Again, on August 5, 1996, the United States President signed theIran-Libya Sanctions Act of 1996 (generally known as the D'Amato Kennedy Act), imposing sanctions against foreign companies that make investments which contribute to Iran's ability to develop its petroleum resources.

The Preamble to the Iran and Libya Sanctions Act of 1996 (hereinafter called the Act) describes it as an Act to "impose sanctions on persons making investments directly and significantly contributing to the enhancement of the ability of Iran or Libya to develop its petroleum resources, and on persons exporting certain items that enhance Libya's weapons or aviation capabilities. or enhance Libya's ability to develop its petroleum resources, and for other purposes."[17]

In a memorandum circulated at the 51st session of the General Assembly the United States maintained that the Act will help to deprive both the Islamic Republic of Iran and the Libyan Arab Jamahiriya from a source of income which, it claimed , could be used to finance international terrorism and procure weapons of mass destruction. The memorandum had affirmed that with the Kennedy D'Amato Law, it aimed to put pressure on Libya to comply with Security Council resolutions.

The Act defines both Iran and Libya in identical terms as "including any agency or instrumentality" of Iran or Libya. It requires persons both natural or legal, association of persons, governmental and non-governmental agencies to refrain from investing either in Iran or Libya any amount greater than US $ 40 million during a 12 month period. To that end the Act defines the term "investment" to mean :

(i) The entry into a contract that includes responsibility for the development of petroleum resources located in Iran or Libya or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a contract.

(ii) The purchase of a share of ownership, including an equity interest, in that development.

[17] See text of the Iran and Libya Sanctions Act, 1996

(iii) The entry into a contract providing for the participation in royalties, earnings,' or profits in that development , without regard to the form of participation. The term investment does not include the entry into, performance, or financing of a contract to sell or purchase goods, services, or technology.[18]

It may be stated that investments under contracts existing prior to August 5, 1996 are beyond the pale of the Act and are exempted. The term "petroleum resources" is to have a large connotation and includes petroleum and natural gas resources.

Section 3 of the Act sets out the Declaration of Policy Paragraph (a) of Section 3 called "Policy with Respect to Iran" reads :

> "The Congress declares that it is the policy of the United States to deny Iran the ability to support acts of international terrorism and to fund the development and acquisition of weapons of mass destruction and the means to deliver them by limiting the development of Iran's ability to explore for, extract, refine, or transport by pipeline petroleum resources of Iran[19] This Declaration of Policy with respect to Iran is based on the Congress findings as set out in section 2 of the Act.[19]

To further the objectives of the Act Section 4 inter alia urges the President of the United States to "commence immediately diplomatic efforts, both in appropriate international fora such as the United Nations, and bilaterally with allies of the United States, to establish a multilateral sanctions regime against Iran, including provisions limiting the development of petroleum resources that will inhibit Iran's efforts" to carry out activities described in section 2 of the Act.

[18] See Section 14 (9) of the Iran and Libya Sanctions Act, 1996.

[19] The Policy with Respect to Libya is set out in paragraph (b),of the same section in the following terms "The Congress further declares that it is the policy of the United States to seek full compliance by Libya with its obligations under Resolutions 731, 748, and 883 of the Security Council of the United Nations, including ending all support for acts of international terrorism and efforts to develop or acquire weapons of mass destruction."

Section 4 of the Act entitled "Multilateral Regimes" it has been suggested "provides for the integration of coercive economic measures into multilateral systems."[20] Section 4 (e) of the Act required the President to present, an interim report monitoring multilateral sanctions, not later than 90 days after the enactment of the Act to the Appropriate Congressional Committee;[21] on :

(1) whether the member States of the European Union, the Republic of Korea, Australia, Israel or Japan have legislative or administrative standards providing for the imposition of trade sanctions on persons or their affiliates doing business or having investments in Iran or Libya;

(2) the extent and duration of each instance of the applications of such sanctions; and

(3) the disposition of any decision with respect to such sanctions by the World Trade Organization or its predecessor organization.[22]

The President is thereafter to report to the "appropriate congressional committees" on the extent that diplomatic efforts, referred to above, have been successful. Each report is to include (i) the countries that have agreed to undertake measures to further the policy objectives with respect to Iran , together with a description of those measures; and (ii) the countries that have not agreed to undertake measures .

