(ii) Decision on the Agenda Item : "The Exrta-Territorial Application of National Legislation: Sanctions Imposed Against Third Parties"

(Adopted on 18.4.98)

The Asian-Afirican Legal Consultative Committee at its Thirty-Seventh Session

Recalling the reference made by the Government of the Islamic Republic of Iran and its Resolution 36/6 of May 7, 1997;

Expresses its appreciation to the Government of the Islamic Republic of Iran for hosting the seminar on the Extra-territoriality of National Legislation : Sanctions Imposed Against Third Parties;

Appreciative of the Report of the Secretary General on the seminar on the subject as set out in Document No.AALCC\XXXVII\ New Delhi \98\ S.5;

Having heard the statement of the Assistant Secretary General as well as the interventions of the delegates of Member States and representatives of Observer States;

Recognizing the significance, complexity and the implications of the Extra-territorial Application of National Legislation: Sanctions Imposed Against.Third Parties;

1. Requests the Secretariat to continue to study the legal issues relating to the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties and to examine the issue of executive orders imposing sanctions against target States;
2. Urges Member States to provide relevant information and materials to the Secretariat; and
3. Decides to inscribe the item "Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties" on the agenda of the Thirty-eighth session of the Committee.

(iii) Secretariat Study : "Background Note on the Extra-Territorial Application of National Legislation: Sanctions Imposed Against Third Parties, Prepared for the Seminar held at Tehran Islamic Republic of Iran on 24-25 January, 1998

The item"Extra-territorial Application of National Legislation:Sanctions Imposed Against Third Parties" was first placed on the provisional agenda of the 36th session of the Asian African Legal Consultative Committee (AALCC) following upon a reference made by the Government of the Islamic Republic of Iran in accordance with Article 4 (c) of the Statutes and sub- Rule 2 of Rule 11 of the Statutory Rules of the Committee. In an Explanatory Note submitted to the Secretariat of the AALCC , the Government of the Islamic Republic of Iran had enumerated four major reasons for the inclusion of this item on the agenda of the AALCC. The reasons so identified and listed were: (i) that the limits of the exception to the principle of extra-territorial jurisdiction are not well established; (ii) that the practice of States indicates that they oppose the extraterritorial application of National Legislation; (iii) that extraterritorial measures infringe various principles of international law; and (iv) that extraterritorial measures, on the one hand, affect trade and economic cooperation between developed and developing countries and interrupt cooperation among developing countries, on the other[4].

Having identified and enumerated the reasons for the inclusion of the item on agenda of the 36th session, the Explanatory Note inter alia requested the AALCC "to carry out a comprehensive study concerning the legality of such unilateral measures, taking into consideration the positions and reactions of various governments, including the positions of its Member-States".

---

4. For the full text of the Explanatory Note of the Government of the Islamic Republic of Iran on the "Extraterritorial Application of National Legislation :Sanctions Imposed Against Third Parties" see Report and Selected Documents of The Thirty-Sixth Session, Tehran, Islamic Republic of Iran (3-7 May 1997)

The rationale for calling a comprehensive study of the legality of unilateral actions was that National Legislation with Extraterritorial Effect Violates the principles of International Law including the impermissibility of unilateral imposition of sanctions. In its Explanatory Note the Government of the Islamic Republic of Iran had maintained that " the actions of States to unilaterally exert coercive economic measures against other States had no foundation in international law. Various resolutions adopted by United Nations Organs affirmed this point." It also demonstrated that the imposition of "unilateral sanctions infringe upon the right to development" and that "the imposition of sanctions violated principle of non intervention."

THE SECRETARIAT PRELIMINARY STUDY

A preliminary study prepared by the Secretariat was considered at the 36th Session of the AALCC. Introducing the item at the Tehran session held in May 1997 the Assistant Secretary General Mr. Asghar Dastmalchi observed that although jurisdiction in matters of public law character was territorial in nature some States were however, known to give extraterritorial effect to their municipal legislation which had resulted in conflict of jurisdictions and resentment on the part of other States. Civil Law countries exercise jurisdiction over their nationals for offenses committed even while United Kingdom law allow such jurisdiction in select cases. The United States of America exercise jurisdiction in a wide variety of cases.

It has been suggested in some quarters that the exercise of such extraterritorial jurisdictions was desirable and, indeed inevitable, and claims and counter-claims as to the acceptability or reasonableness of exercise of extraterritorial jurisdiction were often pressed. Conflicts had arisen in the context of economic issues when States sought to apply their laws outside their territory in a fashion which precipitated conflicts with other States.

