

## **EXTRA-TERRITORIAL APPLICATION OF NATIONAL LEGISLATION: SANCTIONS IMPOSED AGAINST THIRD PARTIES**

### **(i) Introduction**

The subject item "Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties" was placed on the provisional agenda of the 36<sup>th</sup> 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. The Explanatory Note submitted to the AALCC Secretariat by the Government of the Islamic Republic of Iran had enumerated the following four major reasons for inclusion of this item on the agenda (i) that the limits of the exception to the principle of extraterritorial jurisdiction were not well established; (ii) that the practice of States indicates that they oppose the extraterritorial application of national legislation; (iii) that extraterritorial measures violate a number of principles of international law; and (iv) that extraterritorial measures affect trade and economic cooperation between developed and developing countries and also interrupt cooperation among developing countries.

The Explanatory Note 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". Accordingly a preliminary study was prepared by the Secretariat, and considered at the 36<sup>th</sup> Session held at Tehran, in 1997. The study had pointed out that in the claims and counter claims that had arisen with respect to the exercise of extraterritorial 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 and 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 has been expressed on the promulgation and application of municipal legislation whose extraterritorial aspects affect the sovereignty of other States.

The preliminary study had pointed out that while a growing number of other States have applied their national laws and regulations on extraterritorial basis for such as the General Assembly of the United Nations, the Group of 77, the Organization of Islamic Countries, the Inter-American Juridical Committee and the European Economic Community had in various ways expressed concern about promulgation and application of laws and regulations whose extraterritorial effects affect 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.

This study, 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), furnished 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 concern had been expressed 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.

It also drew attention to the opinion of such bodies, as the Inter-American Juridical Committee, the Juridical Body of the Organization of American States<sup>1[1]</sup> and the International Chamber of Commerce.<sup>2[2]</sup>

It also demonstrated that the topic covered the political, legal, economic and trade aspects of inter-State trade relations. It recalled in this regard that the AALCC Secretariat study<sup>3[3]</sup> 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.

The Secretariat brief pointed out that the Declaration<sup>4[4]</sup> and Programme of Action<sup>5[5]</sup> adopted by the Sixth Special Session of the General Assembly, the Charter of Economic Rights and Duties of States, 1974,<sup>6[6]</sup> the United Nations Convention on Law of the Sea, 1982 and several other international instruments retain many of the traditional aspects of sovereignty. The economic sovereignty provisions of these instruments are re-affirmations of the rights and interests in natural resources within the expanded definition of State's territory.

The Secretariat study had submitted that it might, perhaps, be necessary to delimit the scope of inquiry into the issue of extraterritorial 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 44<sup>th</sup> Session of the

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1[1] For details see 35 *International Legal material* (1996) p.1322.

2[2] Dieter Lange And Gary Borne (Eds.):*The Extraterritorial Application of National Laws* (ICC Publishing S.A. 1987).

3[3] AALCC Secretariat Study on "Elements of a Legal instrument on Friendly and Good Neighbourly Relations Between States of Asia, Africa and the Pacific" Reprinted in *AALCC Combined Report of the Twenty Sixth to Thirtieth Sessions* (New Delhi, 1992), p.192.

4[4] GA Resolution 3201, of May 1, 1974 Sixth Special Session.

5[5] GA Resolution 3202, of May 1, 1974 Sixth Special Session.

6[6] GA Resolution 3281 XXIXth Session.

International Law Commission, the Planning Group of the Enlarged Bureau of the Commission had established a Working 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 Extraterritorial Application of National Legislation.

An outline on the topic "Extraterritorial 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 Trans-National Injury, Draft Code of Crimes and Establishment of an International Criminal Jurisdiction".<sup>7[7]</sup>

The Secretariat 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 to carry out a comprehensive study concerning the 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 could consider sharing their experiences, with the Secretariat, on this matter.

### **Thirty-ninth Session: Discussions**

The **Deputy Secretary General Mr. Mohammad Reza Dabiri** while introducing the item recalled that the same was placed on the work programme of the AALCC following a reference made by the Government of the Islamic Republic of Iran. Tracing the work of the 36<sup>th</sup> Session of the Committee, he said that the session had recognised the significance, complexity and serious implications of the topic and had requested the convening of a seminar. Accordingly, a seminar entitled "Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties" was convened in Tehran in January 1998. He stated that the Report of the Seminar was considered at the 37<sup>th</sup> Session of Committee. He informed the plenary that the Secretariat of the Committee had printed the seminar proceedings following the receipt of a grant from the Government of the Islamic Republic of Iran.

