

THE EXTRATERRITORIAL APPLICATION OF NATIONAL LEGISLATION: SANCTIONS IMPOSED AGAINST THIRD PARTIES

I. INTRODUCTION

1. It may be recalled that the item “Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties” was placed on the agenda of the 36th Session (Tehran, 1997) of the Asian-African Legal Consultative Organization (hereinafter called the AALCO) following upon a reference made by the Government of the Islamic Republic of Iran in accordance with Article 4 (c) of the Statutes and sub-Rule 2 of Rule 11 of the Statutory Rules of the Organization.

2. Thereafter, the item had been considered at the successive sessions of the Organization. It was last considered at the 41st Session of the Organization (Abuja, 2002) wherein vide Resolution RES/41/6 the Secretariat was directed to continue to study legal implications related to the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties and the executive orders imposing sanctions against target States. The Resolution also urged upon Member States to provide relevant information and materials to the Secretariat relating to national legislation and related information on this topic.

3. The Secretariat in preparation of the study on this agenda item relies largely upon the materials and other relevant information furnished by the AALCO Member States. Such information provides useful inputs and facilitates the Secretariat endeavor, towards examining and drawing appropriate conclusions on the impact and legality of such extraterritorial application of national legislation, with special reference to sanctions imposed against third parties. In this regard, the Secretariat reiterates its request to the Member States to provide it with relevant legislation and other related information on this topic.

4. The Secretariat has received in this regard information and material from the Government of Japan vide its Note Verbale dated 11 March 2003 wherein the Government of Japan has stated that there was “no legislation in Japan on extra-territorial application of national legislation”.¹

¹ The Note Verbale contains Explanation of Vote made by the representative of Japan on 12 November 2002 at the 57th Session of UN General Assembly on the voting of resolution 57/11 and Comments submitted by Japan to the Secretary-General of the UN at his request under GA Resolution 56/9. In its comments to the Secretary General the Japanese Government inter alia stated (i) The Government of Japan has not promulgated or applied any laws or measures of the kind referred to in paragraph 2 of resolution 56/9. (ii) The Government of Japan believes that the economic policy of the United States towards Cuba should be considered primarily as a bilateral issue. However, Japan shares the concern, arising from the Cuban Liberty and Democratic Soldering Act (the Helms-Burton Act) of 1996 and the Cuban Democracy Act (the Torricelli Act) of 1992, regarding the problem of the extraterritorial application of jurisdiction, which is likely to run counter to international law. (iii) The Government of Japan has been closely following the situation in relation to the above-mentioned legislation and the surrounding circumstances and its concern remains unchanged. Having considered the matter with the utmost care, Japan voted in favour of resolution 56/9.

II. AALCO'S WORK PROGRAMME ON THE EXTRATERRITORIAL APPLICATION OF NATIONAL LEGISLATION: SANCTION IMPOSED AGAINST THIRD PARTIES

A. Backdrop

5. The Government of Islamic Republic of Iran while referring the item submitted an Explanatory Note that enumerated four major reasons for the inclusion of this item on the agenda of the AALCO, namely: (i) that the limits of the exception to the principle of extraterritorial jurisdiction was not well established; (ii) that the practice of States indicates that they oppose the extraterritorial application of national legislation; (iii) that extraterritorial measures violate a number of principles of international law; and (iv) that extraterritorial measures affect trade and economic cooperation between developed and developing countries and also interrupt co-operation among developing countries. The Explanatory Note had furthermore *inter alia* requested the AALCO “to carry out an in-depth study concerning the legality of such unilateral measures, taking into consideration the positions and reactions of various governments, including the positions of its Member States”.

6. Accordingly, a preliminary study prepared by the Secretariat was considered at the 36th Session (Tehran, 1997) of the AALCO which had pointed out that in the claims and counter claims that arose in exercise of extraterritorial jurisdiction involved the following principles: (i) principles concerning jurisdiction; (ii) sovereignty-in particular economic sovereignty – and non-interference in internal affairs of a State; (iii) genuine or substantial link between the State and the activity regulated; (iv) public policy and national interest; (v) lack of agreed prohibitions restricting State's right to extend its jurisdiction; (vi) reciprocity or retaliation; and (vii) promoting respect for rule of law. Notwithstanding the national interests of the enacting State, grave concern had been expressed on the promulgation and application of national legislation whose extraterritorial aspects affect the sovereignty of other States.

7. The preliminary study had pointed out that while a growing number of other States had applied their national laws and regulations on extraterritorial basis, fora such as the General Assembly of the United Nations, the Group of 77, the Organization of Islamic Conference, the Inter-American Juridical Organization and the European Economic Community, had, in various ways expressed concern about promulgation and application of laws with extraterritorial effects, as they affected sovereignty of other States, the legitimate interests of entities and persons under their jurisdiction and the freedom of trade and navigation.

8. Further, the preliminary study apart from referring to some recent instances of extraterritorial application of national laws (without resolving the other questions, including the question of economic counter measures), had furnished an overview of the limits imposed by international law on the extraterritorial application of national laws, and *inter alia* spelt out the response of the international community to such actions. The study also drew attention to the opinion of such bodies, as the Inter-American Juridical Organization, the juridical body of the Organization of American States² and the International Chamber of Commerce.³

² For details see *International Legal Materials*, Vol. 35 (1996), p. 1322.

9. The Secretariat study had also shown that the topic touched upon the political, legal, economic and trade aspects of inter-State relations. It recalled in this regard that the AALCO Secretariat study on the “Elements of Legal Instruments on Friendly and Good-Neighbourly Relations Between the States of Asia, Africa and the Pacific” had *inter alia* listed 34 norms and principles of international law, conducive to the promotion of friendly and good neighbourly relations. Some of these principles enumerated *inter alia* were: (i) independence and state sovereignty; (ii) territorial integrity and inviolability of frontiers; (iii) legal equality of States; (iv) non-intervention, overt or covert; (v) non-use of force; (vi) peaceful settlement of disputes; (vii) peaceful coexistence; and (viii) mutual cooperation.⁴

10. The Secretariat brief had pointed out that the Declaration⁵ and Programme of Action⁶ adopted by the Sixth Special Session of the General Assembly, the Charter of Economic Rights and Duties of States, 1974⁷, the United Nations Convention on the Law of the Sea, 1982 and several other international instruments retain many of the traditional aspects of sovereignty. These instruments also reaffirmed principles of economic sovereignty wherein rights and interests of States in the permanent sovereignty of their natural resources would be protected.

11. The study had submitted that it may, perhaps, be necessary to delimit the scope of inquiry into the issue of extraterritorial application of national legislation in determining the parameters of the future work of the Organization on this item. It had asked for consideration to be given to the question, as to whether it should be a broad survey of questions of extraterritorial application of municipal legislation examining the relationship and limits between the public and private international law on the one hand, and the interplay between international law and municipal law on the other. It had recalled in this regard that, at the 44th Session of the International Law Commission (1992), the Planning Group of the Enlarged Bureau of the Commission had established a working group on the long-term programme to consider topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission and one of the topics included in the open-selected lists was the Extraterritorial Application of National Legislation.

12. An outline on the topic “Extraterritorial Application of National Legislation” prepared by a Member of the Commission had *inter alia* suggested that “it appears quite clear that a study of the subject of Extraterritorial Application of National Laws by the International Law Commission would be important and timely. There is an ample body of State practice, case law, national study on international treaties, and a variety of scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions.

³ Dieter Lange and Gary Borne (eds.), *The Extraterritorial Application of National Laws* (ICC Publishing S.A. 1987).

⁴ The Secretariat Study on “Elements of a Legal Instrument on Friendly and Good Neighbourly Relations Between States of Asia, Africa and the Pacific” was prepared in 1987 and is reprinted in *AALCC Combined Reports of the Twenty-sixth to Thirtieth Sessions* (New Delhi, 1992), p. 192.

⁵ Resolution 3201 of May 1, 1974, Sixth Special Session.

⁶ Resolution 3202 of May 1, 1974, Sixth Special Session.

⁷ Resolution 3281, 29th Session.

13. The Secretariat study had proposed that in determining the scope of the future work on this subject, the Organization should bear in mind the request of the Government of the Islamic Republic of Iran to carry out a comprehensive study concerning the legality of such unilateral measures i.e. sanctions imposed against third Parties, “taking into consideration the position and reactions of various governments, including the position of its Member States”. The study also proposed that in considering the future work of the Secretariat on this item, Member States could consider sharing their experiences with the Secretariat on this matter.

B. Unilateral Sanctions, Executive Orders, and Presidential Proclamations

(a) Unilateral Sanctions

14. It is seen that promulgation of domestic laws having extraterritorial effects has largely been in the form of unilateral sanctions, executive orders and Presidential proclamations. It may be stated that the reasons for the imposition of unilateral sanctions have ranged from boycott activity⁸ to the issue of worker rights⁹ and have hitherto included such other issues as communism¹⁰, transition to democracy¹¹, environmental activity, expropriation¹², harboring the war criminals, human rights¹³, market reforms, military aggression, narcotics activity, political stability, proliferation of weapons of mass destruction and terrorism.¹⁴

15. During the last five years or so there has been a sudden spurt in the number of Federal legislation¹⁵ in the United States invoked to impose unilateral sanctions and/or impose secondary boycotts.¹⁶ Besides, there are number of other reasons ranging from human rights, corruption to forced labour and denial of socio-economic rights as to the enactment of any legislation imposing sanctions.¹⁷

⁸ See the Foreign Relations Act, 1994 (of USA).

⁹ See the Andean Trade Preference Act.

¹⁰ Aimed at Cuba and North Korea. See the Cuba Regulation and the North Korea Regulations (of USA).

¹¹ See the Cuban Democracy Act of 1992 (of USA).

¹² The Helms-Burton Act, 1996 (of USA).

¹³ During 1993-96, human rights and democratization were the most frequently cited objective foreign policy reasons and 13 countries were specifically targeted with 22 measures adopted.

¹⁴ The former Representative Toby Roth criticized the Iran-Libya Sanctions Act as “good politics ... but bad law. It’s only effect, he said, so far had been to unify the European Union, all 15 members, against the U.S. policy toward Iran and Libya.”

¹⁵ The U.S. Congress has passed some of these laws, whereas others are before the House International Relations Committee or the Senate Foreign Relations Committee and are being actively considered as Bills.

¹⁶ Some sanctions programmes have a secondary boycott effect; that is, sanctions are applied not only against a target state, but also against any person or state that maintains relations or engages in transactions with the target. In a secondary boycott, the secondary target is being sanctioned directly for dealing with the primary target, even though such dealings may have no jurisdictional relationship to the sanctioning state. Forced Abortion Condemnation Act, 1999 bans visas for Chinese government officials engaged in forced abortions; People’s Republic of China Policy Act, 1999 bans issuance of visas for Chinese government officials and monitoring of human rights situation in China; Nigerian Democracy and Civil Society Empowerment Act of 1999- seeks to restore some aid and support to the Government of Nigeria, although the ban on military sales and the training to Nigerian forces continues; S. (Senate) 226 North Korean Threat Reduction Act, 1999- the Bill seeks to restrict aid to North Korea an account of its nuclear programmes.