The preliminary study prepared by the Secretariat had pointed out that in the claims and counter claims that had arisen with respect to the exercise of extra-territorial Jurisdiction the following principles had been invoked (i) principles concerning jurisdiction ;(ii) sovereignty -in particular economic sovereignty - and non-interference; (iii) genuine or substantial link between

the State and the activity regulated; (iv) public policy , national interest ; (v) lack of agreed prohibitions restricting States right to extend its jurisdiction; (vi) reciprocity or retaliation; and (vii) promotion of respect for law. Notwithstanding the national interests of the enacting State grave concern had been expressed on the promulgation and application of municipal legislation whose extraterritorial aspects affected the sovereignty of other States.

While a growing number of other States have applied their national laws and regulations on extra-territorial basis, such fora as the General Assembly of the United Nations, the Group of 77, the Organization of Islamic Countries, and the European Economic Community have in various ways expressed concern about promulgation and application of laws and regulations whose extraterritorial effects the sovereignty of other States and the legitimate interests of entities and persons under their jurisdiction, as well as the freedom of trade and navigation.

The preliminary study prepared by the Secretariat, apart from referring to some recent instances of extra-territorial application of national laws, (without resolving the other questions, including the question of economic counter measures), sought to furnish an overview of the limits imposed by international law on the extraterritorial application of national laws, and inter alia spelt out the response of the international community to such actions. It recounted how in various, ways express concern about the promulgation and application of laws and regulations, whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities and persons on their jurisdiction as well as freedom of trade and navigation.

The study prepared by the Secretariat also drew attention to the opinion of such august bodies, as the Inter-American Juridical Committee, the Juridical Body of the Organization of American States[5] and the International Chamber of Commerce[6].

---

[5] For details see 35 International Legal Materials (1996) p. 1322

[6] Dieter Lange And Gary Borne (Eds:') : The Extraterritorial Application of National Laws ICC Publishing S.A. 1987)

The preliminary study prepared by the Secretariat sought to demonstrate that the topic covered a broad spectrum of inter-State relations, that is to say, political, legal, economic and trade. It recalled in this regard that the AALCC Secretariat study on the "Elements of Legal Instruments on Friendly and Good-Neighbourly Relations Between the 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. The 34 principles enumerated inter alia had included : (i) independence and state sovereignty; (ii) territorial integrity and inviolability of frontiers; (iii) legal equality of States; (iv) non-intervention, overt or covert; (v) non-use of force; (vi) peaceful settlement of disputes; (vii) peaceful coexistence; and (viii) mutual cooperation.[7]

The Secretariat study had pointed out that the use of unilateral action, particularly those with extraterritorial effects, can impede the efforts of developing countries in carrying out trade and macro-economic reforms aimed at sustained economic growth. It can hardly be over emphasized that the use of such unilateral trade measures pose a threat to the multilateral trading system. Even where there is a case 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[8] and Programme[9] of Action adopted by the Sixth Special Session of the General Assembly the Charter of Economic Rights and Duties of States, 1974[10] the United Nations Convention on Law of the Sea,

---

[7]. AALCC Secretariat Study on "Elements of a Legal instrument on Friendly and Good Neighborly Relations Between States of Asia, Africa and the Pacific " Reprinted in AALCC Combined Reports of the Twenty Sixth to Thirtieth Sessions (New Delhi, 1992) p. 192

[8]. Resolution 3201 , of May 1, 1974 Sixth Special Session

[9]. Resolution 3202 , of May 1,1974 Sixth Special Session.

[10]. Resolution 3281 XXIX Session

1982 and several other international ' instruments retain many of the traditional aspects of sovereignty. The economic sovereignty provisions of these instruments are re-affirmations of the rights and interests in natural resources within the expanded definition of State's territory.

The preliminary study prepared by the Secretariat had submitted that it may perhaps. be necessary to delimit the scope of 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. It had asked for consideration to be given to the question whether it should be a broad survey of questions of extra territorial application of municipal legislation and, in the process, examining the relationship and limits between the public and private international law on the one hand and the interplay between international law and municipal law on the other. It recalled in this regard that, at the Forty fourth Session of the International Law Commission, the Planning Group of the Enlarged Bureau of the Commission had established a Working Group on the long-term 'programme to consider topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission and that one of the topics included in the pre-selected lists was the Extra-territorial Application of National Legislation.

An outline on the topic Extra-territorial Application of National Legislation prepared by a Member of the Commission had inter alia suggested that "it appears quite clear that a study of the subject of Extraterritorial Application of National laws by the International Law Commission would be important and timely. There is an ample body of State practice, case law, national study on international treaties and a variety of critical scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions. Such a study could further complement the efforts of the Commission in the codification and progressive development of law in other areas, like Responsibility of States, Liability for Transnational Injury, Draft Code of Crimes and Establishment of an International Criminal Jurisdiction".[11]

---

[11]. See A/CN.4/454,p71

The Secretaiat study had proposed that in determining the scope of the future Work on this subject, the Committee may recall that the request of the Government of the Islamic Republic of Iran is to carry out a comprehensive study concerning legality of such unilateral measures ' i.e. sanctions imposed against third Parties, "taking into consideration the position and reactions of various governments, including the Position of its Member States." It was proposed that in considering the future work of the Secretariat on this item Member-States may wish to consider sharing their experiences, with the Secretariat, on this matter.

