

11 FAM 720 NEGOTIATION AND CONCLUSION

*(CT:POL-48; 09-25-2006)
(Office of Origin: L/T)*

11 FAM 721 CIRCULAR 175 PROCEDURE

(CT:POL-44; 05-26-2006)

This subchapter is a codification of the substance of Department Circular No. 175, December 13, 1955, as amended, on the negotiation and conclusion of treaties and other international agreements. It may be referred to for convenience and continuity as the "Circular 175 Procedure." The C-175 procedure facilitates the application of orderly and uniform measures to the negotiation, conclusion, reporting, publication, and registration of U.S. treaties and international agreements, and facilitates the maintenance of complete and accurate records on such agreements.

11 FAM 722 GENERAL OBJECTIVES

(CT:POL-44; 05-26-2006)

The objectives are:

- (1) That the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits;
- (2) That particular treaties or international agreements are not in conflict with other international agreements or U.S. law;
- (3) 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;
- (4) That timely and appropriate consultation is had with congressional leaders and committees on treaties and other international agreements;
- (5) That where, in the opinion of the Secretary of State or a designee,

- the circumstances permit, other agencies and the public be given an opportunity to comment on treaties and other international agreements;
- (6) That firm positions departing from authorized positions are not undertaken without the approval of the Office of the Legal Adviser (L) and interested Assistant Secretaries or their deputies;
 - (7) That the final texts developed are approved by the Office of the Legal Adviser (L) 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;
 - (8) That authorization to sign the final text is obtained and appropriate arrangements for signature are made; and
 - (9) 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 726); the law on the publication of treaties and other international agreements (see 1 U.S.C. 112a and 11 FAM 727); and treaty provisions on registration (see 11 FAM 753.3).

11 FAM 723 EXERCISE OF THE INTERNATIONAL AGREEMENT POWER

11 FAM 723.1 Determination of Type of Agreement

(CT:POL-44; 05-26-2006)

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 723.2 Constitutional Requirements

(CT:POL-48; 09-25-2006)

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

11 FAM 723.2-1 Treaties

(CT:POL-44; 05-26-2006)

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.

11 FAM 723.2-2 International Agreements Other Than Treaties

(CT:POL-48; 09-25-2006)

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 “sole 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) Treaty;*
- (2) Legislation;*
- (3) Constitutional authority of the President.*

11 FAM 723.2-2(A) Agreements Pursuant to Treaty

(CT:POL-44; 05-26-2006)

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.

11 FAM 723.2-2(B) Agreements Pursuant to Legislation

(CT:POL-48; 09-25-2006)

The President may conclude an international agreement on the basis of

existing legislation, or subject to legislation to be adopted by the Congress, or upon the failure of Congress to adopt a disapproving joint or concurrent resolution within designated time periods.

11 FAM 723.2-2(C) Agreements Pursuant to the Constitutional Authority of the President

(CT:POL-48; 09-25-2006)

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:

- (1) The President's authority as Chief Executive to represent the nation in foreign affairs;
- (2) The President's authority to receive ambassadors and other public ministers, *and to recognize foreign governments*;
- (3) The President's authority as "Commander-in-Chief"; and
- (4) The President's authority to "take care that the laws be faithfully executed."

11 FAM 723.3 Considerations for Selecting Among Constitutionally Authorized Procedures

(CT:POL-44; 05-26-2006)

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 723.2:

- (1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;
- (2) Whether the agreement is intended to affect state laws;
- (3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- (4) Past U.S. practice as to similar agreements;
- (5) The preference of the Congress as to a particular type of

agreement;

- (6) The degree of formality desired for an agreement;
- (7) 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
- (8) 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 President, the Senate, and the Congress as a whole.

11 FAM 723.4 Questions as to Type of Agreement to Be Used; Consultation with Congress

(CT:POL-48; 09-25-2006)

- a. All legal memoranda accompanying Circular 175 requests (see 11 FAM 724.3, paragraph h) will discuss thoroughly the legal authorities underlying 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, in the first instance, of the Legal Adviser for Treaty Affairs. If the Assistant Legal Adviser for Treaty Affairs considers the question to be a serious one that may warrant formal congressional consultation, s/he or an appropriate representative of the Office of the Legal Adviser (L) will consult with the Assistant Secretary for Legislative Affairs (*H*) (or designee) and other affected bureaus. Upon receiving their views on the subject, the Legal Adviser will, if the matter has not been resolved, transmit a memorandum thereon to the Secretary (or designee) 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 Affairs and shall be held with the assistance of the Office of the Legal Adviser (L) and such other offices as may be determined. Nothing in this

U.S. Department of State Foreign Affairs Manual Volume 11—Political Affairs

section shall be taken as derogating from the requirement of appropriate consultations with the Congress in accordance with 11 FAM 725.1, *subparagraph (5)*, in connection with the initiation of, and developments during negotiations for international agreements, particularly where the agreements are of special interest to the Congress.