impede the efforts of the developing countries in carrying out macro-economic and trade reforms aimed at sustained economic growth.

In the course of the debate on the subject at the Tehran session of the AALCC several Members and Observer delegates pointed out that the extra territorial application of national legislation *inter alia* violated : (i) the Principles of the Charter of the United Nations in particular the Principle of sovereignty; (ii) the principle of non-intervention; (iii) the Friendly Relations Declaration; (iv) the Declaration on the Right to Development; (v) the Vienna Declaration on Human Rights; and (vi) the Charter of Economic Rights and Duties of States.

At the 36th Session of the AALCC a view was expressed that in as much as the extra-territorial application of national legislation and sanctions against a third party is a violation of international law the AALCC as a legal body of Asian-African countries, could have its own legal opinion on this issue. It was suggested, in this regard , that a comperhensive study concerning the legality of such unilateral measures may be under taken by the AALCC. The formulation and enunciation of an opinion on the subject would be in keeping with the advisory and recommendatory functions of the AALCC. At the Tehran Session a view was also expressed that an examination of the item by the Committee should be based on legal analysis, and should not, to the extent possible, delve into the political dimension or not duplicate work done in the political fora.

Report Of The Seminar On The "Extra-Territorial Application Of National Legislation : Sanctions Imposed Against Third Parties" held in Tehran the Islamic Republic Of Iran, 24 and 25 January 1998.

The AALCC at its 36th Session held in Tehran, the Islamic Republic of Iran, in May 1997 inter alia recognized the significance, complexity and implications of "Extra Territorial Application of National Legislation : Sanctions Imposed Against Third Parties" and requested the Secretariat to convene a Seminar or Meeting of experts on the subject.[1]

[1]. For details see Extraterritorial Application of National Legislation : Sanctions Imposed-Against Third Parties. Resolution 36/6 of 7 May 1997 in Asian African Legal Consultative Committee Report of the thirty Sixth Session.

Pursuant to that mandate the Secretariat in collaboration with the Iranian Government, which generously offered to host such a seminar, convened a two day Seminar in Tehran in January 1998.

Senior Government officials, eminent academics and distinguished international lawyers from 16 Member States of the AALCC viz. Bangladesh, China, Cyprus, Ghana, India, Indonesia, Islamic Republic of Iran, Japan, Jordan, Pakistan, Sierra Leone, Sudan, Syria, Thailand, Turkey and Yemen; and 8 observer States viz. Australia, Canada Cuba, France, Guinea, Kyrgyzstan, Mexico and United Kingdom actively participated in the Seminar The Secretary General, Mr. Tang Chengyuan, and Director Mr. K.J.S.R. Kapoor represented the Secretariat at the Seminar.

The objective of the Seminar, chaired by Dr. M. Javad Zarif, the Deputy Foreign Minister for Legal and International Affairs of the Government of the Islamic Republic of Iran and the then President of the AALCC, was to promote a free and frank exchange of views on the subject

In his inaugural address, Dr. M. Javad Zarif observed *inter alia* that although the rule of law, in international relations, required collective decision making and as far as possible even collective implementation yet there was a growing tendency among some powerful States to, insist on unilateral measures. He stated that the extraterritorial application of national legislation in the form of economic sanctions imposed against third parties was of the extreme forms of unilateral measures and that this becomes an instrument of foreign policy to advance national agenda. This practice he emphasized had not evolved around a consensus building process and could not create a legal norm or obligation for members of the international community. He described the criteria to test the extra-territorial effects of administrative, Judicial and legislative acts of states as "whether or not the act in question is compatible with universally accepted norms of international law."

Referring to the Impermissibility of Extraterritorial Sanctions the President stated that they contravened the Rules and Principles relating to (i) the Sovereignty and Territorial Integrity of States; (ii) Non-Intervention; (iii) Self Determination;(iv) Right to Development ; (v) Countermeasures; and (vi)

Dispute Settlement. He concluded by observing that the response of the community of states to the sanctions imposed against third parties had,hlitherto taken various forms of protection and counteraction including the enactment of "blocking "statutes and "claw back" provisions. He expressed the hope that the deliberations during the course of the seminar would shed more light on these and allied issues.

The Background Note on the "Extra-territorial Application of National Legislation : Sanctions Imposed Against Third Parties " prepared by the Secretariat for the seminar has been given in this chapter as Secretariat Study. At the request of the participants, the Preliminary Study prepared by the Secretariat for the 36th Session of the AALCC held in Tehran, in May 1997 was also circulated as a Seminar Document.

