XI. VERBATIM RECORD OF THE SPECIAL HALF-DAY MEETING ON "EXTRATERRITORIAL APPLICATION OF NATIONAL LEGISLATIONS: SANCTIONS IMPOSED AGAINST THIRD PARTIES" HELD ON WEDNESDAY, 11 SEPTEMBER 2013 AT 2.00 PM

Her Excellency Dr. Neeru Chadha, President of the Fifty-Second Session of AALCO in the Chair.

President: The second half of the today we have "Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties". I will now give the floor to the Secretary-General of AALCO to introduce the topic.

Secretary-General: Thank you Madam President. Her Excellency Mrs. Neeru Chadha, Madam President of Fifty-Second Annual Session of AALCO;

Prof. Vera Gowlland-Debbas, Professor of International Law, Graduate Institute of International Studies, Geneva;

Prof. M. Gandhi, Professor and Executive Director, Centre for International Legal Studies, Jindal Global Law School; and,

Prof. R. Rajesh Babu, Associate Professor, Indian Institute of Management – Calcutta (IIM-C);

Excellencies, Distinguished Delegates, Ladies and Gentlemen;

It is my pleasure to welcome you all to the Special Half-Day Meeting on the topic of "Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties" organized by AALCO in collaboration with the Government of the India. At the outset I would like to formally welcome and thank all the panelists for taking time from their busy schedule to be a part of this discussion today and to provide us with their valuable insights into the topic at hand.

The agenda item entitled, "Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties" was first placed on the provisional agenda of the Thirty-Sixth Session at Tehran, 1997, following a reference made by the Government of the Islamic Republic of Iran. Thereafter the item had been considered at the successive sessions of the Organization. At last year's Fifty-First Annual Session of AALCO (Abuja, Nigeria) vide resolution AALCO/RES/51/S 6, the Secretariat was mandated to undertake a Special Study on the 'legal implications of the application of unilateral sanctions on third parties'. The Secretariat is proud to announce that this Study, entitled "Unilateral and Secondary Sanctions: An International Law Perspective", has been completed and would be released soon. An executive summary of the Study, as well as the contents page of the Study, has been distributed for your perusal.

Madam Chair, The topic of unilateral sanctions is of particular importance to AALCO as some of its Member States have been the targets of unilateral sanctions in the recent past. Indeed, the

topic is also of great relevance to the wider community of developing nations as well as this community exclusively finds itself the target of such sanctions.

'Sanction' as we all know, in international affairs means a penalty imposed against a nation to coerce it into compliance with international law or to compel an alteration in its policies in some other respect. Legitimacy of sanctions under international law is applicable only to 'multilateral sanctions', which are applied as per Chapter VII of the Charter of the United Nations. The Security Council is vested with the 'primary responsibility' for maintenance of international peace and security under the UN Charter.

Unilateral sanctions often refer to economic measures taken by one State to compel a change in policy in another State. The most widely used forms of economic pressure are trade sanctions in the form of embargoes and/or boycotts, and the interruption of financial and investment flows between sender and target countries. However, while the common conception of unilateral sanctions is as a tactic by which a State refuses to maintain trade relations with a country whose policies it disagrees with, or with whom it has a dispute, these unilateral sanctions also give rise to secondary sanctions. These secondary sanctions are imposed against third parties, either States or non-State entities, who are outside the jurisdiction of the sanctioning State, in order to prevent them from trading with the 'target State'. Essentially, this result in the sanctioning State enforcing its own domestically enacted legislations against entities that are outside of its territory and jurisdiction, thus resulting in a violation of some of the most basic principles of international law.

Your Excellencies, the Study conducted by the AALCO Secretariat deals in detail with the violation of international law by Unilateral and Secondary Sanctions and these violations can be broadly divided into 4 areas. The first chapter provides the genesis of the subject within AALCO; how sanctions have been listed under international law; and the political economy of sanctions regime. It also briefly describes the concepts like extraterritorial jurisdiction, unilateral sanctions, secondary sanctions and collective or multilateral sanctions.

Chapter 2 argues that Unilateral and Secondary Sanctions are impermissible under international law. The foundational principles that regulate and govern international relations are stated in Charter of the United Nations and the authoritative 1970 Declaration of Friendly relations and Cooperation among States. These include the principle of sovereign equality of states, principle of non-use of force, the principle of self-determination of people, the principle of non-intervention into the internal and external affairs of States, the principle of peaceful settlement of international disputes, the principle of cooperation among States, and the principle of fulfilling in good faith obligations assumed under international law.

Madam Chair, Chapter 3 attempts to highlight the adverse effects of financial sanctions that are imposed against financial institutions especially the central bank of an economy, which hampers the effective functioning of these institutions in developing countries. The role played by the central banks in achieving development in developing countries is very pivotal. The central bank has a crucial function towards developing the banking and financial system of the country in order for ensuring well-organised money and capital markets within the economies. The main

contention is that since central bank has major role and function in regulating financial system of country, they should be granted immunity and their properties shall not be attached.

Chapter 4 attempts to elaborate on the adverse effects and the illegality of unilateral and secondary sanctions in the context of the international trade agreements (be it multilateral or bilateral) and freedom of trade and navigation. It highlights the violation of the core principles of international trade law vis-à-vis multilateral trade agreements and bilateral trade treaties with analyzes the impact of the secondary sanctions on third parties with country-specific examples. The Chapter suggests possible measures for the developing countries against the imposition of unilateral and secondary sanctions; in other words, the possible legal options for the third countries to respond to the Secondary Sanctions.

Chapter 5 focuses on the list of recognized human rights that are adversely affected by sanctions is long and varied, but the discussion within this chapter is limited to some of the more pertinent rights, particularly in view of the fact that the targeted states are developing and third-world States. The rights discussed will include: the right to self-determination; the right to development; and, the right to life, with particular attention paid to the right to food and the right to health and medicine. While a classification of the importance of rights is obviously not possible, these particular rights were chosen for their relevance to the developing world and because of the massive problems caused by their violation.

Chapter 6 addresses the responses of the International Community on the Imposition of Unilateral and secondary Sanctions. This chapter deals with the opinions voiced by some of the international organizations, as well as their Member States in the forum provided by the organization through resolutions and statements of the organizations. This includes the United Nations General Assembly (UNGA), the Asian-African Legal Consultative Organization (AALCO), the Group of 77 (G-77), and the Non-Aligned Movement (NAM); which form part of in-depth analysis for evolving evidentiary customary international law.

The Study contends that unilateral and secondary sanctions is against international rule of law and promotes self-interest. Unilateral and secondary sanctions affect trade relations of the target country as well as its trading partners; affect the economic and banking system besides inflicting suffering and deprivation of basic human rights on innocent civilian population of the target countries. These sanctions disrupt international trade and navigation and are impermissible and unjustifiable under international law.

In addition to the theoretical discussions in the Study regarding international law and unilateral sanctions, illustration of the practical aspects and real-world consequences of unilateral sanctions regimes will be done through the use of the case study of certain countries who have been the targets of sanctions, primarily Iran.

Madam Chair, Your Excellencies, Ladies and Gentlemen, I hope I have been able to highlight the salient points relating to AALCO's Special Study and that I have given you a brief overview of some of the pertinent issues relating the topic of "Extraterritorial Application Of National Legislation: Sanctions Imposed Against Third Parties" in an effort to set the stage for the

discussion that is to follow. I have no doubt that the discussion that is to follow will be extremely illuminating. Thank you.

President: Thank you for introducing the study. We have four eminent panelists here today. Dr. Rohan Perera, who needs no introduction because he was a panelist for the morning session. Dr. Perera is a former member of the International Law Commission and the Chairperson of the Eminent Persons Group of AALCO. He would initiate this discussion by speaking on the subject "Sanctions and International Law".

Dr. Rohan Perera, Former Member of International Law Commission from Sri Lanka: Thank you Madam Chairperson.

Hon'ble Secretary-General, Distinguished Panelists and distinguished delegates, The task before me this afternoon is somewhat a difficult task because I am actually filling in the task entrusted to Prof. Dr. V.S. Mani who was supposed to have addressed the meeting on the question of sanctions and international law. Since he is unavoidably held up, I have been requested to make some remarks on this aspect, before the specific aspects are developed by the eminent experts who are on this podium.

By way of setting the back drop, the Secretary-General just referred to the legal framework; post-United Nations legal framework regulating inter-State relations – primarily the UN Charter and the 1970 Declaration on Principles of International Law Governing Friendly Relations and Cooperation amongst States, contained in General Assembly Resolution 2625. We also have the Draft Declaration on the Rights and Duties of States 1949, adopted by the International Law Commission. Although it is in draft form it is of considerable policy value. These agreements collectively constitute the edifice of core principles governing international relations and of course international peace and security. We all know what these core principles are: the principles of sovereign equality and territorial integrity, non-use of force, non-intervention in the internal affairs of states and international cooperation and solidarity.

It may be worthwhile to recall at this juncture the judgment of the ICJ in the *Nicaragua v. United States Case*, where the ICJ viewed that these fundamental principles exist as both charter provisions and as customary principles of law, and on this the ICJ was able to overcome the jurisdictional objections that was taken by the United States.

The objective of sanctions, to quote from this very useful publication by the Secretariat, "Unilateral and Secondary Sanctions: An International Law Perspective", is to "through the adoption of economic measures by one State to compel another to change its policies, economic or political". There is a very useful reference at page five of that publication to the definition of George Abi-Saab, which I am very sure my colleagues will further revert to and I just wish to extract from that which says:

> "the ultimate purpose being, as with all forcible execution or enforcement measures, precisely to bend its will in order to bring it back to a conduct compatible with legal prescriptions."

To bend the will of a State, the purpose is to bring it back, compatible with legal prescriptions. But for that there is an important qualifier (at page 6) which says that "more over this "determination" must be accompanied by a "decision" that these measures are taken in application of a decision or recommendation of a competent social organ. So here in international law we are not talking of unilateral measures by one State or by a collection of States, but a decision or a recommendation of a competent social organ. The 'competent social organ' to whom the international community has vested these power in terms of the Charter is the Security Council and may I quote from James Crawford, "The relationship between sanctions and Countermeasures" in a publication edited by Prof. Vera Gowlland–Debbas, who is with us today. Crawford expresses the view that:

> "it may be inferred from the definition of Abi-Saab that a "competent social organ" is not an individual State acting in its own right, or even a small group of States so acting. Instead it appears to refer to some organ authorized to act on behalf of a collective interest".