He also stated that 36<sup>th</sup> and 37<sup>th</sup> Session of AALCC had witnessed delegates' views that imposition of extra territorial national laws that interfere in the internal affairs of states violate the sovereignty and legitimate economic interests of States. The 37<sup>th</sup> Session, he recalled had requested the examination of the issue of executive orders and accordingly the Secretariat brief on the topic had a looked into the same studying a few extraterritorial local acts. The Burma Massachusetts Law of 1996 which was one such local law.

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<sup>7[7]</sup> See A/CN.4./454, p.71.

The Deputy Secretary General further added that the 38<sup>th</sup> session of the Committee held in Accra too had condemned the extra territorial application of national legislation as it violated sovereignty of a state. He brought to the notice of the plenary the recently concluded 54<sup>th</sup> session of the General Assembly which had adopted a resolution entitled "Necessity of ending the economic, commercial and financial embargo against Cuba". This resolution had urged all States that applied laws and measures of an extra territorial nature to repeal them, as they affected the sovereignty of a State and freedom of trade. He expressed the view that the resolution had clearly brought to fore the fact that extra territorial laws were not in conformity with a state's obligation under the United Nations Charter and international law. While airing these views he felt that the discussions on the item would determine the course of the future work on the topic.

The **Delegate of Iraq** while appreciating the importance of the topic, commended the efforts of the AALCC for undertaking the study. Expressing the view that some states had used international law for their personal ends, he added that this amounted to violation of the internal and external sovereignty. Further, extra territorial application of laws, he felt affected the economic sovereignty of a state. Referring to the plight of his own country, he said the sanctions imposed had ruined the economy and had killed number of helpless children and women for want of food and health care. Recalling a number of General Assembly resolutions, he called for the immediate upliftment of sanctions imposed against his country. He expressed hope that the AALCC would continue its study on the topic covering the economic implications of sanctions against developing states.

The **Delegate of Myanmar** recalled that the concept of sovereignty had stood the test of time, right from the period of renaissance to the present age. While adding that, contemporary international relations was governed by international law as enshrined in the UN Charter. Article 2(7) of the Charter, he stated provided that one state should not interfere in the internal affairs of another state. Commending the work of the AALCC on the topic, he recalled that the General Assembly resolution with reference to sanctions imposed against Cuba, had unequivocally condemned application of extra territorial laws against any country. He also expressed the view that the Secretariat document on the topic, had aptly brought out the fact that extra territorial measures violated several principles and accepted norms of international law.

The Delegate further added that his country had become a target of such extra territorial laws, including the executive orders. These laws he stated affected the sovereignty of a state to conduct peaceful and normal economic relations. The AALCC, as a Asian African legal body, he said should continue to study the implications of extra territorial laws on its Member States.

The **Delegate of the Islamic Republic of Iran** recalled that the item was placed on the agenda of the Committee upon the request of his Government at the 36<sup>th</sup> Session of the Committee held at Tehran in 1997. The rationale why the item was placed on the agenda, he added was the practice of the States, which clearly showed that they opposed extraterritorial application of national legislation. These extraterritorial measures, violated a number of well established principles of international law, besides affecting normal trade and economic relations amongst states.

The delegate recalled that at the seminar on the topic held in Tehran, 1998 there was a general agreement that the validity of any unilateral imposition of economic sanctions through extraterritorial application of national legislation must be tested against the accepted norms and principles of international law. These principles he averred included those of sovereignty and territorial integrity, sovereign equality, non-intervention, self-determination and freedom of trade.

Referring to the recently concluded 54<sup>th</sup> Session of the General Assembly, he said the resolution entitled "Necessity of ending the economic, commercial and financial embargo against Cuba" had for the eighth consecutive year, emphasized the need to end the embargo against Cuba. In this regard, he said that the same resolution had urged all States that applied extraterritorial measures to repeal them at the earliest, as such laws affected the sovereignty of States and the freedom of trade and navigation and also violated the UN Charter provisions.

He also added that during the discussion on the topic in the General Assembly, the Delegate from Finland (representing the European Union) had voiced strong opposition to the imposition of secondary boycotts and legislations with extraterritorial effects. Concluding his statement, the delegate requested the AALCC to take similar stand, supporting the extraterritorial laws.

