

11 FAM 720

NEGOTIATION AND SIGNATURE

(TL:POL-36; 02-25-1985)

11 FAM 720.1 Circular 175 Procedure

(TL:POL-36; 02-25-1985)

This subchapter is a codification of the substance of Department Circular No. 175, December 13, 1955, as amended, on the negotiation and signature of treaties and other international agreements. It may be referred to for convenience and continuity as the "Circular 175 Procedure."

11 FAM 720.2 General Objectives

(TL:POL-36; 02-25-1985)

The objectives are:

- a. That the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits;
- b. That the objectives to be sought in the negotiation of particular treaties and other international agreements are approved by the Secretary or an officer specifically authorized by him or her for that purpose;
- c. That timely and appropriate consultation is had with congressional leaders and committees on treaties and other international agreements;
- d. That where, in the opinion of the Secretary of State or a designee, the circumstances permit, the public be given an opportunity to comment on treaties and other international agreements;
- e. That firm positions departing from authorized positions are not undertaken without the approval of the Legal Adviser and interested Assistant Secretaries or their deputies;
- f. That the final texts developed are approved by the Legal Adviser and the interested assistant secretaries or their deputies and, when required, brought a reasonable time before signature to the attention of the Secretary or an officer specifically designated by the Secretary for that purpose;
- g. That authorization to sign the final text is obtained and appropriate arrangements for signature are made; and

h. That there is compliance with the requirements of *1 U.S.C. 112b, as amended*, on the transmission of the texts of international agreements other than treaties to the Congress (see 11 FAM 724); the law on the publication of treaties and other international agreements (see 11 FAM 725); and treaty provisions on registration (see 11 FAM 750.3-3).

11 FAM 721 EXERCISE OF THE INTERNATIONAL AGREEMENT POWER

11 FAM 721.1 Determination of Type of Agreement

(TL:POL-36; 02-25-1985)

The following considerations will be taken into account along with other relevant factors in determining whether an international agreement shall be dealt with by the United States as a treaty to be brought into force with the advice and consent of the Senate or as an agreement to be brought into force on some other constitutional basis.

11 FAM 721.2 Constitutional Requirements

(TL:POL-36; 02-25-1985)

There are two procedures under the Constitution through which the United States becomes a party to international agreement. Those procedures and the constitutional parameters of each are:

a. Treaties

International agreements (regardless of their title, designation, or form) whose entry into force with respect to the United States takes place only after the Senate has given its advice and consent are "treaties." The President, with the advice and consent of two-thirds of the Senators present, may enter into an international agreement on any subject genuinely of concern in foreign relations, so long as the agreement does not contravene the United States Constitution; and

b. International Agreements Other Than Treaties

International agreements brought into force with respect to the United States on a constitutional basis other than with the advice and consent of the Senate are "international agreements other than treaties." (The term "executive agreement" is appropriately reserved for agreements made solely on the basis of the constitutional authority of the President.) There are three constitutional bases for international agreements other than treaties as set forth below. An international agreement may be concluded pursuant to one or more of these constitutional bases:

(1) Agreements Pursuant to Treaty

The President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate, the provisions of which constitute authorization for the agreement by the Executive without subsequent action by the Congress;

(2) Agreements Pursuant to Legislation

The President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by the Congress; and

(3) Agreements Pursuant to the Constitutional Authority of the President

The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority. The constitutional sources of authority for the President to conclude international agreements include:

- (a) The President's authority as Chief Executive to represent the nation in foreign affairs;
- (b) The President's authority to receive ambassadors and other public ministers;
- (c) The President's authority as "Commander-in-Chief"; and
- (d) The President's authority to "take care that the laws be faithfully executed."

11 FAM 721.3 Considerations for Selecting among Constitutionally Authorized Procedures

(TL:POL-36; 02-25-1985)

In determining a question as to the procedure which should be followed for any particular international agreement, due consideration is given to the following factors along with those in 11 FAM 721.2:

- a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
- b. Whether the agreement is intended to affect State laws;
- c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- d. Past U.S. practice as to similar agreements;

- e. The preference of the Congress as to a particular type of agreement;
- f. The degree of formality desired for an agreement;
- g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- h. The general international practice as to similar agreements.

In determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, or the President.

