

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 quality, non-intervention, 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 as the right to development and the principle of permanent sovereignty over natural resources.

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.

While considering the issue of countermeasures, it was emphasized that the presiding peremptory norm must be the peaceful settlement of disputes. The discussion 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 facade 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.

The debate 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 extra-territorial application.

The Seminar had 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.

### **Thirty-eighth Session: Discussion**

*The Deputy Secretary General* Mr. Mohammad Reza Dabiri introduced the topic and recalled that the item 'Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties' had been placed on the agenda of the committee following a reference made by the Government of the Islamic Republic of Iran. Tracing the work of the Committee at its 36th and 37th Sessions on this topic, he recalled that the 36th Session had recognized the significance, complexity and serious implications of the topic and had requested the convening of a seminar in the intersessional period. Accordingly, a Seminar on "Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties" was convened in Tehran in January 1998. The Report of the Seminar, he stated, had been considered at the 37th Session of the Committee. He informed the Committee that the Secretariat had printed the Seminar Proceedings, following the receipt of a grant from the Islamic Republic of Iran. He also recalled that the Committee had requested the Secretariat to study and examine the issue of "executive orders".

With reference to the brief of documents presented before the 38th Session at Accra Mr. Dabiri stated that it was more broad based where apart from looking into municipal legislation, the document had considered and surveyed the local acts of USA, which sought to impose unilateral sanctions. The secretariat brief also enunciated four categories of executive orders. In this regard, he expressed the hope that the Session would guide the Secretariat on the future course of this topic.

On the issue of local acts of States having extraterritorial effects he felt that as a few of them had been declared *ultra vires* of the constitution of the land, their validity could also be questioned as international law which guides relations between States requires conformity with certain basic norms.

Imposition of unilateral sanctions or countermeasures that ensue, Mr. Dabiri added, must be amicably settled without resulting in economic difficulties to States. In this regard, he mentioned the Banana dispute between the US and EU, which had brought about a trade conflict between States and also questioned the non-discriminatory rule based regime of the WTO. He expressed the hope that the deliberations at the Session would help in determining the future work of the Secretariat on this item.

The *Delegate of the Islamic Republic of Iran* expressed his gratitude to the Deputy Secretary General for his introduction and the Secretariat for preparing background notes. He felt that the changing world scenario with increased globalization and liberalization called for respect of rule of law and friendly relations amongst States. He also highlighted the fact that the use of force as an instrument of national policy is prohibited under international law. In such a scenario, the continued use by some States of unilateral sanctions against States, particularly third parties, in his opinion, was illegal.

Drawing an analogy with laws of neutrality, he felt that third parties interests too, i.e. rights and duties must be

protected when economic sanctions are imposed He added that extraterritorial application of an essentially domestic legislation, violated the Charter of the United Nations and also a number of other human rights instruments, which guaranteed right to development and also the right to life.

Speaking on the legality of unilateral sanctions, he said that only the Security Council was authorized to impose sanctions in furtherance of its role to maintain or restore international peace and security in accordance with international humanitarian law. On the eve of the millennium and the close of the UN Decade of International law, there should be an international community where unilateralizing in international relations is done away with as it disrupts peaceful economic relations amongst states. He expressed the hope that the deliberations on this important topic amongst Asian African States would reinforce the need for pacific settlement of disputes and not resort to unilateral sanctions, which violate the sovereign equality and independence of States.

The *Delegate of India* felt that the topic touches areas relating to political, legal and trade aspect of international relations. She reiterated her country's stand that the Committee should strive, to study the 'legal and not political effects of the application of extra territorial sanctions and the effect on Third Parties. She was of the view that the discussion presented in the Seminar report showed that extra territoriality in itself was not an issue, but the fact that it did not fit in the traditional classification based on nationality, passive personality, protective principle, universality and the effects doctrine, created difficulties.