The **Delegate of the People's Republic of China** also expressed the view that extraterritorial application of national laws violated the principle of sovereignty. The right to complete sovereignty, he said, included freedom to chalk out one's path of economic development of every country. He expressed the view that his government supported peaceful settlement of disputes without interference in the internal affairs of a State. While commending the AALCC work on the subject, he supported the General Assembly resolution condemning sanctions against Cuba.

The **Delegate of Sudan** highlighting the importance of the subject condemned the use of extra territorial measures in forms of sanctions against a state. He recalled that the Committee at its 36<sup>th</sup> session had prepared a study, which had brought out a number of principles of international law, which were violated upon the imposition of extra territorial measures. These essential principles, he said were those of sovereignty, non intervention, peaceful settlement of disputes and freedom of trade. Relating the experience of his own country, he expressed the view that executive orders imposed by countries were also violative of the spirit of the UN Charter and in particular Articles 2(7). Commending the good work of the Committee, he expressed the hope that the item would continue to be studied, as it was in the interest of all developing countries.

**(ii) Resolution on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties**

**(Adopted on 23.2.2000)**

**The Asian-African Legal Consultative Committee at its thirty-ninth Session**

**Having considered** the Secretariat brief on the Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties as set out in Document No. AALCC/XXXIX/CAIRO/2000/S.5;

**Having heard** the statement of the Deputy Secretary General as well as interventions of the Member States;

**Recognizing** the significance, complexity and the implications of the Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties;

**Reaffirming** its adherence to the rules of international law, expresses concern that the imposition of unilateral sanctions on Third Parties is not in conformity with the United Nations Charter and accepted principles of international law;

1. **Requests** the Secretariat to continue to study legal issues related to the Extraterritorial 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 place the item "Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties" on the agenda of its fortieth session.

**(iii) Secretariat Study: Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties**

**Reasons for Imposition of Unilateral Sanctions**

The reasons for the imposition of unilateral sanctions have ranged from boycott activity<sup>8[8]</sup> to issue of worker rights<sup>9[9]</sup> and have hitherto included such other issues as communism,<sup>10[10]</sup> transition to democracy,<sup>11[11]</sup> environmental activity, expropriation,<sup>12[12]</sup> harboring war criminals, human rights<sup>13[13]</sup>, market reform, military aggression, narcotics activity, political stability; proliferation of weapons of mass destruction and terrorism.<sup>14[14]</sup> The Federal Legislation invoked to impose unilateral

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<sup>8[8]</sup> See the Foreign Relations Act, 1994.

<sup>9[9]</sup> See the Andean Trade Preference Act.

<sup>10[10]</sup> Aimed at Cuba and North Korea. See the Cuba Regulation and the North Korea Regulations.

<sup>11[11]</sup> See the Cuban Democracy Act of 1992.

<sup>12[12]</sup> The Helms-Burton Act, 1996.

<sup>13[13]</sup> 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.

<sup>14[14]</sup> The Iran Libya Sanctions Act, 1996. The former Representative Toby Roth criticized the Iran-Libya Sanctions Act as "good politics... but bad law. It's only effect he said "so far had been to unify the European Union, all 15 members, against the U.S. policy toward Iran and Libya".

sanctions and/or impose secondary boycott have included the Andean Trade Preference Act; the Anti-Terrorism and Effective Death Penalty Act, 1996 (Antiterrorism, 1996); The Arms Export Control Act (AECA); The Atomic Energy Act; the Cuban Democracy Act, 1992; The 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 ("E-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;<sup>15[15]</sup> 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 Spoils 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, terminating sales of defense 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 State Bank loans to the Government of Pakistan, terminating sales of defense 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 U.S. 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

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<sup>15[15]</sup>The uncertified drug producing/transit countries are Afghanistan, Burma, Colombia, Iran, Nigeria and Syria.

1997<sup>16</sup> 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<sup>17</sup> was characterized by the United States District Court of the State 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.<sup>18</sup>

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 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 "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 is targeted not at the 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

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<sup>16</sup>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.

<sup>17</sup>See Massachusetts Act of June 25, 1996. The State of Massachusetts admitted before the District Court of Appeal that the Statute "was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policy".

<sup>18</sup>See the judgement 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*.



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 Cooperation. This included agreeing that the EU and the U.S. "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".<sup>19</sup>[19]

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 of the United States Constitution and it has been said that such local measures are constitutionally infirm.<sup>20</sup>[20] 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 pre-empt, state and local enactments. Thus any local law that purports to regulate or govern a matter explicitly or implicitly covered by federal legislation in pre-empted, even if it is an area otherwise amenable to state regulation".<sup>21</sup>[21]

## **(b) The Banana War**

The United States had in 1998 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 (the ACP States), and had discriminated against imports of fruit marketed mainly by United States companies in Latin America.<sup>22</sup>[22] The European Union on its part believed that it had rectified the situation by making changes

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<sup>19</sup>[19]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.

<sup>20</sup>[20]David Schmahmann and 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).

<sup>21</sup>[21] Ibid.

<sup>22</sup>[22]The complaints in the dispute before the Dispute Settlement Body of the WTO had included Ecuador, Guatemala, Honduras, Mexico and the United States of America.

to its regime with effect from January 1, 1999 but the amendment is seen as being derisory by the United States, which argued that it was 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 recommendations in the bananas 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<sup>23</sup>[23] are opposed to United States embarking on unilateral action on the issue.

The threat to retaliate against the EU results from a unilateral judgement 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.

### **Thirty-sixth Session of the AALCC**

In the course of deliberations on the item at the 36<sup>th</sup> Session of the AALCC a number of views were expressed. 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<sup>24</sup>[24] which *inter alia* recognized the right to development. It was pointed out that unilateral sanctions were violative of the principle of non-intervention.

A view was also expressed that national laws having extraterritorial 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.

Another view was that extraterritorial application of national legislation would affect international trade. It was felt that in a changing scenario of globalization of trade and privatization of economies extraterritorial application of national laws would affect interdependence.

It was stated that extraterritorial application of national legislation 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

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<sup>23</sup>[23] At present 133 States are members of the World Trade Organization.

<sup>24</sup>[24] The World Conference on Human Rights held in 1993 had *inter alia* 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.

disturb the North-South relations, the AALCC Member States were called upon to voice their protest.

One delegate recalled the United Nations General Assembly's '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 extraterritorial 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.

It was observed that the Helms-Burton Act relating to trade with Cuba, Kennedy - D'Amato Act relating to Libya, Iran and Iraq are examples of extraterritorial 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 extraterritorial application. These extraterritorial 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, and 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 member 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 extraterritorial 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 extraterritorial 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.

It was also stated 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.

A delegate pointed out that the aspect of unilateralism is slightly different from extra-territoriality 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 extra-territoriality, were the basis on which we were working". There is good room to deal with extraterritorial jurisdiction issues, 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 extra-territoriality, 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 36<sup>th</sup> Session (Tehran, 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 Extra-territorial 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 Committee requested the Secretary General to convene a seminar or meeting of experts and, to ensure a scholarly and in-depth discussion, and to table its report at the next session of the Committee.

### **Seminar on the Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties, Tehran, January, 1998**

In fulfilment of the mandate of the 36<sup>th</sup> Session the AALCC Secretariat organized, with the financial assistance of the Government of the Islamic Republic of Iran, a two-day seminar in Tehran in January 1998. A group of experts from Asia and Africa and experts from outside the region were invited.

A Background Note prepared by the Secretariat for that seminar included an overview of the United States: Iran and Libya Sanctions Act of 1996. Although references were also made to some of the earlier US laws such as the anti-trust legislation, the Regulations concerning Trade with USSR, 1982, and the National Defense Authorization Act, 1991. The legality of the two 1996 US enactments (the Helms Burton Act and the Kennedy - D'amato Act) were examined in terms of their conformity with the peremptory norms of international law; the law relating to counter-measures; the law relating to international sanctions; principles of international trade 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 non-convenience* and other aspects of extraterritorial enforcement of national laws.

The deliberation touched 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. References were made in this regard to the response of the Inter-American Juridical Committee and the European Union and the measures discussed included '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 exemptions/waivers in application of the projected sanctions, negotiations for settlement of disputes, use of WTO avenues and measures to influence the drafting of legislation in order to prevent its adverse extra territorial impact.

There emerged 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 between the prescriptive jurisdiction and the enforcement jurisdiction of every state; and (iii) the applicability of WTO disputes settlement procedure to resolve disputes relating to Helms-Burton Act and the Kennedy D'Amato Act in their extraterritorial application.

A number of proposals were advanced by the participants for the consideration of the AALCC. The proposals with regard to the future work on the subject include (i) further study on all aspects of the subject and (ii) the formulation of principles.

It was suggested that AALCC undertake a further study of (i) unilateral sanctions, counter measures and disputes settlement procedures offered by the WTO group of agreements; (ii) the concept of abuse of rights in international law, preferably under the presiding norm of good faith, with context of exercised extra territorial application of national laws in pursuit of national policy objectives; and (iii) the impact of unilateral sanctions on trade relations between States.

On the formulation of principles/rules relating to the question of the extra territoriality of national legislation it was *inter alia* proposed that : (i) the AALCC along with International Law Commission undertake the formulation of principles and rules relating to *extraterritorial application* of national laws in all its implications; and (ii) there is need for a second look at the ILC formulation of principles concerning counter measures vis-a-vis sanctions.

It was suggested that the ILC formulation of the provisions relating to counter measures seems to leave this aspect open. A State, it was said, may violate (a) an obligation *erga omnes* or (b) an obligation *erga omnes* but injuring another state, or (c) an obligation vis-a-vis another state. Which of these situations would give rise to counter measures? A clarification on this issue will help determine the permissible counter measures, and the relationship between them and sanctions. The view was also expressed that the relationship between them and sanctions. The view was also expressed that the relationship between counter measures and other peremptory norms of international law such as non intervention and peaceful settlement of international disputes needs to be further examined.

### **AALCC's Thirty-seventh Session**

The Committee at its 37<sup>th</sup> Session (New Delhi, 1998) considered the Report of the above Seminar. The Report had pointed out that the discussions at the Seminar had revolved around a broad spectrum of politico-legal issues and focused on a broad range

of legal and policy aspects of the subject mainly in relation to two United States enactments, namely the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, 1996 (commonly referred to as the Helms-Burton Act), and the United States Iran and Libya Sanctions Act 1996, (generally referred to as the Kennedy D'Amato Act).

The Secretariat had in the intervening period since the 37<sup>th</sup> Session (New Delhi, 1998) with the financial assistance of the Islamic Republic of Iran published the Report and proceedings of the Tehran seminar. The Report incorporates the Papers prepared for and oral presentations made by the Group of Experts invited to the Seminar. Apart from the inaugural and closing statements made by the then President, Hon'ble Dr. M. Javad Zarif, and the Secretary General, the Report includes the full text of the Report of the Rapporteur.

### **Thirty-eighth Session of the AALCC**

The Deputy Secretary General Mr. Mohammad Reza Dabiri while introducing the AALCC paper on the topic at the thirty eighth session of the AALCC stated that the Secretariat study was more broad based where apart from looking into municipal legislation, the document considered and surveyed the local acts of USA, which sought to impose unilateral sanctions. He added that the Secretariat brief had also enunciated four categories of executive orders and had expressed the hope that the session would guide the Secretariat on the future course of his topic. On the issue of local acts of States having extra territorial effects, he felt that as a few of them had been declared *ultra vires* of the constitution of the land, their validity could also be questioned as international law which guides relations between States requires conformity with certain basic norms.

Furthermore, he was of the view that the imposition of unilateral sanctions or countermeasures that ensure must be amicably settled without resulting in economic difficulties to States. In this regard, he mentioned the Banana dispute between the US and EU, which had brought about a trade conflict between States and also questioned the non-discriminatory rule based regime of the WTO.

The Delegate of the Islamic Republic of Iran felt that the changing world scenario with increased globalization and liberalization called for respect of rule of law and friendly relations among States. He also highlighted the fact that the use of force as an instrument of national policy is prohibited under international law. On the issue of legality of unilateral sanctions, he said that the Security Council alone was authorized to impose sanctions, in furtherance of its role to maintain or restore international peace and security.

The Delegate of India felt that the topic touched areas relating to political, legal and trade aspect of international relations. Extra territorial law, in her view, violated Third States interests on terms of international trade, besides issues of human rights. She expressed satisfaction that the Secretariat had chosen to focus attention on executive order or presidential determinations as her country had been made a target on many such matters.

The Delegate of Myanmar expressed concern that despite all their efforts, some countries such as the United States had imposed unilateral sanctions against them. Commenting on the Massachusetts Burma (Myanmar) Law of 1996, he said the Legislation was already struck down by a District Court, which held that the State of

Massachusetts was "infringing on the federal government's power to regulate foreign affairs". He expressed the hope, that the AALCC as a legal body, could play an important role in pointing out the illegality of the US action in imposing unilateral sanctions.

The Delegate of the People's Republic of China believed that disputes between States should be settled peacefully in accordance with the principle of mutual respect for each other's sovereignty and non-interference in each other's internal affairs and that it was not advisable to resort to frequent sanctions which would lead to new disputes and friction.

### **The General Assembly: Fifty-fourth Session**

The General Assembly at its recently concluded fifty-fourth session for the eighth consecutive year asserted the need to end the United States imposed embargo against Cuba. It adopted a resolution entitled, "Necessity of ending the economic, commercial and financial embargo against Cuba". The resolution urged all States that applied laws and measures of an extraterritorial nature that affected the sovereignty of States and freedom of trade and navigation to repeal or invalidate them as soon as possible. The text further reiterates the Assembly's call for States "to refrain from promulgating and applying such laws and measures, in conformity with their obligations under the Charter and international law".

A number of statements were made during the course of the debate on the topic in the Assembly. Statements were made in the debate and in explanation of vote by the representatives of Cuba; Mexico, Myanmar, Lao People's Democratic Republic, Libya, Argentina, Vietnam, Syria, Mali, Zambia, Malaysia, Indonesia, Namibia, Jamaica, United Republic of Tanzania, Venezuela, Russian Federation, Sudan, Iraq, South Africa, Iran, Finland (on behalf of the European Union); United States; Belarus; Saint Vincent and the Grenadines, Japan, Canada, Republic of Korea, Uruguay, Brazil, China and Norway. Twelve AALCC Member States spoke on the occasion.

Introducing the text, the representative of Cuba said that despite seven previous resolutions in the same vein, the United States continued to engage in pressures and manoeuvres intended to thwart the will of the Assembly. He drew particular attention to the Helms-Burton Act, and its extraterritorial provisions. He said for nearly four decades, the blockade had caused illnesses, death, pain and suffering to millions of Cubans.

The Representative of the United States expressed the view that the said embargo was strictly a matter of bilateral trade policy and not an appropriate matter for the Assembly to discuss.

The Representative of Finland (speaking on behalf of the European Union) reaffirmed the Union's strong opposition to the imposition of secondary boycotts and legislation with extraterritorial effects. She added that the United States had made an agreement with the Union not to adopt such extraterritorial measures in future.

The Representative of Myanmar while calling for an end to the embargo noted that, despite the adoption of resolution 53/4 last year by an overwhelming majority of last year's General Assembly, the United States had further tightened embargo measures and introduced new ones, against the will of the international community. He added a view that Member State's promulgation and application of laws and regulations

that affected the sovereignty of other States and impaired freedom of trade and navigation violated the principles of international law.

The Representative of Libya was of the view that the United States should first respect international law before asking other States to do so.

Likewise, the Republic of Syria expressed the view that the principle of sovereignty was enshrined in the Charter. He furthermore felt that all Members of the United Nations, particularly a great Power like the United States should respect the Charter provisions.

Malaysia was of the view that, based on the adoption of past resolutions on the subject by an overwhelming majority, it was clear that the international community opposed the unilateral efforts by the United States to effect extraterritorial application of the Helms-Burton legislation. The Representative felt that the embargo was coercive and discriminatory and a clear breach of international law and the Charter provisions. He also expressed concern that the policies of the United States against a small developing country that posed no threat was a disturbing situation.

The Representative of Indonesia said his country had always been committed to justice, equality and peace and their promotion, which was a fundamental obligation under the UN Charter and international law. He also added that his country had consistently renounced the use of coercive measures as a means of exerting pressure in relations among Member States.

The Representative of Tanzania stated that it was a matter of concern that despite numerous resolutions of the Assembly the United States continued to apply the Helms-Burton Act, with its broad and unacceptable implications against Cuba.

The Representative of Sudan said the imposition of sanction was a violation of the sovereignty of States, and of the principles that should govern relations between large and small nations.

The Representative of Iraq expressed the view that extraterritorial application of national laws was a direct violation of international law and prevented those States from enjoying free trade with Cuba.

