Document:-

A/CN.4/SR.2750

Summary record of the 2750th meeting

Topic:

Extract from the Yearbook of the International Law Commission:-

2002, vol. I

3. LONG-TERM PROGRAMME OF WORK

Paragraph 6

Paragraph 6 was adopted.

4. PROCEDURES AND METHODS OF WORK

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

5. COST-SAVING MEASURES

Paragraph 9

Paragraph 9 was adopted.

6. HONORARIA

Paragraphs 10 to 14

Paragraphs 10 to 14 were adopted.

Paragraph 15

46. Following a discussion in which Mr. SIMMA, Mr. PELLET and Mr. CANDIOTI took part on the question whether the word "honoraria" should be in the singular to show how usual a symbolic honorarium was or whether it should be kept in the plural, it was decided that the plural should be used and that the words "collect it" should be replaced by the words "collect them".

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted.

Section A, as amended, was adopted.

The meeting rose at 1.05 p.m.

2750th MEETING

Friday, 16 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Opertti Badan, Mr. Pellet, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fourth session (*concluded*)

CHAPTER X. *Other decisions and conclusions of the Commission* (concluded) (A/CN.4/L.626 and Add.1)

B. Date and place of the fifty-fifth session (A/CN.4/L.626)

Paragraph 4

Paragraph 4 was adopted.

Section B was adopted.

C. Cooperation with other bodies

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

Section C was adopted.

D. Representation at the fifty-seventh session of the General Assembly

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

1. The CHAIR said that it was the recommendation of the Bureau that Mr. Dugard, who had produced a number of articles that would, he hoped, be discussed in some detail, should be chosen to represent the Commission, together with the Chair, at the fifty-seventh session of the General Assembly.

It was so decided.

Paragraph 11 was adopted.

Section D was adopted.

E. International Law Seminar

Paragraphs 12 to 24

Paragraphs 12 to 24 were adopted.

Section E was adopted.

Chapter X, as amended, was adopted.

CHAPTER II. *Summary of the work of the Commission at its fifty-fourth session* (A/CN.4/L.616)

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

2. Mr. TOMKA said that the title of the topic of risks ensuing from the fragmentation of international law should be amended to include the words "and expansion".

3. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the title should be cited in the first sentence of paragraph 6, as it had originally been worded, and in the second, as amended at the current session. In the second sentence, the word "thus" before the words "*inter alia*" should be deleted.

Paragraph 6, as amended, was adopted.

Paragraphs 7 to 11

Paragraphs 7 to 11 were adopted.

Chapter II, as amended, was adopted.

CHAPTER III. *Specific issues on which comments would be of particular interest to the Commission* (A/CN.4/L.617 and Add.1)

A/CN.4/L.617

Paragraph 1

Paragraph 1 was adopted with a minor editing change.

Diplomatic protection

Paragraph 2

4. Mr. KAMTO proposed that, in the first sentence, the word "diplomatic" should be deleted. It had been generally agreed that the *M/V "Saiga" (No. 2)* case had been not about diplomatic protection but about protection of a different nature.

5. Mr. BROWNLIE said that he agreed with that point but found the remedy to be inadequate. The decision of ITLOS in the *M/V "Saiga" (No. 2)* case had hinged on direct injury, but paragraph 2 dealt with a different issue.

6. Ms. ESCARAMEIA pointed out that, in the informal discussions held on the subject, some members of the Commission had stated that the protection referred to in the *M/V "Saiga" (No. 2)* case was a form of diplomatic protection. The word "diplomatic" should be retained in the first sentence and, in the second sentence, States should be invited to give their views on whether diplomatic protection was involved or not.

7. Mr. CANDIOTI said he agreed that the first sentence should be worded in neutral terms and refer to "protection", not to "diplomatic protection". The second sentence raised the question whether the protection referred to was diplomatic protection or not.

8. Mr. DUGARD (Special Rapporteur) said that he accepted the suggestion made by Mr. Kamto, which left the question open for States to answer.

9. Mr. BROWNLIE said that the first sentence inaccurately quoted ITLOS as suggesting that the *M/V "Saiga" (No. 2)* case had involved diplomatic protection. It had not done so: it had regarded the matter as one of direct injury under the provisions of the United Nations Convention on the Law of the Sea.

10. Mr. KAMTO suggested that the Commission might request ITLOS to clarify its decision in the *M/V "Saiga" (No. 2)* case. That would be the most effective way of determining whether the Tribunal considered that the case involved diplomatic protection or some other kind of protection.

11. Mr. GAJA suggested that the Secretariat should be requested to incorporate the exact wording of the decision in paragraph 2.

