Document:-
A/CN.4/3096

Summary record of the 3096th meeting

Topic:
Other business

Extract from the Yearbook of the International Law Commission:-
2011, **vol. I**

58. The Commission should also turn its attention to the establishment of procedures and principles for fact-finding missions. International organizations often set up a fact-finding mission in order to settle very serious disputes, but the very nature of the mission had sometimes been challenged on the grounds that it was not, by definition, a judicial body. During her visit to the Commission, the United Nations Legal Counsel had explained that the Secretary-General requested advice from panels, but in reality, such advisory panels engaged in a fact-finding exercise. The Commission had to recognize the need for a code of conduct for fact-finding missions, especially as the broad guidelines in the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, contained in the annex to General Assembly resolution 46/59 of 9 December 1991, were seldom followed in practice.

59. Mr. MELESCANU said that the Secretariat's excellent note on the peaceful settlement of disputes[239] examined 17 peaceful settlement clauses, of which 9 had been embodied in texts and 8 had not. While the note offered the basis for imaginative solutions when drafting model dispute settlement clauses, he agreed that the main problem was the lack of States' acceptance of such clauses.

60. There had never been a better time to focus on improving dispute settlement procedures involving international organizations, since the Commission was about to adopt the draft articles on the responsibility of international organizations.[240] It should therefore examine the manner in which disputes that might arise from their application could be solved.

61. The subject fitted in well with the campaign of the United Nations to strengthen the rule of law. The Commission could initially focus on procedures for improving dispute settlement involving international organizations, and it could then expand the list contained in paragraph 20 of the working paper. He strongly supported referral of the topic to the Working Group on the long-term programme of work with the recommendation that it be included as an item on the agenda of the following year's session. He agreed with Sir Michael that there was not enough time at the current session to appoint a Special Rapporteur on the topic.

62. Sir Michael WOOD, responding to some of the points raised during the debate, said that the case law to which he had referred in the context of reservations to dispute settlement clauses had been the judgment of the ICJ in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. The Court's approach indicated that the risk that States thought they were assuming if they accepted clauses under specific conventions, particularly those in the field of human rights, was not as great as it seemed, since the Court would interpret and apply such clauses in a reasonable manner.

63. Although Mr. Dugard had been right in saying that political will was the main problem in respect of declarations under the optional clause, it had to be acknowledged that the actual drafting of those declarations was very difficult, because it was necessary to have a deep knowledge of case law in order to understand the effect of various provisions. In his experience, States often made such declarations in haste without carefully considering them. On a technical level, it would be helpful if the Commission were to look at possible elements for inclusion in those declarations. Some elements, for example a cut-off date, might be a means of encouraging States to accept the optional clause, as they would no longer fear being held responsible for events that had occurred many years earlier. When the Council of Europe had engaged in such an exercise, at least one State had accepted the optional clauses under articles 25 and 46 of the European Convention on Human Rights and other States had started to consider such action.

64. It would be advisable to investigate the principles underpinning fact-finding missions. It would also be interesting to explore the idea of giving the Secretary-General the power to request an advisory opinion from the ICJ.

Organization of the work of the session (*continued*)

[Agenda item 1]

65. Mr. CANDIOTI (Chairperson of the Working Group on the long-term programme of work) said that the Working Group had the following members: Mr. Caflisch, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

66. Mr. PERERA (Co-Chairperson of the Study Group on the most-favoured-nation clause) said that in addition to Mr. McRae, who was the other Co-Chairperson, the Study Group comprised: Mr. Caflisch, Mr. Candioti, Ms. Escobar Hernández, Mr. Gaja, Mr. Hmoud, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Saboia, Mr. Singh, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood.

The meeting rose at 11.35 a.m.

3096th MEETING

Wednesday, 1 June 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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[239] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/623.

[240] *Yearbook … 2011*, vol. II (Part Two), chap. V, sect. E.

Other business (*concluded*) (A/CN.4/638, sect. J)

[Agenda item 15]

PEACEFUL SETTLEMENT OF DISPUTES (*concluded*) (A/CN.4/641)

Ms. Jacobsson (Vice-Chairperson) took the Chair.

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the working paper on the peaceful settlement of disputes (A/CN.4/641).