11 FAM 721.4 Questions as to Type of Agreement to Be Used; Consultation with Congress

(TL:POL-36; 02-25-1985)

a. All legal memorandums accompanying Circular 175 requests (see 11 FAM 722.3, paragraph h) will discuss thoroughly the bases for the type of agreement recommended.

b. When there is any question whether an international agreement should be concluded as a treaty or as an international agreement other than a treaty, the matter is brought to the attention of the Legal Adviser of the Department. If the Legal Adviser considers the question to be a serious one that may warrant congressional consultation, a memorandum will be transmitted to the Assistant Secretary for Legislative and Intergovernmental Affairs and other officers concerned. Upon receiving their views on the subject, the Legal Adviser shall, if the matter has not been resolved, transmit a memorandum thereon to the Secretary for a decision. Every practicable effort will be made to identify such questions at the earliest possible date so that consultations may be completed in sufficient time to avoid last-minute consideration.

c. Consultations on such questions will be held with congressional leaders and committees as may be appropriate. Arrangements for such consultations shall be made by the Assistant Secretary for Legislative and Intergovernmental Affairs and shall be held with the assistance of the Office of the Legal Adviser and such other offices as may be determined. Nothing in this section shall be taken as derogating from the requirement of appropriate consultations with the Congress in accordance with 11 FAM 723.1, paragraph e, in connection with the initiation of, and developments during negotiations for international agreements, particularly where the agreements are of special interest to the Congress.

11 FAM 722 ACTION REQUIRED IN NEGOTIATION AND/OR SIGNATURE OF TREATIES AND AGREEMENTS

11 FAM 722.1 Authorization Required to Undertake Negotiations

(TL:POL-36; 02-25-1985)

Negotiations of treaties, or other international agreements on matters of substance, or for their extension or revision, are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government, until authorized in writing by the Secretary or an officer specifically authorized by the Secretary for that purpose. Notification of the termination of any treaty or other international agreement on matters of substance requires similar authorization.

11 FAM 722.2 Scope of Authorization

(TL:POL-36; 02-25-1985)

Approval of a request for authorization to negotiate a treaty or other international agreement does not constitute advance approval of the text nor authorization to agree upon a date for signature or to sign the treaty or agreement. Authorization to agree upon a given date for, and to proceed with, signature must be specifically requested in writing, as provided in 11 FAM 722.3. This applies to treaties and other agreements to be signed abroad as well as those to be signed at Washington. Special instructions may be required, because of the special circumstances involved, for multilateral conventions or agreements to be signed at international conferences.

11 FAM 722.3 Request for Authorization to Negotiate and/or Sign Action Memorandum

(TL:POL-36; 02-25-1985)

a. A request for authorization to negotiate and/or sign a treaty or other international agreement takes the form of an action memorandum addressed to the Secretary *or other principal to whom such authority has been delegated, as appropriate, and cleared with the Office of the Legal Adviser (including the Assistant Legal Adviser for Treaty Affairs), the Office of the Assistant Secretary for Legislative and Intergovernmental Affairs, other appropriate bureaus, and any other agency (such as Defense, Commerce, etc.) which has primary responsibility or a substantial interest in the subject matter.* It is submitted through the Executive Secretariat.

b. The action memorandum may request one of the following: (1) authority to negotiate, (2) authority to sign, or (3) authority to negotiate and sign. The request in each instance states that any substantive changes in the draft text will be cleared with the Office of the Legal Adviser and other specified regional and/or functional bureaus before definitive agreement is reached. Drafting offices should consult closely with the Office of the Legal Adviser to insure that all legal requirements are met.

c. The action memorandum indicates what arrangements are planned as to: (1) congressional consultation and (2) opportunity for public comment on the treaty or agreement being negotiated, signed, or acceded to.

d. The action memorandum shall indicate: (1) whether a proposed treaty or agreement embodies a commitment to furnish funds, goods, or services beyond or in addition to those authorized in an approved budget; and if so, (2) arrangements planned or carried out concerning consultation with the Office of Management and Budget (OMB) for such commitment.

e. The Department will not authorize such commitments without confirmation that the relevant budget approved by the President requests or provides funds adequate to fulfill the proposed commitment or that the President has made a determination to seek the required funds.

f. Where it appears that there may be obstacles to the immediate public disclosure of the text upon its entry into force, the action memorandum shall include an explanation thereof (see 11 FAM 723.2 and 11 FAM 723.3).

g. An action memorandum dealing with an agreement that has a potential for adverse environmental impact should contain a statement indicating whether the agreement will significantly affect the quality of the human environment.

h. The action memorandum is accompanied by: (1) *the U.S. draft, if available, of any agreement or other instrument intended to be negotiated; or (2) the text of any agreement and related exchange of notes, agreed minutes, or other document to be signed (with appropriate clearances, including the Assistant Legal Adviser for Treaty affairs); and (3) a memorandum of law prepared in the Office of the Legal Adviser.*

i. These provisions shall apply whether a proposed international agreement is to be concluded in the name of the U.S. Government or in the name of a particular agency of the U.S. Government. However, in the latter case, the action memorandum may be addressed to the interested Assistant Secretary or Secretaries of State, or their designees in writing, unless such official(s) judge that consultation with the Secretary, Deputy Secretary or an Under Secretary is necessary. (See 22 CFR 181.4.)