Welcoming the participants from among both Member and Non-Member States of the AALCC to the seminar, the Secretary General expressed his appreciation to the Special Experts, for the working papers/presentations that they had prepared. He said that the extraterritorial application of national legislation could be a major obstacle in the implementation of the provisions of the Charter of the United Nations and several other international instruments and is not conducive to the promotion of the primacy of the rule of law in international relations. He emphasized that the extra-territorial application of national legislation while necessary in some instances (such as the performance of consular functions or the control of illicit drug trafficking) could , in an increasingly interdependent world , affect developing and developed countries alike. He stated that the impact of such measures was however, far greater on the developing countries than it was on the developed States because they could not always "Claw Back." Referring to the consent of States as the basis of obligtions in international law he observed that "consent, if not consensus, remained and would remain the basis of obligation to observe the principles and norms of international law and that the enforcement of national legislation might be acceptable only in a small number of instances where the interest of the international community as a whole was sub-served. He pointed out that the Nineteenth Special Session of the General Assembly had emphasized that "international cooperation was needed and unilateralism should be avoided" in order to accelerate economic growth, poverty eradication

and environmental protection , particularly in developing countries.

Introducing the Background Note the *Secretary General* stated, among other things, that the AALCC had rightly taken the stance that it was a vital question on which the Committee could formulate an opinion to take a common position in opposing such unilateral measures as may affect their economic systems and the riglit to economic and social development. While it may perhaps be too early to gauge the over all effect and the long term ramifications of the extraterritorial application of national legislation there could be no denying that such measures could affect the process of development in the Asian and African region. The emphasis on the Asian African region, it was clarified was merely to underscore the fact that the membership of the Committee spans these two continents and was not intended to dilute or detract from the effects of such measures in other regions of the world.

Inviting attention to the legality of unilateral imposition of sanctions, in particular against third parties the question was raised whether the unilateral imposition of sanctions tenable? And if so, on what basis? Both the extra-territorial application of national legislation as well as the imposition of sanctions are bad in law and quite apart from being violative of several provisions of many international instruments, neither could be considered as being conducive to the establishment and promotion of good neighborly relations between the members of the international community.

It is somewhat difficult to reconcile the extra-territorial application of national legislation and the imposition of sanctions with the duty of States to cooperate in the various spheres of international relations in order to maintain international peace and security, and to promote mutually beneficial cooperation social and economic progress and the general welfare of nations. Nor does extra-territorial application of national legislation and the imposition of sanctions conform to the duty of States to refrain from direct or indirect recourse to political economic or any other type of coercion aimed at impeding the exercise of sovereign rights by other States

Several international instruments adopted since the Declaration on the Right to Development have reaffirmed the right to development and the Vienna

Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 had inter alia reaffirmed the "right to development ... as a universal and inalienable human right and an integral part of fundamental human rights. It had called upon states to cooperate with each other in ensuring development and eliminating obstacles to development. The Vienna Declaration had also observed that the international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development. More recently the Resolution on the Progress Achieved Towards meeting Objectives of The Earth Summit as adopted by the Nineteenth Special Session of the General Assembly had provided that in order to accelerate economic growth, poverty eradication and environmental protection, particularly in developing countries, there was need to establish macro -economic conditions that favoured the development of instruments enabling all countries to benefit from globalization . It had stated in this regard that "international cooperation is needed and unilateralism should be avoided." (Emphasis added).

The discussion during the substantive sessions of the Seminar revolved largely around the presentations made by a group of experts drawn from both member and nonmember states of the AALCC. These had included Professor James Crawford (Australia); Professor (Ms.) Brigitte Stern (France) ; Mr. Anthony Forson (Ghana) Professor V. S.Mani (India); Dr. A.A.Kadkhodaee (Islamic Republic of Iran)Professor Mohsen M.Sadeghi (Islamic Repulic of Iran); and Mr. David Stuart Sellers (UK) . The Seminar also took note of the research paper sent in by the former Secretary General of the AALCC, Professor Frank X. Njenga (Kenya), who was unable to attend the Seminar. Although Professor V S. Mani was appointed the Rapporteur of the Seminar the debate in the course of the seminar was informal in nature wherein all the participants spoke in their individual capacities and no formal conclusions or resolutions were adopted.

Professor James Crawford in his presentation reviewed the legal basis for the exercise of extra-territorial jurisdiction and the distinction between prescriptive and enforcement jurisdiction . The argument that the legal effects of the sanctions imposed, under the Helms-Burton Act and the D'Amato Kennedy Act, are frontier measures which do not extend beyond the US

border was not tenable For in essence the conduct being regulated under both Acts occurs outside and such prescriptive jurisdiction is clearly unreasonable. Neither Act could rely on any of the traditional bases for exercising extraterritorial jurisdiction such as those of nationality; passive personality; protective principle; universality; and the effects doctrine. Referring to countervailing measures it was pointed out that some States had taken steps towards countering the extraterritorial effects of the law.

Professor Brigitte Stern in the presentation of her paper "Can the United States set Rules For The World"stated that the Helms- Burton Act was a secondary boycott , using economic sanctions in order to foster a political objective. A secondary boycott is based on extra-territorial jurisdiction contrary to international law. It was pointed out that the US enactment can not be justified in law or ethics and shatters the bases of international community. She raised the question as to why should other countries respect international law if one State sets such a bad example? It was pointed out that the common will of States rather than the unilateral act of a State has hitherto been the basis of international law.

Professor V. S. Mani in the presentation of his working paper entitled "Unilateral Sanctions and Extra-territoriality of Domestic Laws : A Perspective of Public International Law" observed that a sovereign State's competence to make laws and enforce them is derived from its authority of *domaine* reserve as recognized by international law. It was pointed out that where the international validity of an act of a State is at issue, the relevant question is "whether the impugned act is attributable to any organ or agency constitutes a violation of international law." A national legislature, he pointed out, is not incapable of violating or authorizing violation of international law. A piece of legislation seeks to provide a legal framework for institutional action by State authorities. He then went on to examine the international legality of enforcement of the two 1996 United States enactments and stated that they violated three peremptory norms of international law viz. (i) sovereign equality; (ii) non intervention; and (iii) freedom of trade. In addition both the Helms Burton Act and the D'Amato -Kennedy Act violated the law relating to peacetime countermeasures.

Professor Mohsen Sadeghi in his presentation "Liability for Extraterritorial Application for Economically Harmful Legislation" in addressing the question whether a State was liable , under general international law, for the injurious consequences of the measures that it adopts against another State, expressed the view that a State engaged in harmful economic activities against another State was liable to that State and/or its nationals for any damages inflicted upon them resulting from those activities. Such liability, in his view , arises out of that State's breach of its international obligation vis a vis both the affected State and its nationals, as well as the third States whose trade with the affected State has been restrained. He emphasized that transnational economic activities of a harmful nature were violative of the acquired rights of both the affected State and its nationals . Such activities also impinge upon the sovereign rights of third States, affect basic human rights and run counter to the "multipolarized institutionalization embedded in the Charter of the United Nations."

Dr. A.A. Kadkhodaee in his paper"Legal Aspects of USA Sanctions on Foreign Companies : Violation of the Conventional Obligations" pointed out that while trade and economic related international organizations - such as the WTO and its forerunner the GATT - required their member States to ensure that all necessary steps were adopted in order to give effect to the rules established by the provisions of their constituent instruments, unilateral economic and trade embargoes continue to be the most common infringements of trade obligations, even though it has been established that economic sanctions should not be used in order to dictate political aims or cause economic changes in the target countries. It was pointed out that 'unlateral imposition of economic sanctions were incompatible with the GATT/WTO provisions relating to the liberalization of trade in goods and services. It was argued that the Helms-Burton Act and the D'Amato-Kennedy Act infringe such GATT provisions as Articles I, II, III, V, XI and XXII. In the context of the MFN Clause it was pointed out that " any embargo not mentioned in the field of General Exceptions set forth in GATT/WTO will be regarded as the infringement of its rules and provisions and consequently distorting freedom of trade."

Mr. Anthony Forson in his presentation "Extra-territorial Jurisdiction of National Legislation : Sanctions Imposed Against Third Parties" furnished

an overview of extraterritorial application of national legislation and the consequential exercise of 'jurisdiction by municipal courts in both civil and criminal cases. As regards the latter i..e the assumption of extraterritorial jurisdiction in criminal cases he drew attention to crimes against civil aviation. He pointed out that the topic of extra-territorial jurisdiction is on of inter-play or interaction between Public International Law and Private International Law.

The former Secretary General of the AALCC, Professor Frank Xavier Njenga, in his paper emphasized that jurisdiction was an attribute of state sovereignty and *inter alia* examined the bases on which a State may exercise Jurisdiction viz. (i) the territorial principle; (ii) the nationality principle ;(iii) the protective or security principle; (iv) the universality principle; and.(v) the passive principle. He pointed out that extra-territorial application of national legislation contravened such principles of international law as the (i) principle of non-intervention; (ii) principle prohibiting the use of coercive measures or to obtain economic objectives; (iii) act of state doctrine; and (iv) extra-territoriality principle.

Mr. David S. Sellers in his prefatory remarks observed that the "main aim of the AALCC is, of course , to consider the legal issues raised by sanctions and in particular sanctions which are purported to have extra-territorial effect. It is right that the legal aspects of these issues be addressed, by the AALCC and in due course the ILC." In his presentation of "Recent Developments : The Kennedy -D'Amato and the Helms Burton Acts " he said that three main objections apply to both the Acts. These included (i) the objection to sanction in general; (ii) an objection to the extraterritoriality of the sanctions ; and (iii) an objection that the sanctions violate the US free trade obligations under NAFTA, GATT And WTO. As regards the first it was stated that sanctions in general are unfocussed and do not really work because there can be no nexus between the sanction and the alleged acts at which they are directed. In his view the European Union opposes sanctions in general essentially on policy and self-interest grounds rather than on legal grounds. As to the objection to the extra territorial nature of sanctions the question was raised as to why should a State be permitted to sanction economic activities between foreign companies and third States which are perfectly legal under the law of the places where the investors are situated, and which have no connection with

the sanctioning State. The European Union it was said is ready to recognize sanctions imposed by the international community pursuant to Security Council Resolution which necessarily affect other States but not unilateral acts which affect third States.

From the foregoing account it would have been discerned that the discussions at the Seminar revolved around a broad srectrum of politico-legal issues . The Rapporteur, Professor V.S. Mani, in his report[2] said that the deliberations focussed on a broad range of legal and policy aspects of the subject mainly in relation to two US enactments, namely the Cuban Liberty and Domocratic Solidarity (LIBERTAD) Act, 1996 (commonly referred to as the Helms-Burton Act), and the Iran and Libya Sanctions Act 1996 (generally referred to as the Kennedy D'Amato Act) although references were also made to some of the earlier US laws such as the anti-trust legislation, the US Regulations concerning Trade with USSR, 1982, and the National Defence Authorization Act, 1991 (i.e. the Missile Technology Control Regime (MTCR Law). The legality of the two 1996 US enactments was examined in terms of their conformity with the peremptory norms of international law; the law relating to countermeasures; the law relating to international sanctions ; principles of international trade law; the law of liability of States for injurious consequences of acts not prohibited by international law; impact of unilateral sanctions on the basic human rights of the people of the target state; and issues of conflicts of laws such as non-recognition, *forum nonconvenience* and other aspects of extra-territorial enforcement of national laws.

The deliberations touched on a range of State responses to counter the possible impact of the US legislation in particular and the unilateral imposition of sanctions through extra territorial application domestic legislation in general. In this regard references were made of the response of the Inter-American Juridical Committee and the European Union. The measures discussed encompassed 'blocking' legislation, statutes with 'claw -back' provisions and laws providing for compensation claims, at the national level. At the international level the responses noted included diplomatic protests negotiations for settlement of disputes, use of WTO avenues and measures to influence drafting of legislation in order to prevent its adverse extra territorial impact.

[2]. For the full text of the Report of the Rapporteur see Annex in this Chapter

The deliberations revealed a general agreement that the validity of any unilateral imposition of economic sanctions through extra territorial application of national legislation must be tested against the accepted norms and principles of international law. The principles discussed included those of sovereignty and territorial integrity, sovereign equality, non-intervention, self-determination, and the freedom of trade. It was generally agreed that the Helms-Burton Act and the Kennedy D'Amato Act in many respects contravened these basic norms. The right to development and the permanent sovereignty over natural resources were specifically mentioned.

While discussing the law relating to counter measures, it was generally agreed that the rules of prohibited counter measures as formulated by the International Law Commission in its draft articles on State Responsibility must be applied to determine the legality of counter measures purported to be effected by the extra- territorial application of the two aforementioned impugned statutes. These rules include the prohibition of injury to third states ; the rule of proportionality ; and the rules relating to prohibited counter measures incorporated in Article 13 of the draft articles on State Responsibility as framed by the International Law Commission.

While considering the issue of countermeasures, it was emphasized that the presiding peremptory norm must be the peaceful settlement of disputes. The discussion also highlighted the inter play between counter measures and non-intervention, and between counter measures and unilateral imposition of economic sanctions.

There was general agreement that counter measures could not be a facade for unilateral imposition of sanctions in respect of matters that fell within the purview of Chapter VII of the Charter of the United Nations or the sanctions' competence of other international organizations. It was argued that the differences between counter measures and sanctions of the nature of international sanctions should be recognized.

The discussion in the seminar also revealed a divergence of views on three main issues viz. (i) whether the subject should be confined to secondary sanctions through extraterritorial application of national laws; (ii) the distinction