2. Mr. GAJA said he regretted that he had been unable to attend Sir Michael Wood's presentation of his working paper on the peaceful settlement of disputes at the previous meeting and the ensuing discussion. He had, however, had the opportunity to read the text of Sir Michael's statement. If he had been a judge in the Court of Appeal or the House of Lords, he could simply have said that he concurred with his learned friend's opinion, but since he had the privilege of being a member of the Commission, he would, in accordance with custom, add a few words of praise for that lucid presentation, which had been very useful for the Commission's future work on the topic. Sir Michael had first referred to the proposal he himself had made at the previous session, in 2010, that the Commission should address the issue of the settlement of disputes involving international organizations and had then outlined certain issues that the Commission might consider in that regard. He would also add a few comments on that subtopic. It was an important topic; the question was how to address it and whether some precautions should not be taken before doing so. A full review of the settlement of disputes involving international organizations would require consideration of whether Article 34 of the Statute of the International Court of Justice should be amended in order to give certain organizations the possibility of bringing a claim or being sued before the Court. Some authors had suggested that Article 34 should be interpreted in a way that included some international organizations. Some judges—albeit in their capacity as scholars—had supported that development, in particular Sir Robert Jennings and Roberto Ago. In his last article, published in 1991 in the *American Journal of International Law*, the latter had written:

> What reason can there be to continue to subject the settlement of disputes concerning the interpretation or application of an international instrument to different procedures depending on whether the parties to the dispute are two States or a State and the United Nations itself or one of the organizations belonging to its system? This disparity of treatment might have had a raison d'être when those international organizations had not yet become active participants in international life as distinct legal persons with their own interests and rights, different from those of the States that constitute them.[241]

Judge Ago had made a plea for trying to broaden the scope of Article 34 of the Statute of the International Court of Justice to reflect the present situation of international organizations. It was clearly one of the difficulties of the topic because it would also be necessary to consider whether the provisions of the Statute of the International Court of Justice should be amended.

3. An alternative system had been devised to allow an international organization to request an advisory opinion on a dispute that it might have with a State, for example with regard to the Convention on the privileges and immunities of the United Nations and the 1986 Vienna Convention. The system of asking for advisory opinions from the Court in order to settle a dispute between an international organization and a State also needed to be critically examined. That system was not balanced because, as evidenced in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case, the organization had the final word about the important issue of how the request should be framed and, even when negotiations had taken place between the State and the United Nations, the wording used was certainly not what the State would have chosen. Moreover, the opportunity for a full discussion of the merits and the presentation of evidence was seriously curtailed in advisory proceedings.

4. The question of the ICJ was an important one and could not be left aside because, as Ago had said, the fact that there might be international conventions to which one or more international organizations were parties complicated the dispute settlement system. Other specific problems arose in the event of a dispute between an international organization and its member States which could result in a claim being brought before other international courts. In particular, it needed to be seen how the relationship between an international organization and its members could give rise to solutions that were different from those that generally applied. The Commission had addressed that question and revised some draft articles, in particular with regard to countermeasures, but the rules of the international organization could play a role in that context and further consideration of the topic was required.

5. Regarding the possible outcome, the topic did not lend itself to the formulation of a set of draft articles. The Commission could review the way in which disputes involving international organizations were settled and propose a number of recommendations, some of which could be far-reaching, in particular if they concerned Article 34 of the Statute of the International Court of Justice. It would be advisable to ascertain the views of States and international organizations on the usefulness of that new endeavour before including the topic of settlement of disputes concerning international organizations in the Commission's long-term programme of work. If Sir Michael's proposal was adopted, an appropriate question could be framed in chapter III of the Commission's annual report to the General Assembly in order to obtain some reaction on the part of States in the Sixth Committee, but international organizations could also be asked for their views, because it was important for those organizations to be actively and positively involved in the review of the way in which their disputes were settled. When the 1986 Vienna Convention had been negotiated, most international organizations had been very content without rules and would have preferred not to have any at all, as was reflected in the summary records of the time. Some had changed their opinion and eventually deposited instruments of formal confirmation in

[241] R. Ago, "'Binding' advisory opinions of the International Court of Justice", *American Journal of International Law*, vol. 85, No. 3 (July 1991), pp. 439–451, at p. 450.

greater numbers than necessary for the Convention to enter into force. It had not yet done so, however, because some States were still reluctant to ratify it. The attitude of a number of international organizations with regard to the issue of their responsibility was also well known: they were very happy with the current situation and essentially perceived the rules of international law as obstacles to the exercise of their functions. Would international organizations like to see the Commission engage in further consideration of the issue of their immunity, as envisaged in the long-term programme of work, or would they view positively an examination of the way in which their disputes were settled? Probably not. Nevertheless, their early involvement would improve the prospects of enlisting their cooperation, hence the proposal to introduce an appropriate question in chapter III of the Commission's annual report before continuing work in that area.

