

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 extra-territorial application.

The Seminar of the group of experts also addressed the question of the future work to be undertaken and a number of proposals were advanced by the participants for the consideration of the AALCC. The proposals with regard to the future work on the subject include (i) further study on all aspects of the subject and (ii) the formulation of principles.

Apropos **further study of the subject of extra-territorial application of national legislation** it was suggested that AALCC undertake a study of:

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

On the question of the **formulation of principles \ rules relating to the question of the extra-territoriality of national legislation** it was *inter alia* proposed that :

- (i) the AALCC along with the International Law Commission undertake the formulation of principles and rules relating to extra-territorial *application of national laws* in all its implications ; and
- (ii) there is need for a second look at the ILC formulation of principles concerning counter measures vis-a-vis sanctions.

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

In his closing remarks the President of the Committee, Dr. M. Javad Zarif expressed his appreciation for the participants , particularly the Experts, for their contribution. He was of the view that the some very important issues had been raised and discussed in the course of the seminar. The discussion had clearly shown that extra-territorial application of national legislation by way of imposing sanctions involved an element of intervention and coercion. The debate had also brought home the point that the subject required careful study and that the member States of the AALCC needed to play an active role in the further, study of the matter.

In his closing statement the *Secretary General* said that a detailed Report of the Seminar would be presented to the 37th Session of the AALCC scheduled to be held in New Delhi in April 1998 and that the Committee at its Session would , on its part, find the deliberations of the Seminar very useful in the determination of its future work on the subjects. The Secretariat would like to continue to be associated with the Experts, and their further work on this complex topic. The Secretary General further stated that the suggestions and the recommendations made at the Seminar would be duly communicated to the Committee at its 37th Session. This report of the seminar together with the views of the AALCC at its forthcoming session would thereafter be transmitted to the International Law Commission. Finally, recalling that the item "Cooperation Between the AALCC and the United Nations" was due for consideration at the 53rd Session of the General Assembly, he stated that he proposed to mention the work of the AALCC on the "Extraterritorial

Application Of National Legislation : Sanctions Imposed Against Third Parties”, in particular the suggestions advanced at the seminar and the subsequent decision of the Committee at its Session in New Delhi , in his report to the General Assembly.

The *Secretary General* said that subject to the availability of funds the AALCC Secretariat will strive in the course of the year to publish the proceedings of the Seminar together with the text of the papers presented and the presentations made thereat.³

Thirty-Seventh Session : Discussion

The *Assistant Secretary General* Mr. Asghar Dastmalchi introduced the topic “Extra-Territorial Application of National Legislation : Sanctions Imposed Against Third Parties”. While introducing the Secretariat brief on the subject he stated that the item was first placed on the work programme of the AALCC following a reference made by the Government of the Islamic Republic of Iran. The Explanatory Memorandum accompanying the reference had requested the Secretariat to carry out a comprehensive study concerning the legality of unilateral measures, taking into account the positions and reactions of various governments including the position of its member states. A preliminary study prepared by the Secretariat was there after considered at the 36th Session of the AALCC held in Tehran in May 1997.

The Secretariat study apart from referring to some more recent instances such as the United States: Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, and the United States Iran and Libya Sanctions Act, 1996 had made an endeavour to provide an overview of the limits imposed by international law on the Extra-territorial Application of National Law; and the reaction of the international community to such actions. The brief of documents *inter alia* recounted various ways in which the international community had expressed its concern about the promulgation and application of laws and regulations whose extra-territorial application effects affect the sovereignty of

³ The detailed Report of the seminar is under process of printing.

other States, the legitimate interests of persons both natural and legal (companies, corporations etc.) within their jurisdiction as also the freedom of trade and navigation. The Secretariat study had demonstrated that the question of extra-territorial application of national legislation covered a wide spectrum of international relations viz. political, legal and trade and had pointed out that the use of unilateral actions, in particular those, with extra-territorial effects can impede the efforts of the developing countries in carrying out macro-economic and trade reforms aimed at sustained economic growth.

The *Assistant Secretary General* recalled that in the course of the debate on the subject at the 36th Session of the AALCC several Member and Observer delegates pointed out that the extra territorial application of national legislation *inter alia* violated : (i) the Principles of the Charter of the United Nations in particular the Principle of sovereignty; (ii) the principle of nonintervention; (iii) the provisions of the United Nations Declaration on Friendly Relations; (iv) the Declaration on the Right to Development; (v) the Vienna Declaration on Human Rights; and (vi) the Charter of Economic Rights and Duties of States. The AALCC at its 36th Session *inter alia* recognized the significance, complexity and implications of “Extra Territorial Application of National Legislation : Sanctions Imposed Against Third Parties” and requested the Secretariat to convene a seminar or a meeting of experts on the subject. The Committee at its 36th Session had requested the Secretary General to table a report of the seminar or meeting of experts at the 37th session of the Committee.