12. Mr. TOMKA recalled that that decision had been studied in detail during the informal consultations, following which the Special Rapporteur had interpreted the position of ITLOS as being that the issue was not one of diplomatic protection and that it was covered by the relevant rules of the United Nations Convention on the Law of the Sea. He proposed that, as a compromise, the first two sentences of paragraph 2 should read: "Some members of ITLOS suggested in the *M/V "Saiga" (No. 2)* case that the State of nationality of a ship might give diplomatic protection to crew members who hold the nationality of a third State. The Commission would welcome the views of Governments on whether the protection under the United Nations Convention on the Law of the Sea is sufficient or whether there is a need for the recognition of a right to diplomatic protection vested in the State of nationality of the ship in such cases."

13. Mr. PELLET said that, in view of the Commission's uncertainty as to whether the words "diplomatic protection" had actually been used in the *M/V "Saiga" (No. 2)* decision, Mr. Gaja's proposal seemed to be the best solution. He did not agree with Mr. Kamto's proposal that ITLOS should be requested to clarify its decision; after all, it was the Commission's job to interpret judicial decisions.

14. Mr. KAMTO said he was absolutely certain that ITLOS had not referred to diplomatic protection in its decision. Guinea' s argument had been precisely that diplomatic protection had been involved, but that argument had been rejected by the Tribunal. Mr. Tomka's proposal was a departure from practice because it put the views of "some members" of the Tribunal before that of the body as a whole, thus giving pride of place to dissenting or individual opinions. He had suggested that the Tribunal should be asked for an interpretation of its decision in accordance with the practice of authenticated interpretation in international law, not in any way to disparage the Commission.

15. Mr. DUGARD (Special Rapporteur) said the best solution would be to adopt Mr. Gaja's proposal and use the same wording as the Tribunal.

16. Mr. PELLET said that, according to paragraphs 103 to 105 of its decision, ITLOS had rejected Guinea's argument and had based its decision on considerations other than diplomatic protection.

17. Ms. ESCARAMEIA pointed out that, after paragraph 105, the decision referred in detail to the reasoning of ITLOS, showing that it had not based its decision solely on the application of the United Nations Convention on the Law of the Sea. She remained opposed to the deletion of the word "diplomatic", as it would suggest that the decision said something different from what it actually did say, because it could not be questioned that the tribunal considered that there was "protection".

18. Mr. CHEE said that the implication of the *M/V "Saiga" (No. 2)* case was that a registering State was entitled to extend diplomatic protection to crew members, regardless of their nationality. The port State was responsible for any offence committed offshore.

19. Mr. BROWNLIE said that, as currently worded, the paragraph gave the impression that a majority of the Commission could not distinguish between direct injury and cases of diplomatic protection. It would be most unfortunate if that were the case. The text of the decision by ITLOS was totally clear: diplomatic protection had not been the point at issue, and the Tribunal had simply applied the idea of direct injuries on the basis of specific provisions of the United Nations Convention on the Law of the Sea. The fact that it had added one or two policy statements to support its general approach did not affect the fact that the *ratio decidendi* was clearly not based on diplomatic protection. Nor would matters be helped by removing the word "diplomatic", since the Commission was not concerned with matters of substance but with diplomatic protection itself.

20. Mr. KAMTO said that what was really needed was to look at the whole decision, with all the arguments and counter-arguments, but that time was too short now. Mr. Brownlie was correct, however: the decision by ITLOS had clearly been in accordance with article 94 of the United Nations Convention on the Law of the Sea relating to the duties of the flag State. There had been no indication in the decision that ITLOS had had diplomatic protection in mind. He trusted that in the future, when citing a case, members would be able to give chapter and verse.

21. Mr. DUGARD (Special Rapporteur) said that the Commission was embarking on the kind of debate that should last several days during the next session. For the time being, however, the question was how the sentence should be framed so as to entice Governments to express their views. The decision by ITLOS was by no means as clear as Mr. Brownlie and others claimed; the Commission's discussion and the doctrine on the subject were witness to the fact that opinions were divided. He suggested that the first sentence might be reworded to read: "The *M/V 'Saiga' (No. 2)* case has been interpreted by some as giving diplomatic protection to crew members who hold the nationality of a third State."

22. The CHAIR suggested that, in the amended phrase, the word "protection" could be followed by the following words in parentheses: "although arguably not necessary in this case", to protect the position of those such as Mr. Brownlie who held an opposite view.

23. Mr. CANDIOTI said that there was no need to shroud an essential question in a controversial reference to case law. In order to avoid a lengthy discussion, he suggested that the first sentence of the paragraph should be deleted altogether. The paragraph would then start: "The Commission would welcome the views of Governments as to whether the protection given by the State of nationality of a ship to crew members who hold the nationality of a third State is already adequately covered by the United Nations Convention on the Law of the Sea…".