6. Mr. HMOUD said that he was in favour of the Commission continuing its consideration of the topic of the peaceful settlement of disputes within the framework of a working group in order to undertake an in-depth study of all its aspects. In that way, the Commission could make a contribution to developing rules in that area. In recent years, States had increasingly used peaceful means to settle their disputes, but there was still a large gap in that area, which tended to limit the possibilities for the dissemination of international law and its application in international relations. Some States still had reservations about using the dispute settlement mechanisms provided for in the international conventions and agreements to which they were parties, and were unwilling to accept the optional clause recognizing the jurisdiction of the ICJ. They increasingly used political settlement mechanisms. As to international organizations and their attachment to dispute settlement mechanisms, it seemed that, as many members had indicated, they tended, for a number of reasons, to seek political solutions rather than legal ones to settle their disputes with countries or other international organizations. Their relations with States tended to be governed by their constituent instruments or State agreements, including headquarters agreements and agreements on privileges and immunities. In addition, there was a general, unspoken consensus which led to peaceful means not being used to settle disputes involving international organizations. In that regard, he agreed with the comments made by Mr. Gaja and Sir Michael at the previous meeting. There were several reasons why legal mechanisms for the peaceful settlement of disputes were not used, including the lack of political will to embrace solutions that would directly or indirectly oblige international legal entities to have recourse to a specific dispute settlement procedure and to accept the resulting outcome. However, there was also a lack of understanding or awareness of the different aspects of the issue, and the Commission could help resolve that problem by examining the question of the peaceful settlement of disputes and drawing some useful conclusions from its work. It could develop a model declaration that States could use to accept the optional clause recognizing the jurisdiction of the ICJ, indicate the required content of each declaration and specify the resulting legal obligations for States. That could assist States in accepting the Court's jurisdiction more readily, given that their reluctance was due in part to their lack of awareness of the consequences of such a step. The mechanisms available to States and international organizations for the legal settlement of disputes should also be discussed, including arbitration and legal proceedings, all issues relating to the immunity of international organizations and the questions of the jurisdiction of States and the compulsory jurisdiction of international organizations. The Commission could also contribute to the peaceful settlement of disputes by developing model rules for inclusion in draft articles and international agreements and conventions. Those rules would merely be examples of solutions because it was very difficult to formulate model rules that would be appropriate for all forms of disputes and because treaties and conventions differed in content, characteristics and signatories. Furthermore, texts of international dispute settlement instruments could sometimes be replaced by an alternative solution while at other times they were linked wholly or in part to the purpose of the instrument. The Commission could propose several alternative dispute settlement mechanisms so that negotiating parties could use one of them wholly or in part. If the Commission approved that proposal, it could, if necessary, appoint a special rapporteur or establish a working group to consider it.

7. Mr. FOMBA said that it was essential for the Commission to contribute to the current debate on the need to promote the rule of law at the national and international levels. In that regard, it was appropriate to include the topic of the peaceful settlement of disputes in the Commission's programme of work, and the list of topics proposed in paragraph 20 of the working paper prepared by Sir Michael (A/CN.4/641) seemed generally acceptable.

8. Sir Michael's arguments for giving priority to the topic mentioned in paragraph 20, subparagraph (*b*), namely improving procedures for dispute settlement involving international organizations, were convincing. The general framework proposed in that connection seemed interesting and deserved greater consideration.

9. He thanked Mr. Gaja for his very interesting and relevant comments on the final outcome of the Commission's work and how to move forward. It would indeed be wise not to prepare draft articles but rather a number of recommendations, and to see the reaction of States and international organizations before including the topic in the Commission's long-term programme of work. Without prejudging the final decision that would be taken in that regard, he proposed that the topic be referred to the Commission's Working Group on the long-term programme of work.

10. Mr. NOLTE congratulated Sir Michael on his working paper, which provided an excellent basis for the Commission's discussions. He would confine his comments to the topics mentioned in paragraph 20 of the document.