Pursuant to that mandate the Secretariat in collaboration with the Government of the Islamic Republic of Iran, which generously offered to host convened a two day Seminar in Tehran in January 1998. Senior Government officials, eminent academic and distinguished international lawyers from 16 Member States of the AALCC participated in the seminar chaired by Dr. M. Javad Zarif, the Deputy Foreign Minister for Legal and International Affairs of the Government of the Islamic Republic of Iran and the then President of the AALCC. The objective of the Seminar, was to promote a free and frank exchange of views on the subject. The Report of the two day seminar on the Extra-territorial Application of National Legislation Sanctions Imposed Against Third Parties held in Tehran in January 1998 , is set out in the brief of

documents. The discussion at the Seminar revolved largely around the presentations made by a group of experts drawn from both Member and non-member States of the AALCC. The Seminar took note of the research paper sent in by the former Secretary General of the AALCC, Professor Frank X. Njenga (Kenya), who was unable to attend the Seminar. Although a Rapporteur was appointed, the debate in their course of the seminar was no formal in nature wherein all the participants spoke in their individual capacities and, no formal conclusions or resolutions were adopted.

The discussions at the Seminar revolved round a broad spectrum of politico-legal issues and focussed on a broad range of legal and policy aspects of the subject mainly in relation to two US enactments, namely the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, 1996 (commonly referred to as the Helms-Burton Act), and the United States Iran and Libya Sanctions Act 1996, (generally referred to as the Kennedy D'Amato Act). The Background Note prepared by the Secretariat for that seminar included an overview of the United States: Iran and Libya Sanctions Act of 1996. Although references were also made to some of the earlier US laws such, as the anti-trust legislation, the Regulations concerning Trade with USSR, 1982, and the National Defence Authorisation Act, 1991. The legality of the two 1996 US enactments was examined in terms of their conformity with the peremptory norms of international law; the law relating to 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-convenience* and other aspects of extraterritorial enforcement of national laws.

The deliberations had also touched on a range of State responses to counter the possible impact of the US legislation in particular and the unilateral imposition of sanctions through extra territorial application domestic legislation in general. References were made to the response of the Inter-American juridical Committee and the European Union and the measures discussed included 'blocking' legislation, statutes with 'claw-back' provisions and laws providing for compensation claims, at the national level. At the international

level, the responses noted included diplomatic protests, negotiations for exemptions \ waivers in application of the projected sanctions, negotiations for settlement of disputes, use of WTO avenues and measures to influence the drafting of legislation in order to prevent its adverse extra territorial impact.

The deliberations 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, nonintervention, self-determination, and the freedom of trade. It was generally agreed that both the Helms-Burton Act and the Kennedy D'Amato Act contravened such basic norms. The right to development and the principle of permanent sovereignty over natural resources.

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 above mentioned impugned statutes. These rules include the prohibition of injury to third states; the rule of proportionality; and the rules relating to prohibited counter measures incorporated in Article 13 of the draft articles on State Responsibility as framed by the International Law Commission. While considering the issue of countermeasures, it was emphasized that the presiding peremptory norm must be the peaceful settlement of disputes. The discussion also highlighted the inter play between counter measures and nonintervention, and between counter measures and unilateral imposition of economic sanctions.

Participants agreed that counter measures could not be a facade unilateral imposition of sanctions in respect of matters that fell within the purview of Chapter VII of the Charter of the United Nations or the sanctions competence of other international organizations. It was argued that the differences between counter measures and sanctions of the nature of international sanctions should be recognized. The seminar also revealed a divergence of views on three main issues viz. (i) whether the subject should be

confined to secondary sanctions through extra-territorial 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.

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

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

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

Referring to the examination of the principles concerning countermeasures vis a vis sanctions he stated that it was suggested that the ILC formulation of the Provisions relating to counter measures seems to leave this aspect opens. A State it was said, may violate (a) an obligation erga omnes or (b) an obligation erga omnes but injuring another state, or (c) an obligation vis-a-vis another state. Which of these situations would give rise to counter measures? A clarification on this issue will help determine the permissible

counter measures, and the relationship between them and sanctions. The view was also expressed that the relationship between counter measures and other peremptory norms of international law such as non-intervention and peaceful settlement of international disputes needed to be further examined.