24. The CHAIR suggested that the sentence might also contain a reference to the *M/V "Saiga" (No. 2)* case, as a pointer to Governments.

Paragraph 2, as amended by Mr. Candioti and the Chair, was adopted.

Paragraph 3

25. Mr. GAJA said that, in order to fully reflect the decision in the *Barcelona Traction* case, the word "incorporated" should be followed by the words "and where the registered office is located". Also, some of the exceptions listed in the second sentence were controversial, and he would therefore advocate the insertion, after the word "except", of the word "possibly", in order to show that the Commission did not endorse a particular interpretation of the decision.

Paragraph 3, as amended, was adopted.

Unilateral acts of States

Paragraph 4

26. Mr. PELLET said that he regretted having to say, in the absence of the Special Rapporteur, that he was far from impressed by the lack of questions in the paragraph. Granted, many Governments had not replied to the Commission's questionnaire, but surely the questions put to States should have been more specific.

Paragraph 4 was adopted.

The responsibility of international organizations

Paragraph 5

Paragraph 5 was adopted.

The fragmentation of international law: difficulties arising from the diversification and expansion of international law

Paragraph 6

27. Mr. MANSFIELD said that his feelings about the paragraph were similar to those of Mr. Pellet about paragraph 4: the request for comments and observations was too broad, almost as if it were an essay question. States would be more likely to provide substantive comments if they had a written report to which they could react.

28. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that, surprising though it might seem, he concurred. Indeed, States might register their doubts about the whole undertaking if addressed in such vague terms. He would write a first study and provide States with material that they could assess. He therefore proposed that the section should be deleted altogether.

29. Mr. PELLET said that the more specific part of the paragraph could be retained: States could be asked whether they agreed with the concept of "self-contained regimes" and whether they found it acceptable under international law. He pointed out that the French translation *régime autonome* was meaningless.

30. Mr. KATEKA said that Governments already had enough trouble answering the Commission's questions; they should not be overloaded. It would be wise to delete the section.

31. Mr. TOMKA said that he agreed. Moreover, the Commission should first define "self-contained regime". Governments should not be asked to do work that the Commission should do itself.

32. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the phrase "self-contained regime" had been used by ICJ in the *United States Diplomatic and Consular Staff in Tehran* case, so a French version must exist. The way the Court used the expression was, however, problematic. He also noted that there might be problems with timing if Governments responded to his invitation. He would need to submit his report shortly, so he would not want to receive replies greatly at odds with the content of his paper.

Paragraph 6 was deleted.

The section was deleted.

Reservations to treaties (A/CN.4/L.617/Add.1)

Paragraphs 1 and 2

33. Mr. TOMKA said that he preferred the following wording for the first phrase: "The Commission would welcome comments on…".

34. Mr. PELLET pointed out that the numbering of paragraphs 1 and 2 should be corrected. Paragraph 1 should consist of the current paragraph 1 (*a*), and paragraph 2 should consist of paragraph 1 (*b*) and the existing paragraph 2.

Paragraphs 1 and 2, as amended, were adopted.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)

The section was adopted.

Chapter III, as amended, was adopted.

CHAPTER I. *Organization of the session* (A/CN.4/L.615 and Corr.1)

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted.

Paragraph 3 *bis*

35. Mr. PELLET said that the words *s'est félicitée* should be replaced by the words *s'est déclarée satisfaite* in the French text.

36. Mr. SEPÚLVEDA said that the text in Spanish, and perhaps in English also, did not place enough emphasis on the fact that the new women members had been elected. The following wording in Spanish would be better: *…hecho de que hubiera mujeres entre los nuevos miembros elegidos…*

37. The CHAIR said that an equivalent change could be made in the English text: "that elections for the new quinquennium had included women as members."

Paragraph 3 bis*, as amended, was adopted.*

Paragraph 12

38. The CHAIR said that the item "Shared natural resources" had been mistakenly omitted from the draft agenda.

Paragraph 12 was adopted, subject to the inclusion of the omitted agenda item.

Chapter I, as amended, was adopted.

The draft report of the Commission on the work of its fifty-fourth session, as a whole, as amended, was adopted.

Closure of the session

39. The CHAIR said he believed that the new quinquennium was off to a good start with a meaningful agenda. He urged special rapporteurs not merely to continue to

provide excellent reports and proposals, but to follow the example of Mr. Dugard and do so in a timely fashion. The secretariat had surpassed his expectations. Mr. Mikulka, the Secretary, had proved to have a firm grasp of every aspect of the Commission's work. The Secretary had been backed up by a superb team, which had contributed enormously to the success of the session. He declared the session closed.

The meeting rose at 11.10 a.m.