¹⁷ The Foreign Operations, Export, Financing and Related Programs Appropriation Act, 1998 purported to impose economic sanctions when a government fails to ensure conduct of free and fair elections safeguarding civil and political rights. It provided that government prosecute officials involved in corruption and drug related activities;

16. The period 1990-1996 was characterized by the US Administration and States promulgating a number of extraterritorial laws other than the Helms-Burton (against Cuba) and the Kennedy-D' Amato (against Libya and Iran) legislations.¹⁸

(b) Extension of Iran and Libya Sanctions Act of 1996

17. On 3rd August 2001, the President of the United States of America signed into law H.R. 1954, the "ILSA Extension Act of 2001". The Act provides for a 5-year extension of the Iran and Libya Sanctions Act (ILSA) with amendments that affect certain of the investment provisions. Explaining the rationale for the extension of the Act, as regard Libya, George Bush said:

Libya must address its obligations under U.N. Security Council Resolutions. These relate to the 1988 Lockerbie bombing and require Libya to accept responsibility for the actions of

H.R. (House of Representatives) 2996 which proposes to withhold assistance to all CARICOM countries which support membership of Cuba in these Organizations; H.R. 3616 amendment 641 and H.R. 3616 (amendment 642) relate to prohibition of transfer of missile related technology and export of satellites respectively to China; H.R. 2647- provides for monitoring of commercial activities of companies run by People's Liberation Army (PLA) of China; S.1083 United States-People's Republic of China National Security and Freedom Protection Act- banned import of any product made by PLA); H.R.2176 Communist China Subsidy Reduction Act- requires Secretary of the Treasury to reduce amount paid to international financial institutions by an amount equal to that provided in loans and support for China; S.810 on China Sanctions and Human Rights Advancement Act requires visa limitation votes against loans to China by U.S. representatives in international financial institutions. It also prohibits import of ply or Norinco group products. Further, the Act requires reporting on human rights and religious persecution in China; H.R. 320 Chinese Slave Labour Act- prohibits importation of articles made with forced labour; H.R.2431 Wolf-Specter Freedom from Religious Act-the Act provides that the targeted countries (China, the Sudan, Laos, Iran, Cuba, Iraq and others) committing a breach of its provisions be denied visas for certain individuals from their countries and also exports of commodities. In this regard sanctions recommended against Sudan includes ban on flights, investments and imports; the U.S.1869 International Freedom from Religious Persecution Act provides sanctions against states persecuting their citizens; HR.2121 dealing on War Crimes Prosecution Facilitation Act; 1997 which restricts economic assistance to (Croatia, Yugoslavia and others) for harbouring war criminals; H.R. 1802 provides that no aid to be provided to India unless human rights concerns are addressed; H.R. 1132 stipulates that no military aid shall be provided to Indonesia, unless it improves its human rights in East Timor; the three Acts H.R. 2930 Iran Missile Proliferation Sanctions Act, 1997, H.R. 2709 Iran Missile Sanctions Act, and H.R. 2159 Foreign Operations, Export Financing and Related Programs Appropriation Act, 1998- provide for halting finances to the Russian Federation, if found aiding Iran's missile development programmes.

¹⁸ These include the Andean Trade Preference Act; the Anti-Terrorism and Effective Death Penalty Act, 1996 (Anti-terrorism 1996); the Arms Export Control Act (AECA); the Atomic Energy Act; the Cuban Democracy Act, 1992; the Cuban Liberty and Democratic Solidarity Act, 1996 (Helms-Burton or LIBERTAD Act); the Department of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1990 (Commerce Appropriations, 1990); the Department of Defence Appropriations Act, 1987 (Defense Appropriations Act, 1987); the Export Administration Act; the Export -Import Bank Act ("Ex-Im"); the Fisherman's Protective Act, 1967; the Foreign Assistance Act (FAA); Foreign Relations Act; the Foreign Relations Authorization Act; the Foreign Operations, Export, Financing and Related Programs Appropriation Act, 1995; the General System of Preferences Renewal Act (GSP); the High Seas Drift Net Fisheries Enforcement Act (Drift Net Act); the International Emergency Economic Powers Act (IEEPA); the Internal Revenue Code; the Internal Security and Development Cooperation Act, 1985 (ISDCA); the International Financial Institutions Act; the Iran-Iraq Non-Proliferation Act, 1992; the Iran and Libya Sanctions Act, 1996; the Iraq Sanctions Act, 1990; the Marine Mammal Protection Act, 1972 (Marine Act); the Narcotics Control Trade Act¹⁸; the National Defense Authorization Act, 1996 (Defense Authorization Act, 1996); the Nuclear Non-Proliferation Act (NNPA), 1994; the Omnibus Appropriation Act, 1997 (1997 Omnibus); the Spoils of War Act; the Trade Act, 1974 (Trade Act); and Trading With the Enemy Act (TWEA).

Libyan officials, disclose all it knows about the bombing, renounce terrorism, and pay appropriate compensation. Cooperative action on these four issues would make it possible for us to begin to move towards a more constructive relationship.

As regards Iran, Bush was of the view:

With respect to Iran, we continue to have serious concerns over its support for terrorism, opposition to the Middle East peace process, and pursuit of weapons of mass destruction.

18. It may be noted that although the US Administration favored a simple two-year extension, the US Congress recommended a five-year extension of ILSA. The pro-Israel lobby's influence can be seen from the fact that 236 of the 435 –member House and 74 of 100 Senators signed on to the five-year extension.¹⁹

(c) Executive Orders and Presidential determinations

19. During the past few years there have been instances of unilateral imposition of sanctions by Executive Orders and Presidential Determinations. These include: Executive Order 13047 of May 21, 1997 invoking a prohibition on new investment in Burma (Myanmar); Executive Order 13067 of November 3, 1997 imposing a comprehensive trade embargo on Sudan; Presidential Determination No. 98-22 of May 13, 1997 prohibiting the sale of specific goods and technology and United States Bank loans to the Government of India, terminating sales of defence articles and design and construction equipment and services, and shutting down Export – Import Bank for Overseas Private Investment Corporation (OPIC) and TDA; and Presidential Determination No. 98-XX of May 30, 1998 prohibiting the sale of specific goods and technology and United States Bank loans to the Government of Pakistan, terminating sales of defence articles and design and construction equipment and services, and shutting down Export-Import Bank, OPIC and TDA.

(d) Local Sanctions Acts

20. In addition to the federal legislation and local governments, in the United States have been increasingly inclined to impose sanctions against foreign countries in response to human rights practices. Some 12 U.S. states, counties, and cities had sought to establish their own measure against other countries and have imposed restrictions against sovereign States ranging from Myanmar to Switzerland. Thus, following the imposition of United States investments sanctions on Myanmar in May 1997²⁰, a dozen or so local governments restricted the granting of public contracts to companies that do business with Myanmar. These include the Commonwealth of Massachusetts, the cities of San Francisco and Oakland, California and several other Governments, which have enacted “selective purchasing ordinances” against domestic and foreign companies that do business with Myanmar.

¹⁹ As to the Libya and Iranian response to the Extension of ILSA by the US Government see pp. 21-24 of this Secretariat Report.

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

21. There are a few recent instances of local states and counties have adopted economic sanctions and laws. The sanctions regulations too are in the form of either selective purchasing or selective investment and non-binding resolutions. Selective purchasing involves a penalty of up to 10 percent on firms operating in a targeting country or prohibition from bidding on governmental contracts. Selective investment in an entity (usually a bank) amounts to actively doing business in a targeted country. As regards non-binding resolutions, it involves a statement by a governing body opposing a country's policies, but no actual sanctions. Against the backdrop of so many local Acts, an attempt is made to study briefly the Massachusetts legislation and the ensuing judgment, which struck down the law as *ultra vires*. Incidentally, it's the only case so far to have undergone judicial scrutiny.

(i) The “Massachusetts Burma Law” of 1996

22. The “Massachusetts Burma Law” of 1996²¹ was characterized by the United States District Court of the State of Massachusetts as infringing “on the federal government’s power to regulate foreign affairs”. In reaching its conclusion the Court had *inter alia* relied on an *amicus curiae* brief filed by the European Union.²²

23. As regards *Myanmar*, Alameda county, California; Ann Arbor, Michigan; Berkeley, California; Boulder, Colorado; Brookline, Minnesota; State of California; Cambridge, Los Angeles, Massachusetts, New York, North Carolina, San Francisco, Seattle, Texas, Vermont and a number of other counties have enacted laws on selective purchasing. On *Cuba*, Dade County, Florida has applied selective purchasing and investment. With respect to *Indonesia*, county of Brookline, Massachusetts, State of Massachusetts have applied laws of selective purchasing. Similarly, as regards *Nigeria*, State of Maryland, county of Maryland, Alameda, California; Amherst, Minnesota; Berkeley California; Oakland had resorted to selective purchasing.

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

²¹ See Massachusetts Acts of 25 June, 1996. The State of Massachusetts admitted before the District Court of Appeal that the Statute “was enacted solely to sanction Myanmar for human rights violations and to change Myanmar’s domestic policy”.

²² See the judgement of the Court of November 4, 1998 in *National Foreign Trade Council vs. Charles D. Baker, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts and Philmore Anderson III in his official capacity as a State Purchasing Agent for the Commonwealth of Massachusetts*.

25. As to the impugned Massachusetts Burma Law having created an issue of serious concern in EU-US relations the *amicus curiae* brief stated that the Massachusetts Burma Law charts a very different course. It is a secondary boycott- an extra-territorial economic sanction that is targeted not at the regime-but at nationals of third countries that may do business with Burma.

26. Finally, the European Union expressed its concern that the failure to enjoin the Massachusetts Burma Law will lead to the proliferation of US State and Local sanctions laws and stated that at least six US municipalities had enacted measures purporting to regulate business activities in Nigeria, Tibet or Cuba and 18 states and governments had considered or “were considering similar measures restricting business ties to Switzerland, Egypt, Saudi Arabia, Pakistan, Turkey, Iran, North Korea, Iraq, Morocco, Laos, Vietnam, Indonesia or China”. It emphasized that “the United States and the European Union had expended considerable effort in seeking to resolve their differences over U.S. extraterritorial economic sanctions” and that “this effort had not yielded progress on the issue of extraterritorial sanctions imposed by State and local governments, a shortcoming that is of considerable concern to the U.S.” It went on to recall that in “recognition of this danger of proliferation of sanctions measures, the EU-US agreed at the EU-US Summit on May 18, 1998 on a set of principles covering the future use of sanctions in the context of the Transatlantic Partnership on Political Co-operation. This included agreeing that the EU and the U.S. “will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators and that such sanctions will be targeted directly and specifically against those responsible for the problem.”²³

27. The validity of punitive measures against Myanmar adopted by State and municipal governments and ordinance in the United States have been analyzed under various provisions of the United States Constitution and it has been said that such local measures are constitutionally infirm.²⁴ On 19 June 2000, this contention was upheld in the NFTC Case, which was before the United States Supreme Court. The Court stated that “ the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics”.

