Document:-

A/CN.4/SR.2825

Summary record of the 2825th meeting

Topic:

Adoption of the report

Extract from the Yearbook of the International Law Commission:-

2004, vol. I

(6) should be retained, the word "substantially" in the second sentence should be replaced by, for example, the word "considerably" because the difference between diplomatic protection and functional protection could not be described as "substantial".

35. The CHAIRPERSON said that the word "substantially" could be translated by the word *substantiellement* in French.

36. Mr. GAJA said that the paragraph could be deleted, but that, if it was retained, the word "officials" in the first sentence should be replaced by the word "agents".

37. Mr. DUGARD (Special Rapporteur) said that he agreed that paragraph (6) was repetitive, but, in his opinion, it must be stated that the draft articles dealt with diplomatic protection, not with functional protection. He therefore proposed that only the second sentence should be deleted.

38. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to retain paragraph (6), subject to the amendments proposed by the Special Rapporteur and Mr. Gaja.

It was so decided.

Paragraph (6), as amended, was adopted.

Paragraph (7)

39. Mr. KABATSI, supported by Mr. DAOUDI, said that he regretted that paragraph (7) gave the impression that all nationals who engaged in official international business on behalf of a State were diplomatic or consular agents, because that was not actually true.

40. Mr. MOMTAZ, supported by the CHAIRPERSON, proposed that the reference to diplomats and consuls at the beginning of the second sentence should be deleted. The sentence should read: "Persons engaged in such business are protected by other rules and instruments of international law, notably the Vienna Convention…".

41. Mr. GAJA, recalling that the *United States Diplomatic and Consular Staff in Tehran* case was often referred to as involving diplomatic protection, proposed that the first sentence should be made less categorical by adding the word "mainly" before the word "covers".

Paragraph (7), as amended, was adopted.

Commentary to article 2 (Right to exercise diplomatic protection)

Paragraph (1)

42. Mr. GAJA said that the last footnote to the paragraph and some of the footnotes to paragraphs that followed referred to the Special Rapporteur's first report. For the sake of the commentary's autonomy, it would be better to include the relevant information in the footnotes instead of referring to the Special Rapporteur's report.

43. The CHAIRPERSON said that the secretariat would make the necessary changes.

Paragraph (1) was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

The meeting rose at 11.40 a.m.

2825th MEETING

Friday, 30 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Draft report of the Commission on the work of its fifty-sixth session (*continued*)

Chapter IV. *Diplomatic protection* (continued) (A/CN.4/L.653 and Corr.1 and Add.1)

C. Text of the draft articles on diplomatic protection adopted by the Commission on first reading (*continued*) (A/CN.4/L.653 and Add.1)

2. Text of the draft articles with commentaries thereto (*continued*)

Commentary to article 3 (Protection by the State of nationality)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Commentary to article 4 (State of nationality of a natural person)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

1. Mr. GAJA proposed that the phrase "judicial decision and treaty" should read "judicial decisions and treaties", since the principle in question was also based on case law other than the two examples cited in the paragraph.

Paragraph (2), as amended, was adopted.

Paragraph (3)

2. Mr. ECONOMIDES questioned the accuracy of the last sentence. A simple reference to the Commission's draft articles on nationality of natural persons in relation to the succession of States would suffice. Accordingly,

the phrase beginning with the words "in accordance with" should be placed in parentheses, and those words replaced by the word "see".

3. Mr. KABATSI questioned the appropriateness of the adjective "short" in the third sentence. The period of residence required for the granting of nationality following marriage was not necessarily short.

4. The CHAIRPERSON suggested that the word "short" should simply be deleted. The phrase referred to by Mr. Economides could be deleted from the text of the commentary and incorporated in the last footnote to the paragraph.

Paragraph (3), as amended, was adopted.

Paragraph (4)

5. Mr. MANSFIELD proposed that in the phrase "it will be difficult to prove nationality" the word "will" should be replaced by "may".

6. Mr. ECONOMIDES said there was no need to draw a distinction between developed and developing countries, as the connecting factors listed in article 4 were used by all States. The adjectives "developed" and "developing" could therefore be deleted.

7. Mr. DUGARD (Special Rapporteur), while fully agreeing with Mr. Economides, recalled that Mr. Brownlie, who regrettably was not present, had felt strongly that mention should be made of the problem in some developing countries where birth records were not kept.

8. The CHAIRPERSON said that the qualification added nothing to the Commission's factual analysis. He took it that the Commission wished to endorse both Mr. Economides's and Mr. Mansfield's proposals.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Commentary to article 5 (Continuous nationality)

Paragraph (1)

9. Mr. PELLET said that, in view of the forcefulness of the assertion to which the first footnote to the paragraph referred, the date of the *Kren* claim should be given.

