

It may be recalled in this regard that the European Economic Community also asserts an extra-territorial application of its own competition laws. The application of these rules to international trade and economic relations too has been controversial. Moreover, a growing number of other States have applied their national laws and regulations on extra-territorial basis. As regards the European Community it has been stated that:

"(i) legislative jurisdiction may be extended to acts outside Community territory in so far as prohibitive rules of international law stand in the way of such extension;

(ii) enforcement territory jurisdiction is strictly limited to community territory, unless the rules of international law permit an extension to the territory of third States."²⁴

It has been commented in this regard that the difficulty "facing the Commission is not so much with the identification of such permissive rules, which are generally to be found in the form of specific treaty obligations permitting action within foreign States' territory, but with ascertaining both the specific nature and the extent of the prohibitive rules of international law delimiting legislative jurisdiction. It is quite likely that when the PCIJ stated (in the *Lotus Case*) that the 'wide measure of discretion' enjoyed by States determining their legislative jurisdiction was limited in certain cases by prohibitive rules it was thinking of such treaty rules as later came to govern the application of States' laws..."²⁵ then went on to suggest that in contemporary international law such prohibitive rules must primarily be derived from broad principles of international law, such as the principles of peaceful cooperation and non-intervention in the domestic affairs of another State, the freedom to choose one's own socioeconomic system, and the doctrines

²⁴ P.J. Kuyper: "European Community Law: And Extraterritoriality: Some Trends And New Developments" 33 *International and Comparative Law Quarterly* (1984) p 1013 at 1014. (footnotes omitted)

²⁵ *Ibid.* p 1015. Emphasis in original

of abuse of rights. Were Professor Kuyper writing this in more recent times he may, perhaps, have added the right to development to that list

Sovereign Equality

According to Bowett, the doctrine of sovereign equality has implications for jurisdiction and he goes on to point out that the formulation of the principle of equal rights and self-determination in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States suggests "something of the kind of limitation on jurisdiction" which might result from that doctrine. The Friendly Relations Declaration *inter alia* refers to the right of States "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development and every State has the duty to respect this right in accordance with the provisions of the Charter." Professor Bowett, now an eminent member of the International Law Commission, then goes on to suggest that this "implies however vaguely, that for State A to assert a jurisdiction which interferes with the political, social or economic development of State B is to exceed the limits of propriety and permissibility. It may also imply a condition of reciprocity in the sense that it would offend against the principle of equality if State A were to assume a jurisdiction it was not prepared to concede to State B."²⁶

Non-Intervention

The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty clearly condemns not only armed intervention but also "all other forms of interference or attempted threats against its political, economic and cultural elements".²⁷

²⁶ D. W. Bowett: "Jurisdiction: Changing Patterns of Authority over Activities and Resources." *British Yearbook Of International Law* (1982) p 1 at 16.

²⁷ General Assembly Resolution 2131 (XX) of 21 December 1965 was adopted by a vote of 109 for, none against and one abstention. It may be recalled that the relevant provisions of this Declaration on Inadmissibility of Intervention were later incorporated in the Friendly Relations Declaration.

The application of unilateral measures is at variance with numerous international instruments, including the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States which in elaborating the principle concerning the duty not to intervene in matter within the domestic jurisdiction of any State, in accordance with the Charter *inter alia* states that:

"No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind"²⁸

At this juncture it may be recalled that the 1970 Friendly Relations Declaration had *inter alia* provided that:

No State ... has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Every State has an inalienable right to choose its political, economic, social and cultural systems without interference in any form by another State."

In the context of a New International Economic Order, Chapter 1 entitled "Fundamentals of International Economic Relations", of the Charter of Economic Rights and Duties of States²⁹ adopted by the General Assembly at its Twenty-ninth Session provides that:

"Economic as well as political and other relations among States shall be governed *inter alia* by the following principles:

- (a) Sovereignty, territorial integrity and political interdependence of States;
- (b) Sovereign equality of States;
- (c) Non-Aggression;

²⁸General Assembly Resolution 2625 (XXV) Annex, para 1

²⁹General Assembly Resolution 3281(XXIX) December 12, 1974.