(ii) The Banana dispute between US-EU

28. The United States had in 1998 accused the European Union of favouring the produce of African, Caribbean and Pacific States (hereinafter called the ACP States), and discriminating against imports of banana fruit marketed mainly by United States companies in Latin America.²⁵

²³ See the *Amicus Curiae* Brief of August 13, 1998 filed by the European Union, in support of Plaintiff National Foreign Trade Council in the *National Foreign Trade Council vs. Charles D. Baker and Philmore Anderson III*, Emphasis added.

²⁴ David Schmahmann & James Finch, “The Unconstitutionality of State and Local Enactments In the United States Restricting Trade Ties with Burma” *Vanderbilt Journal of International Law*, vol. 30 (1997). Under Article 1, Section 8, paragraph 3, foreign policy and foreign trade are in that exclusive domain of the federal government. Further, Article VI, paragraph 2 of the U.S. Constitution states that federal law always takes precedence.

²⁵ The complainants in the dispute before the Dispute Settlement Body of the WTO had included Ecuador, Guatemala, Honduras, Mexico and the United States of America.

Further, it had brought a complaint before the WTO, which had called the EU to change its banana import regime and had ruled it illegal. The European Union on its part believed that it has rectified the situation by making changes to its regime with effect from January 1, 1999 but the amendment was seen as being derisory by the United States, which has argued that it is within its rights to retaliate.

29. In October 1998, the United States Administration announced a series of steps that would lead to the imposition of trade sanctions under section 301 of the Trade Act of 1974 against the European Communities by March 1999 in retaliation for what it claimed were an incorrect implementation of the DSB recommendations in the bananas dispute. The United States of America had announced retaliatory 100% tariffs on 520 million dollars worth of imports of EC products should find that the EC had failed to implement the DSB recommendations. A unilateral determination by the US Administration would violate the fundamental obligations of the WTO's Dispute Settlement Understanding. A unilateral decision to restrict imports from the EC would also violate substantive obligations such as those incorporated in Article I, II and XI of GATT, 1994. An overwhelming majority of the WTO's members opposed the United States embarking on unilateral action on the issue.

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

(iii) Consistency of US Legislation with the WTO Agreements: Ruling of WTO Dispute Settlement Body²⁶

31. Section 301 of the US Trade Act 1974 permitted the United States Trade Representative (USTR) to initiate action against any foreign trade practices violating a trade agreement as well as foreign country practices that are otherwise determined to be unreasonable. The consistency of Section 301 with the WTO covered agreements was challenged by the European Community (EC) in the Dispute Settlement Body (DSB) of the WTO (*US-Section 301-310 of the 1974 Act*). Pursuant to the request of the EC, the DSB established the panel in March 1999.

32. The EC argued before the panel that Section 301, and in particular Section 304 violated US obligations in the WTO by requiring the United States Trade Representative to determine whether another WTO Member "denies US rights or benefits" under the WTO agreement before DSU procedures have been exhausted. The EC further argued that any measure taken under Section 301 would lead to unilateralism, which has been prohibited under Article 23 of the DSU. On the other hand, the US argued that only legislation which mandates WTO inconsistent action, or which precludes WTO consistent action, could violate WTO provisions.

33. The key question faced by the Panel was: does legislation that gives national authorities the possibility to act, either consistently or inconsistently with their WTO obligations, violate those obligations? The Panel firstly considered whether or not Section 301 violated the precise

²⁶ For details see WT/DS152 or the website of the WTO at www.wto.org/disputes.

obligations of the WTO set out in Article 23 of the Dispute Settlement Understanding. It concluded that the Section 301 law, by reserving for the USTR the right to make a determination of inconsistency even in cases where the DSU proceedings have not been exhausted, constitutes a prima facie violation of Article 23

34. The Panel went on to say (paragraph 7.86) that “Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat, even before DSU procedures have been activated. To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one’s way as actually using the stick. The threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members.”

35. The Panel, taking into consideration the undertaking given by the US in the Statement of Administrative Action (SAA) approved by the US Congress curtailing USTRs discretion and in the oral statements before the Panel, concluded that in the final analysis these commitments did enable the US to act in each and every case in conformity with WTO dispute settlement procedures. However, the Panel also concluded that “should the undertakings articulated in the SAA and confirmed and amplified by the US to this Panel be repudiated or in any other way removed by the US Administration or another branch of the US Government, this finding of conformity would no longer be warranted.”

C. Legal Implications of Extra Territorial Jurisdiction

36. International law governs the relation of States between themselves and every State incurs responsibility when it violates rights granted by international law. In this regard, every state has a right to exercise jurisdiction provided such jurisdiction is rooted and based on the generally accepted norms of international law. However, there are instances when in the exercise of its territorial jurisdiction a State may regulate an act whose constituent elements may have occurred only in part in its territory, for example when an act is initiated abroad,²⁷ but consummated within its territory, also called *objective territoriality*. Conversely, an act could have been initiated within its territory and consummated abroad amounting to *subjective territoriality*. Besides, it is well known that without consent or treaty a State cannot take measures on the territory of another state.²⁸

37. The adoption of the Helms-Burton or the Libertad Act, 1996 against Cuba and the Kennedy-D’Amato Act against Iran, by the United States has far reaching impact on the application of national laws outside their territory in a manner, which may lead to conflict with other States. The Helms Burton Act provides *inter alia* for legal proceedings before US Courts against foreign persons or companies deemed to be ‘trafficking’ in property expropriated by Cuba from American nationals. In addition, the legislation enables the US to deny visas to executives, their children, and spouses on the ground that activities in Cuba have a direct, substantial, and foreseeable effect.

²⁷ US v. Aluminum Co. of America 148 F. 2d 416 (1945); and US v. Watchmakers of Switzerland Information Center Inc. 1133.

²⁸ The S.S. Lotus Case, PCIJ (Permanent Court of International Justice), Ser. A.No.10 (19207).

38. These justifications seem being infirm in law, have evoked strong reactions from third States and entities that feel that their legitimate trading interests are affected by such unilateral sanctions or extraterritorial measures. Moreover, third States argue these two extra territorial measures violate their sovereign right to have peaceful trading relations with other States. The European Union²⁹ and Canada in retaliation passed a number of blocking legislation in response to Helms Burton Act³⁰ and other extra territorial measures.

39. It may thus be stated that extraterritorial legislation to be valid must: not violate the local law of a state, must not cast jurisdiction upon nationals of third States who do not fall under the jurisdiction of the prescribing state and must be in conformity with the basic norms of international law. To name a few the principles of the UN Charter such as sovereign equality, non-interference in internal affairs and peaceful settlement of disputes.

40. Against this backdrop, this report will briefly mention the consideration of the topic from 36th to 40th Session of AALCO; elaborate the consideration of the topic at the 41st Session of AALCO and the 57th session of the General Assembly of the United Nations. Finally, it offers the comments and observations of the Secretariat.

²⁹ EU Note date 12 Aug. 1966 and EU Press Release WE 27/96, 18 July 1996.

³⁰ The Canadian the Foreign Extraterritorial Measures Act (FEMA), 1997.

III. CONSIDERATION OF THE ITEM FROM 36TH TO 40TH SESSION OF AALCO

41. Since the 36th Session of the AALCO when this item was placed on its agenda, it has been considered at successive sessions. An attempt is made to provide in brief, the substance of the discussions held.

42. During the course of the deliberations on the topic, at the 36th Session (Tehran, 1997) delegates expressed a number of varied views on the topic. Chief among them being that promulgation and application of laws with extraterritorial effects, had no basis in international law as such laws were in contravention of the principle of non-intervention, political independence and territorial sovereignty enshrined in several treaties.

43. At the 36th session (Tehran, 1997), the AALCO *inter alia*, recognized the significance, complexity and implications of “Extra-Territorial Application of National Legislation: Sanctions Imposed against Third Parties”. It requested the Secretariat to monitor and study developments concerning the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties and urged Member States to share such information and materials that may facilitate the work of the Secretariat. The AALCO also requested the Secretary General to convene a seminar or meeting of experts and to ensure a scholarly and in-depth discussion, to invite a cross-section of professionals, thereto. The AALCO had further requested the Secretary-General to table a report of the seminar or meeting of experts on the subject at the next session of the Organization.

The Report on the Seminar on the Extra-Territorial Application of National Legislation: Sanctions Imposed Against Third Parties, Tehran, January 1998

44. In fulfillment of the mandate of the 36th Session the Secretariat of the AALCO organized a two-day seminar in Tehran in January 1998. A group of experts from Asia and Africa and experts from outside the region were invited thereto.

45. A Background Note prepared by the Secretariat for that seminar had included an overview of the United States: Iran and Libya Sanctions Act of 1996. Although references were also made to some of the earlier US laws such as the anti-trust legislation, the Regulations concerning Trade with USSR, 1982, and the National Defense Authorization Act, 1991. The legality of the two 1996 enactments (the Helms-Burton Act and the Kennedy-D’amato Act) were examined in terms of their conformity with the peremptory norms of international law; the law relating to counter-measures; the law relating to international sanctions; principles of international trade law; the law of liability of States for injurious consequences of acts not prohibited by international law; impact of unilateral sanctions on the basic human rights of the people of the target State; and issues of conflicts of laws such as non-recognition, *forum non-conveniens* and other aspects of extra-territorial enforcement of national laws.

46. The deliberations had also touched upon a range of State responses to counter the possible impact of the US legislation in particular and the unilateral imposition of sanctions through extraterritorial application of domestic legislation in general. References were made in this regard to the response of the Inter-American Juridical Organization and the European Union

and the measures discussed included ‘blocking’ legislation³¹, statutes with ‘claw-back’³² provisions and laws providing for compensation claims, at the national level. At the international level, the responses noted included: diplomatic protests, negotiations for exemptions/waivers in application of the projected sanctions, negotiations for settlement of disputes, use of WTO avenues and measures to influence the drafting of legislation in order to prevent its adverse extra territorial impact.

47. The deliberations of the seminar revealed a general agreement that the validity of any unilateral imposition of economic sanctions through extra territorial application and national legislation must be tested against the accepted norms and principles of international law. The principles discussed included those of sovereignty and territorial integrity, sovereign equality, non-intervention, self-determination, and the freedom of trade, the right to development and the principle of permanent sovereignty over natural resources.

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

49. While considering the issue of countermeasures, it was emphasized that the presiding peremptory norm must be the peaceful settlement of disputes. The discussion also highlighted the inter play between counter measures and non-intervention, and between counter measures and unilateral imposition of economic sanctions. The participants agreed that counter measures could not be a façade for unilateral imposition of sanctions in respect of matters that fell within the purview of Chapter VII of the Charter of the United Nations or the sanctions competence of other international organizations. It was argued that the differences between counter measures and sanctions of the nature of international sanctions should be recognized.