I think that is very important – to act on behalf of collective interest - such as, for example the Security Council. Imposition of national legislation having extra-territorial application is thus contrary to this norm and as such undermines the collective authority of the Security Council, which is the only competent social organ mandated by the international community to impose coercive measures. I think, in that it captures the essence of the position of international law in respect of recourse to unilateral sanctions.

Once again may I refer to the ICJ judgment in the *Nicaragua Case* in the context of compelling a change of policy. Now here just take a situation of unilateral sanction to compel a change of policy, and I think the words of the ICJ are very important at this point. The ICJ referred to the doctrine of rights and duties of States in the case of *Military and Paramilitary Activities in Nicaragua by the United States* and the Court upheld the sovereign right of every State, including Nicaragua, to pursue its own political system or its own economic policies free of intervention by any other State. So that forms an essential ingredient of the doctrine of rights and interests of States. One more word, when we are examining the question of unilateral sanctions, it is useful for us to bear in mind the reaction both within the International Law Commission and in the Sixth Committee to this whole institution of countermeasures in the context of State responsibility and more recently in the context of responsibility of International Organizations.

'Countermeasures' is a unilateral measure, that a State takes which would otherwise be unlawful if not for the prior illegal act by another State. Now, this was shrouded in so much of controversy. Given the element of potential for abuse for political purposes a number of safeguards and caveats had to be worked in and the case of State responsibility, a number of safeguards in the form of the test of proportionality – is the countermeasure in proportion to the original act of illegality? In the case of International Organizations, the Rules of the Organization must provide that it is not contrary to the Rule of the Organization to adopt countermeasures. So the international community even in that respect, when it has to take the legitimate countermeasures, is cautious and there are number of caveats that have been worked into these draft Articles. So this is something we need to bear in mind: that in institution of countermeasures, international community is aware that there can be an abuse of that practice.

Therefore, in our approach to unilateral sanctions, we have to bear in mind that the escalation of a situation through recourse to unilateral sanctions can pose a threat to international peace and security and in that process cause irreparable harm to fundamental principles of international law on which the international order is based today. I thank you Madam Chair.

President: Thank you Dr. Perera. Thank you for accepting to be a part of the panel on a short notice. I give the floor now to Professor Vera Gowlland-Debbas. She will take the discussion forward. She will be speaking on 'Sanctions and State Responsibility'. Professor Debbas is a professor of international law at Geneva School of International Studies, Geneva. Madam, you have the floor.

Prof. Vera Gowlland-Debbas, Professor of International Law, Graduate Institute of International Studies, Geneva: Thank you very much Madam Chair. I would particularly like to extend my thanks to AALCO and particularly its Secretary-General, Prof. Dr. Rahmat Mohamad for having extended to me his invitation to be here amongst you and I am really delighted to be here. I come from your part of the world, which means that I am particularly committed to the cause of AALCO, which is to see to it that the African and Asian States feed into the development of International Law so that ultimately it is not just left to a cross-Atlantic dialogue.

My topic is on State Responsibility. I will focus on individual State accountability for the imposition of economic measures and from the perspective of state responsibility that will also include human rights law. But this is from a particular perspective, in other words, what interests me is the relationship between unilateral measures and collective measures because we have seen increasingly the intertwining of these two areas. I think it is important to see how they relate. I would like to pick-up from Dr. Perera's intervention regarding, first of all, the importance of ILC Draft Articles on State Responsibility, which has in fact reserved the term "sanctions" for institutional measures adopted by international organizations, i.e. centralized collective measures, in particular the UN Security Council under Chapter VII. The ILC was obviously reflecting general international law on this matter. The ILC therefore distinguished between sanctions and unilateral measures, which are termed "countermeasures" as a decentralized reaction in response to particular conduct by a State.

Now it is evident that the progressive institutionalization of international society with the development of international organizations has had a very important impact on the enforcement of international law and this has gone, hand in hand, first with the progressive limiting of the use of force as we know in international relations, but also in the attempts to constrain countermeasures. The term, by the way, was first used in the 1979 Air Services arbitration between France and was meant to be a euphemism to distinguish it from forcible reprisals; in other words there was the detachment of countermeasures from the use of force.

We all know the negative impact of sanctions on trade and investment and the right to development; this has been underlined in numerous General Assembly resolutions. In the ILC, there is a controversy over whether to include countermeasures at all in the Articles on State Responsibility. They were recognized as liable to be abused in view of the fact of inequality between States. In other words, these were obviously measures which were open to some States

and not to all. So the ILC ended up by adopting the regime of countermeasures but accompanying this was a very strict framework in order to avoid abuse. Now the ILC was not the only efforts to constrain countermeasures. We have regulated through prior conditioning or subsequent control by international institutions. For example trade measures under the law of the WTO or the European Union.

Now, I will focus on the Draft Articles on State Responsibility. There is obviously a framework for unilateral measures but at the same time, and this is what I mean by the 'relationship between unilateral and collective', we've had an ongoing debate on how to also constrain collective measures. In other words, the Security Council has been challenged also in the field of Chapter VII. The idea was that the State could not escape by imposing unilateral measures by hiding behind the collective veil. In a way, the ILC efforts impacted on the collective measures. There was once a huge discussion in the ILC on whether to integrate the UN Mechanism into the ILC drafts but finally the ILC decided to exclude collective measures from the scope of State Responsibility. However, my point is they continued to be extremely relevant.

So what I'm focusing on, as I've said before, is unilateral measures adopted in parallel with collective measures and I would like to give, as a very good example, the economic measures adopted by the United States against Iran. I think it's important there, it provides us with a framework for analysis.

Now the first question to be asked about these sanctions; should they be seen as implementation or enforcement of Security Council sanctions?

If they are seen as implementation or enforcement, they will benefit from certain circumstances precluding wrongfulness. In other words, they will be regulated by Article 25 of the Charter, which imposes an obligation on States to carry them out, as well as Article 103 of the Charter, which states that the obligations under the Charter prevail over any other international agreement.

If they are not seen as implementation or enforcement, in that case the only justification will be lawful countermeasures, and if so what are the conditions that apply to them?

So, the implementation of Security Council measures I have no time to go into great detail but if we look at their legal basis, the web of legislative and executive measures imposed against Iran were first adopted in the 1980's and actually preceded the adoption of collective measures. And as you know, the US has a long history of using economic sanctions as a tool of foreign policy. This goes right back, in fact, to the 19th Century. So, it's obvious that these measures in the 1980s and beyond do not invoke the UN Participation Act, which the US adopted in order to carry out measures by the Security Council.

Instead, the measures generally have their basis in a number of domestic legislative acts including the 1977 International Emergency Economic Powers Act (IEEPA), which was first used in 1979 following the hostage case, as the legal basis to block Iranian assets and so on. Now the importance of that and in fact the first use of the UN Participation Act was in 2001 following the terrorist attack on 9/11, which blocked property and prohibited transactions with persons

determined to be supporting international terrorism, which included the freezing of assets of certain Iranian entities. But, interestingly, when the measures adopted by the Security Council against Iran in 2005 were taken, there was no mention of the UN Participation Act, so the point I'm making is that the legal basis is clearly US domestic legislation.

Now, the problem with using the Emergency Act that is the IEEPA, the US has to declare a state of national emergency, and I quote "an unusual or extraordinary threat to national security, foreign policy or economy of the United States". So this means that we are in a constant state of emergency, which means of course that there will be difficulty in challenging before domestic courts because the executive orders rely on its emergency situation, plus the fact that many of the documents in evidence are kept confidential.

Now as far as their content is concerned, and so far we've spoken of the legal basis, but as far as the content is concerned, it's not identical either to that decreed by the UN Security Council resolutions on Iran. The UNSC adopted resolutions in 2006 and 2010, which imposed targeted sanctions on Iran for its failures to comply with the International Atomic Energy Agency requirements and its continuing Uranium-enrichment activities. Now as I said I have no time to go into the details, but one thing that is extremely clear is that the Security Council was avoiding comprehensive sanctions. I will come back to it later on; comprehensive sanctions have been discredited after the sanctions against Iraq. So the Security Council imposed certain targeted measures on certain materials and technologies, on certain designated persons.

The US sanctions however, are far more comprehensive. So they go back a step and are a regression to comprehensive sanctions. The measures include, in particular, sanctions on the energy sector, which are based on new legislative acts, in particular the Iran Sanctions Act (ISA) adopted in 1996, which curbs international investment into Iran's energy sector. This is not something which reflected in the Security Council resolutions. There is also the Comprehensive Iran Sanctions Accountability and Divestment Act (CISADA) of 2010, which aims to penalize domestic and foreign companies for selling to Iran refined gasoline and related equipment. Also a comprehensive ban on US trade and investment in Iran, though again the point I want to make here is the departure from the targeted sanctions, which was the deliberate choice of the Security Council. Aims to further the sanctions within the Security Council were met by opposition. So it's clear that US measures are well beyond the targeted measures of the Security Council.

As to their objectives, it is clear that these are not the same of the Security Council. The objective of sanctions in the Security Council is to end the threat to international peace and security posed by Iran's Uranium enrichment related nuclear program as determined by the Security Council. It is very clear from the resolutions that it is the Council alone that is competent to determine when the sanctions are to be suspended or terminated; that is, to determine when Iran has complied with its obligations under the resolutions of the Security Council. Again, the resolutions reserve to the Council and its sanctions committee the full authority to add designations to list of targeted persons leaving no margin of appreciation to the Member States.

On the contrary, the objectives of the US sanctions, or countermeasures, include of course, regime change so on and so forth. They go well beyond implementation of Security Council Sanctions.

So, could the US economic measures be viewed if not as implementation then as enforcement of the Security Council Resolutions against Iran, i.e., the unilateral adoption of new measures which would actually strengthen and enforce Security Council sanctions by adding new legislative measures?

It's interesting that Council through its Resolution 1929 (2010) stresses "that nothing in this resolution compels States to take measures or actions exceeding the scope of this resolution, including the use of force or threat of force". The Council also establishes its own monitoring and recording system for implementation of its sanctions; it says *it shall review* Iran's actions and *if* it determines that Iran is not in compliance, it shall adopt further appropriate measures. The Council further specifies that "concrete measures on exploring an overall strategy of resolving the Iranian nuclear issue" taken by states should be sought through non-forceful ways, and encourages the use of a negotiated solution. The Council continues to be seized of the matter.