A. SANCTIONS

Section 6 of the Act called the Description of Sanctions stipulates that the sanctions to be imposed on a sanctioned person are;

1. Export-Import Bank Assistance For Exports to Sanctioned Persons

[20] See the statement of the Representative of Iraq at the 67" PLENARY meeting of the 51 " Session of the General Assembly.

[21] Section 14 (2) of the Act defines the term Appropriate Congressional Committee to mean the Committee on Finance, the Committee on Banking, Housing, and Urban Affairs, and the Committee on Foreign Relations of the Senate and the Committee on Ways and Means, the Committee on Banking and Financial Services, and the Committee on International Relations of the House of Representatives.

[22] Section 4 (e) of the Act.

2. Export Sanction;
3. Loans from Financial Institutions;
4. Prohibitions on Financial Institutions;
5. Procurement Sanction; and
6. Additional Sanction.

1. Export -Import Bank Assistance For Exports to Sanctioned Persons

Under Section 6 paragraph 1 the President may direct the Export Import Bank of the United States not to give approval to the issuance of any guarantee , insurance, extension of credit, or participation in the extension of credit in connection with the export of any goods or services to any sanctioned person.

2. Export Sanction

Section 6 paragraph 2 stipulates that the President may order the United States Government not to issue any specific license and not to grant any other specific permission or authority to export any goods or technology to a sanctioned person under (i) the Export Administration Act of 1979; (ii) the Arms Export Control Act; (iii) the Atomic Energy Act of 1954; or (iv) any other statute that requires the prior review and approval of the United States Government as a condition for the export or re-export of goods or services.

3. Loans from Financial Institutions

Pursuant to Section 6 (3) of the Act the United States Government may prohibit any United States financial institution from making loans or providing credits to any sanctioned person totaling more than US $ 1 0,000,000 in any 12 -month period unless such person is engaged in activities to relieve human suffering and the loans or credits are provided for such activities.-,

4. Prohibitions on Financial Institutions

It may be stated at this 'juncture that under the Act the term "financial

institution' includes (a) a depository institution[23] including a branch or agency of a foreign bank[24],(b) a credit union; (c) a securities firm , including a broker or dealer; (d) an insurance company , including an agency or underwriter and (e) any other company that provides financial services.

Paragraph 4 of Section 6 of the Act envisages two kinds of prohibitions that may be imposed against a sanctioned person that is a financial institution These are

(a) Prohibition on Designation As Primary Dealer; and

(b) Prohibition On Service As A Repository Of Government Funds.

As regards the prohibition on designation as primary dealer it is stipulated that neither the Board of Governors of the Federal Reserve System nor the Federal Reserve Bank of New York may designate , or permit the continuation of any prior designation of, such financial institution as a primary dealer in United States Government debt instruments.

As to the prohibition on service as a repository of Government Funds it is stipulated that a financial institution may not serve as an agent of the United States Government or serve as repository for United States Government funds.

The subsection goes on to clarify that the imposition of either prohibition on a sanctioned person that is a financial institution shall be treated as a single sanction and that the imposition of both shall be treated as two sanctions for the purposes of Section 5 of the Act.

5. Procurement Sanction

The United States Government may not procure , or enter into any contract for the procurement of, any goods or services from a sanctioned person.

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23. As defined in section 3 (c) (1) of the Federal Deposit Insurance Act.

24. As defined in section 1 (b) (7) of the International Banking Act of 1978.

6. Additional Sanction

Finally, the President may, in accordance with the International Emergency Economic Powers Act , impose sanctions to restrict imports with respect to a sanctioned person.

The European Union has identified the measures taken by the United States President, to limit imports into USA, prohibition of designation as primary dealer or as repository of USA Government funds, denial of access to loans from USA institutions , export restrictions by USA, or refusal of assistance by Export - Import Bank, as damaging to its interests.

Be that as it may, the impermissibility under international law of unilateral sanctions is uniformly recognized by the international community. The adoption of coercive economic measures lies only within the mandate of the United Nations in particular instances where there exists a threat to peace or breach of peace .