Paragraph (1) was adopted subject to that editorial amendment.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

10. Mr. GAJA, referring to the second sentence, proposed that the words "the award" should be amended to "an award". However, a more serious objection was that the commentary contradicted the text of the article. While that was partly attributable to the influence of the ICSID decision in the *Loewen* case of 2003, no reference was made to that case in the commentary. To require nationality to be continuous until the making of the award would give the defendant an incentive to delay settlement. He therefore further proposed the deletion of the third and fourth sentences. Reference might be made in a footnote to the differing views expressed in the Commission on the matter.

11. Mr. PELLET, while begging to differ on Mr. Gaja's first proposal, agreed that the commentary did not illustrate, but contradicted, the article proper. Perhaps that was because the text of the article was debatable, since it did not reflect a general rule. It would be useful to include a footnote referring to the *Loewen* case. Nevertheless, the problem would not be resolved by simply deleting the last two sentences. The paragraph should be redrafted to reflect the fact that, according to some writers and recent case law, the continuous nationality rule required the bond of nationality until the making of the award, but that the Commission had decided in favour of a different rule.

12. Mr. MATHESON said that he entirely endorsed the substantive conclusions that the Special Rapporteur had drawn from his extensive study of the matter. However, it must be recognized that there had been a difference of opinion in both the Working Group and the Drafting Committee as to whether to follow the decision taken in the *Loewen* case. It was important to indicate that that issue remained unresolved. He therefore proposed that the third sentence should be deleted and the fourth sentence amended to read: "Hence the Commission did not find it necessary to deal with this question in the article."

13. Mr. GALICKI, noting that two words in the paragraph had been underlined for emphasis, suggested that the underlining should be deleted since it was not in accordance with the Commission's usual practice. The same technical comment applied to paragraph (11) of the commentary to article 11.

14. Mr. DUGARD (Special Rapporteur) endorsed Mr. Galicki's suggestion: the underlining reflected an earlier version of the text, produced in the Drafting Committee. He also endorsed Mr. Matheson's proposal. There had been considerable debate in the Drafting Committee in the light of the *Loewen* case, and it was important to bring the problem to the attention of States so that they could respond for the purposes of a second reading.

15. Mr. GAJA said that he wished to insist on his proposal to amend the words "the award". An award was not necessarily always made in cases relating to diplomatic protection; only where one was made would the problem of whether to take account of the date of the award or of the date of presentation of the claim arise. He endorsed the idea of rewording the paragraph along the lines suggested by Mr. Pellet. Some reference should also be made to the *Loewen* case and to the fact that, although the majority in the Drafting Committee had favoured the rule set forth in article 5, some members of the Commission would have preferred to have followed the *Loewen* decision.

16. Mr. PELLET said that he failed to understand why Mr. Gaja insisted on his proposal to amend the phrase "the award". More to the point, Mr. Matheson's proposal would resolve nothing. It was essential to mention that not only Jennings and Watts but also ICSID in the *Loewen* decision had taken positions different to the one adopted by the Commission. It would be best for the Special Rapporteur to redraft the paragraph.

17. The CHAIRPERSON said that he took it that the Commission wished the Special Rapporteur to redraft paragraph (5) in the light of the discussion.

It was so decided.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

18. Mr. GAJA, supported by Mr. Economides, proposed that the sentence "The injured person was not an alien when the injury occurred." should be added at the end of the paragraph, to clarify the reasoning.

Paragraph (11), as amended, was adopted.

Commentary to article 6 (Multiple nationality and claim against a third State)

Paragraph (1)

19. Mr. MOMTAZ said that some countries, including his own, while not prohibiting dual or multiple nationality, imposed draconian conditions on those seeking it. He therefore suggested the insertion of a phrase to that effect in the first sentence, so that the beginning of paragraph (1) would read: "Although some domestic legal systems prohibit their nationals from acquiring dual or multiple nationality or submit such acquisition to very strict conditions, it must be accepted that …".

20. Mr. AL-BAHARNA said that there was no evidence that such conditions were widespread. It would be rash for the Commission to state that "some domestic legal systems" imposed strict conditions.

21. Mr. DUGARD (Special Rapporteur) said that the Commission could safely use the word "some"; although he had not researched the matter extensively, he was confident that a substantial number of countries imposed strict conditions on those seeking dual nationality. He suggested that he should redraft the paragraph, the balance of which might be upset by an insertion along the lines suggested by Mr. Momtaz.