So, nowhere would it appear that individual Member States are authorized to enforce Council decisions against Iran extraterritorially or against third parties. Nor does the Council authorize an embargo at sea as it did in regard to previous sanctions regimes. It calls upon States to inspect the cargo of Iranian State owned aircraft and vessels, only at airports and seaports. It is quite obvious that the Security Council resolutions do not require extraterritorial application, as did some of the earlier resolutions of the council and other sanctions regimes. This was debated and some States vociferously opposed the application of sanctions extraterritorially.

So in short, they cannot be seen in the light of collective measures and the US cannot use the justification of Article 25 or 103 to justify the measures. The justification that remains is as unilateral countermeasures. However, they have to meet a certain number of conditions laid down in the State Responsibility articles. Also, as has been mentioned by Dr. Perera; who can invoke these measures? The State imposing measures has to firstly demonstrate that it is an injured State, which would allow it to take these countermeasures. A State is considered injured, hence entitled to invoke responsibility of another State and adopt countermeasures, if the obligation is owed to it individually or if in the case of a collective obligation is owed to a group of States of which the injured State is a part; such as, and I will give the example here that perhaps the NPT treaty, if considered an interdependent treaty will fall into this category as a collective obligation owed to a group of States. But in the latter case one would have to demonstrate that first there is a breach in the obligations contained therein, which is not evident, or that it has radically affected the enjoyment of the rights or performance of the obligation of all the other State parties. These conditions may prove difficult to demonstrate.

In short, the legal basis for a countermeasure is not a threat to the peace or a threat to national security, but a violation of international law and a State must be an injured State within that definition.

Under Article 48 of the ILC Articles, a State which is not an injured State has a legal interest in compliance but has no right to take countermeasures only to invoke responsibility in order to demand cessation of the breach or recurrence on behalf of the injured State. There is a question which is controversial and has been debated in the ILC and that is whether is State which is not an injured State in that sense may impose countermeasures to enforce obligations protecting general or collective interests important for the, or fundamental to the, international community as a whole. This type of countermeasure however is controversial and Article 54 refers to the right of any State other than the injured State to take lawful measures. I'm saying that this Article 54 is ambiguous and has perhaps deliberate ambiguity causing controversy in the ILC.

It may be argued that the law of collective security has, in this particular situation of parallel imposition of collective measures, displaced the law of State Responsibility. It could very well be, but that again is debatable, that a State's right to adopt countermeasures terminates in situations where the Council has exercised its exclusive responsibility under Chapter VII to deal with a threat to peace. The exercise of unilateral measures in this situation would only serve to undermine the authority of the Security Council. Assuming that the measures can nevertheless be characterized as lawful countermeasures, they still have to comply with conditions and limitations laid down.

For example, they may not be punitive; they may not cause irreparable damage, and that is important. They are supposed to be temporary measures which are reversible. They are not meant to be punitive. So one can debate whether the measures taken in particular situations go beyond reversibility and others where they cause such damage that they can no longer be reversed

Secondly, they are not to be directed against third parties and so on, which of course the US laws can be seen to be in imposing penalties on third parties who have certain transactions with Iran.

They must be proportional and commensurate to the injury suffered and they must not depart from certain basic obligations. We know that the prohibition on the use of force applies too, but there is also the protection of fundamental human rights interpreted by the ILC as the non-derogable rights in the respective treaties and of the humanitarian character, as well as the peremptory norms of international law.

Then there are procedural requirements which must implement procedures. The term good faith is applied to these dispute settlement proceedings; offers to negotiate and so on.

The question in the light of this framework is, whether these sanctions constitute comprehensive sanctions and affect Iran's economy and right to development and so on. But as it is, I am only providing a grid for the analysis.

That's not the be-all and end-all. I don't want to stop with the State Responsibility articles because the articles themselves recognize that their provisions are not exhaustive. In other words, you have to also turn to general international law and to a particular regime. And there may be also a development of the law. We know that outside the framework, for example the UNGA has underlined numerous resolutions that the embargo on Cuba is of course contrary to the Sovereign

Equality of States, non-intervention, non-interference, and so on. What I am trying to say is that we have to approach unilateral measures also in the light of what is happening with respect to collective measures because there is kind of feeding in here and just as one argues that the States cannot escape the unilateral obligations by hiding behind the corporate veil, so too they cannot hide behind the corporate veil in trying to escape the constraints placed on collective measures. So unilateral measures should be viewed in the light of what has been happening, and a lot has been happening in the field of collective measures.

We have had charges to such collective measures; we have had a re-reading of Charter purposes and principles. Article 1 speaks of collective security – one of the functions of the UN. But collective security has to be interpreted in the light of the concept of human security now and the Security Council has been very aware of that in insisting in some of the Resolutions that States implementing sanctions should do so with regard to the obligations under human rights law. There is also the concept of rule of law which has sprung up in terms of the International Organizations; So there has been a grand debate over the humanitarian fault of comprehensive sanctions, particularly the decade long sanctions against Iraq; and then the Security Council was pushed to move to targeted sanctions.

There has been a great debate as to the due process rights of the individuals who have been targeted as terrorist suspects. And recent reforms proposals for the UN have emphasized the link between collective security and respect for human rights and underlined that the term 'security' can no longer be confined to the security of States but must be ultimately destined to protect individuals. Now, while acknowledging that sanctions remain an important tool, the 2005 World Summit Outcome Document has also underscored that sanctions should be

> "implemented in ways that balance effectiveness, to achieve the desired results against possible adverse consequences, including socio-economic and humanitarian consequences for populations and Third States", and importantly it has underlined the temporary nature of sanctions measures which should "remain for as limited a period as necessary to achieve the objectives of the sanctions and should be terminated once their objectives have been achieved."

Numerous discussions both outside and within the Security Council, in other words, in Regional Courts for example, over the fact that the Security Council's sanctions are not limited and the Council was not above the law. Though courts have refrained from reviewing directly the sanctions, on the grounds that it is not within their competence, Regional Courts such as the European Courts of Human Rights and so on, have raised the individual responsibility of Member States to respect their human rights obligations while implementing Security Council decisions.

There has nevertheless been a number of cases which have underlined the responsibility of Member States in implementing collective sanctions, for carrying out their obligations under human rights treaties, and the emphasis also has been on the 'due process' for individuals. So the Council has responded to such pressure in a small manner, rather grudgingly, but it has: it has gone from comprehensive to targeted sanctions. It instituted an Ombudsman for persons on the blacklist, which is not a judicial review but is at least something; and has responded to calls of the World Summit Outcome Document; And so we have had, of course, also the various bodies of the United Nations such as the Economic, Social and Cultural Rights Committee, which has

called on the Permanent Members to be responsible - that's General Comment No.8 - in adopting sanctions decisions to be very conscious of their obligations under the Covenant on Economic, Social and Cultural Rights.

So we have had a lot of pressure from all kinds of Organizations, Specialized Agencies and Regional Courts as well as the Human Rights Committee for example in the Case of Behrami. At the European level we have the decisions of *Kadi, Al-Jeddah* and so on and so forth. The European Court of Human Rights in the *Al-Jeddah Case* turned into the limitations placed by the purpose of the Charter in Security Council decisions said that the Court, interpreting the resolutions of the Council must presume that the Council does not intend to impose any obligation on Member States to breach fundamental principles of Human Rights, and in the event of any ambiguity, the Court must choose the interpretation which is most in harmony with the requirements of the Convention [that is the European Convention], which avoids any conflict of Obligations. And in fact a point that is important to align is that while Human Rights in the Charter was part of the Secondary Obligations of the United Nations, and collective security for peace was the primary obligation, what has happened is that the Human Rights purposes has shifted emphasis and become a part of the whole collective security apparatus. The Council now imposes sanctions to protect human rights. So you are not saying now that there is a conflict between public order and respect for Human Rights law – One is an integral part of the other.

So, the responsibility of the Member States has been underlined also in the Draft Articles on the Responsibility of International Organizations, which recognizes a dual and even multiple addition of conduct which are shared responsibility between the International Organizations and the Member States. So there are certain circumstances in which a state through the Council may be responsible for the collective measures if it exercises direction and control of the Council Decision, exercises coercion by playing a prominent role in the Council for example, participation in the decision making process when it rise to the level of overwhelming control. So, in short, my conclusion is that in the field of collective measure, we have had certain limitations which are going even beyond the constraints imposed by the ILC Draft Articles or rather, one would debate this, I am not saying that it is hard and fast development, but I think this is worth pursuing as a study on the comparison between the restraints on collective and unilateral measures.

Just to conclude on things, which are important, the problem in international law is that there are no compulsory dispute settlement measures or countermeasures. The ILC excluded finally the section which would have dealt with dispute settlement. Moreover, the collective measures adopted by the UN Security Council, the UN cannot be brought before any court for any international instance and for domestic instances immunity applies. So we have a paradoxical situation in which states can impose coercive measures but there is no way to counter them peacefully in other way, there is no compulsory dispute settlement measure. So, there have been few challenges before the court.

Secondly, I think it is important to revisit certain principles like the principle of non-intervention. I would say that measures like sanctions or countermeasures interfere with the principle of non-intervention. They are allowable if there is consonance with prior illegal act but they are not allowable if it intends to deal with change in foreign policy or intervene in the sovereignty of the states.

Third reflection is that, there has to be a balancing act. We are really talking about public order, emergency situations and human rights. As you know that all the treaties of human rights, there are special clauses for the ability to derogate, in times of public emergency. But we don't have such clauses in general.

Finally, while non-forcible measures are unilateral or collective, it continues to be a part and perhaps that is another debate, is another instrument for the achievement of certain important priorities of the international community, which you know has developed in public international law per se. These are a set of fundamental principles to the international community as a whole; they are nevertheless not compatible with the basic principle of international rule of law.

Finally, I just want to quote Roberto Ago, I think Dr. Perera had mentioned this development, where he says in seeking a more structured organization which refers to institutionalization of the international society. We must address about institutions, which must tell us the international institutions which has exclusive responsibility for determining the breach of an obligation which is a basic importance to the international community as a whole and thereafter for deciding what measures should be taken. In other words, it is a big debate as to who should protect from the member country interest, should it be left to unilateral measures by individual states or it should in fact return to more institutionalized system. Thank you very much.

President: Thank you Prof. Debbas for outlining the various contours of sanctions, the move from unilateral sanctions to targeted sanctions in the pretext of humanitarian grounds and also for explaining to us the countermeasures that can be lawfully applied. Next, I will give the floor to Prof. Gandhi, who will speak on 'sanctions and financial institutions'. Dr. Gandhi is a former colleague of mine; he was the legal adviser to the Legal and Treaties Division, Ministry of External Affairs, Government of India. Now he is a Professor and Executive Director at the Centre for International Legal Studies, Jindal Global Law School. Dr. Gandhi, you have the floor please.

