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Practice of the United Nations Secretariat in relation to certain questions raised in with the articles on the Law of Treaties, note by the Secretariat

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Law of treaties

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Practice of the United Nations Secretariat in relation to certain questions raised in connexion with the articles on the law of treaties

Note by the Secretariat

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It is hoped that the International Law Commission, in elaborating the articles of a code on the law of treaties, in so far as it concerns multilateral treaties, will not leave out of account, much less specifically contradict, the practice of the largest treaty-making organization in the world. Accordingly, it must be accepted that the practice of States in concluding treaties through the medium of the United Nations treaty-making machinery in itself constitutes a development of international law, which should, therefore, be fully reflected in the draft. It is in this latter connexion that the Secretariat would present to the Commission the following observations on certain aspects of the treaty practice within the United Nations.

A. The question of signature "ad referendum"

1. The practice of signing "*ad referendum*" is not a common one; for example, only one State (Venezuela) used the term "*ad referendum*" in signing the four conventions on the Law of the Sea, and Israel used it in signing the Protocol.

2. In the experience of the United Nations Secretariat, the purpose and effect of a signature "*ad referendum*" are identical with the purpose and effect of a signature "subject to ratification".

3. The only two instances (Austria and Federal Republic of Germany) where a signature "*ad referendum*" has been followed by a formal communication relate to the GATT protocols, which provided that States might become parties by signature only. In both cases, the communications emanated from the Office of the respective permanent Observers and stated that their Governments recognized themselves bound by the signatures affixed by their plenipotentiaries.

4. In all other instances, where ratifications were required, signatures "*ad referendum*" were followed by the deposit of an instrument of ratification or acceptance.

5. In conclusion, on this aspect of the matter, it would appear that the practice of the Secretariat, namely to make no distinction between a signature "*ad referendum*" and a signature "subject to ratification", corresponds to the practice of the Member Governments. In view of the fact that divergent views are held on this question, the Secretariat would propose that the comments of Governments should be specifically sought upon it.

B. Full powers and signature "ad referendum"

Full powers have always been required for a signature "*ad referendum*" and, in the experience of the Secretariat, no State has ever taken exception to this requirement.

C. Form of full powers

On 11 July 1949, the Assistant Secretary-General in charge of the Legal Department circulated to Member Governments a letter (LEG 103/01 (1) AL) from which the following is an extract:

> "Full powers should be issued, in accordance with the constitutional procedure of each State, either by the Head of the State, the Head of the Government or the Minister of Foreign Affairs. They should clearly specify the instrument referred to and give its exact and full title and its date.
>
> "In some exceptional cases and for reasons of urgency, if, for example there is a time-limit, cabled credentials may be accepted provisionally but the cable should also originate from the Head of the State, the Head of the Government or the Minister of Foreign Affairs and should be confirmed by a letter from the Permanent Delegation or the Plenipotentiary certifying its authenticity. The text of the cable should also state the title of the agreement referred to, and whether the Plenipotentiary is authorized to sign subject to later acceptance, and should specify that ordinary credentials are being sent immediately by mail.
>
> "This is the more important now that several conventions or agreements concluded under the auspices of the United Nations have provided that States can be definitively bound by signature alone.

"It is finally suggested that in order to facilitate their examination, the credentials of the representatives should be deposited with the Legal Department of the Secretariat twenty-four hours before the ceremony of signature of an international instrument."

Since the date of this circular letter the United Nations Secretariat has accepted, as definitive full powers, cable communications emanating from the Head of the State or Government or from the Minister for Foreign Affairs for signature of agreements which provide that they are subject to ratification.

D. Initialling

The custom of initialling has never been used in the United Nations for the purposes of authenticating the text of a multilateral convention. The very purpose of initialling—that of authentication—has been supplanted, in the more institutionalized treaty-making processes of the United Nations, by such standard machinery as the recorded vote on a resolution embodying or incorporating the text, or by incorporation into a final act. No representative has ever asked to initial a text of an instrument deposited with the Secretary-General.

E. Accession

The practice of the United Nations in adopting conventions has been, in numerous instances (e.g., conventions on the Law of the Sea), to offer to States the alternative of becoming parties either by signature followed by ratification or by accession. The development of international law in this respect appears to have been for simplification of formalities and for offering to States the procedures most convenient to them. From the Secretariat's records it appears that the number of instruments of accession deposited is roughly equivalent to the number of instruments of ratification. Moreover, it seems clear that accession, at least in United Nations treaty-making practice, does not presuppose the existence of a treaty in force (i.e., "a contract already entered into"). Thus, the situation which paragraph 6 of article 34 of the first report on the Law of Treaties (A/CN.4/101) treats as exceptional is in United Nations practice a normal one.

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The Secretariat takes this opportunity to inform the Commission that a summary of practice concerning the exercise of depositary functions in respect of multilateral conventions deposited with the Secretary-General is now in the course of preparation. It is expected that this publication will be in general distribution some time in September or October 1959.