REPORT OF THE DISCUSSIONS HELD AFTER THE FOUR SESSIONS OF THE 36TH COLLOQUIUM ON THE LAW OF OUTER SPACE

The topic of the first session of the Colloquium was "Legal Aspects of Activities of Organizations of the UN System and Other International Organizations". In the *discussions* that followed the presentation of the papers, *Amb. E. Finch* (USA) asked *Dr. Kopal* about the relationship between the IISL and the IAF. *Dr. Kopal* elaborated on the importance of The Hague as a legal city; the first Colloquium was held there. The second was held in London and the third in Stockholm. The IISL was founded there. Although the IISL and the IAF work together, the IISL is relatively independent. *Prof. C.Q. Christol* (USA) mentioned that he wrote an article about the early history of the IAF and the IISL. After a question from *Mr. M. Orrico* (Mexico) concerning the character of the IAF, Dr. Kopal elaborated on the importance of the status of IAF as an observer to UNCOPUOS.

Commenting on Prof. Lyall's paper concerning the ITU, *Prof. C. Q. Christol* asked Prof. Lyall whether there was an analogy between the financing problems of the ITU and those of the UN. *Prof. Lyall* held that the discrepancy between the amount paid to ITU and the number of votes which developed countries have in return is too big. *Dr. W. Stoffel* noted that the financing system of the ITU will be changed.

Mr. A. A. Golrounia (Iran) stated with regard to the paper by *Dr. Balsano* that developing countries should have free access to information from satellites. *Dr. Balsano* commented that protection does not mean that free access is impossible. It only means that access may be refused to some states or users. But access for developing countries remains often free.

Dr. S. Hobe (Germany), in commenting on the papers by *Dr. Popescu and Dr. Courteix*, wondered whether the proposed World Space Organization would be similar to the Deep Seabed Authority which has not been a success, to say the least. *Dr. Bourély* replied that the main idea is a flexible and independent UN space division. *Amb. E. Finch* argued that the World Space Organization is not a new idea. He also stressed that the Law of the Sea should be detached from the Law of Space and that comparisons cannot be made between the two. *Dr. H. Safavi* (Iran) countered that the Law of the Sea, Air Law and Space Law cannot be disconnected. *Dr. Popescu* elaborated on the different conditions of any World Space Organization; all or many nations should participate and the World Space Organization must be in accordance with Art. I of the Outer Space Treaty. Finally, *Prof. K. H. Böckstiegel* (Germany) came back to the remark made by Dr. Hobe and agreed with him that a World Space organization should not resemble the Deep Seabed Authority because that was a failure. The Moon Agreement, especially because of Art. 11, must also be regarded as a failure. A technical organization would work; an international regime would certainly not.

The topic of the second session of the Colloquium was "Adjudication and Arbitration of Disputes Regarding Space Activities". The chairman provided opportunity for discussion after each presented paper instead of at the end of the session.

The first paper was presented by *Prof. Dr. K. H. Böckstiegel* (Germany) and was entitled "Arbitration of Disputes regarding Space Activities". *Dr. W. B. Wirin* (USA) asked in what circumstances a judicial resolution would be preferable to arbitration, and Dr. Böckstiegel responded that this could be the case when enforcement of the arbitral award is not ensured, e.g. in a state that has not ratified the New York Convention. *Amb. E. Finch* (USA) asked the author's comment on the rules of evidence and how they may affect arbitration. *Dr. Böckstiegel* remarked that the rules of evidence are left to the discretion of the arbitrators, and that all parties must know and agree to the rules in advance. Finally, *Mr. L. Bencock* asked whether or not arbitration proceedings establish precedent. Dr. Böckstiegel replied that the confidentiality of most proceedings prevent their use as precedent, although abstract descriptions of decisions may have some persuasive value.

Dr. M. Bourély (France) presented the next paper, "The Creation of an Aerospace Court of Arbitration". *Prof. I.H.Ph. Diederiks-Verschoor* (Netherlands) noted during the *discussion* that an international court of justice and an international court of arbitration already exist, and that both have many judges who are competent and experienced in space related disputes. She further stated that the justifications presented by Dr. Bourély for the creation of a new court of arbitration did not seem sufficiently convincing to her. *Dr. Bourély* responded that the new court of arbitration would not conflict with the ICJ because it would not hear inter-state disputes. *Ms. T. Masson-Zwaan* (France) asked about the status of the ILA Draft Convention on the settlement of disputes, and Dr. Böckstiegel indicated that the draft convention has been put on the "back burner" as COPUOS is currently occupied with the issue of space debris. *Prof. C.Q. Christol* (USA) asked whether public intergovernmental organizations could submit their disputes to the proposed court. Dr. Bourély replied that while the new court will not have competence to

hear inter-state disputes, it *might* be able to address disputes involving intergovernmental organizations. *Dr. D. Popescu* (Romania) asked if this new court would require a new international convention, and the author answered that the proposal is for a voluntary administrative and judicial body, and does not require a new international convention. The question of the financing of the court was raised by *Mr. J. Pelton*, and Dr. Bourély indicated that funding would be pro-vided by the parties submitting their disputes to the court. *Prof. S. Gorove* (USA) then asked whether one could use the proposed court to enjoin a launch in the US, and Dr. Bourély said that the court lacks competence to do so. *Ms. T. Masson-Zwaan* (France) asked Dr. Bourély whether the ESA Convention provides for binding arbitration, which was confirmed by the author, who also indicated that no disputes had been arbitrated so far. *Mr. S. Hobe* (Germany) wondered whether the changing environment in the space industry, from predominantly governmental activity to increased private activity, will increase the demand for dispute resolution. *Dr. Böckstiegel* replied that this was certainly true. The breakdown of the court system in Eastern Europe combined with the diminished clout of government agencies has led contractors to demand more arbitration.This was confirmed by *Prof. Christol* who noted that more private activities in space will create more controversies and more arbitration. *Prof. Gorove* however remarked that some national laws will require disputes to go to court instead of arbitration, because of the more binding character of a court decision.