THIRTY SIXTH SESSION OF THE AALCC

In the course of deliberations on the item at the 36th session of the AALCC one delegate expressed the view that sanctions can only be imposed by the Security Council after it had determined the existence of a threat to peace, breach of peace and act of aggression' and that unilateral sanctions are violative of the Vienna Declaration and Programme of Action of 1993[12] which inter alia, recognized the right to development. It was pointed put that unilateral sanctions are violative of the principle of non-intervention.

The view was also expressed that national laws having extra-territorial effect had no basis in international law and that such laws, primarily aimed at individuals or legal persons, were violative of the principle of non- intervention, political independence and territorial sovereignty enshrined in several treaties. Such acts it was observed are aimed at weaker developing countries.

One delegate expressed the view that extra-territorial application of national legislation would affect international trade. Another delegate was of the view that in a changing scenario of globalization of trade and privatization of economies extra-territorial application of national laws would affect interdependence.

---

12. The world Conference on Human Rights had reaffirmed the right to development as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

One delegate, stated that extra territorial application of national legislatation infringed the sovereign right of states, violated the principles of non-intervention and affected the economic and political relations amongst states. Elaborating that sanctions would disturb the North-South relations, he called upon the AALCC states to voice their protest.

One delegate recalled the United Nations General Assembly 'Friendly Relations Declaration' and stated that although no State has the right to intervene directly or indirectly in the internal or external Affairs of any other State and every State has an inalienable right to choose its political economic, social and cultural systems without interference in any form by another state, large and powerful States are using it as a weapon. He pointed out that a particular country had within a short span of four years imposed around sixty-four unilateral sanctions against thirty-five countries. In the present era, the notion of inter-dependency among states had become quite obvious and the principles of non-intervention and non-aggression, the two principles of the well known five principles of peaceful co-existence have become all the more obvious and are universally accepted by all nations, big or small rich or poor. He stated categorically that extra-territorial application of national laws has no basis whatsoever, legal moral or political. It blatantly violates the rules of international law and the rules of civilized law and amounts to infringement of internal affairs of other countries.

One delegate observed that the Helms-Burton Act relating to trade with Cuba. Kennedv-D'Amato Act relating to Libya, Iran and Iraq are examples of extra territorial application of national law in the form of sanction against third parties. Even though superficially one might think that these national laws relate to actions by individuals, their object is the imposition of sanctions against States. This is so if one looks to the substance rather than the form of the Acts or national laws having extra territorial application. These extra territorial national laws are contrary to international law, they usurp the role entrusted to the Security Council for imposing sanctions against Member States. They are unilateral, they affect the principles of sovereignty, the sovereign equality of States, they go against the principle of non interference in the affairs of other States, and non-intervention. Indeed they go against several instruments and declarations of the UN and other international organizations.

This development affects not only domestic economies of developing countries but also South-South Cooperation and relation between themselves and the developed countries. In his opinion AALCC States should present a unified position which could demonstrate member countries' rejection of such national laws which constitutes unilateral economic and political sanctions against other States.

It was pointed out that extra-territorial application of national legislation is not entirely a new thing, but has deep roots. It is the legacy of the colonial period. While the AALCC as a legal consultative body is not in a position to talk about political issues, underlying the extra-territorial application of national legislation it is however, in a position to consider the legality of such actions. Under the United Nations Charter and international law, the Member-States of the United Nations have the obligation to support and implement the sanction measures taken by the Security Council against the law-breakers, in accordance with Chapter VII of the United Nations Charter. But States do not have obligations to observe and implement national laws of any State, with sanctions against any third party.

The view was expressed that extraterritorial application of national legislation and sanctions against a third party is violation of international law. AALCC, as a legal body of Asian-African countries, could have its own legal opinion on this issue. For this purpose, a comprehensive study concerning the legality of such unilateral measures, be considered by the Committee. The AALCC should keep this issue under review and could support the inclusion of the item, Extra Territorial Application of National Laws, or Unilateral Acts and their Legal Effects in the future programme of work of the International Law Commission.

One delegate pointed out that the aspect of unilateralism is slightly different from extraterrioriality and though they appear to be identical they are not. Extraterritoriality of national jurisdiction, in terms of exercising one's criminal jurisdiction over one's own nationals while abroad is a very ancient one, otherwise well established, and not debatable as a negative aspect of law. He advised caution against hastening to conclude that unilateral acts, which are different from extraterritoriality, on the basis on which we are working. If we

want to deal with extra-territorial jurisdiction issues, there is good room to deal with it technically and professionally, But unilateral acts essentially are pertaining to state responsibility and essentially pertain to a different field of study altogether. A unilateral act means that a country pronounces certain commitments unilaterally, without anybody endorsing it, without anybody having to agree with it or disagree with it.