11 FAM 722.4 Separate Authorizations

(TL:POL-36; 02-25-1985)

When authorization is sought for a particular treaty or other agreement, either multilateral or bilateral, the action memorandum for this purpose outlines briefly and clearly the principal features of the proposed treaty or other agreement, indicates any special problems which may be encountered and, if possible, the contemplated solutions of those problems.

11 FAM 722.5 Blanket Authorizations

(TL:POL-36; 02-25-1985)

In general, blanket authorizations are appropriate only in those instances where, in carrying out or giving effect to provisions of law or policy decisions, a series of agreements of the same general type is contemplated; that is, a number of agreements to be negotiated according to a more or less standard formula (for example, Pub. L. 480 Agricultural Commodities Agreements; Educational Exchange Agreements; Investment Guaranty Agreements; Weather Station Agreements, etc.) or a number of treaties to be negotiated according to a more or less standard formula (for example, consular conventions, extradition treaties, etc.). Each request for blanket authorization shall specify the office or officers to whom the authority is to be delegated. *The basic precepts under 11 FAM 722.3 and 11 FAM 722.4 apply equally to requests for blanket authorizations. The specific terms of any blanket authorization, i.e., that the text of any particular agreement shall be cleared by the Office of the Legal Adviser and other interested bureaus before signature, shall be observed in all cases.*

11 FAM 722.6 Certification of Foreign Language Text

(TL:POL-36; 02-25-1985)

a. Before any treaty or other agreement containing a foreign language text is laid before the Secretary (or any person authorized by the Secretary) for signature, either in the Department or at a post, a signed memorandum must be obtained from a responsible language officer of the Department certifying that the foreign language text and the English language text are in conformity with each other and that both texts have the same meaning in all substantive respects. A similar certification must be obtained for exchanges of notes that set forth the terms of an agreement in two languages.

b. In exceptional circumstances the Department can authorize the certification to be made at a post.

11 FAM 722.7 Transmission of Texts to the Secretary

(TL:POL-36; 02-25-1985)

The texts of treaties and other international agreements must be completed and approved in writing by all responsible officers concerned sufficiently in advance to give the Secretary, or the person to whom authority to approve the text has been delegated, adequate time before the date of signing to examine the text and dispose of any questions that arise. Posts must transmit the texts to the Department as expeditiously as feasible to assure adequate time for such consideration. Except as otherwise specifically authorized by the Secretary, a complete text of a treaty or other international agreement must be delivered to the Secretary or other person authorized to approve the text, before any such text is agreed upon as final or any date is agreed upon for its signature.

11 FAM 723 RESPONSIBILITY OF OFFICE OR OFFICER CONDUCTING NEGOTIATIONS

11 FAM 723.1 Conduct of Negotiations

(TL:POL-36; 02-25-1985)

The office or officer responsible for any negotiations keeps in mind:

a. That during the negotiations no position is communicated to a foreign government or to an international organization as a U.S. position that goes beyond any existing authorization or instructions;

b. That no proposal is made or position is agreed to beyond the original authorization without appropriate clearance (see 11 FAM 722.3, paragraph a);

c. That all significant policy-determining memorandums and instructions to the field on the subject of the negotiations have appropriate clearance (see 11 FAM 722.3, paragraph a);

d. That the Secretary *or other principal, as appropriate*, is kept informed in writing of important policy decisions and developments, including any particularly significant departures from substantially standard drafts that have been evolved;

e. That with the advice and assistance of the Assistant Secretary for Legislative and Intergovernmental Affairs, the appropriate congressional leaders and committees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation

of the new treaty or agreement. Where the proposal for any especially important treaty or other international agreement is contemplated, the Office of the Assistant Secretary for Legislative and Intergovernmental Affairs will be informed as early as possible by the office responsible for the subjects;