The Representative of Iran said that, despite the existence of a new international environment that was conducive to strengthening constructive dialogue and genuine partnership to promote further economic cooperation for development, the recourse to unilateral coercive economic measures was on the rise. He expressed the view that such measures impeded access by all countries to financial resources and hampered economic development and thereby global trade and international financial relations. He expressed the view that all countries should refrain from recourse to measures that were contrary to the Charter and to principles of international law. Sanctions, he added adversely affected social and economic development and the humanitarian situation of the target country. They also violated human rights. Furthermore, he stated that it was an undeniable right of every State to choose its own political, economic, social and cultural system. Calling for a peaceful settlement of disputes, he said that as the ultimate objective of the sanctions was to undermine international peace and security, and create political and economical instability in another country, the embargo should be lifted.



The Representative of Japan expressed concern over the extraterritorial application of jurisdiction arising from such legislation as the Helms-Burton Act.

The Representative of China, expressed concern over the United States lack of response to the international community's calls, and its refusal to implement relevant Assembly resolutions.

Apart from the AALCC Member States, a number of other States expressed the urgent need to do away with the extraterritorial application of national laws. Views were expressed that only sanctions adopted by the international community through relevant and representative organizations had legitimacy. Another view was that the twelfth Non-Aligned Movement Summit had reiterated the position that the international community must oppose any interference, intervention, economic coercive measures or extraterritorial laws that affected the sovereignty of other States.

On the basis of statements and the intervening explanations the Assembly adopted the resolution contained in document A/54/L.11 by a recorded vote of 155 in favour to 2 against, with 8 abstentions.

### **Comments and Observations**

It is increasingly observed that the United States continues to resort 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 overseas 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 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 within the framework and parameters of the Constitution of that State the *vires* of a national legislation which impose 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 one or two but several norms and principles of contemporary international laws. The important of these are the sovereignty of States and the principles of non-interference.

Many of these intentional 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 of 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 or implicit, undermines the further development and growth of the rule based system that the members of the international community is endeavouring to evolve. Such legislation apart from undermining the principle of rule of law in inter-state relations poses a challenge, if not a threat, to the avowed objective of the international

community to make international law the language of international relations in this millennium.

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25[1] For details see 35 *International Legal material* (1996) p.1322.

26[2] Dieter Lange And Gary Borne (Eds.): *The Extraterritorial Application of National Laws* (ICC Publishing S.A. 1987).

27[3] AALCC Secretariat Study on "Elements of a Legal instrument on Friendly and Good Neighbourly Relations Between States of Asia, Africa and the Pacific" Reprinted in *AALCC Combined Report of the Twenty Sixth to Thirtieth Sessions* (New Delhi, 1992), p.192.

28[4] GA Resolution 3201, of May 1, 1974 Sixth Special Session.

29[5] GA Resolution 3202, of May 1, 1974 Sixth Special Session.

30[6] GA Resolution 3281 XXIXth Session.

31[7] See A/CN.4./454, p.71.

32[8] See the Foreign Relations Act, 1994.

33[9] See the Andean Trade Preference Act.

34[10] Aimed at Cuba and North Korea. See the Cuba Regulation and the North Korea Regulations.

35[11] See the Cuban Democracy Act of 1992.

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- 36[12] The Helms-Burton Act, 1996.
- 37[13] 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.
- 38[14] The Iran Libya Sanctions Act, 1996. The former Representative Toby Roth criticized the Iran-Libya Sanctions Act as "good politics... but bad law. It's only effect he said "so far had been to unify the European Union, all 15 members, against the U.S. policy toward Iran and Libya".
- 39[15]The uncertified drug producing/transit countries are Afghanistan, Burma, Colombia, Iran, Nigeria and Syria.
- 40[16]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.
- 41[17]See Massachusetts Act of June 25, 1996. The State of Massachusetts admitted before the District Court of Appeal that the Statute "was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policy".
- 42[18]See the judgement 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*.
- 43[19]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.
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44[20]David Schmahmann and 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).

45[21] Ibid.

46[22]The complaints in the dispute before the Dispute Settlement Body of the WTO had included Ecuador, Guatemala, Honduras, Mexico and the United States of America.

47[23] At present 133 States are members of the World Trade Organization.

48[24] The World Conference on Human Rights held in 1993 had *inter alia* 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.

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