50. The debate in the seminar had also revealed a divergence of views on three main issues viz. (i) whether the subject should be confined to secondary sanctions through extraterritorial application of national laws; (ii) the distinction between the prescriptive jurisdiction and the enforcement jurisdiction of every State; and (iii) the applicability of WTO disputes settlement procedure to resolve disputes relating to Helms-Burton Act and the Kennedy D’Amato Act in their extraterritorial application.

51. The Seminar of the group of experts had also addressed the question of the work to be undertaken and a number of proposals were advanced by the participants for the consideration of

³¹ The centerpiece of any blocking legislation is that the national courts would not recognize or enforce any judgment made under legislation that results in unjustified extraterritorial application. The objective of such legislations is to neutralize the effects of extraterritorial legislation promulgated by the sanctioning State.

³² A “claw back” provision allows nationals who have been sued under a sanctioning legislation to recover damages and costs.

the AALCO. The proposals with regard to the future work on the subject included: (i) further study on all aspects of the subject; and (ii) the formulation of principles.

52. The Secretariat in the intervening period since the 37th Session (New Delhi, 1998) with the financial assistance of the Islamic Republic of Iran, published the Report and proceedings of the Tehran Seminar which incorporates the papers presented and the oral presentations made by the Group of Experts.

53. At its 37th session (New Delhi, 1998) continued its study of the legal issues relating to the Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties and examined the issue of “executive orders” imposing sanctions against target States. The Organization urged the Member States to provide relevant information and materials to the Secretariat of the Organization.

54. The Secretariat Report submitted for the consideration of the Session stressed that the United States of America had armed itself with a plethora of laws, which had hitherto allowed the Administration to extend its jurisdiction and impose unilateral sanctions against more than 70 States.³³ According to report of the Latin American Economic System (SELA), which groups 28 Latin American and Caribbean States, 76 States put up with or were seriously threatened by one or more trade sanctions. Unilateral trade sanctions, it was stated, severely threatened or punished 68 percent of the world population. The President’s Expert Council report on sanctions listed 73 States, which, as of January 1997, had been subjected to some form of unilateral sanctions.

55. A report commissioned and published by the United States National Association of Manufacturers (NAM) had, in March 1997, revealed, “from 1993 through 1996, 61 U.S. laws and executive actions were enacted authorizing unilateral sanctions for foreign policy purposes. Thirty-five countries were specifically targeted”.³⁴ The report had concluded that all economic sanctions “should be multilateral except the most unusual and extreme circumstances”.

56. The Organization at its 38th session, held in Accra, considered, and surveyed the local acts of USA, which sought to impose unilateral sanctions. The Secretariat brief had also enunciated four categories of executive orders and had expressed the hope that the Session would guide the Secretariat on the future course of the topic. On the issue of local acts of States having extraterritorial effects, it was felt that as few of them had been declared *ultra vires* of the

³³ The targeted States then were: Afghanistan, Algeria, Angola, Armenia, Azerbaijan, *Bahrain*, *Bangladesh*, Belarus, Belize, *Burma*, Burundi, Cambodia, Canada, *China*, Columbia, Costa Rica, Cuba, Djibouti, *Egypt*, *Gambia*, Georgia, Guatemala, Haiti, Honduras, *Iran*, *Iraq*, Italy, *Japan*, *Jordan*, Kazakhstan, *Kuwait*, Kyrgyzstan, Laos, *Lebanon*, Liberia, *Libya*, Maldives, Mauritania, Mexico, Moldavia, Morocco, *Nigeria*, *North Korea*, *Oman*, *Pakistan*, Panama, Paraguay, *Qatar*, Romania, Russia, Rwanda, *Saudi Arabia*, *Somalia*, *Sri Lanka*, *Sudan*, *Syria*, Taiwan, Tajikistan, *Tanzania*, *Thailand*, Turkmenistan, *Uganda*, Ukraine, *United Arab Emirates*, *Uzbekistan*, Vanuatu, Venezuela, Vietnam, *Yemen*, Federal Republic of Yugoslavia and Zaire. In addition to these States, unilateral sanctions have also been targeted at other newly independent States of erstwhile Soviet Russia and *India*. In addition to these States, *Indonesia* and *Malaysia* are considered to be among the possible targets.

³⁴ See, *A Catalog of New US Unilateral Economic Sanctions For Foreign Policy Purposes 1993-96 (With Analysis and Recommendations)*, March 1997. The Catalog was prepared under the direction of Professor Barry Carter of Georgetown University Law School. Marino Marcich of the NAM Trade and Technology Policy Department prepared the analysis and recommendations. For the text of the Catalogue, visit <http://www.usaengage.org/studies/nam.html>.

constitution of the land, their validity could also be questioned as international law, which guided relations between States and required conformity with certain basic norms.

57. The discussion that followed saw a number of Member States voicing their concern on the growing instances of the application of extra-territorial application of national legislation. Some of the important points made were:

- the changing world scenario with increased globalization and liberalization called for respect of rule of law and friendly relations among States and the use of force as an instrument of national policy was prohibited under international law;
- the Security Council alone, was authorized to impose sanctions, in furtherance of its role to maintain or restore international peace and security.
- The topic touched upon political, legal and trade aspects of international relations and sanctions, violated the right of third States to undertake peaceful and uninterrupted international trade relations;
- Disputes should be settled peacefully in accordance with the principle of mutual respect for each other's sovereignty and non-interference in each other's internal affairs;

58. At the 39th session of the Organization, held at Cairo (2000) the Secretariat study focused on executive orders, particularly the Burma Massachusetts Law of 1996. The study reiterated the view that extraterritorial sanctions violated a State's sovereignty and a number of core principles of the UN Charter. The main issues expressed included:

- A number of delegates condemned the promulgation of national legislation with extra-territorial effects and called for the immediate repeal of such laws;
- Views were expressed that extraterritorial measures, violated a number of well established principles of international law such as those of sovereignty and territorial integrity, sovereign equality, non-intervention, self-determination, principle of peaceful settlement of disputes and freedom of conducting normal trade;
- It was felt that extraterritorial application of national laws violated the principle of sovereignty and came as an impediment to the right of socio-economic development of a country.

59. The Organization at its 40th session (New Delhi, 2001) continued its discussion on the topic. It is generally held that the discussions revealed that promulgation of extra-territorial measures were violative of the core principles of territorial integrity and political independence of States. Besides violating the principles enshrined in the UN Charter, extra-territorial sanction hindered peaceful and economic relations between States.

IV. CONSIDERATION OF THE TOPIC AT THE 41ST SESSION OF THE AALCO

60. At the 41st Session of the Organization, the item “**Extraterritorial Application of National Legislation: Sanction Imposed Against Third Parties**” was introduced by the **Deputy Secretary-General Amb. Dr. Ali Reza Deihim**. He said that promulgation of domestic laws having extra-territorial effect, including imposition of unilateral secondary boycotts were violative of the sovereignty and economic interest of a State. It also violated the core principles of territorial sovereignty and political integrity of a State and constitutes interference in the internal affairs of a State. They also hamper trade and economic cooperation among States.

Drawing attention to the much criticized D’Amato-Kennedy Act and the Helms-Burton Act, Ambassador Deihim said that in an increasingly interdependent world, unilateral sanctions against States besides possessing infirmities in law were bad as a foreign policy tool.

Unlike multilateral sanctions, unilateral sanctions were inherently ineffective and lacked the collective will of the international community. For these reasons, Dr. Deihim said it was imperative that all States must reject the promulgation and application of this dubious form of legislation

61. The **Delegate of the Islamic Republic of Iran** said that unilateral sanctions and extraterritorial measures against other countries were inadmissible under international law. Such actions, the delegate said, violate the principles set out in the UN Charter; the Declaration on the Inadmissibility of Interference in the Internal Affairs of States and the Protection of their Independence and Sovereignty (adopted in 1969); the 1979 Charter of Economic Rights and Duties of States; and the Friendly Relations Declaration of 1980. They also violate many other resolutions of UN General Assembly and ECOSOC resolutions that express grave concern over the negative impact of unilateral extraterritorial coercive economic measures and call for their immediate repeal. The delegate pointed out that such illegal measures impede free international trade and negatively impinge upon social and human development in the targeted developing countries.

The delegate said that the Islamic Republic of Iran had been subjected to these measures in the past 20 years. While the form and method of applying such measures had changed with the passage of time, their nature remained unchanged. Both developed and developing countries, he said, had vigorously reacted to these unlawful measures. Some of them had gone as far as to adopt legislation aimed at countering the legal effects of such measures within their national territory.

The delegate urged retaining this topic on the agenda of the AALCO work-programme, so as to carrying on and enriching the already-conducted extensive study of the issue.

62. The **Delegate of Indonesia** cited the example of the US Helms-Burton Act and Kennedy-D’Amato Act as extraterritorial measures intended to isolate target countries, economically and politically. More particularly, such US policy towards Iran and Libya, the delegate said, had been addressed by the Organization of Islamic Conference (OIC) at its 26th Session. The resolution adopted by the OIC on this matter proposed seeking comprehensive solutions through dialogue

and peaceful means to resolve the problem and condemned any political or economic measures applied unilaterally and extraterritorially.

Therefore, his country rejected the application of extra-territorial measures, as they were violative of international law. The delegate called for reflecting this position in the resolution to be adopted on the topic. He supported AALCO Resolution No. 39/5 as a legal document containing the norms of international relations, which should be adopted by all States.

63. The **Delegate of Democratic People's Republic of Korea** said that the United States has imposed multi-faceted sanctions against his country for several decades now, thus hampering its independent socio-economic development and prosperity. Such unilateral sanctions, the delegate said, violated the principles of sovereignty and non-interference and presented a serious threat to world peace and security. Therefore, he joined the Delegate of Iran in urging the retention of this topic on the AALCO's agenda.

64. The **Delegate of Sudan** said that his country was opposed to extra-territorial application of national laws, as it constituted a flagrant violation of the established norms of public international law and incompatible with the principles of the world public order. Terming such illegal acts as dangerous, the delegate pointed out that it consequently affected free trade and the rights of nations and peoples to attain social economic development.

Sudan, along with many other countries had been affected by such extraterritorial measures. Due to such measures, the delegate informed that a good number of international companies had been denied the opportunity to invest in Sudan, more particularly in the petroleum production sector. Consequently, the Sudanese people had been deprived of their rightful opportunity to benefit from the use of their natural resources. He urged retaining the item on the agenda of the next Session.