Prof. Dr. M. Gandhi, Professor and Executive Director, Centre for International Legal Studies, Jindal Global Law School, India: Thank You Madam Chair. I would like to thank AALCO and its Secretary-General for inviting me as a panelist. I would like to discuss on "Implications of Unilateral and Secondary sanction on financial institutions: An international law perspective".

Madam Chair, Since the days of Pericles Athens, political States have deployed economic sanction as a weapon of international diplomacy to bring change in the attitude of sanctioned state.

Jeffrey Meyer in his research paper on 'Secondary sanctions' enumerates that the United States today has unilateral sanctions programs relating to many countries and regions, including the Balkans, Belarus, Cuba, the Congo, Iran, Iraq, Cote d'Ivoire, Myanmar, North Korea, the Sudan, Syria, and Zimbabwe. The broadest of its programs involve general embargos on trade and financial transactions with longstanding hostile regimes such as Cuba, North Korea, Iran, and Syria. Other sanctions measures focus more narrowly on penalizing the leadership and close

associates of enemy regimes, as well as hundreds of designated terrorist, drug trafficking, and weapons-proliferating persons and entities. UK and EU have sanction programmes of their own.

Most of the economic sanction regimes deployed by the US are primary sanctions only— which restrict its own companies and citizens (or other people who are in the United States) from doing business with certain specified countries, terrorist group, or other countries, against them already international sanctions are in place.

Secondary sanctions, such as secondary trade boycotts and foreign company divestment, involve additional economic restrictions designed to inhibit non-U.S. citizens and companies abroad from doing business with a target of primary U.S. sanctions. Secondary sanctions have proven highly controversial, in part because of broad claims that they are illegally "extraterritorial" in purpose and effect.

Resistance to Sanction

When US imposed unilateral sanctions on Cuba, Iran and Libya, their major trading partners EU were hit by secondary sanctions. They opposed the sanction and regard the extra-territorial application of US sanctions as an unacceptable attempt to expand US jurisdiction. Despite sanctions were in place EU reaffirmed its commitment to the achievement "to the greatest extent possible" of the objective of the "free movement of capital" and to the lowering of trade barriers. EU viewed the US imposition of secondary sanctions as a departure from the free trade principles long advocated by the US.

Another case of Europe's resistance for unilateral secondary sanction was the Siberian Pipelines case. This happened in 1982, when the United States sought to impede the construction of a pipeline from the former Soviet Union to Western Europe. It not only prohibited U.S. companies from providing parts and services, but also most controversially extended this prohibition to foreign subsidiaries of U.S. companies (similarly Canadian supplies to China (through US subsidiaries) at one point of time was prohibited under unilateral sanction).

Amidst storm of protest from the United States, Western European trading partners decrying the regulations as improperly "extraterritorial" and a Dutch court decision declining to allow its enforcement against a Dutch subsidiary of a U.S. company, finally the United States retracted its extension of the export control regulations within several months of their issuance.

In 1996, Congress enacted the Iran and Libya Sanctions Act (now known as the Iran Sanctions Act) that aimed to deter investment by non-U.S. companies in the oil production sectors of Iran and Libya. As amended to date, the Act provides that for any non-U.S. company that invests within one year more than $40million in the Iranian oil sector, the President is required to select at least two sanctions from the following menu of retaliatory measures:

- denial of any export licenses and approvals for products to be shipped to any sanctioned person;
- denial of Export-Import Bank assistance in connection with any products to be exported to any sanctioned person;
- prohibiting U.S. banks from loaning more than $10 million in one year to any sanctioned person (subject to certain exceptions);

- procurement debarment of sanctioned persons from U.S. government contracts;
- import restrictions against the sanctioned person; and
- denial of certain U.S.-government-linked banking privileges (in the case of sanctioned entities that are financial institutions).

Both the Cuba and Iran/Libya laws were vehemently condemned as "extraterritorially" illegal by the U.S.'s major trading partners, some of whom enacted their own retaliatory laws to block or offset any damage to their companies' business interests.

As these examples show, secondary sanctions often prove politically problematic. The resentment of third-party countries may divert attention from the wrongful conduct of the target regime and undermine U.S. efforts to rally multilateral consensus for United Nations trade sanctions. Still, as George Shambaugh notes, "[w]hat critics misunderstand is that secondary sanctions tend to cause intergovernmental conflict precisely because they can provide an effective means for states to influence the activities of foreign firms and individuals operating abroad."

Similarly, U.S. sanctions against Myanmar not only prohibit U.S. persons from investing directly there but—in secondary sanctions fashion—prohibit them from buying shares in a third country company if the company's profits are predominantly derived from its economic development of resources located in Myanmar. In addition, U.S. persons are prohibited from approving, financing, facilitating, or guaranteeing a transaction in Myanmar by a person who is a foreign person if the transaction would be prohibited if performed by a U.S. person or within the United States.

The political controversy about secondary sanctions is complicated by questions about their legality under international law. The majority view is that secondary sanctions are an impermissible "extraterritorial" extension of U.S. jurisdiction that impinges on the rights of neutral states to regulate their own citizens and companies. For example, Sarah Cleveland notes that "'[e]xtraterritorial' sanctions, or secondary boycotts . . . since they purport to exercise authority over foreign states and entities for engaging in conduct (business with third countries) that has no jurisdictional nexus with the sanctioning state." Similarly, Peter Fitzgerald claims:[A]n international consensus does appear to be building that the unilateral extraterritorial application of these controls [sanctions] to third parties is impermissible . . . .

The international community is coming to regard the blacklisting of third parties, or secondary boycotts, as "unreasonable," and therefore an unjustifiable intrusion upon the sovereignty of the neutral state.

To the same effect, Andreas Lowenfeld argues that "secondary boycott" measures such as the Helms-Burton Act and the Arab League boycott are "contrary to international law, because [they seek] unreasonably to coerce conduct that takes place wholly outside of the state purporting to exercise its jurisdiction to prescribe." He further suggests that "[w]hile no precise rules have been formulated, it seems that in the areas of sanctions . . .customary international law places limits on unilateral extraterritorial measures." Other commentators have joined the chorus casting doubt on the legality of secondary sanctions measures.

Black listing of Iranian banks

The U.S. Treasury Department began blacklisting major Iranian banks, pressuring and cajoling other states to follow suit. Senior U.S. officials travelled the world, allegedly arguing that the Iranian financial system has ties with Hizbollah, Hamas and Islamic Jihad, highlighting the reputational risks of working with allegedly involved in banks engaged in illicit financial conduct and warning of severe penalties. With many financial institutions worldwide halting their business with Iran and the U.S. barring Iranian banks from dealing in dollars, Iran virtually became a financial hermit.

The current wave of secondary sanctions can be traced to 2006, when U.S authorities began a concerted effort to dissuade non-U.S. financial institutions from doing business with Iranian banks — not because of their nationality or affiliation with the Iranian state, but because of their presumed conduct.

Role of OFAC and SDN's

To begin, the U.S Treasury Department's Office of Foreign Assets Control (OFAC) amended a provision in its Iranian sanctions regulations that had authorized so-called U-turn payments, or funds transfers originating and terminating outside the United States, effectively to prohibit any such payments involving Iran's Bank Saderat, which OFAC stated was serving as a conduit between the Iranian government and terrorist organizations. OFAC's 2007 sanctions on Iran's Bank Sepah for its role in Iran's missile procurement was the next in a series of U.S. government actions imposing various economic sanctions on large Iranian commercial enterprises because of their alleged conduct.

By late 2008, the U-turn authorization for Iranian parties had been revoked altogether, and by 2012 it seemed as if almost every major Iranian commercial enterprise had been accused of a role in Iran's nuclear program or support for international terrorism.

US sanction programme is confusion: too much legislation too many agencies to deal with

Not only are all U.S. sanctions programs different in scope, but certain sanctions programs change on a regular basis. For example, under 31 CFR part 598, OFAC is authorized to identify and prohibit virtually all transactions with Specially Designated Narcotics Traffickers (SDNTs). SDNTs, along with other specially designated individuals and entities (collectively, "SDNs"), are listed on OFAC's SDN List, which is updated on a regular basis with new names as OFAC identifies new SDNs. So if a Colombian business partner of your company is designated as an SDNT, your company no longer can conduct any business with that partner, even if there are pending contracts or other ongoing business with that partner. The list of SDNs can change very quickly. Moreover, many SDNs reside in countries against which the United States does not otherwise impose sanctions; with respect to SDNTs, many SDNTs reside in Colombia, Mexico, Peru, or other countries against which the United States does not impose any sanctions. In addition to changing frequently, the SDN List is expanded on a regular basis. Ten years ago there

were a few several thousand entries on the SDN List; now, it has increased to more than 46,000 entries. Moreover, in 2008 alone, the SDN List was modified approximately 50 times, that is, nearly once a week.

Iranian banks on SDN List

On October *25*, 2007, OFAC announced that it had added Iran's largest bank, Bank Melli, to the SDN List for its alleged connections to the proliferation of weapons of mass destruction. At the same time, OFAC took similar action against Bank Mellat, which supports Iran's nuclear programs. The designation of these two banks as financiers of unconventional weapons programs effectively prohibits all U.S. persons (including U.S. branches of non-U.S. banks) from conducting any business with either bank. OFAC simultaneously identified Iran's Bank Saderat as a terrorist financier and added it to the SDN List. As with Bank Melli and Bank Mellat, Bank Saderat's addition to the SDN List effectively prohibits all transactions with that bank by entities subject to U.S. sanctions. Prior to this designation, OFAC had taken the intermediate step in September 2006 of revoking its general licenses with respect to Bank Saderat, thereby excluding the bank from certain activities in the U.S. financial sector that had otherwise been permitted. In January 2007, OFAC added Bank Sepah to the SDN List, thus prohibiting all U.S. persons from doing business with the bank. Bank Sepah was also made subject to sanction by the U.K. government under the Iran (Financial sanctions) Order 2007 and has been subject to sanctions in other countries as a result of Security Council Resolution 1747.

Significantly, on 31 December 2011, under Congressional pressure and after obtaining flexibility for incremental implementation to mitigate any impact on global energy prices, Obama signed the National Defense Authorization Act of 2012 (NDAA 2012), section 1245 of which bars foreign banks from processing oil receipts through the CBI, with the goal of gradually depleting Iran’s revenues.