11. He doubted whether it would be useful to prepare the model dispute settlement clauses mentioned in subparagraphs (*a*) and (*e*). States had a wide variety of possible clauses and it was unsure whether the Commission could give appropriate advice as to the best choice from a political or even a technical point of view. States would probably opt for one clause or another depending on the

kind of dispute, their interests and the substantive law at stake. As Sir Michael had recalled in paragraph 15 (*e*) of his working paper, the United Nations had already published in 1992 the *Handbook on the Peaceful Settlement of Disputes between States*,[242] which contained a digest of the different dispute settlement clauses found in State practice and which could be updated.

12. On the other hand, the suggestion made in paragraph 20, subparagraph (*b*), of the document was promising. Procedures for the settlement of disputes involving international organizations had been somewhat neglected, even though the issue was important and would probably become more so after the adoption by the Commission of the draft articles on the responsibility of international organizations. The topic as set out in subparagraph (*b*) could be enlarged to include some aspects of the topic proposed in subparagraph (*c*). The question of access to and standing before different dispute settling mechanisms, addressed in subparagraph (*c*), could have particular relevance to disputes involving international organizations and should therefore be given further consideration.

13. He had a number of concerns regarding the topic mentioned in subparagraph (*d*), regarding in particular the possible procedural fragmentation of international law. The Commission had decided not to include that topic in its initial study on the fragmentation of international law. He wondered whether discussion of the issue had moved forward enough for the Commission to propose more than a general frame of reference.

14. Mr. McRAE congratulated Sir Michael on his working paper. He noted that the topic proposed in paragraph 20, subparagraph (*b*), enjoyed the broad support of members of the Commission and he approved Mr. Nolte's idea of enlarging it to include some of the elements mentioned in subparagraph (*c*).

15. The topic proposed in paragraph 20, subparagraph (*d*), should not be ruled out. It might not be ripe for consideration, but it was a logical follow-up to the Commission's work on the fragmentation of international law. If a working group was established to study the issue of the peaceful settlement of disputes, it would be a good idea for it to consider that topic.

16. The topic proposed in paragraph 20, subparagraph (*c*), was interesting, particularly with regard to international organizations, but the Commission should take as broad an approach as possible to it. International organizations were at times subject to litigation. Sir Michael had mentioned cases brought before domestic courts as well as proceedings brought by staff against their own organization. The last issue should not be ruled out and deserved further study. It would be interesting to study the procedures established to enable staff to sue their organization through an international mechanism and make use of them as a basis for developing procedures applicable in the framework of other mechanisms.

17. In addition to the examples mentioned at the previous meeting of circumstances where organizations were sued, mention should also be made of the considerable number of cases brought before the WTO in which the European Union was either plaintiff or defendant, and which were a valuable source of experience.

18. As to the procedure to follow, it seemed logical to refer the topic to the Commission's Working Group on the long-term programme of work. There was a need for some caution about timing, however. Given the controversy surrounding the draft articles on the responsibility of international organizations, it would be useful for the Commission to know how those articles were received by the General Assembly before it decided to examine the topic of the settlement of disputes involving international organizations.

19. Ms. ESCOBAR HERNÁNDEZ congratulated Sir Michael on his working paper and thanked the Secretariat for its very interesting note. Her comments would focus on the importance and interest of the topic of the peaceful settlement of disputes on the one hand and the topics proposed by Sir Michael on the other.

20. On the first point, she agreed that it was an important issue for international law, not only from a general point of view, within the context of guarantees of the rule of law at the international level, but also in practical terms, where the Commission could make a useful contribution. The dispute settlement model had undergone some noteworthy changes in recent years, as reflected in particular by the increasing use of judicial settlement and the calling into question of certain aspects of the model, such as the scope and meaning of the advisory function and the legitimacy criteria, and the need to reflect on the interaction of alternative arrangements for the peaceful settlement of disputes, particularly in connection with the judicial model. Those included the recent ruling of the ICJ in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case and other recent decisions of the International Tribunal for the Law of the Sea concerning the relationship between prior negotiation and recourse to international authorities.

21. With respect to the second point, the topics which warranted particular attention fell into two general categories: on the one hand, the issue of international organizations and dispute settlement and, on the other, the need to initiate a wide-ranging review of the judicial settlement of disputes by conducting a cross-cutting analysis that would cover the different topics proposed and possibly include others such as the conditions for the exercise of international jurisdiction.