- (d) Non-intervention;
- (e) Mutual and equitable benefit;
- (f) Peaceful coexistence;
- (g) Equal rights and self-determination of peoples;
- (h) Peaceful settlement of disputes;
- (i) Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development;
- (j) Fulfilment in good faith of international obligations;
- (k) Respect for human rights and fundamental freedoms
- (l) No attempt to seek hegemony and spheres of influence
- (m) Promotion of international social justice
- (n) International cooperation for development; and
- (o) Free access to and from the sea by land-locked countries within the framework of the above principles."

Article 32 of the Charter of Economic Rights and Duties of States also stipulates that "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of its sovereign rights."

The Explanatory Note points out that Article 15 of The Bogota Charter of 1948 establishing the Organization of American States among other things, expressly prohibits "the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." A similar prohibition may be found in Article VI of the Helsinki Final Act of 1975 which, *inter alia*, requires all States in all circumstances to

"refrain from any other act of military, or political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantage of any kind"³⁰

³⁰See the Final Act of the Conference on Security and Cooperation in Europe, Helsinki, August 1, 1975. For text of the Declaration See *International Legal Materials*, Vol XIV (1975) p.1293

Apart from these international and regional instruments which proscribe resort to economic or political coercion, recourse may be had to the jurisprudence of the International Court of Justice which recognized the illegality of economic measures in the context of the principle of non-intervention in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*⁴¹

Besides, as with the principle of equality, the above mentioned stipulations suggest limits to jurisdiction, as the principle of non-intervention is breached by an assertion of jurisdiction which interferes with another State's political, social, economic or cultural system.

Dispute Settlement

The legality of the use or resort to countermeasures is linked closely to the recourse to dispute settlement procedures and is considered as a core issue in the current work of the International Law Commission on State Responsibility. It may be recalled that the Special Rapporteur, Mr. Arangio-Ruiz, had taken the view that countermeasure cannot be taken prior to the exhaustion of all available dispute settlement procedures, except in certain specific circumstances⁴²

The "Understanding on Rules and Procedures Governing the Settlement of Disputes" adopted as an annex to the "Agreement Establishing the World Trade Organization" (WTO), *inter alia*, incorporates restrictions on the use of individual countermeasures. A similar provision can also be found in the "North American Free-Trade Agreement" (NAFTA)

⁴¹ I.C.J. Reports 1986, P 1108

⁴² For details see the *Report of the International Law Commission on the Work of its Forty-fifth Session*, UNGA official Records, 48th session (1993) UN Doc. A/48/10

On 20 November 1996 the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) established a panel to examine the complaint of the European Communities, against the US Cuban Liberty and Democratic Solidarity (Libertad) Act⁴³ In its request the European Communities had stated that the problem was not with the objective of that Act but rather with the extra-territorial means chosen to meet those objectives. It was stated that though some of the measures had been suspended the provisions relating to the denial of visas was in force and contended that the US measures violated GATT 1994 and the General Agreement on Trade in Services (GATS) and nullified and impaired EC benefits under the WTO.

III RESPONSE OF THE INTERNATIONAL COMMUNITY

Earlier, the European Union Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act of March 15, 1995 had, *inter alia*, pointed out that the European Union had consistently expressed its opposition as a "matter of law and policy to extra-territorial application of US jurisdiction which would restrict EU trade in goods and services with Cuba. It emphasized that "it cannot accept that the US unilaterally, determine and restrict EU economic and commercial relations with third countries."⁴⁴

The Council of Ministers of the European Union adopted a regulation declaring that Act to be in violation of international law and decreeing that any company established in Europe that is subjected to a judgment under the Act may "claw back" against the assets of the American plaintiff in any of the Union's fifteen States. Mexico is known to have recently adopted an Act for the Protection of Commerce and Investment against Foreign Rules Contravening International Law. This legislative

⁴³ Public Law 104-114. For the text of the Act see 35 *International Legal Materials* (1996) p 357. It stated that the Preamble to the "Helms Burton" Act reads "An Act to seek international sanctions against the Castro government in Cuba for support of a transition government leading to a democratically elected government in Cuba and for other purposes."