65. The Government of **Malaysia** although didn't attend the session had given its written comments on this agenda item. These comments are as under:

1. Malaysia has expressed its views on national laws that have ET application contrary to the norms of international law at various fora. Malaysia has had first-hand experience of the application of the Helms-Burton Act and the Kennedy-D'Amato Act because of its investments in Cuba and Iran.
2. At the 55th General Assembly, Malaysia, while commenting that the US attitude towards Cuba was changing in relation to the Helms-Burton Act, expressed the view that a lot still needed to be done to do away with national laws with ET application. Malaysia is of the view that all forms of economic, commercial and financial sanctions run counter to the letter and spirit of the UN Charter Malaysia called for an immediate end to the embargo against Cuba as it violated the principles of international law, in particular international humanitarian law, and freedom of trade and navigation (cited at paragraph 79 of Doc. AALCC/XL/H.Q.India/2001/S.5)
3. At the 56th General Assembly, Malaysia rejected the ET application of national laws and called for an immediate end to the embargo imposed against Cuba. In Malaysia's view, the embargo, besides undermining the principles of sovereignty of States, also

seriously infringes the rights of the Cuban people to life and socio-economic development.

4. Malaysia agrees with the views expressed by the Secretariat in the document tabled for the consideration of the 41st Session that ET measures, besides being infirm in law are also bad instruments of foreign policy being largely ineffective as deterrents against the targeted States. They also undermine the efforts being made by the UN, WTO, and other international organizations to establish an equitable, multilateral, non-discriminatory, rule-based trading system and question the primacy of international law.
5. Malaysia continues its support of the campaign of the international community to end the ET application of national legislation and lauds the lead that has been taken by the UN in this regard. These efforts must continue for so long as ET application of national legislation continues.
6. In view that certain States still continue to enact national legislation with ET application and States that have such legislation have not repealed such ET laws in accordance with the calls of the General Assembly resolutions, it is proposed that, depending on the views expressed by other AALCO Member States, Malaysia may consider supporting a further resolution that the item be placed on the agenda of the 42nd Session and that the Secretariat monitor the developments in this matter.

V. CONSIDERATION OF THE ITEM AT THE 57TH SESSION OF THE GENERAL ASSEMBLY (2002)

66. The General Assembly like previous years considered in the plenary meetings agenda item “Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsions” and “Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba”. Herein the Report of the Secretary-General, the discussion at the plenary meetings and the resolution adopted by the General Assembly on these items are discussed.

A. Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsions

i. Report of the Secretary-General

67. By resolution 55/6 of 26 October 2000, entitled “Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsions”, the General Assembly requested the Secretary-General to prepare a report on the implementation of the resolution and to submit it to the Assembly at its fifty-seventh session. Pursuant to the above-mentioned request, the Secretary-General invited Governments to provide any information that they might wish to contribute to the preparation of the Report.

68. In response, the Secretary-General till 5th August 2002, received replies from ten Governments, namely that of Argentina, Ecuador, **Japan**, Lao People’s Democratic Republic, Mali, **Libyan Arab Jamahiriya**, **Syrian Arab Republic**, **Iran**, Jamaica and **Qatar**.³⁵ These Governments were in complete agreement that the use of unilateral coercive economic measures constituted a flagrant violation of the norms of international law, particularly in relation to freedom of trade, and were incompatible with the principles of the United Nations Charter. They all called for the repeal of laws that sanctioned the subordination of one State’s interests to those of another.

69. The **Government of Argentina** in its reply reiterated its position on the elimination of such measures and stated that it had promulgated Act No. 24.871 on 5 September 1997, under which foreign laws that, directly or indirectly, are designed to restrict or prevent the free exercise of trade and the movement of capital, assets or persons to the detriment of any country or group of countries, shall not be applicable or produce juridical effects of any kind in the territory of Argentina. Further, Article 1 of the Act provides that foreign laws that seek to produce extraterritorial juridical effects, through the imposition of an economic blockade or the limitation of investments in a given country, in order to bring about a change of government in a country or affect its right of self-determination shall also be absolutely inapplicable and have no juridical effect.

³⁵ Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsions: Report of the Secretary-General, UN Doc. A/57/179 dated 2 July 2002 and UN Doc. A/57/179/Add.1 dated 5 August 2002. The names of AALCO Member States are indicated in bold.

70. The **Government of Ecuador** reiterated that it had neither adopted, nor would adopt, laws that infringe upon the economic freedom of international trade, or that contain coercive economic measures as a means of political and economic compulsion, or that violate the principle of non-intervention in the internal affairs of other countries. It further stated that these norms appear in the Constitution of Ecuador and therefore guide each and every legal, political, and economic action of the country, at both the domestic and international levels.

71. The **Government of Japan** stated in its reply it had neither imposed any economic measures nor was it subject to any such measures. It took the position that unilateral economic measures that are taken as the result of extraterritorial application of domestic laws are contrary to international law, and thus unacceptable.

72. The Government of **Lao People's Democratic Republic** inter alia expressed its concern over the negative impact of unilaterally imposed extraterritorial coercive economic measures on trade, financial and economic cooperation at all levels. It refused to recognize the unilateral extraterritorial law enacted and the imposition of penalties on corporations and nationals of other countries by any country. In its view, such law and measures were contrary to the principles and norms of international law and the Charter of the United Nations.

73. In its reply, the **Government of the Republic of Mali** firmly condemned the use of unilateral extraterritorial coercive measures as a means of political compulsion. It held that the use of such measures constituted a flagrant violation of the norms of international law, in relation to freedom of trade. It called upon the international community to adopt, as a matter of urgency, effective measures to eliminate the imposition against developing countries of unilateral extraterritorial coercive measures that are not authorized by the competent bodies of the United Nations or that do not conform to the principles of international law as set forth in the Charter of the United Nations, and that are contrary to the fundamental principles of the international trade system. Mali was opposed to the adoption of unilateral extraterritorial coercive measures by any country in order to exert pressure with a view to changing a political or economic situation that is not within its territorial jurisdiction. It reaffirmed that every State had the inalienable right to economic, social, and cultural development and the right to choose freely the political, economic, and social system that it deemed most conducive to the well-being of its population, in accordance with its national plans and policies.

74. The **Government of the Libyan Arab Jamahiriya** (one of the affected States due to imposition of extraterritorial coercive economic measures) in its elaborate reply inter alia reaffirmed its condemnation and firm rejection of any measures that bar any State from exercising its full political rights in choosing its political, economic and social systems, because this constituted a flagrant violation of the Declaration on Principles of International Law Concerning Friendly relations and Cooperation among States, adopted by the General Assembly on 24 October 1970. It cited General Assembly resolutions³⁶ that reaffirmed that the enactment of such laws was incompatible with the principles of the Charter of the United Nations,

³⁶ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res. 2131 (XX) of 21 December 1965 and the Charter of Economic Rights and Duties of States, UNGA Res. 3281 (XXIX) of 12 December 1974 were cited in the reply to substantiate the Libyan argument.

constituted a flagrant violation of the norms of international law, had an extremely negative impact on the economies of developing and developed countries alike and posed an obstacle to the endeavours of the international community aimed at constructive cooperation and beneficial exchange. Thus, by adopting such resolutions and instruments, the General Assembly has given clear expression to the overwhelming rejection by Member States of coercive measures and the strength of their opposition to the use of such measures against other States as a means of compulsion and of forcing them to accept policies that are not appropriate for or satisfactory to them. An international consensus has developed with regard to the need for halting such measures, which are adopted by certain States with a view to pursuing their foreign policies and which are employed in their dealings with other States.

The Libyan response pointed out that the United States of America was the State that had taken greatest recourse to this type of measure, has ignored international demands and continued its policy of imposing sanctions and embargoes: in mid-1996, the Senate adopted the D'Amato-Kennedy Act, which penalizes foreign companies that invest in the Libyan oil sector. This enactment had been greeted with unease and disapproval by the General Assembly (Res. 55/6 of 26 October 2000), Organization of the Islamic Conference, the League of Arab States and the Group of 77 and China, Assembly of Heads of States and Governments of the Organization of African Unity, and the Meeting of the Non Aligned Movement. These bodies have inter alia rejected such measures and have called upon the international community to take effective measures to halt this tendency.

However, the US Government did not respond to the call of the international community and extended on 22 June 2001, the D'Amato-Kennedy Act for five more years.

In its reply Libyan Governments had had submitted that the grounds on which the US Administration had extended the Act, namely non-compliance of relevant Security Council Resolutions relating to Lockerbie incidents, acquisition of weapons of mass destruction and support to international terrorism by Libya were completely groundless, unsubstantiated by the evidence and facts. It had carried out in full the demands of the Security Council in its resolutions.³⁷ Libya has always condemned international terrorism in all its forms and is also a party to most of the conventions on international terrorism. Further, it was a Party to most of the disarmament conventions.

Further, in its response the Government of Libya has cited several instances of US actions that had adversely affected the Libyan interests.

Finally, the Libyan Arab Jamahiriya strongly urged the international community to reject the imposition of laws and prescriptions which have extraterritorial implications and all other forms of coercive economic measures, including unilateral sanctions against developing countries, and reiterated the urgent need for them to be repealed forthwith. It stressed that measures of this type were not merely destructive of the principles enshrined in the Charter of the United Nations and international law, but also posed a grave threat to freedom of trade and

³⁷ The relevant Security Council resolutions are UNSC Resolutions: 731 (1992), 748 (1992), 883 (1993) and 1192 (1998).

investment, therefore, the international community need not recognize or implement such measures.

75. The Government of the **Syrian Arab Republic** in its response stated that its vote in favour of Res. 55/6 of UNGA entitled “Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsions” depicted its position. It drew attention to the fact that the Heads of State or Government of Non-Aligned Countries, at their meeting held in Durban, South Africa, had expressed the need to eliminate coercive measures and legislation as contrary to international law, the principles and purposes of the Charter of the United Nations and the norms and principles governing peaceful relations among States, and urged States applying unilateral coercive measures to put an immediate end to those measures.

76. The **Government of Iran** stated that successive resolutions adopted by the General Assembly (51/22, 53/10 and 55/6) expressed its deep concern at the negative impact of unilaterally imposed extraterritorial coercive economic measures on trade, financial and economic cooperation, including trade and cooperation at the regional level, as well as serious obstacles to the free flow of trade and capital at the regional and international levels. The Member States, in adopting these resolutions, have rejected the application of extraterritorial coercive economic measures or legislative enactments unilaterally imposed by any State. They have also called for the repeal of unilateral extraterritorial laws that impose sanctions on corporations and nationals of other States. Promulgation and application of laws or regulations that have extraterritorial effect or that affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction – a clear violation of the universally accepted principles of international law – has been strongly rejected on various occasions by the overwhelming majority of States.

Further, the South Summit, held at Havana, and the recent Ministerial Meeting of the Coordinating Bureau of the Movement of Non-Aligned countries, held at Durban, South Africa, have called for the elimination and rejection of coercive economic and extraterritorial implementation of such laws against developing countries.

Simultaneously, an increasing number of voices in multilateral forums, regional bodies and the private sector have joined the international community and called for the total elimination and lifting of unilateral, extraterritorial and other forms of coercive economic measures.