Extra territorial law, in her view, violated Third States interests on terms of trade and also human rights. She expressed the view that consent of States alone is the basis of international law and international cooperation and unilateralism can not solve international problems. Furthermore, the delegate said that extraterritorial application of national legislation violated the principle of non-intervention

and the Declaration Relating to Friendly Relations and Cooperation Amongst States, the Declaration on the Right to Development, the Vienna Declaration on Human Rights and the Charter of Economic Rights and Duties of States. Moreover, she added that such laws also violate the provisions of GATT and WTO.

However, she expressed the view that the topic was complex and certain issues such as those relating to the distinction between prescriptive and enforcement jurisdiction, extra-territorial jurisdiction, civil, criminal and trade matters, transfer of technology, sanctions and counter measures, need to be further studied. Besides, extra-territoriality the interface between international law and national law, public international law and private international law, she said, also needs to be looked into.

She expressed satisfaction that the Secretariat had chosen to focus attention on executive order or presidential determinations as her country had been made a target on many such matters. An executive order, in her view, was violative of the principle of non-discrimination provided in GATT/WTO regime, and the disputes arising therefrom lead to the erosion of the multilateral trading system which is rule based and aimed at ensuring stability in international trade relations.

The *Delegate of Myanmar* appreciated the fact that the topic under consideration was very important for his country. Tracing the historic origin and the ethnicity of his country, he said that his people had lived in unity despite the problem of armed insurrection. Despite this, he said his country was on the path to economic progress, wherein the private sector played an important role in attracting foreign investment in the country. He further added that his country was actively pursuing efforts to foster regional and global cooperation.

He expressed concern that despite all their efforts, some countries such as the United States had imposed unilateral sanctions against them. Commenting on the Massachusetts

Burma (Myanmar) Law of 1996, he said the Legislation was already struck down by a District Court which held that the State of Massachusetts was "infringing on the federal government's power to regulate foreign affairs". Finally, he expressed the hope, that the AALCC as a legal body, could play an important role in pointing out the illegality of the US action in imposing unilateral sanctions.

The *Delegate of the People's Republic of China* stated that her delegation believed that coercive measures imposed against third parties including restrictions on trade and investment were very likely to create long term effect on international transactions. In the light of the various rules established by the international community regarding free trade, the legal admissibility of such extraterritorial application of national legislation was questionable. Her Government, she stated, believed that disputes between states should be settled peacefully in accordance with the principles of mutual respect for each other's sovereignty and non interference in each other's internal affairs and that it was to advisable to resort to frequent sanctions which will lead to new disputes and friction. She expressed the hope that all the parties concerned would settle their disputes through bilateral or multilateral negotiations, dialogue and consultations on the basis of equality and mutual respect.

(ii) **Decision on "the Extra-territorial Application of National Legislation: Sanctions imposed Against Third Parties"**

**(Adopted on 23.04.1999)**

*The Asian-African Legal Consultative Committee at its Thirty-eighth Session*

*Recalling* the reference made by the Government of the Islamic Republic of Iran and its Resolutions 36/6 of 7th May, 1997 and 37/5 of 18th April 1998;

*Appreciative* of the printed report of the seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties held in Tehran in January 1998;

*Expressing* its appreciation to the Government of the Islamic Republic of Iran for hosting the seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties and for the financial grant for the printing of the papers and report of the seminar;

*Having considered* the Secretariat brief on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties as set out in Doc. AALCC/XXXVIII/Accra/99/S.6;

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

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

1. *Requests* the Secretariat to continue to study legal issues relating to the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties and to

examine the issue of executive orders imposing sanctions against target States.

2. Urges Member States to provide relevant information and materials to the Secretariat; and

3. Decides to inscribe the item "Extra-territorial application of National Legislation: sanctions Imposed Against Third Parties" on the agenda of the Thirty-ninth Session of the Committee.