B. Ratione Personae

The ratione personae of the Act is set out in Section 5 (e) which identifies the Persons Against Which the Sanctions Are to be Imposed. The sanctions described in the Act are to be imposed on (i) any person , the president determines, has carried out the activities described; (ii) successor entity to the person referred ; (iii) a parent or subsidiary of that person, if that parent or subsidiary , with actual knowledge , engaged in the activities referred to ; (iv) or an affiliate if that affiliate, with actual knowledge, engaged in those activities and if the affiliate is in fact controlled by the person .

Section 14 paragraph 14 stipulates that the term person means (a) a natural person; (b) a corporation business association, partnership, society, trust, any other non governmental entity, organization, or group , and any other governmental entity operating as a business enterprise; and (c) any successor to any entity- described above.

C. Rationae Temporis

The Iran and Libya Sanctions Act of 1996 entered into force on the date of its enactment viz. 5th August 1996. It will "cease to be effective 5 years after the date of the enactment of the Act."

The Iran Libya Sanctions Act goes beyond previous sanctions imposed by the United States against other States and is not limited to regulating American interests in these countries. Rather, like the LIBERTAD Act it is designed to impose sanctions on companies or individuals located outside the United States that trade with Iran and Libya and these sanctions are targeted at investments of non-US businesses in the oil industries of Iran and Libya i.e. investments having no necessary link with the United States.

In the course of the debate at the 36th session of the AALCC it was pointed out that the imposition of sanctions is permissible only by the United Nations under Chapter VII of the Charter. Article 41 of the United Nations Charter provides *inter alia* for complete or partial interruption of economic relations" in order to give effect to Security Council decisions with respect to maintaining or restoring international peace and security. Sanctions can only be imposed by the Security Council against a lawbreaking State after the determination of the existence of "threat to peace, breach of peace or act of aggression". The Security Council has followed this procedure over the past half a century. Although the sanctions policies of the United Nations remain under criticism, the power of the United Nations to enforce sanctions and the obligation of the Member States to abide by such decisions continue to remain as part and parcel of contemporary international law.

The General Assembly on its part has repeatedly denounced economic coercion as a means of achieving political goals. Among these the resolution entitled "Economic Measures as a means of Political and Economic Coercion against Developing Countries" has strongly urged the industrial nations to abstain from the use of their superior position as a means of applying economic pressure "with the purpose of inducing changes in the economic, political, commercial and social policies of other countries."

The unilateral imposition of sanctions infringe upon the right to development. The Vienna Declaration and Programme of Action of June 25, 1993 has delineated that the Right to Development has become a "universal and inalienable right and an integral part of fundamental human rights."[25] The Declaration on the Right to Development describes this principle as "an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, culrural and political development, in which all human rights and fundamental freedoms can be fully realized."[26]

Another inherent flaw is that the unilateral imposition of sanctions violates the principle of non-intervention. The principle of non-intervention, a customary norm of international law, is backed by established and substantial state practice and has been incorporated in various internationally binding instruments as well as the General Assembly resolutions. The resolutions of the General Assembly and the proceedings of the International Court of justice[27] provide ample evidence that the non-intervention principle encompasses the rejection of intervention and interference in both internal and external affairs of other states. Consequently, imposition of secondary sanctions, which interrupt economic cooperation and trade relations of traget States with third parties, violates the universally accepted principle of non-intervention in the international and external affairs of other States.

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[25] op.cit.note9

[26] See Article 1, paragraph 1 of General Assembly Resolution 41/128 of 4 Dec. 1986.

[27] The International Court of Justice in the *Case concerning the Military and Paramilitary Activities* in Nicaragua against the Unites States of America has established that: "The principle of non-intervention establised the right of every sovereign State to rule it's affairs without foreign interference; although examples of violation of such principle are not rare. the Tribunal states that it's part of the customary internaional right. The existence of the No intervention principle is backed by a very important and well established practice. On the other hand. this principle has been introduced as corollaries of sovereign equality of all States"

GENERAL ASSEMBLY OF THE UNITED NATIONS

An item entitled "Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion" was inscribed on the agenda of the 51th session of the General Assembly at the request of the Libyan Arab Jamahiriya. In the course of deliberations on the item it was pointed out that the United States had enacted legislation that punishes foreign non-United States companies which invested more than $40 million to develop petroleum resources in either the Islamic Republic of Iran or the Libyan Arab Jamahiriya. It was recalled that the United Stats had often employed sanctions to bring pressure on what it termed "rogue" States[28]

The enactment of laws which contravene the principle of territoriality national laws significantly affects the sovereignty of other States and the legimate interests of companies and persons within their jurisdiction.