The U.S. took the lead in this regard, penalizing foreign banks and firms that violated its regulation with several high-profile cases involving penalties against major international financial institutions (eg, Lloyds, Barclays, Credit Suisse and Standard Charter. In some cases, firms took extra precautions that affected permissible trade. Many small and mid-sized companies, for whom compliance with overlapping and layered regulations was too costly and cumbersome, simply left the Iranian .market.

The complex U.S. framework for secondary sanctions is no longer properly understood as sanctions “against” Iran, but rather U.S. sanctions against third-country companies that do business with Iran. Over the past several years, there has been a series of settlements, each exceeding $100 million, between U.S. authorities and non-U.S. banks — including ABN AMRO, Barclays, Credit Suisse, ING, Lloyds and Standard Chartered — alleging violations of U.S. sanctions against Iran and other countries.

Judicial scrutiny of executive determination

It is pertinent to note that the executive determination with regard to the allegation of involvement of certain Iranian banks have not been brought under the judicial scrutiny in the US.

However, recently similar sanctions have been brought under the scrutiny of the Supreme Court in London and the General court of the European Union. These cases are great eye opener.

In a series of recent judgments, the Fourth Chamber of the General Court of the European Union ("the General Court") annulled the designation of some of the largest privately held commercial Iranian banks on the EU's sanctions list. On 11 December 2012, sanctions against Sina Bank (Case T-15/11 *Sina Bank v. Council*) were annulled. Similarly, sanctions against Bank Mellat (Case T-496/10 *Bank Mellat v. Council*) were struck down on 29 January 2013. On 5 February, sanctions targeting Bank Saderat (Case T-494/10 *Bank Saderat Iran v. Council*) met the same fate, further illustrating the General Court's willingness to annul sanctions if their adoption is not based on sufficient evidence and if the entity concerned is not given ample time to review and respond to the evidence against it.

Brief background of the sanction regime involved in these cases:

On 26 July 2010, the Council of the European Union ("the Council") imposed sanctions on a number of Iranian banks, listing them in Annex II of Council Decision 2010/413/CFSP. The sanctions included, *inter alia*, the freezing of assets and economic resources of entities presumed to be linked to Iran's nuclear proliferation program. Bank Saderat and Bank Mellat were two of several listed banks and their funds and assets were frozen across the EU.

In Decision 2010/413, the Council stated that "*Bank Mellat is a state-owned Iranian bank [that] engages in a pattern of conduct which supports and facilitates Iran's nuclear and ballistic missile programmes. As for Bank Saderat, the Council got a little bit more specific and held that [it]…is an Iranian state-owned bank (94 %- owned by IRN government) [and] has provided financial services for entities procuring on behalf of Iran's nuclear and ballistic missile programmes, including […] Iran Electronics [and] Mesbah Energy Company."*

In October 2010, both banks appealed against the Decision, arguing that the Council had not advanced any evidence in support of its claim. The banks thus argued that their fundamental rights of defence and their right to effective judicial protection were breached and that the Council violated its obligation to give reasons for their designation. Secondly, they claimed that the Council had committed a manifest error of assessment as regards the adoption of restrictive measures against them. Thirdly, the banks argued that the designation was an infringement of their right to property and of the principle of proportionality.

The Judgments

In both cases, the Council argued that the banks were emanations of the Iranian state and therefore not entitled to rely on fundamental rights protection and safeguards under EU law. According to the Council, a "*state is the guarantor of respect for fundamental rights in its territory but cannot qualify for such rights"* (*Bank Saderat* para.37, *Bank Mellat* para.39).

The General Court firmly rejected this argument. It held that EU law contains no rule preventing legal persons, even if they were emanations of a non-Member state (which was

not proven in this case), from relying on fundamental rights protection and guarantees. Moreover, the General Court held that: "the fact that a State is the guarantor of respect for fundamental rights in its own territory is of no relevance as regards the extent of the rights to which legal persons which are emanations of that same State may be entitled *[…]"* (*Bank Saderat* para.38; *Bank Mellat* para.40).

1. *Infringement of the obligation to state reasons, the banks' rights of defence and their right to effective judicial protection* Turning to the substance of the case, the General Court held that the obligation to state reasons for an act adversely affecting a person constitutes an essential principle of EU law and may only be derogated from for compelling reasons touching upon the security of the Union or its Members. The Council is thus under an obligation to disclose the considerations which led to the adoption of the sanctions and the considerations must be sufficiently detailed and clear. Additionally, the Council must notify the designee in good time, so that he has ample time to review the Council's file and to make known its own point of view

2. *Manifest error of assessment in relation to the adoption of restrictive measures against the applicant*: The banks also claimed that the reasoning for designation provided by the Council was not substantiated by evidence and, consequently, the Council made a manifest error of assessment by putting the two banks on the sanctions list.

The General Court largely agreed with this.

First, in the Bank Saderat case, the General Court established that the Council had acted on a mistaken factual premise by asserting that the bank was 94% held by the Iranian state, when in fact the state was only a minority shareholder.

Second, the General Court held in both cases that the fact that the Iranian state holds shares in the banks did not imply, in itself, that they were facilitating nuclear proliferation. Furthermore, the Council did not present any evidence that the banks were providing illicit services to entities that were engaged in proliferation.

Third, the General Court had asked the Council to submit evidence to support its claims, but the Council failed to do so. On the contrary, the Council argued that the burden was on the bank to produce evidence that it was not involved in facilitating nuclear proliferation. The General Court swiftly dismissed this argument: the burden of proof was upon the Council and the absence of evidence should not be held against the banks.

In the light of the foregoing, the General Court decided in both judgments that the sanctions had to be partially annulled, and that there was no need to further examine the banks' claim concerning an infringement of the principle of proportionality and/or of their right to property.

The judgments raise a number of interesting issues. First, in both cases the General Court referred to the role of diplomatic cables (read "Wikileaks") and the suggestion that some Member States, in particular the UK, were subject to American pressure to ensure the

adoption of restrictive measures against Iran. The General Court, however, firmly rejected the banks' allegation that this cast doubt on the lawfulness of the measures and of the procedure for their adoption. It held that the fact that Member States might be subject to diplomatic pressure – even if proven – did not imply, in itself, that such pressure had any effect on contested measures.

Second, the General Court confirmed that if the Council is going to rely on Member States' information as evidence for including entities on EU sanctions lists, it is obliged to conduct its own assessment of the "*relevance and validity*" of the evidence. The incorrect statement in the Council Decision concerning the extent of the Iranian State's holding in Bank Saderat indicated that no such checking took place.

Finally, the General Court's judgments show that the Council does not have unfettered discretion to designate undertakings and persons on the sanctions list without providing sufficient evidence to support its claim and without giving the designate ample chance to exercise its right to self-defense.

Interestingly, neither the Council nor the Commission invoked confidentiality reasons for not presenting evidence against the banks to the General Court or the applicants. Rather, the General Court notes that the Council simply did not put forward any evidence even though the General Court requested the Council to do so. The General Court did thus not get a chance to rule on the legality of relying on classified information or how the Council could base its decisions on such information without infringing the defendant's rights of defence. But regardless of the rulings, the EU will be utterly careful not to disclose or upset their intelligence sources. Without an EU-lead spy agency, Brussels relies fully on Member States' support to obtain any such information. Opening up its information and sources to the public would probably dry them up for good.

But the sensitive issue of using intelligence as evidence in court has caused severe judicial problems in Luxembourg. On 21 March, the UK Supreme Court took the highly controversial decision and went into secret session for the first time ever to hear sensitive intelligence about Bank Mellat of Iran. If this practice will also find hold in the proceedings in Luxembourg remains in doubt (cf. Article 31, Statute of the Court of Justice), but the question as to how to deal with intelligence in court will soon have to be discussed very openly.

The Supreme Court has quashed the Financial Restriction (Iran) Order 2009.Writing the judgment for the majority, Lord Sumpton held that the Order was irrational and unjustifiable, as it singled out the bank even though it posed no risks than other Iranian financial institutions.

Conclusion

The Law is very clear as summed up in the first part of the presentation that the unilateral secondary sanctions targeting financial institutions are violative of international law as it interferes with sovereignty of State. They are illegally "extraterritorial" in purpose and effect. It

affects free movement of capital. The unilateral secondary sanctions are unreasonable and impermissible under international law. Moreover, the unilateral secondary sanctions, as we have seen, instead of providing necessary immunities to the central bank (as it performs sovereign functions. It is a market regulator and its functions include maintaining price stability and inflation), targeted it.

The recent court decisions from UK and EU indicate that the black listing of financial institutions under sanction regime has not been done on a sound and factual basis. Mostly it is done by the executive in a non-transparent way without subjecting the decision under judicial scrutiny. Thank you Madam Chair.

President: Thank you Dr. Gandhi, for a very comprehensive review of the recent happenings and case laws on Illegality of Sanctions Imposed against financial institutions of Third Parties. We will re-assemble after 20 minutes. Thereafter, Dr. Rajesh Babu will make a presentation on "Sanctions and International Trade Law".

Tea break

President: Now, I would like to invite Dr. R. Rajesh Babu, Associate Professor, Indian Institute of Management, Calcutta (IIM – C) to speak on "Sanctions and International Trade Law".

Dr. R. Rajesh Babu, Associate Professor, Indian Institute of Management, Calcutta (IIM–C), India: Thank you Madam Chair. I would also like to take this opportunity to thank the Secretary-General and the Secretariat for inviting me. It's always a pleasure to be back in AALCO.

The issue that I am trying to bring in is sanctions within the context of International Trade Law and how sanctions are regulated. If you look at the World Trade Organisation, which has provided a framework for trade, it also provides for limitations or conditions on which sanctions can be imposed. So, the Marrakesh Agreement establishing WTO consists the core background on the principles on which the WTO is based such as the principle of Most-Favored-Nation Treatment, refraining from imposing quantitative restrictions, high tariffs, National Treatment, etc. So, you cannot discriminate between two countries unless there is an enabling provision provided in the text. If a member state discriminates and takes unilateral action, this will fall in direct conflict with the principles of the WTO, which would be considered as invalid, and a violation of the WTO Agreement. So, in case there is any violation by a Member State, a procedure has been provided, called the Dispute Settlement Understanding (DSU). Therefore, rather than going for a unilateral determination of violations, the WTO mandates for a multilateral settlement or determination of whether sanction has to be imposed for the violation which has been committed against the WTO law.