f. That the interest of the public be taken into account and, where in the opinion of the Secretary of State or his or her designee the circumstances permit, the public be given an opportunity to comment;

g. That in no case, after accord has been reached on the substance and wording of the texts to be signed, do the negotiators sign an agreement or exchange notes constituting an agreement until a request under 11 FAM 722.3 for authorization to sign has been approved and, if at a post abroad, until finally Instructed by the Department to do so as stated in 11 FAM 730.3. If an agreement is to be signed in two languages, each language text must be cleared in full with the Language Services Division or, if at a post abroad, with the Department before signature, as stated in 11 FAM 722.6;

h. That due consideration is given also to the provisions of 11 FAM 723.2 through 11 FAM 723.9, 11 FAM 730.3, and 11 FAM 731 of this chapter; and

i. That, in any case where any other department or agency is to play a primary or significant role or has a major interest in negotiation of an international agreement, the appropriate official or officials in such department or agency are informed of the provisions of this subchapter.

11 FAM 723.2 Avoiding Obstacles to Publications and Registration

(TL:POL-36; 02-25-1985)

The necessity of avoiding any commitment incompatible with the law requiring publication (1 U.S.C. 112a) and with the treaty provisions requiring registration (see 11 FAM 750.3-3) should be borne in mind by U.S. negotiators. Although negotiations may be conducted on a confidential basis, every practicable effort must be made to assure that any definitive agreement or commitment entered into will be devoid of any aspect which would prevent the publication and registration of the agreement.

11 FAM 723.3 Questions on Immediate Public Disclosure

(TL:POL-36; 02-25-1985)

In any instance where it appears to the officer or office in the Department responsible for the negotiations or to the U.S. representatives that the immediate public disclosure upon its entry into force of an agreement under negotiations would be prejudicial to the national security

of the United States, the pertinent circumstances shall be reported to the Secretary of State and his or her decision awaited before any further action is taken. Where such circumstances are known before authorization to negotiate or to sign is requested, they shall be included in the request for authorization. All such reports and requests are to be cleared with the Office of the Legal Adviser.

11 FAM 723.4 Public Statements

(TL:POL-36; 02-25-1985)

No public statement is to be made indicating that agreement on a text has been reached, or that negotiations have been successfully completed, before authorization is granted to sign the treaty or other agreement. If such authorization has been granted subject to a condition that no substantive change in the proposed text is made without appropriate clearance (see 11 FAM 722.3, paragraph a), no such public statement is to be made until definitive agreement on the text has been reached and such clearance has been received. Normally, such a public statement is made only at the time a treaty or other agreement is actually signed, inasmuch as it remains possible that last-minute changes will be made in the text. Any such statement prior to that time must have the appropriate clearance, and the approval of the Secretary or the Department principal who originally approved the action memorandum request under "Circular 175 Procedure."

11 FAM 723.5 English-Language Text

(TL:POL-36; 02-25-1985)

Negotiators will assure that every bilateral treaty or other international agreement to be signed for the United States contains an English-language text. If the language of the other country concerned is one other than English, the text is done in English and, if desired by the other country, in the language of that country. A U.S. note that constitutes part of an international agreement effected by exchange of notes is always in the English language. If it quotes a foreign *government* note, the quotation is to be rendered in English translation. A U.S. note is not in any language in addition to English, unless specifically authorized (*with the clearance of the Assistant Legal Adviser for Treaty Affairs*). The note of the other government concerned may be in whatever language that government desires.

11 FAM 723.6 Transmission of Signed Texts to Assistant Legal Adviser for Treaty Affairs

(TL:POL-36; 02-25-1985)

a. The officer responsible for the negotiation of a treaty or other agreement at any post is responsible for insuring the most expeditious

transmission of the signed original text, together with all accompanying papers such as agreed minutes, exchanges of notes, plans, etc. (*indicating full names of persons who signed*), to the Department for the attention of the Assistant Legal Adviser for Treaty Affairs; *provided*, that where originals are *not* available, accurate certified copies are obtained and transmitted as in the case of the original. (See 11 FAM 723.7, 11 FAM 723.8, and 11 FAM 723.9.) The transmittal is by airgram, *not* by transmittal slip or operations memorandum.

b. Any officer in the Department having possession of or receiving from any source a signed original or certified copy of a treaty or agreement or of a note or other document constituting a part of a treaty or agreement must forward such documents immediately to the Assistant Legal Adviser for Treaty Affairs.