The view was expressed that on the threshold of the new millennium, the emergence of unilateral coercive measures of an extraterritorial nature entails yet another serious danger in the context of an increasingly interdependent world . The risks posed by a country in unilaterally reserving the right to undemine the discipline of multilateral trade for reasons totally alien to trade issues, must be confronted appropriately and resisted by the international community.

In the course of the debate on the item it was *inter-alia* pointed out that the imposition of coercive measures and the approval of domestic legislation for the horizontal escalation of such actions with extraterritorial implications contradicts established international trade law including the regulations of the World Trade Organization.[29]

[28] The United States of America has since 1941 either unilaterally or in concert with others- has invoked sanctions more than 70 times. The overall success of sanctions has largely been limited For details see *The wall Street Journal* November 25, 1996.

[29] The Understanding of Rules and Pocedures Governing 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 counter measures. A similar provision can also be found in the "North American Free Trade Agreement" (NAFTA)

Speaking on behalf of the European Community at the 51th session of the General Assembly, the Permanent Representative of Ireland stated : "the European Union wishes to reiterate its rejection of attempts to apply national legislation on an extra-territorial basis." He concluded : "Measures of this type violate the general principles of international law and the sovereignty of independent States."

At that session the Assembly by its Resolution 51/22 of 27th November 1996 guided by the principles of the Charter of the United Nations, particularly those which call for the development of friendly relations among nations, and the achievement of cooperation in solving problems of an economic and social character recalled its resolutions in which it had called upon the international community to take urgent and effective steps to end coercive economic measure;[30] Concerned over the enactment of extraterritorial coercive economic laws in contravention of the norms of international law and believing that the prompt elimination of such measures is consistent with the aims and purposes of the United Nations and the relevant provisions of the World Trade Organization , the General Assembly reaffirmed the "inalienable right of every State to economic and social development and to choose the political, economic and social system which it deems most appropriate for the welfare of its people in accordance with its national plans and policies," and called for "the immediate repeal of unilateral extraterritorial laws that imposed sanctions on companies and nationals of other States". It also called upon all States not to recognize unilateral extraterritorial coercive economic measures or legislative acts imposed by any State[31], and decided to include in the agenda of its 52nd session an item entitled Elimination of Coercive economic Measures as a means of Political and Economic Coercion."

[30] See General Assembly Resolutions 47/19, 48/16 and 49/9 of the General Assembly of the United Nations." A similar resolution, calling upon all States to refrain from promulgating laws and regulations the extraterritorial 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 was also adopted at the 50th session of the General Assembly.

[31] Earlier by its resolutions 47/19 and 50/10, General Assembly had called upon all States to refrain from promulgating and applying such laws and measures in conformity with their obligations under he Chart of the United Nations and international law which, *inter alia*, reaffirm the freedom of trade and navigation. These resolutions call upon States to revoke such laws.

By its resolution 51/22 the General Assembly had requested the Secretary General to prepare a report on the implementation of the resolution in the light of the purposes and principles of the Charter of the United Nations and international law and to submit the same to the Assembly at its 52nd Session. Pursuant to that request to Secretary General invited Governments to furnish any infirmation that they may wish to contribute to the preparation of that report. In response to that invitation of the Secretary General the Government of Belgium stated that like its partners in the European Union it was " opposed to the extraterritorial application of national legislation, more particularly the unilateral imposition of commercial measures, especially sanctions."[32] The Government of Iraq in its reply to the Secretary General stated inter alia that the coercive measures taken by some States constitute a real threat to international peace and security and a flagrant violation of human rights principles. It went on to suggest that "the international community, as represented by the United Nations, must increase the resolute and effective measures it takes with a view to dissuading States from taking such action and in order to block any attempts to apply pressure on the United Nations or any multilateral body , or to use them as a means to legitimize such practices, which conflict with the Provisions and Precepts of international law."[33]

The Government of the Islamic Republic of Iran observed that the "consideration of this very issue in all recent major international conferences and summits is a manifestation of the international concern about the multidimensional character of unilateral coercive economic measures which adversely affect all countries and the world economy as a whole"

The outcome of the debate, during the recently concluded 52nd session of the General Assembly, at the time of preparing this Background Note was not available to the Secretariat.