To reiterate this point, a specific Article was incorporated in the Uruguay round of negotiations, which is Article XXIII that prohibits explicitly unilateral actions. The reason why this Article came into being is because in the earlier decades, there has been a huge problem with the United States Trade Act, Section 301 and all other sections that permitted unilateral determination of sanctions, and taking action against foreign countries. So, in order to counter that, the section

provides that when a Member seeks for the redress of a violation of obligations, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

Article XXIII (2) says that in such cases, "a Member shall not make a determination to the effect that a violation has occurred, except through recourse to dispute settlement, in accordance with the rules and procedures of this Understanding". This basically means that the Member States of the WTO, cannot make unilateral determination of violation, rather take recourse to the multilateral dispute resolution process.

So, this has marked the shift from what is called as the power-based system to the rule-based system, where the lowest, or the smallest of the countries can have access to the system and enforce WTO rules.

Again, sanctions in the context of violations, the WTO Agreement specifically mentions that the sanctions can only be imposed if it is authorised by the Dispute Settlement Body, which is a body consisting of all Member States. It provides for a slightly minor form of compensation or sanctions when compared to ILC Draft Articles, which says that it should be prospective in nature, and not from the date of injury, but rather from the date on which the Member is supposed to comply with its WTO obligations, meaning that every country is given a reasonable period of time to comply with the directions. So only from the date of the completion of the reasonable period of time, the average will be calculated for the purpose of sanctions. Not only that, in terms of proportionality, there is always a debate about whether the object of sanctions is to induce compliance or of rebalancing right. Although most of them are in the academic area, but if you look at all the Panel Reports, they point more towards the rebalancing of a right in the context of Proportionality.

Also, you will find a progressive and high retaliation provided for in the WTO Agreement. For example for some sector, where violation is found, the aggrieved country can suspend concessions, and if it is not practical or effective, you go to a different sector in the same Agreement. And then, go again to a different Agreement altogether where a country will find higher retaliation, and if the country is asking for higher retaliation, it can prove that the earlier sectors weren't practical or effective, and the circumstances are serious enough- which is known as cross-retaliation measures.

So, these are the procedural sanctions within the sequence of the dispute settlement under the multilateral dispute settlement process. Of course, there are some problems related to this, the sequencing problem for instance. I am not going to enter into that, but suffice to say that it is basically when to take retaliatory action, and there is conflict and ambiguity between language of Article XXI (5) and XXII (6). So, it is in this context the problem has arisen. It has not been settled yet. So there are procedural problems.

But some of the broader problems remain with respect to the exceptions that are permissible under WTO Agreement, where you can deviate from the non-discriminatory principle and impose sanctions, and which you find in the context of Article XX and Article XXI of GATT. Article XX talks of general exceptions, and Article XXI talks about special security exceptions.

First we will consider Article XX, and then move on to the security exceptions, which are much broader in scope than the general exceptions provide.

The problem with Article XX is that it has several types of exceptions which are acceptable unilateral action within the WTO, but then some provisions are being used recurrently. The broadest of these exceptions allow nations to allow discriminatory and restrictive trade laws to protect public health, environment, public moral, or conservation of exhaustible resources. These are some of the broader provisions where there have been cases where the Panel has attempted to interpret the scope of these exceptions. In addition to the specific measures or sanctions in place, the chapeau of the Article XX speaks that, of course you can take a measure but then you have to make sure that the measures are not arbitrary or unjustifiable discrimination, or a disguised restriction on international trade. Same two-tier approach, first tier-provisional justification under one of the sub-clauses, either the public moral issue, or public health issue. To identify the measure, whether it is justified under that count; and then moving on to the second tier- which is final justification under chapeau requirements.

One of the earliest cases relating to this Article, of course there have been several cases, but for our purpose, we have the Tuna Dolphin case. There are two cases - 1991 GATT case by Mexico, and the 1995 case filed by the European countries - both against the US. Through US Marine Mammal Protection Act, the US sought to justify the import prohibition on tuna harvested with purse-seine nets (incidental killing of dolphin) from Mexico and the EU under both Art. XX(b) and (g). There were several issues in this case. But one of them was relating to the extra-territorial application of national laws. The key question was whether one country can dictate to another, what its environmental regulation should be. So, the first panel said that Article XX exceptions does not apply outside jurisdiction of a country, and that GATT rules does not allow members to take measures for the purpose of enforcing its own domestic laws outside the jurisdiction of the country, even to protect animal health or exhaustible natural resources. "Negotiation of international cooperative arrangements seems to be desirable in view of the fact that dolphins roam around the waters of many states and in the high seas." The Panel was suggesting that rather than going for a unilateral measure, go for a multilateral approach towards something that would impact the entire world.

Tuna-Dolphin II, again here is a slight difference in the interpretation of the panel. The panel did not reject *extraterritoriality*, but preferred a narrow interpretation of Art XX and, said that Measures taken so as to *force other countries to change their policies could not be considered "necessary".* So, the first requirement is the measure should be 'necessary' and hence, a less discriminatory measure as the one that has to be adopted. The Panel, however, deviated from the earlier decision that –nothing in Art. XX prevents measures affecting *outside the territory of the contracting parties*. So, there is large scale dilution of the concept and said that there was nothing in Article XX which does not prevent extraterritoriality. Now, both the reports never got adopted because there was blockade in GATT period. So US blocked the adoption of the Report.

Now comes the WTO establishment and one of the first cases which was in defence of Article XX was in the context of *Shrimp/Turtle I and II* 1998. Case II was a review petition filed and started in 1998. Again a similar kind of situation, which said that US imposed ban on all shrimp imports from developing countries that does not enforce US prescribed environmental

regulations to protect endangered sea turtles from shrimp trawling. US trade measures to protect sea turtles (conservation of exhaustible resources), stated that there should be mandatory use of TED, and that if there was a gap in the net it provides for escape of the turtles. And unless one gets a certification, it could not import its products to US. Joint complaint was made by developing countries, such as India, Malaysia, Pakistan and Thailand, wherein complainants maintained that the US statute was antidemocratic because it attempts to dictate how the Complainants will allocate its scarce resources, to protect the environment. Again there were several measures, like product-process method, etc, but focussing the issue at hand, the first time the Appellate Body justified action under Article XX (g) - Turtle constituted "exhaustible natural resources". By saying so, the AB justified unilateral extraterritorial measures for protecting public health, the environment, and public morals. But again in that context, even though measure is valid, the ways it was implemented by the US, that is within condition under chapeau, found that it violated the chapeau due to lack of multilateralism in its procedure. The US failed to adequately attempt to negotiate a solution with the complainants. That is, the US did not sufficiently attempt to negotiate a re-regulation of shrimp trawling rules at the international level. So, it should have agreed on the conclusion of an international agreement rather than going on bilateral agreement. If US had committed that Procedural error, the measure would have been justified under Article XX. US failed to engage in meaningful negotiations with an *objective of concluding bilateral or multilateral agreements*.

In compliance with the findings of the Appellate Body, the US complied with the recommendations and brought a Revised Guidelines of 1999. But then, some of the countries did not agree, specifically Malaysia, with that the US had implemented the recommendation or not for upholding the spirit of it. It was challenged under Article XXI (5) on Compliance Review mechanism. One of the central questions here was whether under the multilateral process in which the AB was talking about a Panel, there was an Obligation to negotiate or conclude international agreement. Here, the AB said that it was sufficient long as it continued to satisfy conditions of, *inter alia*, ongoing *serious good faith efforts* to reach a multilateral agreement. So you don't need to conclude a treaty, but rather there should be serious good faith negotiations at international level. Hence, there is only an *obligation to negotiate*, as opposed to an obligation to conclude an international agreement. The AB, thus, made it clear that countries have the right to take unilateral trade action to protect the environment. So this action, i.e., extraterritorial legislation was considered permissible as per Chapeau to Article XX.

Unlike Article XXI, Article XX has a higher threshold. It says that the applicability of this exception was moderated by the scope of limitations of the *chapeau* of Article XX itself. The exceptions are "[s]subject to the requirement that member state is measures are not applied in a manner, which constitute a means of arbitrary or unjustifiable discrimination between countries ...or a disguised restriction on international trade." Even if you are taking a measure for public health purpose or for consumption of natural resources, it should not be discriminated between two countries. So, the chapeau provides a limitation on implementation of unilateral sanctions within the context of this provision. Thus, action "provisionally justified" under an exception may nevertheless constitute an abuse or misuse of the exception "in the light of the *chapeau* of Article XX'.

On the other hand, Article XXI provides for security exceptions. There is no *chapeau* for national security exception. The scope of the Article says that: "Nothing in this Agreement shall be construed:

(*b*) to prevent any CP from taking **any action which *it* considers necessary** for the protection of its essential security interests
(i) relating to fissionable materials …;
(ii) relating to the traffic in arms, ammunition …;
(iii) taken in time of war or **other emergency in international relations**; or

Therefore, any action which the states considers necessary is permissible. So what is important is that the provision is self-judging, meaning, that a State on its own decides what is national security interest and it is not for any other state to judge whether its national security interest is at stake. Prof. John Jackson states that this provision is: "so broad, self-judging and ambiguous that is obviously can be abused", "the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuse". Historically, this has been there since 1947 and claimed the provision as "self judging". For instance, the provision was directly or indirectly invoked in the several contexts. In 1949, against Czechoslovakia by the US, in 1961 - Ghana justifying it boycott of Portuguese goods, in 1975 - Sweden import quota on certain footwear, in 1982 - Trade action against Argentina (annexation of Falkland Islands), in 1984-86 - US embargo against Nicaragua I and II. It was also a matter of discussion that the UAR accession to GATT and the Kingdom of Saudi Arabia accession to WTO within the context of Arab Embargo.

In 1985 *US-Nicaragua* case, one of the panels was established but was not adopted. The Panel noted that nation relying on the exception must balance its need to do so against the more fundamental need for stable trade regulations. When being considered for adoption, the representative of India said that:

> "…only actions in time of war or other emergency in international relations could be given the benefit of such exception. Clearly, the two contracting parties in this case could not be said to be in a state of belligerency. The scope of the term "other emergency in international relations" was very wide. The Contracting party having recourse to Article XXI (b) (iii) should be able to demonstrate a genuine nexus between security interests and the trade action taken".