The report of the Seminar was expected, Mr. Dastmalchi stated, to furnish an input not only in the consideration of the subject and the Committee's future work thereon, but also in the crystallisation of the opinion of the Asian African Legal Consultative Committee on the subject. The Committee at its 37th Session after consideration of this Report of the Seminar held in Tehran, the Islamic Republic of Iran, may direct the AALCC about future work of the Secreteriat on the subject.

The Delegate of China expressed the view that the topic was a complex one with legal, political and technical implications. Dwelling on the effects of globalization, he felt States not only apply measures against third States but also for their nationals, companies and trading and entities of such third States, which amounted to indirect sanctions. Furthermore, these coercive measures took the form of restrictions on trade practices and investments, which in turn have global ramifications. Recalling various international legal instruments and arrangements for facilitating free trade, he was of the view that sanctions would impede relations between states. The settlement of disputes, in his government's view should be in accordance with the principles of mutual respect for upholding sovereignty of States and non-interference in each others internal affairs.

The Delegate of the Islamic Republic of Iran expressed the view that extraterritorial application of national legislation in the form of economic sanctions had become an instrument of foreign policy of some powerful States. He added that the Helms-Burton Act and the Kennedy D'Amato Act which apply coercive sanction against Cuba, Libya and Iran respectively, had no basis in international law. These unilateral acts with extra-territorial effects, disrupt peaceful trade relations amongst States and have been denounced by States and regional organizations, like the European Community. He recalled the Seminar in Tehran on the topic, which had revealed a general agreement amongst States that unilateral imposition of economic sanctions undermined accepted norms of international law. Concluding his statement, he supported

the proposals of the Tehran seminar and called upon the AALCC and other international fora such as the ILC to attempt a formulation of principle and norms on this important issue.

The Delegate of Japan expressed the view that the topic of extraterritorial application of national legislation, should be dealt on a more general and broader basis without confining only to the two US Acts of Helms-Burton and Kennedy-D' Amato. Furthermore, he expressed the view that although this topic has linkages with other topics of international law such as countermeasures, State responsibility and dispute settlement mechanism the AALCC should focus upon finding and establishing a principle on the exercise of prescriptive jurisdiction. The AALCC, she asserted, could make a significant contribution by studying the legal effects and not 'political effects' of this, topic.

The Delegate of Sudan recalled that the Tehran Seminar had reached consensus that unilateral imposition of sanctions, through extra territorial application of national legislation, violated norms of customary international law. Furthermore, condemning the Helms-Burton and Kennedy D' Amato Acts of US Government, he was of the view that a similar sanction was imposed on Sudan on 4 November 1997. The Executive Order, which imposed this sanction, had frozen all assets and property of Sudanese and also blocked import of Sudanese goods in USA and exports from Sudan. He was of the firm view that the AALCC should study the topic of Extraterritorial application of national legislation as a sub-item entitled "Executive Orders Imposing Unilateral Economic Sanction on Targeted States".

The Delegate of India expressed the view that the subject was of topical importance involving economic, legal and political implications. Recalling the Seminar on the topic held in Tehran in January 1997, he felt that extraterritorial effects could be dealt at two levels. Firstly, judgements of municipal national courts and secondly, the evolution of unilateral acts which could include doctrinal aspects deduced from judgements of ICJ, General Assembly resolutions and state practice. In the latter context, he mentioned the judgement of ICJ in the AngloNorwegian Fisheries Case, which had dealt with the validity/invalidity of unilateral measures. Expressing his personal

opinion, he felt at the national level, a research could be undertaken with examination of extra - territorial effects of national legislations. At the international level, he was of the view that principles such as permanent sovereignty of natural resources, and other related issues of international customary law, would require a clinical examination. As regards national legislation having extra territorial effects, he was of the view that the study could focus on: basic standards of national legislation within the territory of a state, national legislation having geographical locus beyond territory of State and the object and purpose of national legislation with extra territorial effects.

The Delegate of the Arab Republic of Egypt highlighting the topical importance of the subject expressed the view that the AALCC should study only the specific legal dimensions. The application of extraterritorial legislation on third parties, in the view of his Government, contravened the UN Charter principles of sovereign equality and non-interference in the internal affairs of a State. Furthermore, he felt that trade issues, pertaining to dispute settlement under the WTO and counter measures which are related to imposition of economic sanctions, should be further looked into.