In the discussion around the third paper in this session, written by *P. Sterns and L. Tennen* (USA) and entitled "Resolution of Disputes in the Corpus Iuris Spatialis: Domestic Law Considerations", *Dr. E. Fasan* (Austria) asked about the possibility of appealing an arbitrary decision. *Mr. Tennen* responded that both the FAA and the UAA provide for appeal in such cases, and Dr. Böckstiegel confirmed that there are limited grounds for challenging the enforcement of arbitral awards in international agreements such as the New York Convention. *Mr. D. Brown* (engineer at ESTEC, the Netherlands) asked whether arbitrators can issue injunctions. *Mr. Tennen* said yes, but that the party seeking the injunction must show a likelihood of winning on the merits, a likelihood of irreparable harm, and must post a substantial bond. *Dr. Christol* noted that arbitrators with the proper technical expertise can be found by word of mouth, through lists provided by Bar Associations and through "Rent-a-Judge" services.

Finally, *Dr. Böckstiegel* reported that the Board of Directors of the IISL has decided to establish a Committee on dispute resolution and cases regarding space activities with the goal of publishing a loose-leaf series, and invited interested persons to contact the Secretary, Ms. T. Masson-Zwaan.

The paper by *Prof. S. Gorove* (USA) on "Recent Litigation involving the Launch of a Spacecraft with NPS on Board" was also presented in this session. *Mr. D. Reibel* (USA) noted regarding this last paper that the National Environmental Policy Act (NEPA) is a procedural law and the NPS Principles are primarily substantive, so no real comparison could be made. *Prof. Gorove* noted that Principle 5 of the NPS Principles requires a saftey assessment to be made, and Chairman *Dr. Wirin* added that the NPS Principles will become part of the NEPA process if they become a treaty to which the US was a party.

The subject of the third session was "Legal aspects of space insurance". *Prof. Priyatna* (Indonesia) commenced the discussion asking for further specification regarding the paper by *Dr. Wright and Dr. Masson*, as to the factors that raise the costs of space insurance and for the insurance agents' views of the scope of arbitration. With respect to the first question, *Dr. Wright* responded that the costs of insured space-related accidents affect the costs of insurance. After further questioning by *Prof. Lyall*, he also admitted that the space insurance market can become affected by the world-wide disaster market. *Dr. Wright* noted that with respect to the question relating to arbitration, he had not seen any long-running disputes between insurer and insured. *Prof. Böckstiegel* pointed out that insurance-related arbitrations would often involve an injured third party. An engineer from the ITU, *Dr. Meyerhoff*, asked for clarification as to the term "market capacity". *Dr. Wright* responded that the market capacity for an event is all of the amount of money that can be put towards insuring a particular event. Currently, 370 million is available for insuring any one launch. *Dr. W. Wirin* asked whether engineers were currently involved in assessing risk, because they had not been involved in the early days of space launchings. Dr. Wright ackowledged that they were indeed involved. *Dr. O'Connor* pointed out that a large number of losses of the space industry have not been insured. Therefore, the insurance premiums are lower than would be the case had, for example, the U.S. losses of more than 2.5 billion been insured. *Prof. Christol* asked the manner in which insurance companies provide for the needs of the procurer of a launch. The response was that a number of insurance options were available to cover risks that were not provided for in the launching contract. For example, insurance could be purchased by the launch procurer for a launch delay or for a launch failure.

The last session of the Colloquium dealt with "Recent Developments in Space Law with Special

Emphasis on Nuclear Power Sources". In the discussion, *Dr D. Reibel* (USA) requested a precision concerning one of *Amb. E. Finch*' ideas. He noted that the American Bar Association urges the preparation of an international convention that would provide for the prevention of the creation of space debris and the pollution of outer space in any manner whatsoever "to the greatest extent feasible and practical and consistent with each nation's national security". He wondered about the use of this principle in case space debris must be created for national security purposes. *Amb. Finch* answered that the idea is to try *not* to create space debris, at all times.

Then *Prof. C. Christol* agreed with *Amb. A. Cocca* on the point that there is definitively a problem with the UN NPS principles especially regarding the definition and identification of the Launching State and the Procuring State. He stressed that this raises substantial legal issues concerning liability. *Dr. N. Jassentuliyana* (UN) confirmed that the question of the identification of the launching State and the procuring State in the NPS Principles is a very important issue which needs to be studied. The UNCOPUOS has not yet gone that far in their discussions.

Regarding the paper by *Dr. S. Sanz Fernández de Córdoba*, *Dr. Yturriaga* (Spain) stressed that a new position on the colonization of space is required. The seabed regime is still not implemented, because when States invest in the exploitation of the seabed, they wish to secure compensation for their investment. A compromise must therefore be reached in order to make it profitable for the explorer while maintaining the principle of res communis.

Referring to the paper by *Dr. F. von der Dunk*, *Prof. K. H. Böckstiegel* stressed the gap of the liability convention which does not apply to the second or third State in the row, if it is not implied in the launching. He mentioned that in present launching contracts, cross-waivers of liability are included, also in contracts with a third state, because otherwise it could become liable. He also noted, referring to *Dr. K. Gorove's* paper, that the draft of the ILC on responsibility is not yet customary international law, but if it were, it could become a complement to the liability convention.

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