22. Mr. ECONOMIDES was in favour of the amendment proposed by Mr. Momtaz. Greece, too, imposed draconian conditions on nationals seeking to change their nationality. As for Mr. Al-Baharna's objection, the phrase "some domestic legal systems" would cover both categories.

23. Mr. GALICKI said that, as it stood, the first sentence was over-simplistic. Although some legal systems prohibited acquisition of dual or multiple nationality, the tendency in Europe was for dual nationality to be permitted but for Governments simply to decline to recognize the dual or multiple nationality of their nationals in matters relating to internal status. However, such situations had a long history. In Poland, for example, holding dual nationality had once been a punishable offence: Polish nationality had had to be renounced first. It was important to distinguish between strict conditions for those seeking to renounce their nationality and the possibility or impossibility of acquiring dual or multiple nationality. The first sentence should be redrafted by the Special Rapporteur to take full account both of the present situation and of recent past history.

24. Mr. KABATSI said that Ugandan nationals were prohibited from acquiring dual or multiple nationality.

25. Mr. KEMICHA said that Mr. Momtaz's proposal patently reflected a situation that existed throughout the world. He would therefore favour its adoption.

26. Mr. KOLODKIN, supported by Mr. KABATSI, said that the words "Although some domestic legal systems prohibit their nationals from acquiring dual or multiple nationality it must be accepted that" were redundant and should be deleted. The paragraph would then start with the simple statement that "Dual or multiple nationality is a fact of international life."

27. Mr. KATEKA said that he opposed that suggestion. The introductory phrase stated the incontestable fact that in some countries—including his own—nationals were prohibited from acquiring dual or multiple nationality. To delete the phrase would leave the paragraph unbalanced.

28. Mr. DUGARD (Special Rapporteur) said that he was in favour of Mr. Kolodkin's proposal. The difficulty was that national legal systems had different approaches, and he had erred in trying to acknowledge that fact in a single sentence. It would be better to delete the opening phrase than to attempt to summarize briefly the diversity of legal systems.

29. Mr. AL-BAHARNA said that he would still prefer to retain the existing text. The point raised by Mr. Momtaz was adequately dealt with in the opening phrase of the first sentence.

30. The CHAIRPERSON recommended that, since it had been supported by the Special Rapporteur, Mr. Kolodkin's proposal should be adopted.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

31. Mr. PELLET proposed amending the words "*essais de codification*", in the French text, to read "*textes de codification*".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted with a minor drafting amendment.

Commentary to article 7 (Multiple nationality and claim against a State of nationality)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

32. Mr. GAJA said that the footnote referring to the *Nottebohm* case contained a clearly erroneous reference to "footnote 369", which should be corrected.

Paragraph (3), as amended, was adopted.

Paragraph (4)

33. Mr. GAJA said that the reference to international human rights law in the second sentence was irrelevant to the content of the draft article. He therefore suggested that the second sentence should be deleted in its entirety.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Commentary to article 8 (Stateless persons and refugees)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

34. Mr. PELLET said that, as it stood, the text implied that a majority of the Commission had supported the requirement of effectiveness, whereas—to his great regret—that had not been the case.

35. Mr. GAJA suggested that, in the second sentence, the phrase "approximates to the requirement of effectiveness invoked in respect of nationality and" should be deleted. The end of the paragraph would then read "… the majority took the view that the combination of lawful residence and habitual residence is justified in the case of an exceptional measure introduced *de lege ferenda*".

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

36. Mr. PELLET pointed out that the French equivalent of the phrase "lawfully staying", in article 28 of the Convention relating to the Status of Refugees, was *résidant régulièrement*. Consequently, the first sentence of the paragraph was based on a misinterpretation of the Convention, and the thrust of the paragraph as a whole was unclear. If the paragraph was retained, the words "*qui séjournent légalement*" in the French text should be replaced by the words "*résidant régulièrement*".

37. Mr. GAJA said that there was a redundancy at the end of the paragraph: the situation of stateless persons had already been dealt with in paragraph (3). The phrase "in the case of both stateless persons and refugees" should therefore be replaced by the phrase "also in the case of refugees".

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (12)

Paragraphs (8) to (12) were adopted.

Commentary to article 9 (State of nationality of a corporation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

38. Mr. PELLET said that, in the last sentence, the words "A separate provision" should be replaced by the words "Draft article 13".

Paragraph (2), as amended, was adopted.

Paragraph (3)

39. Mr. GAJA said that, according to his understanding, the *Nationality Decrees Issued in Tunis and Morocco* case, referred to in the first footnote to the paragraph, related only to natural persons and not to corporations. He therefore wondered whether it was appropriate to use the phrase "within the reserved domain" in relation to corporations.