As to the future course of action to be followed by the AALCC, it was pointed out that due to the complexity of the topic of extraterritoriality, an overall study of the subject was ruled out. To this end, it was felt that organizing one or two seminars in the inter-sessional period would be very useful.

At its 36th Session held in Tehran in May 1997 the AALCC inter alia recognized the significance, complexity and implications of "Extra Territorial Application of National Legislation : Sanctions Imposed Against Third Parties". It requested the Secretariat to monitor and study developments in regard to the Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties and urged Member States to share such information and materials that may facilitate the work of the Secretariat. The AALCC also requested the Secretary General to convene a seminar or meeting of experts and, to ensure a scholarly and in-depth discussion, to invite a cross section of professionals thereto The AALCC further requested the Secretary General to table a report of the seminar or meeting of experts on the subject at the next session of the Committee; and decided to inscribe the item "Extra-territorial Application of National Legislation: Sanction Imposed Against Third Parties" on the agenda of the Thirty-seventh Session of the Committee.

Pursuant to that mandate the Secretariat of the AALCC proposed in collaboration with the Government of the Islamic Republic of Iran to convene a two day Seminar in Tehran in January 1998 . A group of experts was invited from both Member and Non-member States of the AALCC to present papers thereat.

OBSERVATIONS AND COMMENTS

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[13] and the Charter of Economic Rights and Duties of States[14]. The legality of the use or resort to countermeasures is linked closely to the recourse to dispute settlement procedures and considered as a core issue in the current work of the International Law Commission on State Responsibility. The ILC had taken the view that countermeasure cannot be taken prior to the exhaustion of all available dispute settlement procedures, except in certain specific circumstances.

The topic "Extra Territorial Application of National Legislation : Sanctions Impose Against Third Parties" clearly covers abroad spectrum of inter-state relations i.e. politico legal, economic and trade. The use of unilateral actions, particularly those with extraterritorial effects can impede the efforts of the developing countries in carrying out trade and macro economic reforms aimed at sustained economic growth. It can need hardly be over emphasized that the use of such unilateral trade measures poses a threat to the multilateral trading system.

To delimit the scope of the inquiry into the issue of extraterritorial application of national legislation consideration requires 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. It would be gainful to carry out a comprehensive survey of the legality of such unilateral measures (i.e. sanctions imposed against third parties) "taking into consideration the positions and reactions of various governments" and regional economic groupings.

---

13. GA Resolution2625(XXV)

14. G.A. Resolution 3281 (YXIX) Article 32 of the Charter of Economic Rights and Duties of States, adopted by the General Assembly, 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 right.

It is recalled that a view had been expressed at the 36th session of the AALCC that the extraterritorial application of national legislation and sanctions against a third party is a violation of international law and that the AALCC as a legal body of Asian-African countries, could have its own legal opinion on this issue. For this purpose, it was suggested that a comprehensive study concerning the legality of such unilateral measures may be considered by the Committee.[15]

The view was also expressed that an examination of the item by the Committee should be purely technically, based on legal analysis, and should not , to the extent possible, step into the political arena. The United Nations, the non-aligned forum and other fora could delve into the political dimension of the matter and the AALCC should not duplicate their work The work of the AALCC it was emphasized required a different type of perspective to deal with this issue and that is the reason that the seminar of a group of experts from Member and non-Member States of the AALCC had been convened.

THE IRAN AND LIBYA SANCTIONS ACT OF 1996: AN OVERVIEW

In 1996, two legislations by the United States Congress, extended the jurisdiction of that State beyond its territory, by imposing sanctions against third States that invest in, or enter into business with Iran, Libya and Cuba. First , In March 1996, the Cuban Liberty and Democratic Solidarity Act of 1996 (generally known by the names of its principal co-sponsors as the Helms-Burton Act)[16] was signed by the United States President. The Act inter alia codifies the existing economic sanctions previously imposed against Cuba pursuant to executive orders.

15. It was also proposed that the AALCC should keep this issue under review and could support the inclusion of the item, Extra Territorial Applioation of National Laws, or Unilateral Acts and their Legal Effects in the future program of work of the International Law Commission. See the statement of the Delegate of the People's Republic of China made during the Fourth Plenary Meeting in the *Verbatim Record of Discussions* of the Thirty Sixth Session of the Asian African Legal Consultative Committee, Tehran, Islamic Republic Of Iran, May 1997.

16. For the full text of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act see 35 *International Legal Materials (1996) p.397*