11 FAM 723.7 Transmission of Certified Copies to the Department

(TL:POL-36; 02-25-1985)

When an exchange of diplomatic notes between the mission and a foreign government constitutes an agreement or has the effect of extending, modifying, or terminating an agreement to which the United States is a party, a properly certified copy of the note from the mission to the foreign government, and the signed original of the note from the foreign government are sent, as soon as practicable (*indicating full names of persons who signed*) to the Department for attention of the Assistant Legal Adviser for Treaty Affairs. The transmittal is by airgram, not by transmittal slip or operations memorandum.

Likewise, if, in addition to the treaty or other agreement signed, notes related thereto are exchanged (either at the same time, beforehand, or thereafter), a properly certified copy (copies) of the note(s) from the mission to the foreign government are transmitted with the signed original(s) of the note(s) from the foreign government.

In each instance, the mission retains for its files certified copies of the note exchanged. The U.S. note is prepared in accordance with the rules prescribed in 5 FAH-1, *Correspondence Handbook*. The note of the foreign government is prepared in accordance with the style of the foreign ministry and usually in the language of that country. Whenever practicable, arrangements are made for the notes to bear the same date.

11 FAM 723.8 Certification of Copies

(TL:POL-36; 02-25-1985)

If a copy of a note is a part of an international agreement, such copy is certified by a duly commissioned and qualified Foreign Service officer either

(a) by a certification on the document itself, or (b) by a separate certification attached to the document. A certification on the document itself is placed at the end of the document. It indicates, either typed or rubber stamped, that the document is a true copy of the original signed (or initialed) by (*INSERT FULL NAME OF OFFICER WHO SIGNED DOCUMENT*), and it is signed by the certifying officer. If a certification is typed on a separate sheet of paper, it briefly describes the document certified and states that it is a true copy of the original signed (or initialed) by (*FULL NAME*), and it is signed and dated by the certifying officer. The certification may be stapled to the copy of the note.

11 FAM 723.9 Preparation of Copies for Certification

(*TL:POL-36; 02-25-1985*)

For purposes of accuracy of the Department's records and publication and registration, a certified copy must be an exact copy of the signed original. It must be made either by typewriter (ribbon or carbon copy) or by facsimile reproduction on white durable paper (not by the duplimat method) and must be *CLEARLY LEGIBLE*. In the case of notes, the copy shows the letterhead, the date and, if signed, an indication of the signature or, if merely initialed, the initials which appear on the original. It is suggested that, in the case of a note from the mission to the foreign government, the copy for certification and transmission to the Department be made at the same time the original is prepared. If the copy is made at the same time, the certificate prescribed in 11 FAM 723.8 may state that the document is a true and correct copy of the signed original. If it is not possible to make a copy at the same time the original is prepared, the certificate indicates that the document is a true and correct copy of the copy on file in the mission. The word "(Copy)" is not placed on the document which is being certified; the word "(Signed)" is not placed before the indication of signatures. Moreover, a reference to the transmitting airgram, such as "Enclosure 1 to Airgram No. 18 (ect.)", is not placed on the certified document. The identification of such a document as an enclosure to an airgram may be typed on a separate slip of paper and attached to the document, but in such a manner that it may be easily removed without defacing the document.

11 FAM 724 TRANSMISSION OF INTERNATIONAL AGREEMENTS OTHER THAN TREATIES TO CONGRESS: COMPLIANCE WITH THE CASE-ZABLOCKI ACT

(*TL:POL-36; 02-25-1985*)

All officers will be especially diligent in cooperating to assure compliance with Pub. L. 92-403 "An Act to require that international agreements other

than treaties, hereafter entered into by the United States, be transmitted to the Congress within sixty days after the execution thereof." That Act, *popularly known as the Case-Zablocki Act*, approved August 22, 1972 (86 Stat. 619; 1 U.S.C. 112b), provides as follows:

The Secretary of State shall transmit to the Congress the text of any international agreement other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.

11 FAM 725 PUBLICATION OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES

(TL:POL-36; 02-25-1985)

The attention of all officers is directed to the requirements of the Act of September 23, 1950 (64 Stat. 979; 1 U.S.C. 112a), which provides as follows:

The Secretary of State shall cause to be compiled, edited, indexed, and published, beginning as of January 1, 1950, a compilation entitled "United States Treaties and Other International Agreements," which shall contain all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other final formality has been executed, during each calendar year. The said United States Treaties and Other International Agreements shall be legal evidence of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements, therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

11 FAM 726 THROUGH 729 UNASSIGNED