Coercive economic measures as a means of political and economic compulsion, in particular through the enactment of extraterritorial legislation, are not only against the well-recognized provisions and principles of international law and the Charter of the United Nations, but also threaten the basic fabric of international peace, security and stability and violate the sovereignty of States. They also impede and constrain settlement of disputes through the promotion of mutual dialogue understanding and peaceful means.

In an era of rapid and unprecedented change, the world needs peace, security and stability, which could be strengthened through the collective responsibility of countries and also

through, inter alia, respect for sovereignty, rejection of interference in the internal affairs of other States, refraining from compulsion and intimidation, as well as the creation of an enabling environment for replacing conflict and unequal relations with dialogue and negotiations.

The Government of Iran was of the view that such coercive measures had a serious adverse impact on the overall economic, commercial, political, social and cultural life of the targeted countries, and intensify the challenges they face in a time of globalization and its concomitant traumatic transformations. Moreover, they have an adverse impact on the transfer of technology, increase the rate of investment risks, threaten financial and monetary management, weaken industrial and agricultural infrastructures and undermine the commercial policies of the targeted countries.

Moreover, such measures reduced existing actual and potential capacities of targeted countries in the very important areas of health and education, which are basic elements in every social welfare programme. This in itself delays the development of their economic infrastructure and results in further exacerbation of regional social and economic outlook.

Enforcement of unilateral coercive economic measures, in defiance of the Charter, has inflicted grave and irreparable losses, including a heavy financial and human toll, on the targeted countries. To this effect, the Islamic Republic of Iran, as one of the affected countries, reserves its right to pursue its financial and intellectual claims and lodge its complaint against Governments enacting those measures, through the adoption of concrete actions. All countries should, in the true spirit of multilateralism and sincere observance of international laws and regulations, avoid resorting to and enacting such measures.

77. The **Government of Jamaica** in its response submitted that it had repeatedly supported the General Assembly resolutions on this agenda item. It recognizes the universal, inalienable and sovereign rights of all States, including the right to economic, social and cultural development, political status and self-determination. Therefore, Jamaica had never adopted unilaterally any legislation or measure with the intent or effect of extraterritorial coercion as a means of political and/or economic compulsion.

78. The **Government of the State of Qatar** stated in its reply that it had consistently opposed the imposition of unilateral sanctions on a sovereign State. The imposition of sanctions on other countries with a view to protect economic interests or the achievement of political ends constitutes a violation of the principle of sovereign equality and the right to self-determination, as set forth in the Charter and the relevant resolutions of the United Nations. It was also incompatible with the development of friendly relations and the strengthening of international cooperation among Member States. It therefore affirmed its categorical rejection of all attempts aimed at the extraterritorial application of domestic laws to nationals or corporations of third countries to comply with unilaterally adopted economic measures, which is contradictory to international law and the Charter of the United Nations.

79. The **Government of Namibia** in its response stated that it did not had unilateral extraterritorial laws that imposed coercive economic measures, contrary to international law, on

corporations and nationals of other States. Such laws were not recognized by Namibia, since they violated the principles and objectives of the Charter of the United Nations.

ii. Discussion on the topic at the 57th session

80. The General Assembly at its 31st Plenary Meeting on 16th October 2002 considered the agenda item on the “Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsions”. Representatives of **Libya**, Venezuela, **Iran**, **Sudan**, **Egypt**, Holy See, Cuba, **Malaysia**, **Kuwait**, **Syria**, **Iraq**, Denmark (on behalf of European Union), South Africa (on behalf of Non-Aligned Movement) and the United States of America stated their countries position on the agenda item.³⁸

81. Introducing the draft resolution on the elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsion, the Representative of **Libyan Arab Jamahiriya** said that such measures were against the principles of the Charter, international law and sustainable development. He questioned-What right did any Parliament in any country have to prohibit cooperation among nations?

82. Representative of **Islamic Republic of Iran** stated that unilateral extraterritorial economic measures had a negative impact on targeted countries and their populations and were contrary to common sense. In times past, the General Assembly had adopted resolutions indicating widespread opposition to such measures. The promulgation of such legislation infringed on the sovereignty of other States and was a clear violation of international law. On many occasions Member States had expressed their disapproval of such legislation.

83. In an era of rapid change and in a world that needed peace and security, such measures must be rejected and substituted with dialogue between States to resolve their differences, he said, noting that coercive measures generally had an adverse impact on the development of trade and technology and weakened the development of the targeted countries. They also inflicted grave and irreparable damage.

84. The Representative of **Sudan** speaking on behalf of the Organization of the Islamic Conference, reiterated that all peoples had the right to determine freely the political status they deemed appropriate and to achieve their economic growth and social development. Expressing deep concern over the imposition of unilateral extraterritorial coercive economic measures and their adverse effects, the Islamic Conference called upon all States not to respond to or apply such measures. It also expressed solidarity with Libya, Iran and Sudan as well as with other States suffering from unilateral economic sanctions.

85. The Representative of **Cuba** unequivocally rejected any imposition of unilateral extraterritorial coercive measures as a means of political and economic compulsion. He noted that the Assembly had, in many resolutions, opposed the application of such measures, which

³⁸ For a Summary of the discussion at the Plenary see UNGA, “General Assembly Adopts Resolution Calling on States not to recognize Unilateral Coercive Economic Measures”, *UN Press Release GA/10083* dated 16th October 2002.

were a flagrant violation of Charter principles as well as international law. However, the United States Government had continued to impose such measures to further its own national interests, particularly through such laws as the Helms-Burton Act and the D'Amato-Kennedy Act.

86. The Representative of **Malaysia** expressed dismay that despite the recommendations adopted on the issue by the Assembly and United Nations conferences, unilateral coercive measures continued to be promulgated and employed as State policies and practices, with all their negative effects on the socio-economic development of the affected countries. The imposition of such measures contravened international law and was totally incompatible, not only with international rules and regulations, but also with the principles of non-intervention and non-interference in the internal affairs of sovereign States. He rejected the application of such measures as tools for political or economic pressure or coercion, noting their often debilitating effects on women, children, the elderly and the disabled.

87. From the developmental perspective, unilateral coercive measures were among the major obstacles to the implementation of the Declaration on the Right to Development. They ran counter to the principles of non-discriminatory and open multilateral trade and hampered the progress of all developing countries. They created barriers to free or unfettered trade among States. In expressing his support for the text, he joined the call for the immediate repeal of such unilateral extraterritorial laws, particularly the D'Amato-Kennedy Act and the Helms-Burton Act.

88. The Representative of **Arab Republic of Egypt** speaking on behalf of the Group of African States said that today's world, which overlapped on the economic and political levels, was characterized by globalization and interdependence among societies and cultures. Coercive economic measures were a violation of the spirit of that world.

Noting that the United Nations Charter authorized the use of coercive measures only when international peace and security were threatened, he said that their unilateral use was a violation of international law and a clear threat to international cooperation and to the international trade and finance system.

Guided by the principles of the Charter, the countries of the African Group had expressed their rejection and condemnation of such measures, which should be eliminated in order to achieve a more just and peaceful world. Coercive measures threatened freedom of investment and trade, whereas every State had an inalienable right to economic, social and cultural development and the right to choose the economic and social regimes that were best for its people.

89. The Representative of **Kuwait** speaking on behalf of the Arab Group, noted that numerous Assembly resolutions had called for the elimination of unilateral coercive extraterritorial measures and that the Arab Group had expressed more than once its total rejection of such measures.

Urging the Assembly to continue to reject such measures, which aimed to place national law above international law, he stressed the inadmissibility of States intervening in the sovereign affairs of other States and expressed his delegation's support for the text before the Assembly.

90. The Representative of **Syrian Arab Republic** said the international community must discharge its duties in dealing with unilateral coercive measures. Noting that globalization meant dealing with great challenges for which the world had to work together, he said that the imposition of such negative measures, particularly on developing countries, violated the rules of international law and the goals of the United Nations.

All peoples had the right to determine freely their own development, political situation and economic and social systems, he stressed, adding that the sovereign right of States had been confirmed in the Charter and other international instruments. Unilateral coercive measures not only violated international law and laws governing international trade, but also had a negative impact on social and human development, he added.

91. The Representative of **Republic of Iraq** said practical experience had shown that coercive economic measures were a hateful weapon that could nevertheless not deny peoples their inalienable right to choose their own social, political and economic regimes. They had hurt civilians, delayed development, disseminated the seeds of economic and political instability and flouted the United Nations Charter, as well as international standards, particularly those of sovereignty and non-intervention. Economic coercive measures, whether imposed by specific countries or through multilateral forums, demonstrated a shortsighted policy. Those countries that resorted to such measures were trying to give them a cover of legality by transforming them into multilateral measures as in the cases of Libya, Sudan, Iraq, Cuba and Iran.

He said that a few countries, motivated by the arrogance of force, considered themselves above the law and would use all possible means to serve their interests. The coercive economic measures imposed on Iraq had led to the destruction of its infrastructure and to a humanitarian catastrophe, one of the worst in modern history. They had forced Iraq not to pay its fair share to the Organization and had lost the country the right to vote, otherwise, it would have voted in favour of the draft before the Assembly.

92. Representative of the **United States of America** opposed the resolution, saying it served as a direct challenge to the sovereign right of States in the free conduct of their economic relations. It also served to undermine the international community's ability to respond to acts that were offensive to international norms and for which there must be consequences. She stressed that unilateral and multilateral sanctions were a legitimate means to achieve foreign policy objectives and the United States was not alone in that view or in that practice.

Not too long ago, she recalled, unilateral and multilateral economic sanctions imposed on South Africa and Rhodesia had underscored the international community's solidarity with the people of those countries in their struggle for their rights. Those concrete measures had been appropriate then and remained so today, she said.

Finally the Assembly adopted Resolution 57/5 was adopted by 133 votes to two, with two abstentions. Israel and United States voted against the resolution while Australia and Latvia abstained from voting.

iii. Resolution Adopted by the General Assembly

93. The United Nations General Assembly at its 57th Session, adopted on 16th October 2002, Resolution 57/5 entitled “Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsion.”³⁹ The Assembly expressed grave concern over the continued application of unilateral extraterritorial coercive measures whose effects have an impact on the sovereignty of other States and the legitimate interests of their entities and individuals in violation of the norms of international law and the purposes and principles of the United Nations. Such measures had a negative impact on trade and financial and economic and posed serious obstacles to the freedom of trade and the free flow of capital at the regional and international levels. The Assembly took the position that prompt elimination of such measures would be consistent with the purposes and principles embodied in the Charter of the United Nations and the relevant provisions of the Agreement on the World Trade Organization. It reiterated its call for the repeal of unilateral extraterritorial laws that impose coercive economic measures contrary to international law on corporations and nationals of other States. The Assembly again called upon all States not to recognize or apply unilateral extraterritorial coercive economic measures imposed by any State, which are contrary to recognized principles of international law.

B. Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba

i. Report of the Secretary-General (A/57/264 and add.1)

94. The Secretary-General’s report was requested in the Assembly’s resolution 56/9 of 27th November 2001. The Secretary-General was asked to prepare a report on the implementation of that resolution. As of 16th July 2002, there were 75 replies from governments and 12 replies from organs and agencies of the United Nations system. The Government of Cuba had described the embargo as “genocidal”, claiming that for 42 years the US had sought to spread hunger and sickness among the Cuban people, in an effort to subjugate their spirit of resistance to aggression and annexation.

ii. Discussion on the topic at the 57th Session

95. The fifty-seventh session of the General Assembly for the eleventh successive year considered this agenda item. Representatives of Mexico, China, Vietnam, United States of America, South Africa, Venezuela, Lao People’s Democratic Republic, Cuba (the sponsor of resolution) **Sudan**, Togo, **Myanmar**, Zambia, Belarus, Namibia, **United Republic of Tanzania**, **Iraq**, **Libyan Arab Jamahiriya**, Zimbabwe, **Syrian Arab Republic**, **Japan** and **Democratic People’s Republic of**

³⁹ For text of the resolution adopted by the UN General Assembly, see pp. 36-37 of this Report.

Korea, Denmark (on behalf of European Union), Russian Federation Brazil and Australia participated in the debate and stated their Government's position.⁴⁰

96. During the course of the debate majority of Members States rejected the promulgation or application by any State of any law affecting the sovereignty of other States and urged all States to refrain from promulgating and applying such laws and to repeal those that have already been enacted.

97. The Representative of **Cuba** expressed the view that the continued economic, commercial and financial blockade imposed against Cuba runs counter to the purposes and principles of the Charter of the United Nations, violates the norms of law and trade among nations and illegally disregards the sovereignty and interests of other countries. He reported that despite some positive developments in American exports to Cuba, the US President George Bush in a clearly interventionist and aggressive speech on 20 May 2002, declared, "The United States will continue to enforce economic sanctions on Cuba".

98. The Representative of **Sudan** reiterated his Government's total rejection of the embargo imposed by the USA on Cuba. He said that his country and people as well as those of Islamic Republic of Iran and the Libyan Arab Jamahiriya also suffered because of the unilateral sanctions imposed against them by the USA. The US policy he said reflected its desire to impose its hegemony, to pursue the policies of isolation and imposition, and to take the law into its own hand.

99. The Representative of **Libyan Arab Jamahiriya** was of the view that the strict blockade imposed against Cuba by the USA for more than four decades had serious consequences for the Cuban people. It exposed the true nature of American approach: blockading peoples and punishing other States, as well as trade partners, companies and individuals, to prevent them from dealing with those States on which blockades have been imposed by the American Government- actions that run counter to international legal instruments. The representative added that American action were in line with the many coercive measures and sanctions that had been imposed on a number of States, such as his own, Sudan and Iran. Imposition of unilateral sanctions by the US was a ready-made formula that was imposed on any people that defended their dignity and insisted on making their own choices.

100. The Representative of the **People's Republic of China** stated that the US embargo and other sanctions against Cuba have been in place for more than four decades, with the purported goal of promoting democracy and human rights. These have seriously impeded Cuban efforts to alleviate poverty, to raise the standard of living, and to realize economic and social development for national construction. The Economic sanctions imposed by the US on Cuba had an extraterritorial effect that flied in the face of international law and the principles, objectives and rules of international trade.

101. The Representative of the **United Republic of Tanzania** stated that the economic, commercial, and financial embargo imposed by the United States Government against Cuba was

⁴⁰ For full records of the meeting see UNGA, *Official Records* of the 57th Session, 48th Plenary Meeting, 12 November 2002, UN Doc. A/57/PV.48.

a serious negation of the UN Charter both in letter and spirit. Such unilateral measures ran counter to the common desires of States to build around sound international relations on the basis of equality and the right of every people to determine their political and economic systems. In the era of globalization, the accent was on open borders and rule based trade relations. Unilateral coercive measures not only run counter to the spirit of the times, but also worked against the very essence of globalization.

102. The Representative of the **Syrian Arab Republic** stated that unilateral sanctions that were extraterritorial in character contravened the principle of equal sovereignty among States. Experience had shown that the sanctions system caused enormous material losses and did economic harm to civilians in targeted countries. Recalling the support of the international community towards ending the embargo against Cuba, he cited the Cartagena Declaration adopted by Non-aligned States and the Agreement among developing countries reached at the South Summit of the Group of 77 and China, held at Havana. Both these instruments had condemned the use of unilateral measures against States.

103. The Representative of **Myanmar** was of the opinion that promulgating domestic legislation that affects the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction was not conducive to the development of friendly relations among nations. Accordingly, Myanmar was opposed to any domestic legislation that had extraterritorial effects, such as the Cuban Democracy Act, the Torricelli Act and the Helms-Burton Act.

104. The Representative of **Iraq** stated that while the international community expected a positive response from the US to General Assembly resolutions, successive American administrations have moved in the opposite direction-tightening their economic embargo against Cuba. The economic embargo against Cuba has created immense difficulties for the Cuban people in its attempt to achieve socio economic development. This constituted a flagrant violation of human rights and furnished categorical proof refuting American allegations of respect for international law and the instruments governing relations among nations. He added that the use of economic sanctions with a view to changing the political systems of targeted countries undermined the very basis of international relations and took the world back to the law of the jungle. United States was striving for the same goal of regime change through embargo and economic sanctions against his own country.

105. The Representative of **Japan** stated that he shared the concerns expressed by others that national legislation with extra territorial effects was violative of the established principles of international law. He however, added that the General Assembly was not the right forum for dealing with the topic at hand, and the United States and Cuba should seek strengthened bilateral dialogue to resolve the issue.

106. The Representative of the **Democratic Republic of Korea** was of the view that his Government opposed all forms of sanctions and extra territorial laws imposed against sovereign states. Such laws, he felt directly affected the sovereignty of a State and were violative of the principles enshrined in the UN Charter and impeded the freedom of trade and navigation. He also added that his Government was of the firm view that the international community had voiced its

continued concern at blockade imposed against Cuba and the same should be lifted at the earliest.

107. Finally, the General Assembly adopted resolution entitled “Necessity of ending the economic, commercial and financial embargo imposed by the United States against Cuba”. The resolution was adopted by 173 votes to 3, with 4 abstentions. Israel, Marshall Islands and United States of America voted against while Ethiopia, Malawi, Nicaragua and Uzbekistan abstained from voting.

iii. Resolution Adopted by the General Assembly⁴¹

108. The Resolution urged all States applying laws and measures with extraterritorial effects to take the necessary steps to repeal or invalidate such laws as soon as possible.

109. The Assembly reiterated its call upon all States, in conformity with their obligations under the Charter of the United Nations to refrain from applying laws and measures of a type similar to the Helms-Burton Act of 12 March 1996 (of the USA) the extraterritorial effects of which affected the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation.

⁴¹ UNGA Res. 57/11 dated 12 November 2002. For text of the resolution adopted by the UN General Assembly, see pp. 38-39 of this Report.

VI. SECRETARIAT COMMENTS AND OBSERVATIONS

110. In the light of the preceding references to the terminology of sanctions imposed by the United States of America, it may be useful to enunciate the definition of these terms from an American perspective and this perspective is reflected in the recent work of an American author Michael P. Malloy's *United States Economic Sanctions: Theory and Practice*. The book deals elaborately with the imposition of the Economic Sanctions by the United States of America. Herein some excerpts from this book highlighting the US position on the issue are reproduced:

110-1. Malloy is of the view that "Economic sanctions have become an increasingly prevalent feature of U.S. international economic and foreign policy".⁴² By the term "economic sanction" Malloy means "any country-specific economic or financial prohibition imposed upon a target country or its nationals with the intended effect of creating dysfunction in commercial and financial transactions with respect to the specified target, in the service of specified foreign policy purposes. The term "sanction" in the present context therefore includes a range of trade and financial measures that may be imposed in varying combinations, administered by a number of agencies."⁴³

110-2. He emphasizes that instrumentally, the historical objective of most sanctions imposed by Western countries has been to induce change in another country's behavior by inflicting economic damage. Referring to the generic policy objectives, he states "economic sanctions can be said to be directive or defensive. In directive economic sanctions, the objective is to create calculated economic pressure to alter behavior of a target state. In defensive objective it is to reduce or slow development of an adversary's military or strategic capabilities by raising the economic cost of acquiring imports or import substitutes."⁴⁴

110-3. Malloy believes that "economic sanctions are not a part of U.S. economic policy and are antithetical to the basic rubrics of that policy". He feels that the imposition of economic sanctions impedes the progress of any principle of transparency in the free flow of private international financial services and transactions, thus rendering economic sanctions inconsistent with the stated U.S. policy in favor of nondiscriminatory, "national treatment" of private participants in international financial services. In his opinion, this inconsistency is part of the potency of sanctions. He states that without its dissonance in relation to the expectations of the international financial system, a program of economic sanctions would lose much of its potential for inducing dysfunction in the service of its foreign policy objective.⁴⁵

111-1. As regards the extraterritorial applicability of sanctions⁴⁶, he is of the view that: first, (O)utside conventional arrangements, arguments to the effect that international law prohibits extraterritorial economic sanctions have remained speculative and without serious practical consequence. Secondly, (r)ecent efforts in this regard have suggested that the intended

⁴² Michael P. Malloy, *United States Economic Sanctions: Theory and Practice* (Kluwer Law International, The Hague/London/Boston, 2001), pp. xxv+ 738; p. 3.

⁴³ *Ibid.*, p. 10.

⁴⁴ *Ibid.*, p.18.

⁴⁵ *Ibid.*, p. 23.

⁴⁶ *Ibid.*, pp.322-23.

extraterritorial effect of such sanctions renders them legally suspect.⁴⁷ He further adds that this extraterritoriality argument has been vigorously disputed by representatives of the U.S. Government, at least to the extent that the argument denies that a state has the legal authority and jurisdiction to prescribe a rule of law affecting extraterritorial transactions.⁴⁸

111-2. Malloy is of the view that “in principle economic sanctions are ineffective and should not be imposed is to confuse the assessment of the effectiveness of policy with the assessment of the instrumental effectiveness of sanctions. The rhetorical use of international economic sanctions for domestic political purposes subverts the appropriate role of sanctions as instruments of foreign policy”.⁴⁹

112. Malloy categorically states that discerning the legality of unilateral sanctions under customary principle is difficult due to the “apparent indeterminacy” of law in this regard and observes:

As a general matter, one would expect that unilateral economic sanctions, as a type of “nonforcible countermeasure,” ought to be invoked by a state only in situation in which the target state has breached some obligation or duty owed to the invoking state. In addition, there should be a demand for redress by the invoking state, which has not been satisfied by the target state, prior to the invocation of countermeasures. Finally, the countermeasures invoked should be proportional to the violation or breach suffered.