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[32] It went on to state that the European Union had confirmed this position in its explanation of vote when the General Assembly voted on resolution 51/22,. See *Elimination of coercive economic measures as a means ofpolitical and economic compulsion. Report of the Secretary General*, A/52/343 dated 15 September 1997.

[33] *Ibid*

EUROPEAN ECONOMIC COMMUNITY

The European Economic Community too asserts an extraterritorial application of its own competition laws and the application of these rules to international trade and economic relations has been equally controversial. As regards the European Community it has been stated that "(i) legislative jurisdiction may not 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* jurisdiction is strictly limited to community territory, unless the rules of international law permit an extension to the territory of third States."[34]

Be that as it may , it has been and continues to be the policy of the European Union to oppose national legislation with extra-territorial effects. The 1982 Amendments to the US Export Administration Regulations which, expanded the US control on the export and re-export of goods and technical data to USSR was objected by the European Commission. The European Commission called these amendments "unacceptable under international law because of their extra-territorial effects."

The European Union strongly opposed the enactment of the legislation and termed the extraterritorial application of US jurisdiction baseless in international law. The essence of the European objection to D'Amato Act is summarized in the following extract from a letter addressed by EU to Senator D'Amato on 12 February 1996:

" We find it unacceptable that companies incorporated in and operating from European Community will be threatened by unilateral US sanctions when maintaining legitimate business relations with Iran and Libya. We reiterate our opposition that the US has no basis in international law to claim the right to regulate in any way transactions taking place outside the US."

The European Union Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act of March 15, 1995, had *inter alia*

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[34] P.J.Kuyper "European Community Law and Extra-territoriality: Some Trends and New Developments" 33 ICLQ (1984) p. 1013

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 European Union trade in goods and services with Cuba. It emphasizes that "it cannot accept US unitateral determination and restrict EU economic and trade relations with third countries."[35] The Council of Ministers of the European Union adopted a regulation declaring the 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 States.

The Council of the European Union has by its Regulation No. 2271/96 of 22 November 1996 emphasized that extra-territorial application of laws, regulations ' and other legislative instruments which purport to regulate activities of natural and legal persons under the jurisdiction of its Member States violate international law and impede the attainment of the objective of free movement of capital between its Member States and third countries. It further states that such laws, regulations and other legislative instruments, which by their extra territorial application purport to regulate activities of natural and legal persons, "affect or are likely to affect the established legal order and have adverse effects on the interests of the Community and the interests of natural and legal persons exercising rights under the Treaty establishing the European Community."

Article 1 of the Regulation adopted by the European Council provides protection against and counteracts the effects of extra-territorial application" of the (i) National Defense Authorization Act for Fiscal Year 1973; Title XVII "Cuban Democracy Act 1992'; (ii) Cuban Liberty and Democratic Solidarity Act of 1996; (iii) Iran and Libya Act of 1996 ; and (iv,) Code of Federal Regulations Chapter V (7.1.95 edition) Part 515 - Cuban Assets Control Regulations, subpart B (prohibitions), E (Licenses, Authorizations and Statements of Licensing Policy) and G (Penalties)[36]

35. See the text of the European Union Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act in 35 international Legal Materials (1996) p. 397.

36 For the full text of the European Council : Regulation (EC) No.2271 / 96, Protection Against The Effects. of the Extra-territorial Application of Legislation Adopted by A Third Country of November 22,1996 see 36 International Legal Materials (1997) p. 125

GROUP OF 77

The Ministerial Declaration of the Group of 77 adopted at Midrand. South Africa on 28 April 1996 during the Ninth Session of the UNCTAD *interalia* 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 "continuing use of coercive economic measures against developing countries, through inter alia, unilateral economic and trade sanctions which are in clear contradiction with international law."[37]

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

NON-ALIGNED COUNTRIES

The Eleventh Conference of the Heads of State or Government of the NonAligned Countries held in Cartagena de India's, Colombia, in October 1995 had *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."

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