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

The Committee at its 37th Session (new Delhi, 1998) considered the Report of the Seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties, held in Tehran, the Islamic Republic of Iran, in January 1998. That Report had pointed out that the discussions at the Seminar had revolved around a broad spectrum of politico-legal issues and focused on a broad range of legal and policy aspects of the subject mainly in relation to two United States enactments, namely the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, 1996 (commonly referred to as the Helms-Burton Act), and the United States Iran and Libya Sanctions Act 1996, (generally referred to as the Kennedy D'Amato Act).

It may be stated that the Secretariat has in the intervening period since the 37th Session (New Delhi, 1998) has with the financial assistance of the Government of the Islamic Republic of Iran published the Report and Proceedings of the Tehran seminar. The Report incorporates the Papers prepared for and oral presentations made by the Group of Experts invited to the Seminar. Apart from the inaugural and closing statements made by the then President, Dr. M. Javad Zarif, and the Secretary General, the Report includes full text of the Report of the Rapporteur.

The Committee at the New Delhi Session took note of the Report of the Tehran Seminar and reiterated the significance, complexity and the implications of the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties. It requested the Secretariat to continue to study the legal issues relating to the topic.

It may be recalled that whilst introducing the item at the 36th session (Tehran, 1997) the then Assistant Secretary

General had observed that although jurisdiction in matters of public law character is territorial in nature some States are, however, known to give extraterritorial effect to their municipal legislation which has resulted in conflict of jurisdictions and resentment on the part of other States. Civil Law countries exercise jurisdiction over their nationals for offenses committed even while they were abroad. Among the Common Law Countries United Kingdom law allows such jurisdiction in select cases. The United States of America, however, exercises jurisdiction in a wide variety of cases. The National Association of Manufactures has stated that "resort to unilateral sanctions may be justified in some cases; it may be rationalized in many more. But it can rarely, if ever, be explained..."

The United States of America has armed itself with a plethora of laws which have hitherto allowed the Administration to extend its jurisdiction and impose unilateral sanctions against more than 70 States.<sup>5</sup> According to report of the Latin American Economic System (SELA), which groups 28 Latin American and Caribbean States, 76 States put up with or are seriously threatened by one or more trade sanctions. Unilateral trade sanctions severely threaten or punish 68 percent of the world population. The President's Export Council report on sanctions listed 73 States which, as of

<sup>5</sup> The targeted States include 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, Islamic Republic of Iran, Iraq, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Lebanon, Liberia, Libya, Maldives, Mauritania... Mexico, Moldova, 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 the erstwhile Soviet Russia and India. In addition to these States. *Indonesia and Malaysia* are considered to be among the possible targets.

January 1997, had been subjected to some form of unilateral sanctions.

A report commissioned and published by the United States National Association of Manufactures (NAM) had, in March 1997, revealed that "from 1993 through 1996, 61 US laws and executive actions were enacted authorizing unilateral sanctions for foreign policy purposes. Thirty-five countries were specifically targeted".<sup>6</sup> The report had concluded that all economic sanctions "should be multilateral except in the most unusual and extreme circumstances.

Senator Jesse Helms, one of the promoters of the Helms Burton Act, however, has questioned the validity of the report of the National Association of Manufacturers.<sup>7</sup> According to him "between 1993 and 1996, the Congress passed and the President signed a grand total of five new sanctions laws: the Nuclear Proliferation Prevention Act, 1994; the Cuban Liberty and Democratic solidarity Act of 1996; the antiterrorism and Effective Death Penalty Act of 1996; the Iran Libya Sanctions Act, 1996; and the Free Burma Act, 1996." He goes on to emphasize that during "the same period, the President imposed just four new sanctions: declaring Sudan a terrorist state; banning imports of munitions and ammunition from China; tightening travel-related restrictions, cash remittance levels, and the sending of gift parcels to Cuba (restrictions that have since been lifted); and imposing a ban on new contractual

<sup>6</sup> 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. The analysis and recommendations were prepared by Marino Marcich of the NAM Trade and Technology Policy Department. For the text of the Catalog visit <http://www.usaengage.org/studies/nam.html>

<sup>7</sup> The list of administrative actions taken by individual government agencies was compiled by the Georgetown University Law Center.