Elaborating on the two basic difficulties with the “nonforcible countermeasure” approach to the analysis of economic sanctions, he observes that

first, under what customary principle of public international law is a countermeasure justification required when a state decides to interdict commercial or financial intercourse with another state? That there is such a customary principle is often tacitly assumed but rarely discussed in the secondary literature. Second, even accepting *arguendo* that such a customary principle exists, a difficulty remains in identifying situations, particularly *post facto*, in which a state has imposed sanctions in violation of this rubric; states normally construct at least a colorable justification for the imposition of sanctions.⁵⁰

114. It may be recalled that at the 37th Session of the Organization (New Delhi, 1998) the delegate from Japan, while this agenda item was under consideration stated that “considering the possible increase of extraterritorial application of national laws in the globalization of international society”, it was “desirable” that this issue “be dealt with, as a general and broad basis not confining only to the two U.S. Acts: the Helms Burton Act and the D’Amato Kennedy

⁴⁷ Cf., Burchill, *Remarks in Malloy (Reporter), Extraterritoriality: Conflict and Overlap in National and International Regulation*, 1980 Proceedings of the American Society of International Law, 30, 36 (1980):

U.S. insistence on exercising the extent of extraterritorial jurisdiction it claims, in the absence of international consensus, invites or even requires an increasingly radical response on the part of other governments, a cause and effect that, in total, detracts from the operation of the rule of law in international relations.

Cited by Malloy at f. n. 933 at p. 322.

⁴⁸ See, e.g., Robinson, *Extraterritoriality and Other Problems Affecting Foreign Policy and National Security Controls* (Presentation before the Treasury Department Conference on Sanctions and Settlements, Nov. 17, 1983). Cited at f. n. 934 by Malloy at p. 323.

⁴⁹ *Ibid.*, p. 340.

⁵⁰ *Ibid.*, p. 305.

Act”. He called for establishing a “well-refined typology of extraterritorial application based upon the relevant international practice may not be only helpful, but also required”. He suggested that in examining this topic concentration be on inter alia issues of a conceptual framework or terminology regarding jurisdiction (prescriptive, enforcement and judicial jurisdiction so called), typical situations of extraterritorial application of legislative jurisdiction; targets of the extra-territorial application”.⁵¹

115. Although “**Extraterritorial Application of Nation Legislation: Sanction Imposed Against Third Parties**”, is the agenda item for Organization’s work, with focus being on the effects of imposition of unilateral sanctions on third parties. However, it may be useful, in the light of the above-mentioned suggestion made by the Japanese delegate to cite in here the following information on primary sanctions from Malloy’s book. He states in 1990, 332 particular sanctions were maintained by 85 states against 134 different targets.⁵² He further states “(a) significant number of states are still maintaining a large number of economic sanctions, though the numbers are significantly less than in 1990.” As regards distribution of sanctions, based upon *Annual Report on Exchange Arrangements and Restrictions (1999) of the International Monetary Fund*, and national sources, he states that that a gross total of 114 particular sanctions maintained by 35 States.⁵³ The information as to the primary sanctions imposed by the USA against different States, as stated by Malloy is reproduced below:

Distribution of Sanctions by the United States of America

| Sanctioning State | Target State(s) | Primary Sanction(s) |
|--------------------------|-----------------------------|---|
| United States of America | Afghanistan | Currency restrictions Import prohibitions Export prohibitions Financial restrictions Capital controls |
| | China, People’s Republic of | Other sanctions |
| | Colombia | Financial restrictions |
| | Cuba | Currency restrictions Financial restrictions Import prohibitions Export prohibitions Capital controls |
| | India | Other sanctions |
| | Iran Islamic Republic of | Financial restrictions Import prohibitions Export prohibitions Capital controls |

⁵¹ Verbatim Record of Discussions, 37th Session of AALCC (New Delhi, 1998), p. 148.

⁵² Michael P. Malloy, *United States Economic Sanctions: Theory and Practice* (Kluwer Law International, The Hague/London/Boston, 2001), pp. xxv+ 738, at p. 307.

⁵³ For further details see the Table on pp. 309-13.

| | | |
|--|--|---|
| | Iraq | Currency restrictions Financial restrictions Import prohibitions Export prohibitions Capital controls |
| | Korea, Democratic People's Republic of | Financial restrictions |
| | Libya | Currency restrictions Financial restrictions Import prohibitions Export prohibitions Capital controls |
| | Myanmar | Capital controls |
| | Pakistan | Other sanctions |
| | Sudan | Financial restrictions Import prohibitions Export prohibitions Capital controls |
| | Syria | Other sanctions |
| | Yugoslavia (Socialist Federal Republic of) | Financial restrictions |

116. Citing the views in supporting the imposition of unilateral sanctions by USA one should bear in mind that many of the prominent professors in international law are of the view that the extraterritorial application of national legislation against third Parties violates the principles of sovereign equality of States, non-intervention and non-interference enshrined in Charter of the United Nations. Such measures also undermine the collective authority of the Security Council, which is the only competent international body mandated by States to impose coercive measures in accordance with the procedures of Chapter VI and VII of the UN Charter.

117. Today, in an increasingly interdependent world, with close to 200 sovereign States as members of the international society, the effects of globalization and liberalization dictate the course of economic relations among States. The imposition of unilateral sanctions and secondary boycotts that affect nationals of third States are seen a retrograde step retarding the economic progress of the sanctioning, as well as the target State.

118. Extraterritorial measures, besides being infirm in law are also bad as an instrument of foreign policy. Unlike multilateral sanctions enforced by the Security Council, extraterritorial measures are inherently ineffective in a global society as target States often are able to find new investors and entities, other than those from the sanctioning State, to carry out their business activities.⁵⁴

⁵⁴ The American industry happens to be the biggest loser when sanctions are imposed. As the world economy has no single market leader today, loss of business by U.S. companies, is the gain of European and East Asian ones. In a study conducted by the International Institute for Economics, John Hopkins University, in 1995, the United States policy of disengagement and trade embargo against Cuba alone, in the last 35 years, cost the U.S. business an

119. It may also be stated that extraterritorial application of national legislation having effects on third Parties, poses a serious challenge to the efforts of the international community to establish an equitable multilateral, non-discriminatory, rule based trading system and question the very basis of the primacy of international law. It is imperative that all States must reject promulgation and application of this form of dubious legislation.

estimated loss of \$100 billion. The European American Business Council (EABC) a frontal EU- American business body, in 1997 came out with findings that: economic sanctions severely harmed U.S. interests; had very limited effectiveness and a policy of dialogue and engagement with target States was a better foreign policy tool, than use of coercive economic measures, such as sanctions.

ANNEX

RESOLUTIONS ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY ON THE AGENDA ITEM

57/5. Elimination of unilateral extraterritorial coercive economic measures as means of political and economic compulsion

The General Assembly,

Guided by the principles embodied in the Charter of the United Nations, particularly those that call for the development of friendly relations among nations and the strengthening of cooperation in solving problems of an economic and social character,

Taking note of the opposition of the international community to unilateral extraterritorial coercive economic measures,

Recalling its resolutions in which it has called upon the international community to take urgent and effective steps to end unilateral extraterritorial coercive economic measures,

Gravely concerned over the continued application of unilateral extraterritorial coercive measures whose effects have an impact on the sovereignty of other States and the legitimate interests of their entities and individuals in violation of the norms of international Law and the purposes and principles of the United Nations,

Believing that the prompt elimination of such measures would be consistent with the purposes and principles embodied in the Charter of the United Nations and the relevant provisions of the Agreement on the World Trade Organization,

Recalling its resolutions 51/22 of 27 November 1996, 53/10 of 26 October 1998 and 55/6 of 26 October 2000,

1. *Takes note* of the report of the Secretary-General on the implementation of resolution 55/6;⁵⁵

2. *Reaffirms* that all peoples have the right to self-determination and that by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

3. *Expresses its deep concern* at the negative impact of unilaterally imposed extraterritorial coercive economic measures on trade and financial and economic cooperation, including at the regional level, because they are contrary to recognized principles of international law and pose serious obstacles to the freedom of trade and the free flow of capital at the regional and international levels;

⁵⁵ A/57/179 and Add. 1 and Corr.1.

4. *Reiterates its call* for the repeal of unilateral extraterritorial laws that impose coercive economic measures contrary to international law on corporations and nationals of other States;

5. *Again calls upon* all States not to recognize or apply unilateral extraterritorial coercive economic measures imposed by any State, which are contrary to recognized principles of international law;

6. *Requests* the Secretary-General to submit to the General Assembly at its fifty-ninth session a report on the implementation of the present resolution;

7. *Decides* to include in the provisional agenda of its fifty-ninth session the item entitled “Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsion”.

*31st plenary meeting
16 October 2002*

57/11. Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba

The General Assembly,

Determined to encourage strict compliance with the purposes and principles enshrined in the Charter of the United Nations,

Reaffirming, among other principles, the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of international trade and navigation, which are also enshrined in many international legal instruments,

Recalling the statements of the heads of State or Government at the Ibero-American Summits concerning the need to eliminate the unilateral application of economic and trade measures by one State against another that affect the free flow of international trade,

Concerned at the continued promulgation and application by Member States of laws and regulations, such as that promulgated on 12 March 1996 known as the “Helms-Burton Act”, the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation,

Taking note of declarations and resolutions of different intergovernmental forums, bodies and Governments that express the rejection by the international community and public opinion of the promulgation and application of regulations of the kind referred to above,

Recalling its resolutions 47/19 of 24 November 1992, 48/16 of 3 November 1993, 49/9 of 26 October 1994, 50/10 of 2 November 1995, 51/17 of 12 November 1996, 52/10 of 5 November 1997, 53/4 of 14 October 1998, 54/21 of 9 November 1999, 55/20 of 9 November 2000 and 56/9 of 27 November 2001,

Concerned that, since the adoption of its resolutions 47/19, 48/16, 49/9, 50/10, 51/17, 52/10, 53/4, 54/21, 55/20 and 56/9, further measures of that nature aimed at strengthening and extending the economic, commercial and financial embargo against Cuba continue to be promulgated and applied, and concerned also at the adverse effects of such measures on the Cuban people and on Cuban nationals living in other countries.

1. *Takes note* of the report of the Secretary-General on the implementation of resolution 56/9;¹

2. *Reiterates its call upon* all States to refrain from promulgating and applying laws and measures of the kind referred to in the preamble to the present resolution in conformity with their obligations under the Charter of the United Nations and international law, which, inter alia, reaffirm the freedom of trade and navigation;

¹ A/57/264 and Add.1.

3. *Once again urges* States that have and continue to apply such laws and measures to take the necessary steps to repeal or invalidate them as soon as possible in accordance with their legal regime;

4. *Requests* the Secretary-General, in consultation with the appropriate organs and agencies of the United Nations system, to prepare a report on the implementation of the present resolution in the light of the purposes and principles of the Charter and international law and to submit it to the General Assembly at its fifty-eighth session;

5. *Decides* to include in the provisional agenda of its fifty-eighth session the item entitled “Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba”.

48th plenary meeting
12 November 2002