40. Mr. DUGARD (Special Rapporteur) said that the case concerned did indeed relate to natural persons. It was, nonetheless, relevant to the general principle whereby the granting of nationality was within the reserved domain.

41. The CHAIRPERSON suggested that the words "to a corporation" should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

42. Mr. PELLET said that a phrase should be added to the last sentence in order to draw attention to the fact that not all members of the Commission agreed with the opinion expressed therein.

43. The CHAIRPERSON suggested the insertion of the words "In the prevailing view," before "registered office".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

44. Mr. PELLET said that, since a corporation could quite conceivably have dual nationality, the categorical statement contained in the second sentence, to the effect that it was impossible for a corporation to have dual nationality, was unacceptable, since there had been no consensus on the matter.

45. Mr. KATEKA said that some corporations could indeed have dual nationality; for example, as a result of State succession. He therefore proposed the addition of a qualifying word such as "generally".

46. Mr. DUGARD (Special Rapporteur) said that it was wise, where possible, for the commentaries to suggest that there had been consensus. He therefore favoured Mr. Kateka's suggestion.

47. Mr. PELLET said that a crucial question of international commercial law was being dispatched with undue haste. He fundamentally disagreed with the Special Rapporteur; as the draft articles were being adopted on first reading, it was particularly important that attention should be drawn to instances where there was no consensus. Hence he was in favour of Mr. Kateka's proposal, which implied that cases did exist in which corporations had dual nationality.

48. The CHAIRPERSON said that he was concerned that if paragraph (7) were amended too extensively, it would contradict the provisions of draft article 9, which had already been adopted. He asked whether the Commission could go along with the amendment proposed by Mr. Kateka: "This language is used to avoid any suggestion that a corporation might have dual nationality, which is not generally the case."

49. Mr. ECONOMIDES said that the phrase which had just been suggested considerably weakened the text. In its place, he proposed "which certain members do not rule out".

50. Mr. PELLET said that, while he would prefer the formulation proposed by Mr. Kateka, he could accept Mr. Economides's suggestion, provided that it was recast to read "a possibility which some members do not rule out."

51. Mr. DUGARD (Special Rapporteur) said that he too continued to prefer Mr. Kateka's proposal.

52. Mr. PELLET said that, if national rules on the formation of a corporation were not identical, at the international level corporations could *de facto* meet the criteria laid down in draft article 9 in two different States. While draft article 9 did not include the possibility of dual or multiple nationality, neither did it preclude that possibility. The commentary should not create the false impression that the Commission had reached consensus that such a situation could never arise.

53. The CHAIRPERSON said that a distinction should clearly be drawn between the nationality of natural persons and that of legal persons. Draft article 9 referred to "the" State of nationality, a plain indication that, in the Commission's view, a corporation could have only one State of nationality. Draft article 4, on the other hand, spoke of "a" State of nationality of natural persons, thus reflecting the current *de facto* situation, in which some persons did have more than one nationality. Although the approach adopted in draft article 9 had not received unanimous support on first reading, if paragraph (7) of the commentary were altered too much, it might conflict with the text of the article itself.

54. Mr. AL-BAHARNA, subscribing to the Chairperson's opinion that it was necessary to abide by draft article 9, wondered if the phrase "This language is generally used" might solve the problem posed in paragraph (7).

55. Mr. MANSFIELD supported Mr. Kateka's suggestion: the paragraph merely explained why certain phrases had been used in the text of draft article 9. It was quite legitimate to explain that the reason for using particular language was to avoid the suggestion that a corporation might have dual nationality, which was not generally the case. That was an accurate explanation, and it also covered Mr. Pellet's point.

56. Mr. MATHESON concurred with the Chairperson that the language had been deliberately changed in order to specify that a corporation had a single nationality. He suggested that the sentence in question be deleted so that the text of draft article 9 could speak for itself.

57. Mr. PELLET said that he was against deletion of the sentence at issue and that the phrasing proposed by Mr. Kateka was correct, legally speaking.

58. Mr. AL-MARRI said that the wording of the text was clear in all languages and that he saw no need for amendment.

59. Mr. DAOUDI said he agreed with Mr. Pellet that the text of paragraph (7) gave the impression that it was impossible for a corporation to have dual nationality, despite the fact that such cases actually existed. He therefore strongly supported Mr. Kateka's proposal.

60. Mr. KABATSI said that he was in favour of Mr. Kateka's proposal, but that if it were to be accepted by the Commission, the last sentence of paragraph (7) should perhaps be deleted.

61. The CHAIRPERSON suggested that further discussion of paragraph (7) should be postponed until the next plenary meeting.

It was so decided.

The meeting rose at 11.45 a.m.

2826th MEETING

Tuesday, 3 August 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr.