agreements or investments in Iran".[8] On the other hand, the former Secretary of State, Henry A. Kissinger, has observed that "these congressionally mandated sanctions are threatening to place American policy into a straitjacket".

Reasons for Imposition of Unilateral Sanctions

It may be stated that the reasons for the imposition of unilateral sanctions have ranged from boycott activity[9] to the issue of worker rights[10] and have hitherto included such other issues as communism[11], transition to democracy[12] environmental activity, expropriation[13] harbouring war criminals, human rights,[14] market reform, military aggression, narcotics activity, political stability; proliferation of weapons of mass destruction and terrorism.[15] The Federal Legislation invoked to impose unilateral sanctions and or impose secondary boycott have included the Andean Trade Preference Act; the Antiterrorism and Effective Death Penalty Act, 1996 (Antiterrorism, 1996): the Arms Export Control Act (AECA); the Atomic Energy Act; the Cuban Democracy Act, 1992; the

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[8] Senator Jesse Helms: "What Sanctions Epidemic?: U.S. Business 'Curious Crusade", Foreign Affairs, Jan-Feb. 1999.

[9] See the Foreign Relations Act. 1994.

[10] See the Andean Trade Preference Act.

[11] Aimed at Cuba and North Korea. See the Cuba Regulation and the North Korea Regulations.

[12] See the Cuban Democracy Act of 1992.

[13] The Helms-Burton Act. 1996.

[14] During 1993-96 human rights and democratization were the most frequently cited objectives foreign policy and 13 countries were specifically targeted with 22 measures adopted.

[15] The Iran Libya Sanctions Act. 1996. The Former Representative Toby Roth criticized the Iran-Libya Sanctions Act as "good politics... but bad law. Its only effect he said "so far had been to unify the European Union, all 15 members, against the US policy toward Iran and Libya".

Cuban Liberty and Democratic Solidarity Act, 1996 (Helms-Burton or LIBERTAD Act); the Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (Commerce Appropriations, 1990); the Department of Defense Appropriations Act 1987 (Defense Appropriations Act 1987); the Export Administration Act; the Export-Import Bank Act ("Ex-IM"); the Fisherman's Protective Act 1967; the Foreign Assistance Act (FAA); foreign Relations Act; the Foreign Relations Authorization Act; the Foreign Operations, Export, Financing and Related Programs Appropriation Act, 1995; the General System of Preferences Renewal Act (GSP); the High Seas Drift Net Fisheries Enforcement Act (Drift Net Act); the Internal Emergency Economic Powers Act (IEEPA); the Internal Revenue Code; the Internal Security and Development Cooperation Act, 1985 (ISDCA); the International Financial Institutions Act; the Iran-Iraq Non Proliferation Act, 1992; the Iran and Libya Sanctions Act, 1996; the Iraq Sanctions Act, 1990; the Marine Mammal Protection Act, 1972 (Marine Act); the Narcotics Control Trade Act,[16] the National Defense Authorization Act, 1996 (Defense Authorization Act, 1996); the Nuclear Non-proliferation Act, (NNPA) 1994: the Omnibus Appropriation Act, 1997 (1997 Omnibus); the Spills of War Act; the Trade Act 1974 (Trade Act); Trading With The Enemy Act (TWEA).

Executive Orders/Presidential Determinations

During 1997-98 there have been four instances of unilateral imposition of sanctions by Executive Orders and Presidential Determinations. These include Executive Order 13047 of May 21, 1997 invoking a prohibition on new investment in Burma (Myanmar); Executive Order 13067 of November 3, 1997, imposing a comprehensive trade embargo on Sudan; Presidential Determination No. 98-22 of May 13, 1997, prohibiting the sale of specific goods and technology and United States Bank loans to the Government of India,

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[16] The uncertified drug producing/transit countries are Afghanistan, Burma. Colombia, Iran, Nigeria and Syria.

terminating sales of defence articles and design and construction equipment and services, and shutting down Export -Import Bank (Ex-Im), Overseas Private Investment Corporation (OPIC) and TDA; and Presidential Determination No.98-XX of May 30, 1998, prohibiting the sale of specific goods and technology and United States Bank loans to the Government of Pakistan, terminating sales of defence articles and design and construction equipment and services, and shutting down Ex-Im, OPIC and TDA.

State and Local Sanctions Acts

In addition to the Federal legislation State and Local Governments have been increasingly inclined over the last year and a half to impose sanctions against foreign countries in response to human rights practices. Some 12 US States, countries and cities have sought to establish their own measure against other countries and have imposed restrictions against States ranging from Myanmar to Switzerland. Thus, following the imposition of United States investments sanctions on Myanmar in May 1997[17] a dozen or so local governments restricted the granting of public contracts to companies that do business with Myanmar. These include the Commonwealth of Massachusetts, the Cities of San Francisco and Oakland, California and several other Governments which have enacted "selective purchasing ordinances" against domestic and foreign companies that do business with Myanmar. Some States have been contemplating similar procurement restrictions against companies that deal with Indonesia.

(a) The "Massachusetts Burma Law" of 1996

The "Massachusetts Burma Law" of 1996[18] was characterized by the United States District Court of the States

[17] See Executive Order 13047 of May 20. 1997. In imposing the investment ban the President is said to have exercised authority given by an amendment to the fiscal year 1997 Foreign Operations Appropriation Act.

[18] See Massachusetts Act of June 25, 1996. The State of Massachusetts admitted before the District Court of Appeal that

of Massachusetts as infringing "on the federal government's power to regulate foreign affairs. "In reaching its conclusion the Court had *inter alia relied on an amicus curiae* brief filed by the European Union.[19]

In its ***amicus curiae*** brief the European Union had called to the Court's attention the following points: (i) the Massachusetts Burma Law interferes with the normal conduct of EU-US relations; (ii) the Massachusetts Burma law has created a significant issue in EU-US relations including raising questions about the ability of the United States to honour international commitments it has entered into in the framework of the World Trade Organization ("WTO"); and (iii) failure to invalidate the Massachusetts Burma Law risks a proliferation of similar non-federal sanctions laws, aggravating these effects. As regards the first point it was stated that the Massachusetts Burma Law "constitutes a direct interference with the ability of the EU to cooperate and carry out foreign trade with the United States... The Massachusetts Burma Law is thus aimed at influencing the foreign policy choices of the Union and its Member States, and at sanctioning the activities of EU companies which are not only taking place in a third country but which are also lawful under EU and Member States' laws".

As to the impugned Massachusetts Burma Law having created an issue of serious concern in EU-US Relations the *amicus curiae* brief stated that the "Massachusetts Burma Law charts a very different course. It is a secondary boycott-- an extraterritorial economic sanction that it targeted not at the

the Statue "was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policy".

[19] See the judgment of the Court of November 4, 1998 in *National Foreign Trade Council vs Charles D. Baker, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts and Philmore Anderson III in his official capacity as a State Purchasing Agent for the Commonwealth of Massachusetts.*

regime-but at nationals of third countries that may do business with Burma.

Finally, the European Union expressed its concern that the failure to enjoin the Massachusetts Burma Law will lead to the proliferation of US State and Local sanctions laws and stated that at least six US municipalities had enacted measures purporting to regulate business activities in Nigeria. Tibet or Cuba and 18 States and local governments had considered or "were considering similar measures restricting business ties to Switzerland, Egypt. Saudi Arabia, Pakistan, Turkey, Iran North Korea, Iraq, Morocco, Laos, Vietnam, Indonesia or China". It emphasized that "the United States and the European Union had expended considerable effort in seeking to resolve their differences over U.S. extraterritorial economic sanctions" and that "this effort has not yielded progress on the issue of extraterritorial sanctions" imposed by state and local governments, a shortcoming that is of considerable concern to the U.S." It went on to recall that in "recognition of this danger of proliferation of sanctions measures, the EU-US agreed at the EU-US Summit on May 18, 1998 on a set off principles covering the future use of sanctions in the context of the Transatlantic Partnership on Political Co-operation. this included agreeing that the EU and the US "*will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators* and that such sanctions will be targeted directly and specifically against those responsible for the problem.[20]

The validity of punitive measures against Myanmar adopted by state and municipal governments and ordinance in the United States have been analyzed under various provisions

[20] See the *Amicus Curiae* Brief of August 13. 1998 filed by the European Union in support of Plaintiff National Foreign Trade Council in the *National Foreign Trade Council vs Charles D. Baker and Philmore Anderson III.* Emphasis Added.

of the United States Constitution and it has been said that such local measures are constitutionally infirm.[21] It has been pointed out in this regard that "Article VI of the Constitution provides that the laws and treaties of the United States are 'the Supreme Law of the Land' and prevail over, or preempt, state and local enactments. Thus any local law that purports to regulate or govern a matter explicitly covered by federal legislation is preempted, even if it is an area otherwise amenable to state regulation".[22]

The Banana War

The United States had last year accused the European Union of not complying with a ruling of the World Trade Organization (WTO) calling upon it to change its banana import regime, which had been ruled illegal because it favoured the produce of African, Caribbean and Pacific States (hereinafter called the ACP States), and had discriminated against imports of fruit marketed mainly by United States companies in Latin America". The European Union on its part believes that it has rectified the situation by making changes to its regime with effect from January 1, 1999 but the amendments are seen as being derisory by the United States, which has argued that it is within its rights to retaliate.

In October 1998 the United States Administration announced a series of steps that would lead to the imposition of trade sanctions under Section 301 of the Trade Act of 1974 against the European Communities by March 1999 in retaliation for what the US claims to be an incorrect implementation of the DSB[23] recommendations in the bananas

[21] David Schmahmann & James Finch: "The Unconstitutionality of State and Local Enactments in the United States Restricting Trade Ties With Burma "*Vanderbilt Journal of International Law* Vol.30, (1997).

[22] Ibid.

[23] The Complainants in the dispute before the dispute Settlement Body of the WTO had included Ecuador. Guatemala, Honduras, Mexico and the United States of America.

dispute. The United States of America had announced retaliatory 100% tariffs on 520 million dollars worth of imports of EC products should it find that the EC had failed to implement the DSB recommendations. A unilateral determination by the US Administration would violate the fundamental obligations of the WTO's Dispute Settlement Understanding. A unilateral decision to restrict imports from the EC would also violate substantive obligations such as those incorporated in Article I. II and XI of GATT. 1994 An overwhelming majority of the WTO's members [24] are opposed to United States embarking on unilateral action on the issue.

The threat to retaliate against the EU results from a unilateral judgment that the EU has not complied with a WTO ruling "condemning" EU banana import regime and the conflict has raised serious issues of interpretation of WTO laws and brought to light ambiguities in the WTO rule book.

Fifty-Third Session of the General Assembly

The General Assembly at its recently concluded 53rd Session had expressed its concern at the continued promulgation and application of 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. It took note of the declarations and resolutions of different intergovernmental forums, bodies and Governments that expressed the rejection by the international community and public opinion of the promulgation and application of such regulations and had reiterated its called to all States to refrain from promulgating and applying laws and measures the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons, "in conformity with their obligations under the Charter of the

[24] At present 133 States are members of the World Trade Organization.

United Nations and international law, which *inter alia* reaffirmed the freedom of trade and navigation".[25]

Comments and Observations

As the Catalog of New US Unilateral Economic Sanctions for Foreign Policy Purposes 1993-96 revealed, the United States is resorting increasingly to unilateral economic sanctions against a broad range of countries for a wide variety of reasons. Apart from the increase in the instances of unilateral imposition of sanctions has been the wrinkle of "secondary boycott measures, which extended the reach of the United States law to oversees companies doing business in the targeted countries". the unilateral imposition of sanctions is at the core of the problem of extraterritorial application of national legislation.

Owing to its extraterritorial reach the imposition of unilateral sanctions for foreign policy purposes has often caused a new set of commercial problems with allies as it did in the instance of both the Helms-Burton Act and the D'Amato-Kennedy Act. The abrogation, annulment or revocation of extraterritorial provisions and Acts would require a new Act.

Just as the validity or constitutionality of municipal, local and state laws must be tested with the framework and parameters of the Constitution of that State the *vires* of the national legislation which imposes unilateral sanctions and has extraterritorial reach must be examined in the context of the provisions of the charter of the United Nations and other international instruments which that State has negotiated and ratified. The preliminary study prepared by the Secretariat had emphasized this point and had sought to demonstrate that national legislation with extraterritorial reach contravenes not

[25] See General Assembly Resolution 53/4 of 22 October 198 on the "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba".

one or two but several norms and principles of contemporary international law.

Many of these international instruments had been negotiated, concluded and brought into force to establish a rule based system and to promote the rule of law in international relations. This is particularly true to international economic and trade relations where such legislation poses a challenge to the avowed objective of the international community to establish a rule based system to ensure stability and predictability in international trade relations. National legislation with extraterritorial reach, explicit implicit, undermines the further redevelopment and growth of the rule based system that the members of the international community is endeavouring to evolve. Such legislation apart from sapping the principle of rule of law in inter-state relations poses a challenge nay a threat, to the avowed objective of the international community to make international law the language of international relations in the next millennia.

V. REPORT ON THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS FIFTIETH SESSION

(i) Introduction

The International Law Commission (ILC) established by General Assembly Resolution 174 (III) of 21 September 1947 is the principal organ to promote the progressive development and codification of international law. The Commission held the first part of its fiftieth session in Geneva from May 12 to June 12, 1998 and the second part in New York from July 20 to August 14, 1998. There were six substantive topics on the agenda of the aforementioned Session of the Commission. These included:-

(I) State Responsibility;

(II) International Liability for injurious Consequences Arising Out of Acts Not Prohibited by International Law;

(III) Reservations to Treaties;

(IV) State Succession and its Impact on the Nationality of Natural and Legal Persons;

(V) Diplomatic Protection; and

(VI) Unilateral Acts of States

It may be recalled that the General Assembly at its 52nd Session had, by operative paragraph 3 of its resolution 52/156 of December 15, 1997, *inter alia*, recommended that the International Law Commission continue its work on the topics in its current programme.

The Commission at its fiftieth Session considered all the above mentioned items and some notes and comments on these topics may be found in the latter part of this Report.

As indicated in the report on the work of its forty-ninth session the first part of the Fiftieth session of the ILC session was devoted to discussion of the various reports, whereas the second part, held in New York was used for the adoption of draft articles with commentaries and of the report of the Commission.

As regards "State Responsibility", the Commission commenced the task of second reading of the draft articles on the basis of the comments of member States on the draft articles as adopted by the Commission on first reading and the first report of the Special Rapporteur, Mr. James Crawford The first report of the Special Rapporteur dealt with general issues relating to the draft articles as adopted on first reading, the distinction between "crimes" and "delictual responsibility, and articles 1 to 15 of Part One of the draft articles. The Commission established a Working Group to assist the Special Rapporteur in the consideration of various issues during the second reading of the draft articles. The Commission decided to refer draft articles 1 to 15 to the Drafting Committee. The Commission took note of the report of the Drafting Committee on draft articles 1, 3, 4, 5, 6, 7, 8, *bis*. 9, 10, 15, 15 *bis* and A. The Commission also took note of the deletion of the text of 6 draft articles viz. 2, 6 and 11 to 14. For details of the draft articles as adopted by the Drafting Committee of the ILC see *Part I* of the present report.

The Commission has invited the views of the General Assembly on whether with respect to Part One of the draft articles, the conduct of an organ of a State is attributable to that State under draft article 5, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct? As regards Part Two of the draft articles, the Commission has sought guidelines as to the appropriate balance to be struck between the elaboration of general principles concerning reparation and the more detailed provisions relating to compensation?

As regards "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", the Commission after consideration of the

First Report of the Special Rapporteur, Dr. P.S. Rao, adopted on first reading a set of 17 draft articles on Prevention of Transboundary Damage from Hazardous Activities. The Commission decided to transmit the draft articles together with the commentaries thereon, as adopted on first reading, to Governments for comments and observations. The details of the draft articles as adopted on first reading by the ILC are set out in *Part II* of the present report.

The Commission has referred to the General Assembly two issues related to the "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law". The issues referred are (i) for the purpose of developing and applying the duty of prevention, what kind of regime should be made applicable to activities which actually cause harm and (ii) in a prevention regime whether the duty of prevention should be treated as an obligation of conduct or failure to comply and be met with suitable consequences under the law of State responsibility or civil liability or both where the state of origin and the operator are both accountable for the same? If the answer to the question is in the affirmative, what type of sanctions are appropriate or applicable?

The first of these issues is based on the fact that the Commission intended to separate activities which have a risk of causing significant harm from those which actually cause such a harm for the purpose of developing and applying the duty of prevention to the latter type of activities. It is generally understood that the duty of prevention is an obligation of conduct and not of result and non-compliance with duties of prevention in the absence of any damage actually occurring would not in itself give rise to any liability. The Commission having decided to recommend a regime on prevention, separating it from a regime of liability, it has to address the question whether the duty of prevention should be treated as an obligation of conduct or failure to comply be visited with suitable consequences under the law of State responsibility or civil liability or both.