

Document:-
A/CN.4/L.312

Draft articles on treaties concluded between States and international organizations or between international organizations. Texts adopted by the Drafting Committee: arts. 61- 80 and Annex, and titles of the parts and corresponding sections of the draft (A/CN.4/1624, para.30)

Topic:
Treaties concluded between States and international organizations or between two or more international organizations

Extract from the Yearbook of the International Law Commission:-
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*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

would prefer the Commission to study mainly contemporary practice. Mr. Reuter had said he was not sure that a principle of State immunity existed in contemporary practice; the Commission must prove the existence of such a rule in contemporary international law before trying to formulate it.

26. On the whole, he shared the views expressed by the members of the Commission on draft articles 2 to 5. On the other hand, he considered that draft articles 1 and 6 did not really express the subject-matter of the titles they had been given. Some clarification was therefore required, and it would be particularly desirable to specify, in draft article 6, the content of the notion of jurisdictional immunity, on which the Commission seemed to have a general idea which was, however, difficult to express.

27. The Commission should not be hasty with such a complex subject, and it was in no way bound to study one, not to say two, drafts of articles every year. It might perhaps be preferable to let the study of such a delicate matter ripen slowly.

**Question of treaties concluded between States and international organizations or between two or more international organizations (concluded)*
(A/CN.4/327, A/CN.4/L.312)**

[Item 3 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE**

ARTICLES 61–80 AND ANNEX

28. The CHAIRMAN invited the Chairman of the Drafting Committee to present the results of the Committee's work on the draft articles which the Commission had referred to it at the current session.

29. The results of the Committee's work were presented in document A/CN.4/L.312, which contained the text of articles 61–80 and of the annex concerning article 66, as well as the titles of the parts and corresponding sections of the draft.

30. The texts proposed by the Drafting Committee read:

[PART V

**INVALIDITY, TERMINATION AND SUSPENSION OF
THE OPERATION OF TREATIES**

...
SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION
OF TREATIES
...]

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty concluded between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

* Resumed from the 1596th meeting.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66. Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to another State, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present articles may set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by an international organization with respect to another organization, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

3. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to an international organization or by an organization with respect to a State, the procedure provided for in paragraph 2 above may be applied.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it shall produce appropriate powers.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69. Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Article 70. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72. Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI

MISCELLANEOUS PROVISIONS

Article 73. Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization [and termination of participation in the membership of an organization]

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization [or from the termination of participation by a State in the membership of the organization].

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and of powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or organization in question;

(e) informing the parties and the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and the contracting organizations, or

(b) where appropriate, of the competent organ of the organization concerned.

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations or, as the case may be, the said organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States and organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

ANNEX

Procedures established in application of article 66

I. ESTABLISHMENT OF THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles [and any international organization to which the present articles have become applicable] shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

(a) In the case referred to in article 66, paragraph 1, the State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(b) In the case referred to in article 66, paragraph 2, the international organization or organizations constituting one of the parties to the dispute shall appoint:

(i) one conciliator who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator chosen from among those included in the list who has not been nominated by that organization or any of those organizations.

The organization or organizations constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) In the case referred to in article 66, paragraph 3,

(i) the State or States constituting one of the parties to the dispute shall appoint two conciliators as provided for in subparagraph (a). The international organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b).

(ii) The State or States and the organization or organizations constituting one of the parties to the dispute shall appoint one conciliator who may or may not be chosen from the list referred to in paragraph 1 and one conciliator chosen from among those included in the list who shall neither be of the nationality of that State or of any of those States nor nominated by that organization or any of those organizations.

(iii) When the provisions of subparagraph (c) (ii) apply, the other party to the dispute shall appoint conciliators as follows:

(1) the State or States constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (a);

(2) the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b);

(3) the State or States and the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (c) (ii).

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General received the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit

the above-mentioned request to the President of the International Court of Justice who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

II. FUNCTIONING OF THE CONCILIATION COMMISSION

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

8. The appointment of conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the relevant rules of that organization.

31. Mr. VEROSTA (Chairman of the Drafting Committee) said that articles 61 to 80 and the text of the Annex setting out procedures established in application of article 66 completed the first reading of the draft.

32. Commenting on the draft as a whole, he said that the Drafting Committee had been guided by the Commission's intention to maintain, as far as possible, the spirit of the Vienna Convention on the Law of Treaties⁷ with its precision and flexibility in wording, while preserving the specific characteristics of treaties entered into or concluded with the participation of international organizations. The Drafting Committee had kept the same numbering for the articles as in the Vienna Convention, so as to facilitate comparison between the texts. It had also endeavoured to achieve terminological consistency throughout the draft and had therefore included or deleted the word "international" before the word "organization" as appropriate, using the term "international organization" only the first time it appeared in a paragraph, the word "organization" being used alone thereafter in the same paragraph. The only departures from that rule of drafting concerned the use of terms defined in article 2,⁸ such as "negotiating organization" or "contracting organization". The Drafting Committee had also deleted, throughout, the word "concluded", in the phrase "treaties concluded between".

⁷ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The convention is hereinafter called "Vienna Convention".

⁸ See *Yearbook . . . 1979*, vol. II (Part Two), pp. 138–139, document A/34/10, chap. IV, sect. B.1.

33. A number of articles remained unchanged. In others the Committee had maintained the text originally proposed but added, for the sake of precision, a reference to the type of treaty concerned. Thus in article 62, paragraph 2, the word "several", which had appeared before the word "States", had been changed to "two or more"; in article 63 it had been specified that the treaty concerned was between two or more States and one or more international organizations; in article 74 the same particular had been introduced and article 75 now spoke of a treaty "between one or more States and one or more international organizations". In the drafting of articles 76, 77, 78 and 79, the Drafting Committee had attempted to reflect the distinction between the mixed type of treaty and a treaty between organizations only, by referring, as appropriate to the defined terms "negotiating States" and "negotiating organizations", or "contracting States" and "contracting organizations" or simply referring to "States" and "organizations".

ARTICLE 61⁹ (Supervening impossibility of performance)¹⁰

34. Mr. VEROSTA (Chairman of the Drafting Committee) said that no comment was needed on article 61, as no change had been made.

Article 61 was adopted.

ARTICLE 62¹¹ (Fundamental change of circumstances)¹²

35. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 62, in addition to the general changes already mentioned, the Drafting Committee had added the words "by a party" after the verb "invoked" in paragraphs 2 and 3, in order to determine clearly who could exercise the right provided for. The phrase "establishing a boundary", in paragraph 2, was taken from the Vienna Convention, it being understood that the Commission was not taking any position on possible interpretations of the rules concerning treaties involving international organizations in the light of developments taking place in the Third United Nations Conference on the Law of the Sea.

36. Mr. TABIBI said he maintained the views he had already expressed concerning article 62, paragraph 2,¹³ and wished to record his objection.

Article 62 was adopted.

⁹ For consideration of the text initially submitted by the Special Rapporteur, see 1585th meeting, paras. 4 *et seq.*, and 1586th meeting, paras. 9–32.

¹⁰ For text, see para. 30 above.

¹¹ For consideration of the text initially submitted by the Special Rapporteur, see 1586th meeting, paras. 33 *et seq.*, and 1587th meeting, paras. 1–39.

¹² For text, see para. 30 above.

¹³ See 1587th meeting, paras. 7–9.