⁴⁴ For the text of the European Union Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act see 35 *International Legal Materials* vol. XXXV (1996) p 397.

measure is meant to counteract the extra-territorial effects of laws of third States. It may be recalled in this regard that, in the context of the United States Anti-Trust Legislation submitting the Protection of Trading Interests Act to the British Parliament the then-Secretary of State for Trade had stated that the objective of the Bill was

"to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us. From our point of view the most objectionable method by which this is done is by the extra-territorial application of domestic law.

(T)he practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America. "We have not suddenly become belligerent or confrontational in regard to this most powerful and valued friend. The Bill is a response to a situation of a very particular nature which has been developing over several decades and which in the past few years has become much more acute".²⁷ These self-help measures by States in response to perceived abuses of extra-territorial application of national legislation, it has been observed, have extra-territorial application.²⁸

Addressing the Fifty first Session of the General Assembly the Chairman of the delegation of Dominica, His Excellency Mr Simon Paul Richards stated *inter alia* that

"The Commonwealth of Dominica abhors the concept of national laws having extra-territorial jurisdiction and serving as underpinnings for illegal secondary boycotts. We are particularly

troubled by the potential use of these instruments by large and powerful States to compromise the territorial integrity and national sovereignty of small States like ours"²⁷

It is pertinent to recall in this regard that addressing the General Assembly the Foreign Minister of Myanmar had *inter alia* stated that:

"We find unacceptable the threat or use of economic sanctions and the extra-territorial application of domestic law to influence policies in developing countries. The use of economic sanctions as a tool of policy is indefensible. It is flagrant breach of the United Nations Charter".²⁸

The Ministerial Declaration of the Group of 77 adopted at Midrand, South Africa on 28 April 1996 during the Ninth Session of the United Nations Conference on Trade and Development *inter alia* observed that although the Uruguay Round Agreements and the establishment of the World Trade Organization (WTO) had boosted confidence in the multilateral trading system, its credibility and sustainability are being threatened by emerging recourse to unilateral and extra-territorial measures. The Declaration emphasized that environmental and social conditionalities should not constitute new obstacles to market access for developing countries. That Declaration had also expressed concern at the "(c)ontinuing use of coercive economic measures against developing countries, through *inter alia*, unilateral economic, and trade sanctions which are in clear contradiction with international law."²⁹

²⁷See Official Records of the United Nations General Assembly, Fifty-first Session 29 th Plenary Meeting, Thursday 10 October 1996. A/51/PV.29 p.17 at 19

²⁸See *Official Records of the General Assembly, Fifty-first session*, Plenary Meetings, A/51/PV.13 p. 17

²⁹See the Ministerial Declaration of the Group of 77, Midrand, South Africa, 28 April 1996 in the Report of the United Nations Conference on Trade and Development on its Ninth Session, held in Midrand, South Africa, from 27 April to 11 May 1996. Doc. TD/378 p.89 at 90.

²⁸ See British Year Book of International Law vol. LIII (1982) p 457

²⁹ See Comment, "The Protection of Trading Interests Act of 1980: Britain's Response to US Enforcement", 2 *North Western Journal of International Law and Business*, (1980) p 476.

The Group of 77 had at Midrand objected to the new attempts aimed at extra-territorial application of domestic law, which "constitutes aflagrant violation of the United Nations Charter and of WTO rules."

The Eleventh Conference of the Heads of State or Government of the NonAligned countries held in Cartagena de Indias, in October 1995 Colombia *inter alia* condemned the fact that certain countries, using their predominant position in the world economy, continue to intensify their coercive measures against developing countries, which are in clear contradiction with international law, such as trade restrictions, blockades, embargoes and freezing of assets with the purpose of preventing these countries from exercising their right to fully determine their political, economic and social systems and freely expand their international trade. They deemed such measures unacceptable and called for their immediate cessation.⁴¹

The Conference of the Heads of State or Government of the Non-Aligned Countries had called upon the developed Countries "to put an end to all political conditionalities to international trade, development assistance and investment, as they are fully in contradiction with the universal principles of selfdetermination, national sovereignty and non-interference in internal affairs."

