended the U.S. Patent Law to include the make, use or sale in outer space of inventions on space objects carried on the registry of the United States. Nevertheless, in recognition of the jurisdiction (Art. 5) and intellectual property provisions of the 1988 IGA, the Act contains a specific exceptions in the case of the ISS and in the case of inventions made use or sold in outer space on space objects carried on the registry of a foreign state.

[xv] RESTATEMENT 3rd , *Foreign Relations Law of the United States*, § 303, comment (e) (1987).

[xvi] 1 USC § 112b

[xvii] 22 CFR Part 181.

[xviii] Vol. XI, *Foreign Affairs Manual*, Chapt. 700 (Department of State).

[xix] Pub. L No. 100-147, § 112, *codified at* 42 U.S.C. § 2451 (note 1994). See, Dalton, "National Treaty Law and Practice: United States" which appears in *National Treaty Law and Practice: Austria, Chile, Columbia, Japan, The Netherlands, United States*, Chapt. 6 (Studies in Transnational Legal Policy No. 30, American Society of International Law (Washington, D.C., 1999). Mr. Dalton served for a number of years as the State Department Assistant Legal Advisor for Treaty Affairs and has written an excellent summary of US Treaty Practice to which is appended a number of very useful annexes setting forth examples of the various types of documents used in U.S. treaty practice.

[xx] 22 CFR § 181.3(c).

[xxi] Id., at 181.3(d).

[xxii] IGA, Art. 4.2.

[xxiii] IGA, Art.15.2. The language of Article 15 is identical in both the 1988 and 1998 versions of the IGA.

[xxiv] 31 U.S.C. § 665.

[xxv] Codified at Article 18 of the *Vienna Convention on the Law of Treaties*, entered into force 27 January 1980

[xxvi] *Vienna Convention on the Law of* Treaties, Art. 26. See, I. Brownlie, *Principles of Public International Law*, 620 (5th ed. 1998). See generally, J.F.O'Connor, *Good Faith in International Law* (Reprint, Dartmouth Publ. Co., 1999). O'Connor concludes by offering the following definition of "good faith":

"The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctly and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time." O'Connor at 124.

[xxvii] *Id.*, O'Connor at 113.

[xxviii] Farnsworth, *Farnsworth on Contracts*, § 7.17b (1990)(emphasis added) (He contrasts "best efforts" with "good faith", the latter being "a standard that has honesty and fairness at its core and that is imposed on every party to a contract."

[xxix] *Harvard Research: Draft Convention on the Law of Treaties*, comment *ad* Art. 20 (Part III, 1935. See, Bing Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 114 (1953).

[xxx] See, NASA-ESA MOU, Art. 19.1; NASA-Russian Space Agency MOU, Art. 19.1; NASA-Canadian Space Agency MOU, Art. 19.1; and the NASA- Government of JAPAN MOU Art. 19.1, which, however, imposes the further requirement for entry into force of the MOU that the IGA have also entered into force, which it has not as of the date of the presentation of this paper.

[xxxi] NASA-ESA MOU, Art. 19.1 and NASA Government of Japan MOU, Art. 19.2.

[xxxii] Article 19.2 in the NASA-ESA MOU, NASA-Russian Space Agency MOU, and NASA-Canadian Space Agency MOU. The text of Article 19.2 in each of these MOU is identical to the text in Paragraph 4 of the Interim Arrangement of January 29, 1998, except in each MOU provision the undertaking is to abide by the "relevant" terms of the the IGA.

[xxxiii] (Emphasis added). See, e.g., NASA-ESA MOU, Art. 1.1. The substance of Art. 1.1 of each of the other three MOUs is the same as Art. 1.1 of the cited MOU.

[xxxiv] See, e.g., NASA-Russian Space Agency MOU, Art. 1.2.

[xxxv] NASA Procedures and Guidelines (NPG) 1051 Space Act Agreements, Chapt. 3., Non-reimbursable and Reimbursable Agreement with

Foreign Governments or Governmental Entities, § 3.2, Non-reimbursable Agreement/ Memorandum of Understanding, effective December 30, 1998 – December 30, 2003.

[xxxvi] *Cross-waiver of liability for Space Station Freedom activities,* 56 Fed. Reg. 48430, Sept. 25, 1991, *codified at,* 4 CFR § 1266.102.