This captures the sentiments of how the provision has to be interpreted. In 1996, the US Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act) specifically targeted Cuba through economic sanctions, but also dealt with secondary sanctions. The Act was designed to tighten the 1962 embargo on Cuba. The Act extended the territorial application of the initial embargo to apply to foreign companies trading with Cuba. It permits US nationals to bring legal action against foreign companies that were dealing or trafficking in US property confiscated by Cuba (Title III). The Act also authorized US State Department to bar entry of officials and shareholder of such companies to US; it involved measures that impugn the conduct of foreign nationals unconnected with US companies or individuals. This means that internationally operating companies have to choose between Cuba and the US.

The European Union on 3 May 1996 US (DS38), initiated a complaint against the US. The EC claimed that the Act imposed trade restrictions on goods of Cuban origin, and certification that sugar or sugar products do not contain any Cuban sugar, to access US sugar quota. Basically means that while exporting chocolate, certification was required to the effect that that chocolate does not contain any sugar manufactured in Cuba. There was possible refusal of visas and the exclusion of non-US nationals from US territory.

On Secondary sanctions, there were violations of many GATT provisions, such as Articles I, III, V, XI and XIII, and GATS Articles I, III, VI, XVI and XVII were alleged. The EC also alleges that even if these measures by the US may not be in violation of specific provisions of GATT or GATS, they nevertheless nullify or impair its expected benefits under GATT 1994 and GATS and impede the attainment of the objectives of GATT 1994. The EC requested the establishment of a panel on 3 Oct 1996. According to WTO, when a State requests for establishing panel for the second time, the Panel has to be established. But it never reached to that stage. An US-EU MoU was signed in 1997, agreeing to suspend the WTO claim as long as the US agreed to not prosecute any European companies under relevant provisions of the Act. EU agreed that to condition their aid to Cuba on the implementation of democratic reforms. This allowed Clinton, as well as his successors, to successfully waive one of the provisions which are Title III. As Clinton declared in his first waiver of Title III, "I would expect to continue suspending the right to file suit so long as America's friends and allies continue their stepped-up efforts to promote a transition to democracy in Cuba."

Prof. Gandhi has already mentioned that this statute is known as "Blocking Statute". It means that if any company does not comply with statute and trade with Cuba, they will be penalized for that. Europe Council Regulation (EC) No 2271/96 of 22 November 1996 which prohibits companies in the E.U. from complying with the Cuba sanctions**.** The UK created an offence of complying with U.S. legislation by implementing the Extraterritorial U.S. legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996. Mexico passed a law in October 1996 aimed at neutralizing the Helms–Burton Act. The law provides for a fine of 2.2 million pesos, or $280,254, against anyone who while in Mexican territory obeys another country's laws aimed at reducing Mexican trade or foreign investment in a third country.

To conclude, trade must take into account genuine national security concern (Article XXI). However, secondary sanctions cannot be justified under the WTO. The self-judging application of the national security exception remains a formidable bar to WTO review of the merits of these unilateral sanctions. There is indeed a danger that this provision may allow governments to protect shoe or bubble-gum industries merely by invoking the exception with not even a threshold or "reasonableness" criterion, there is a possibility of abuse. The practice till date suggests that the Member States has been reluctant to invoke this provision, because they don't want any external body to judge 'essential security interest' which purely falls under State sovereignty. Thus it is highly unlikely that the Member State would take the DSU route to test the legality of Art. XXI sanctions. Thank you.

President: Thank you Dr. Rajesh Babu for giving us a very informative presentation on the unilateral measures and their legality under the WTO regime. I open the floor for comments, questions, and interventions. The first delegation on my list is Japan. You have the floor, Sir.

The Delegate of Japan: Thank you, Madam President. My delegation wishes to touch briefly upon Japan's attitude on the question of extraterritorial application of law.

We are grateful to the AALCO Secretariat for preparing useful papers on this agenda item. We are of the view that the question of whether the sanction measures taken by States are lawful or not under international law should be considered on a case-by-case basis in accordance with the actual circumstances in question.

As the sanctions could include those applied by states in accordance with the UN Security Council resolution under Chapter VII of the UN Charter and also those which are taken by States as counter-measures against such internationally wrongful acts, fulfilling certain conditions which are stipulated in the provisions of responsibility of States for Internationally Wrongful Acts of 2001, it cannot be stated that all cases of economic sanction or extraterritorial application of national legislation of states are unlawful under international law.

However, it is to be admitted that certain unilateral economic sanction measures taken by states could include those unlawful cases of extraterritorial application of national legislation and sanction that are inconsistent with such basic principles of international law as sovereignty of other states or non-interference with internal affairs of other States. Thank you.

President: Thank you, Japan. The next delegation on list is India. You have the floor, Sir.

The Delegate of Republic of India: Thank you, Madame President. I don't know whether it is time for comments or questions or statements. I'll go with the statement first. Then I'll ask one or two questions. At the outset, on behalf of the delegation of India, let me take this opportunity to thank the Secretary-General for his very informative opening remarks as well as the panelists for their views. The Indian delegation also appreciates the Executive Summary prepared by the Secretariat on this Agenda Item. It is indeed a very thought-provoking document providing valuable inputs to Member States on this topic.

Madam President, The fundamental principle in international law is that all national legislations are prima facie, territorial in their application. Any unilateral extraterritorial measure based on a national law brings into sharp focus the issues concerning extraterritorial effects of such measures. State practice and doctrinal evolution in international law reflect an almost unanimous rejection of the extraterritorial application of national legislation for the purposes of creating obligations for third States. This was also echoed in panelist's remarks today. The unilateral and extraterritorial application of national laws to other States violates the fundamental principle of sovereign equality of States and the principles of respect for and dignity of national sovereignty and non-intervention in the internal affairs of other State. The unilateral and extraterritorial sanctions also impeded the full development of a country, especially adversely affecting citizens, particularly women and children.

India has consistently opposed any unilateral extraterritorial measures as it impinges upon the sovereignty of another country. These include any attempt to extend the application of a country's laws extraterritorially to other sovereign nations.

In this regard, India has always associated itself with G77 and NAM in urging the international community to adopt all necessary measures to protect sovereign rights of all states. India also opposes unilateral measures that impinge the sovereignty of other States, including the efforts to change the laws of another States.

Madam President, the delegation of India supports the draft resolution on this Agenda Item. We are particularly delighted to support Operative Paragraph 3 of the said resolution which requests the Secretariat to undertake further research in the implications of unilateral and extraterritorial sanctions on international trade and its effect on AALCO Member States.

I thank you Madam President. Before I end, I would like to ask Prof Rajesh Babu- is there any dispute on Article 20 of the GATT: the general exceptions, and Article 21: security exceptions. Was the Panel Report adopted or not, but was it given any consideration?

President: Thank you India.

Dr. Rajesh Babu: As regards dispute between Article XX and Article XXI, I am not aware if any Panel has been adopted within interpretation of Article XX. I have not missed out any provisions or cases which deal with this. One of the cases deals with section 301, relating to sanctions, but the dispute was more in the context of mandatory and discretionary legislations. Whether a provision is a discretionary one and can it be maintained, etc. so, given the time, I was trying to avoid some of the disputes of the purview of the discussion. Thank you.

President: Thank you. The next delegation on my list is South Africa. You have the floor, Sir.

The Delegate of Republic of South Africa: Thank you, Madam Chair. The Republic of South Africa only deals with sanctions in the context if the United Nations Security Council and is not qualified to address unilateral and secondary sanctions from an international law perspective.

South Africa's position in the United Nations Security Council on the issue of sanctions has been consistent:

- While recognizing that the United Nations Security Council could be called upon to impose coercive measures such as sanctions, South Africa has consistently called for these measures to be exercised with great caution; and only to support the resumption of political dialogue and negotiations to achieve a peaceful solution.
- The Security Council in voting in favour of sanctions measures needs to exercise the highest degree of scrutiny and oversight I their implementation to ensure that there are not unintended detrimental consequences on the citizens of the target state, third parties and neighboring countries.
- South Africa has cautioned against comprehensive economic sanctions, which could impose widespread suffering on ordinary people, while leaving those they target unaffected. In this regard, South Africa has been critical of efforts to use sanctions as a legitimizing platform for action against certain states.

Minister Nkoana-Mashabane answering a Parliamentary question on Iran (which has United States of America sanctions imposed against it, in addition to UNSC sanctions) in February 2012

said that "As a member of the United Nations, South Africa is obliged to implement United Nations Security Council sanctions that have been imposed on any UN Member States. The Government of South Africa does not subscribe to unilateral sanctions as an instrument of its international relations."

President: Thank you South Africa. The next delegation is Democratic People's Republic of Korea. You have the floor, Sir.

The Delegate of Democratic People's Republic of Korea: Madam President, let me first thank the AALCO Secretariat and the eminent panelists for their detailed and thoughtful presentation explaining the nature and negative aspects of the US unilateral sanctions against targeted States.

Madam President, the question of extraterritorial application of national legislation is a crucial issue to be resolved for the AALCO Member States to protect and defend their sovereign rights, rights to development and rights to survival.

At present, the acts of imposing unilateral sanctions against third states and parties by invoking domestic legislation of an individual state are a flagrant violation of the Charter of the United Nations and general principles of international law and this is increasingly causing deep concern among the international community. These acts retard the socio-economic development of the target state and greatly impeded the establishment of a fair international economic order and trading regime.

It is a well known fact that my country together with Iran, Syria and other Member States has been subjected to the US sanctions for the longest period without stop. The United States has imposed sanctions against my country for many decades by applying tens of its domestic laws, including "Trading with the Enemy Act", "Export Administration Act", "Foreign Assistance Act", "Export and Import Bank Act", and many others, all of which are unilaterally fabricated in wanton violation of general principles of international law. The scope and amount of losses that developing countries including my country have suffered during these years due to the unfair sanctions imposed by the United States are beyond imagination.

If the arbitrary act of imposing unilateral sanctions against third states by individual states like the US by invoking its domestic laws goes unpunished, it is obvious that more and more countries, especially Asian and African countries are bound to fall victims of the unilateral sanctions.

However, the instead of making efforts to apologize and compensate the political and economic damages they have inflicted to those suffered due to its unfair sanctions continues to create a more negative results through imposition of its domestic laws to the third states and parties questioning their normal trading activities.

Recently, some Western countries influenced by and scared of the US high-handedness blocked sports facilities for ski ground to be used by ordinary people entering into my country. This is a clearly a flagrant violation of the UN Charter and international law and outlawed acts internationally denying the rights to development of other countries. This unfair and unlawful act is stemmed out the US hostile policy to the DPRK base on the rejection of our ideology and system chosen by our people themselves.

It is crystal clear that if this kind of acts, individual countries applying unilateral sanctions to other countries invoking domestic laws prompted for the political purpose, is left unchecked many more Asia, African countries will be the victims of such practice.

The DPRK government condemns of all forms imposed against third states parties by extraterritorial application of domestic legislation by individual states. Abusing international law and international organizations as an infringement upon the state sovereignty and strongly opposes and rejects it.

Madame President, Distinguished delegates, Appreciating that AALCO is paying a due attention to and included the issue of imposing unilateral sanctions against third states and parties extraterritorially applying the domestic laws in the agenda item, we hope that the AALCO continue to make efforts to establish international legal regime to criminalize and punish these acts of abusing international law. Thank you.

President: Thank you. The next delegation on the list is China. You have the floor, Madam.

The Delegate of People's Republic of China: Thank you Madam Chair, Distinguished Delegates, Madam Chairperson,

First of all, on behalf of the Chinese delegation, I would like to welcome the inclusion of such an important item, namely the extraterritorial application of national legislation: sanctions imposed against third parties, into our agenda, and holding a Special Half-Day Meeting for thorough discussion.

What I want to point out is, that one state imposes unilateral sanctions against another state based on its national legislation, which shows that the state prevail its national legislation over international law, violates core principles of the UN Charter such as sovereign equality, non-intervention and duty to cooperate, and seriously undermines the authority of international law.

I also want to emphasize that such unilateral sanctions imposed against the third state, including its government, entities and citizens, which shows that the state exercise extra-territorial jurisdiction over the third state in accordance with its national legislation, and compel entities or citizens of the third state join the embargo so as to realize de facto multilateral sanctions, violates the principles of jurisdiction in international law, and infringes the sovereignty and economic interests of the third state.

Madam Chairperson, China holds the opinion that every country has the right to choose its own political, economic, social and cultural system, and any other country should not intervene by using sanctions or other compelling means. Currently, the international relations are undergoing complex and profound changes. Countries need to follow the principle of peace, development and cooperation, conduct equal-footed and mutually beneficial relations, seek common ground while shelving differences, properly resolve disputes and differences by peaceful means, and realize common development and progress.

Therefore, China always opposes any move to impose unilateral sanctions against other countries by abusing domestic legislation, and rejects further any move to impose such unilateral sanctions

against the third State. I believe that this kind of action has been, and will be opposed by the whole international community.

Madam Chairperson, China believes that AALCO may and should play a more unique role in terms of dealing with the negative impact of unilateral sanctions on international relations, and put forward a set of reasonable suggestions and recommendations in accordance with international law, which would be widely accepted by the Member States of AALCO. Thank you Madam Chairperson.

President: Thank you China. Iran has the floor now.

The Delegate of Islamic Republic of Iran: Thank you very much, Madam President. I would like to thank the Secretariat of AALCO for convening this half-day session on sanctions. And we would like also to thank the panelists for their very useful information given to us today.

Madam President, my delegation would like to reiterate the critical importance of this agenda item as 'extraterritorial application of national legislation', especially those manifested by unilateral economic restrictions against some developing countries which continues to unfold in various and new forms. This matter is more important since an alarming trend seems to be emerging by certain powers to defy all international norms concerning the immunity of State and its properties in furtherance of their policy of pressurizing developing countries through economic embargoes. This trend is consequential not only for the economic and overall human development of the countries but also disruptive of norms and principles of international law and international human rights law.

It goes without saying that extraterritorial imposition of national legislations on other States contravenes international law by violating the fundamental principles enshrined in the Charter of the United Nations, particularly the principle of sovereign equality of States and non-intervention in domestic affairs of other States. It also defies the recognized principle of State immunity, especially in cases where the functional agencies of a sovereign State, like central banks, are subjected to sanctions. The imposing States disregard the very basic notion of State sovereignty by forcing other States to abide by the restrictive measures against a third party. This is tantamount to the presumption of a super sovereign power which has supremacy over all other sovereign States. This cannot be acceptable to any State by any means, for sure.

Moreover, the very basic human rights are at stake; the ongoing unilateral economic sanctions are in fact imposed only to punish the ordinary citizens by depriving them of their basic necessities. This is a shameful hypocrisy which aims to cover up the human costs of unilateral sanctions.

Furthermore, imposition of domestic laws and regulations on other States with the aim of pressurizing a third party prejudices the right to development.

Madam President, we think that the position of international law is quite clear with regard to unilateral sanctions. I would like here to refer, for instance, the Declaration on Principle of International Law concerning Friendly Relations and Cooperation among States in accordance

with the Charter of the United Nations, which, among others, urges all states to respect the principle of sovereign equality and territorial integrity as well as non-intervention in domestic affairs of other States. This is the same Declaration that has severally been invoked by the International Court of Justice in its judgments, including in the Nicaragua Case in 1986. It is highlighted in the Declaration that: "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding the differences of an economic, social, political or other nature", and that "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it subordination of the exercise of its sovereign rights and to secure from its advantage of any kind." This is in fact a confirmation of Article 2 paragraph 7 of the Charter of the UN that prohibits any form of intervention.

My delegation believes that the most unjustifiable and deplorable form of sanctions is the imposition of unilateral embargo and extraterritorial application of domestic laws by one State against others that affect not only the population under sanction but also the interests of the third parties.

Madam President, the Islamic Republic of Iran has been under unjustified and unjustifiable economic restrictions for the past 3 decades following the popular Islamic Revolution in 1979. Very recently the Islamic Republic of Iran came under a most unprecedented economic coercive measure by the United States by blocking of the property of central bank of Iran and imposing other restriction on it. This unilateral act should be very alarming to all States, particularly for developing States in Asia and Africa, as it contravenes all norms and principles of international law concerning the immunity of State and its properties as manifested also in the 2004 UN Convention on Jurisdictional Immunities and their Property. It is underlined therein, under article 21 and the preamble of this Convention that the jurisdictional immunities of States and their properties including property of central bank or other monetary authority of the State are generally accepted as a principle of customary international law.

Madam President, the Islamic Republic of Iran strongly rejects and remains opposed to the application of unilateral economic and trade measures by one State against another as well as to the extraterritorial application of national legislations on other sovereign States. We oppose and condemn these legislative measures and urge other States to do likewise by refraining from recognizing and implementing extra-territorial or unilateral coercive measures or laws. This includes unilateral economic sanctions, other intimidating measures, and arbitrary travel restrictions that seek to exert pressure on other countries, threatening their sovereignty and independence, and their freedom of trade and investment and prevent them from exercising their sovereign right, by their own free will.

Madam President, the fact that the item “Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties” has been on the agenda of annual sessions of the Asian African Legal Consultative Organization from 1997 indicates the high importance the States members of this Organization attaches to the issue at hand. This issue deserves to be considered in a more serious manner since extraterritorial application of national legislations, continues to affect all countries as well as the international trade system, as certain powers persist in their unlawful unilateral imposition of restrictive measures against whoever dares to have economic relations with some developing countries. This politically narrow and ethically

unfair and legally rejected approach defy all the norms and principles of international law and the Charter of the United Nations and signifies a very alarming domineering policy which certain powers insist to dictate to the whole international community.

During each session of AALCO, the delegation of the Islamic Republic of Iran underlined the fact that Iran is a victim of unilateral sanctions and extraterritorial sanctions, and of course we consider these sanctions to be unlawful.

Madam President, I would like to raise a question to Madam Vera Gowlland-Debbas. Madam, I want to ask if there is a relation between an action taken by target state and the application of the sanction during the period when a court is already examining this question. Thank you very much.

President: Thank you, Iran, for the question. Prof. Debbas, you have the floor.

Professor Vera Gowlland-Debbas: Thank you very much for your question. If I have understood your question correctly, does that question refer to what we were discussing relating to the suspension of sanctions while the court is deliberating? I would need to make a further reflection on that. But it depends, for example, in the context of provisional measures it would depend on whether the court would consider it. Remember that the provisional measures are prima facie acceptance of restriction, and the second condition is that it does not prejudice the heart of the dispute. So, it would depend on how the court would interpret this. Would the court consider, let's say, the court can call for the suspension of the sanction since a dispute settlement procedure is in place; but whether the court can also address itself to the target state and require the lifting of the action that has led to sanction. I think that in this case, the court may consider that it is really looking at the substance of the case. But I can't really give you a satisfactory answer. I think, certainly, the court can ask for the suspension of certain action while it is calling for provisional measures. It has, for example, required in the case of ongoing use of armed forces in dispute settlement, that the State respect the United Nations Charter principles and so on. Now, as far as the ILC Draft Articles are concerned, if the court were to refer to these, then certainly the court should emphasize the procedural aspects of sanctions, which requires the dispute settlement procedures be pursued in good faith. So, I have given you an unsatisfactory answer, but I certainly think there is a possibility of requesting the suspension of sanctions in the case of provisional measures. But again, we would have to study it on a case-to-case basis.

President: Is there any other delegation wishing to take the floor. Yes, Malaysia.

The Delegate of Malaysia: Thank you Madam Chair. First of all I would like to thank all the panelists and the Secretariat for elucidating on this very important topic. I don't intend to go into the details of the discussion. Only, I have a question for any of the panelists. We, as students of law, have understood that within the context of Chapter VII of the Charter, we always appreciated comprehensive measures to be within the international legal framework. However, the UN Security Council sanctions through resolutions are now extending or applicable beyond states to individuals. Is there any legal justification within the UN Charter.

Prof. Vera Gowlland-Debbas: Thank you. Infact, this is very significant because now UNSC sanctions are applied beyond states on individuals. There is a combination of domestic and international legal instruments to justify legally these sanctions, which is a very detailed subject for examination.

The Delegate of Sudan: Thank you Madam President. Sudan is badly affected by the unilateral sanctions from the United States of America since 1997. We believe that this sanctions is not even respect the general rules of international humanitarian law as it severely harm the innocent civilian people in different ways.

In Sudan, there is most high rate of plane crash because US has banned the spare parts for our planes since 1997 and this resulted in many loss of lives for Sudanese as well as foreigners. US also banned my country from importing medical equipment and this is clear violation for the right to life. Do you think these unilateral sanctions are a clear violation even for the humanitarian law and do you suggest any road map to break this evil circle?

Thank you Madam President.

President: Thank you very much. I would like to thank all the panelists for their very informative presentations. It is clear beyond doubt that unilateral sanctions violate basic principles of international law as mentioned under the UN Charter and any legislation are territorial in nature. I thank all the Member States also for their valuable interventions. Thank you.

The meeting was thereafter adjourned.