It had also called upon the Government of the United States of America to: put an end to the economic, commercial and financial measures and actions ... which, in addition to being unilateral and contrary to the Charter and international law, and to the principles of neighbourliness, cause huge material losses and economic damage.

⁴¹See the documents of the Eleventh Conference of the Heads of State or Government of the Movement of Non-Aligned Countries, held in Cartagena, Colombia from 18 to 20 October 1995 Reproduced in United Nations Doc A/50/752 & S/1995/1035

They called upon the United States of America to settle its differences with Cuba through negotiations on the basis of equality and mutual respect, and requested strict compliance with resolutions 47/19, 48/16 and 49/9 of the General Assembly of the United Nations.⁴¹

In this regard it may be recalled that by its resolutions 47/19, 48/16 and 49/9 the General Assembly had, *inter alia*, reaffirmed the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of international trade and navigation. Concerned about the "continued promulgation and application ... of laws and regulations whose extra-territorial effects affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction, as well as the freedom of trade and navigation" the General Assembly had called upon all States to refrain from promulgating and applying such laws in conformity with their obligations under the Charter of the United Nations and international law, which reaffirm the freedom of trade and navigation. It may be recalled that similar resolutions, calling upon all States to refrain from promulgating laws and regulations the extra-territorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation, were also adopted at the Fiftieth and Fifty-first session of the General Assembly.⁴²

More recently, the Twelfth Conference of the Foreign Ministers of the NonAligned Countries held in New Delhi in April 1997, *inter alia* called upon all States to "refrain from adopting or implementing extra-territorial or unilateral measures of coercion as means of exerting pressure on non-aligned and developing countries. They noted that

⁴¹The Eleventh Meeting of the Heads of State or Government of the Non-Aligned Countries had also expressed deep concern about new legislation presented to the Congress of the United States that would intensify the embargo against Cuba *Ibid.* para 183 at p.52

⁴²See General Assembly Resolution 50/10 of 2 November 1995 adopted by a vote of 117 in favour 7 against and 38 abstentions and Resolution 51/15 of 12 November 1996 adopted by a vote of 137 in favour, 3 against and 25 abstentions.

measures such as Helms-Burton and Kennedy-D'Amato Acts constitute violations of international law and the Charter of the United Nations, and called upon the international community, to take effective action in order to arrest this trend.⁴³

The Foreign Ministers reiterated their concern for the insistence of certain States to resort to one-sided qualifications of the policies of other States, thus serving interests of their own. They rejected the continued use of unilateral mechanisms of evaluation, qualification and certification, as they are inconsistent with the principles of sovereign equality of States and of non-intervention and undermine multilateral instruments and mechanisms established for this purpose.

They reiterated the commitment expressed by the Heads of State or Government at the Eleventh Summit held in Cartagena to jointly oppose all kinds of conditionalities and coercive unilateral measures, rules and policies that are attempted to be imposed or those that are imposed on Member States, and called upon all States to refrain from adopting or implementing any unilateral measures not in accordance with international law and the Charter of the United Nations.⁴⁴

A report on the "Extra-territorial Application of National Laws", issued under the auspices of the International Chamber of Commerce, had pointed out that the overall effect of extra-territorial application of national laws is to discourage productive economic activity, including international investment, and ultimately to reduce employment and economic growth. The Report had argued that an emerging international legal rule forbids nations to apply their laws to conduct principally occurring abroad when to do so would unreasonably interfere with the interests of other States and of private parties. The Report had recommended that States endeavor to minimize the extra-territorial

⁴³ See the draft final document of XII Ministerial Conference of the Movement of Non-Aligned Countries, New Delhi April 4-8, 1997. Document No. NAC/FA. 12/Doc. 1/Rev. 3 Para 89 at page 33.