22. She had a few reservations regarding the preparation of model clauses relating to the settlement of disputes. The proposal was certainly interesting, but it called for an in-depth consideration of the issue by the Commission because it was not clear that it had much to contribute in that regard. Lastly, she supported the proposal to refer the topic of the peaceful settlement of disputes to the Working Group on the long-term programme of work for its consideration.

[242] Office of Legal Affairs, Codification Division, *Handbook on the Peaceful Settlement of Disputes between States* (OLA/COD/2394) (United Nations publication, Sales No. E.92.V.7), New York, 1992.

23. Ms. JACOBSSON, speaking as a member of the Commission, congratulated Sir Michael on his working paper. At the previous session, she had underlined the link between international peace and security and the rule of law and the peaceful settlement of disputes. It would therefore be useful for the Commission to make a contribution to the debate on the topic.

24. With respect to the five topics proposed by Sir Michael for the Commission's consideration, the most important were those mentioned in paragraph 20, subparagraphs (*c*), (*e*) and (*b*), in that order. The proposal for improving procedures for dispute settlement involving international organizations referred to in subparagraph (*b*) could be treated as a separate topic, despite the view to the contrary expressed by Mr. Dugard at the previous meeting.

25. Consideration of the topic proposed in subparagraph (*c*), namely a study of access to and standing before different dispute settling mechanisms of various actors, would be an important contribution by the Commission, particularly if it was accompanied by concrete proposals on how to improve the mechanisms and fill gaps.

26. The proposal contained in subparagraph (*e*) concerning declarations under the optional clause, including the elaboration of model clauses for inclusion therein, was timely. The issue was less sensitive now and seemed to be undergoing a new and positive development, and the Commission could take advantage of the work done by other legal bodies, such as the Committee of Legal Advisers on Public International Law (CAHDI).

27. She was not convinced of the value of elaborating model dispute settlement clauses for possible inclusion in drafts prepared by the Commission, as referred to in subparagraph (*a*). It would be better if the Commission more routinely included such clauses when preparing draft conventions. There was no "one-size-fits-all" solution and model clauses had to be tailored to each specific case.

28. She had stated at the previous session that it was important to widen the discussion and include not only genuine dispute settlement clauses but also alternative tools and mechanisms, such as fact-finding mechanisms. Fact-finding could be of a legal nature and it did not have to be political. That aspect was not expressly mentioned in the working paper and was not listed among the proposals. She was glad to note that other members had raised those issues during the debate and hoped that they would be included in the Commission's future work on the topic, if it was included in the long-term programme of work. It was also important to discuss mechanisms which had never been used, such as the mechanism of the OSCE and the mechanism provided for under article 90 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (known as the International Fact-Finding Commission). Mention should also be made of the rosters of experts listed under various treaties, which were never used.

29. It would be helpful if a workplan was presented to the Working Group on the long-term programme of work during the current session.

30. Sir Michael WOOD proposed that, in the light of the words of caution expressed by Mr. Gaja and Mr. McRae, chapter III of the Commission's annual report indicate that the Commission was planning to consider a new topic, namely the peaceful settlement of disputes, and list possible subtopics, in a different order from that set out in paragraph 20 of the working paper, with additions as appropriate. That approach would enable the Commission to see the reaction of States and international organizations.

31. A paper should be drawn up for the Working Group on the long-term programme of work. The paper could be prepared during the current session, but it would probably be wiser, in view of the comments that had been made, to wait until the 2012 session. Rushing ahead with the topic might raise concerns.

32. Mr. HMOUD said that he supported Sir Michael's proposal to refer to the topic in chapter III of the Commission's report. However, with respect to the issue of including the topic in the Commission's long-term programme of work, he wondered whether it could not be discussed in the Working Group at the same time as other points that had been raised by members of the Commission. It would be preferable, before establishing a workplan and preparing a paper, to decide on the approach to adopt and the aspects on which to focus.

33. Sir Michael WOOD said that, rather than taking a hasty decision, the best solution would perhaps be to ask the enlarged Bureau to decide in the light of the programme of work for the second part of the current session and the 2012 session.

The meeting rose at 11.05 a.m.

3097th MEETING

Friday, 3 June 2011, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS
(Vice-Chairperson)

Later: Mr. Rohan PERERA (Rapporteur)

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.