⁴⁴ *Ibid.* Paras 91, 97 at page 33.

application of national laws and where that is impractical to coordinate their extra-territorial activities by means of consultations, coordination and international adjudication.⁴⁵

IV GENERAL OBSERVATIONS

The topic clearly covers a broad spectrum of inter-state relations i.e. politicolegal, economic and trade. It may be recalled in this regard that an AALCC Secretariat study on the "Elements of a Legal Instrument on Friendly and Good Neighbourly Relations Between States of Asia, Africa and the Pacific" had *inter alia* listed 34 norms and principles of international law conducive to the promotion of friendly and good neighbourly relations on space ship earth. The 34 principles and norms so enumerated *inter alia* included : (1) Independence and State Sovereignty; (2) territorial Integrity and inviolability of frontiers; (3) legal equality of States; (4) non-intervention, overt or covert; (5) non-use of force; (6) peaceful settlement of disputes; (7) peaceful coexistence and (8) mutual cooperation.⁴⁶

It may be recalled that the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty clearly condemns not only armed intervention but also "all other forms of interference or attempted threats against its political, economic and cultural elements."⁴⁷

⁴⁵ Dieter Lange and Gary Born (Eds.): *The Extraterritorial Application of national Laws*, I.C.C. Publishing S.A. 1987) p. 1

⁴⁶ AALCC Secretariat study on "Elements of a Legal Instrument on Friendly and Good-Neighborly Relations Between the States of Asia, Africa and the Pacific" Reprinted in *AALCC Combined Report of the Twenty-Sixth to Thirtieth Session* (New Delhi 1992) p 193

⁴⁷ General Assembly Resolution 2131 (XX) of 21 December 1965 adopted by a vote of 109 for, none against and one abstention. It may be recalled that the relevant provisions of this Declaration on Inadmissibility of Intervention were later incorporated in the Friendly Relations Declaration.

It is equally pertinent to recall that the application of unilateral measures is at variance with numerous international instruments, including the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States which *inter alia* states that:

"No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."⁴⁸

The use of unilateral actions, particularly those with extra-territorial effects can impede the efforts of the developing countries in carrying out trade and macro economic reforms aimed at sustained economic growth. It need hardly be emphasized that the use of such unilateral trade measures poses a threat to the multilateral trading system. Even where there is a basis for exercising jurisdiction the principles of comity suggest that forbearance is appropriate. Under these principles (of comity) States are obliged to consider and weigh the legitimate interests of other States when taking action that could affect those interests.

The Declaration and Programme of Action adopted by the Sixth Special Session of the General Assembly,⁴⁹ the Charter of Economic Rights and Duties of States, 1974, the United Nations Convention on the Law of the Sea, 1982 and several other international instruments retain many of the traditional aspects of sovereignty. The economic sovereignty provisions of these instruments are reaffirmations of the rights and interests in natural resources within an expanded definition of a State's territory. Further, the provisions relating to development touch upon the concept of economic sovereignty. Article 7 of the Charter of Economic Rights and Duties of States stipulates:

⁴⁸General Assembly Resolution 2625 (XXV) Annex, para 1

⁴⁹General Assembly Resolutions 3201 and 3202 of 1 May 1974 adopted at the Sixth Special session.

"Every State has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each State has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement the progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development. All States have the duty, individually and collectively, to co-operate in order to eliminate obstacles that hinder mobilization and use."

General Assembly Declaration on the Right to Development envisages that States have the primary responsibility for the creation of national and international conditions favorable to the right to development. The Declaration clearly stipulates:

"The realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations."⁵⁰

The Report issued under the auspices of the International Chamber of Commerce referred to above had argued that an emerging international legal rule forbids nations to apply their laws to conduct principally occurring abroad when to do so would unreasonably interfere with the interests of other States and of private parties.

It may, perhaps, be necessary to delimit the scope of the inquiry into the issue of extra-territorial application of national legislation. In determining the parameters of the future work of the Committee on this item consideration needs to be given to the question whether it should be a broad survey of the question of extra-territorial application of municipal legislation and in the process examining the relationship and limits between public and private international law on the one hand and the inter play between international law and municipal law on the other.

⁵⁰ See Article 7 paragraph 2 of the General Assembly Resolution 41/128 of 4th December 1986.