FORTY-FIRST COLLOQUIM ON THE LAW OF OUTER SPACE

SUMMARY OF DISCUSSION

The fourth session of the Colloquium was devoted to a general discussion of all papers presented during the previous sessions. Following the presentation of the last of the papers, and consistent with the practice followed in recent years, the rapporteurs for each session gave a summary of the main points and issues raised by each presented paper. The floor was then opened for what can only be described as a spirited discussion.

Prof. Christol began the discussion by focusing on three questions. First, he inquired as to what was the nationality of Kistler Australia. Recalling the example of the International Petroleum Corporation. Prof. Christol stated that an international arbitration found that the nationality was based on the place of incorporation, at least for purposes of pursuing a claim for compensation following the nationalization of the company. He cautioned about jumping to conclusions on this issue. Prof. Christol next inquired as to the meaning of the phrase "peaceful purposes" in space law, noting that certain military uses of space could still be peaceful, and that not all military uses were illegal. Finally, Prof. Christol stated that the "common heritage of mankind" must constantly be reviewed and re-examined. He asked whether the common heritage of mankind was an idea, a concept, or a principle, and stated that according to the International Law Association, the common heritage of mankind was regarded as a principle, and a starting point for further development. He observed that the consensus for the Moon Treaty dissolved after the instrument was opened for signature, and that there are only infrequent references to the common heritage of mankind in the literature by developing countries since 1979. He asked whether the common heritage of mankind could be rehabilitated, and concluded that although international legislation was "wonderful, care must be exercised in the development of new principles.

The subject of the first session, *Managing Space Resources and Revitalizing Space Treaties*, produced significant controversy concerning the paper of Mr. Benson. Three specific propositions were expressed by Mr. Benson in his presentation which were addressed in the discussion: first, that the space treaties should be abrogated, and in any event had no application to private property rights in space; second, that his company intended to land a craft on and lay claim to a near Earth asteroid; and third, that the conduct of scientific missions by private companies will render government agencies, such as NASA, superfluous and unnecessary.

Dr. von der Dunk stated that Mr. Benson must be a "thrillseeker" to come before this body and claim that the absence of regulation of commercial enterprise in space is "paradise." He asked in the event a competing company was the first to claim the asteroid whether Mr. Benson would "shoot it out" like in the old west, or would he seek the services of a lawyer? *Mr. Benson* responded by stating that his company intended to launch a craft to the asteroid Nerious on April 3, 2001, and that if someone else got there first, to be consistent, he would have to say it belonged to them. He asserted that his position was necessary, even if not popular. According to Mr. Benson, an extreme position was needed for negotiation purposes to start the debate over private property rights in space. He conceded that he did not have the answers, but merely was laying out the challenge.

Pres. Jasentuliyana observed that it is necessary for private entities to be licensed to conduct activities in space. He noted that while there is widespread agreement, as a matter of policy, to encourage the development of private enterprise, the United States will not throw out the outer space treaties, and the government itself has certain responsibilities and liabilities. Pres. Jasentuliyana further noted that the Congress has accepted the amendments to the Law of the Sea Convention, and that such action does not support the position taken by Mr. Benson.

Dr. Doyle described the position of Mr. Benson as "preposterous, arrogant, unrealistic, and off-the wall." The conduct of a private science mission, in Dr. Doyle's view, does not eliminate the necessity for NASA to exist. Dr. Doyle further stated that no private company can declare sovereignty on behalf of the United States.

Nothing in the law prevents a private company from appropriate use of an asteroid, but, it is not necessary for a claim of appropriation of the body to be made. The analogy in this area, of course, is to the high seas. Nevertheless, the claim of appropriation by a private company would have no legal effect, and would be without government sanction. Any such sanction, according to Dr. Doyle, "flies in the face of history, right and justice." He noted that there are lawful processes to modify the treaties, if desired, but that it was not necessary to flaunt the law to change it.

Pres. Jasentuliyana observed that Mr. Benson wants to dispense with all space law, but anarchy and a lawless society are not acceptable.

Prof. Lyall stated that lawyers tend to go by what was done before, and how can the law be amended. The history of the law of the sea reflects that states did grant private entities the right to explore and make discoveries. He noted, however, that there was a distinction between a privateer and a pirate, and questioned which one described Mr. Benson.

Dr. Ferrazzani inquired whether the intention is to actually own the asteroid or merely to use it. He predicted that a claim of appropriation will come into conflict with and not be recognized by states. In his opinion, the plan to appropriate the asteroid will not work under any circumstances.

Pres. Jasentuliyana observed that the claim to the asteroid is in reality a mechanism to trade in the stock of the company. He pointed to the framework provided by the Law of the Sea as an example of a system which included the participation of the private sector.

Mr. Benson responded to several of the comments made by the speakers. First, as to whether he was a privateer or a pirate, he would characterize himself more as a catalyst. Second, concerning the issue of licensing, he stated that there was no law that prohibited him from saying he was going to lay a claim to an asteroid in space. Third, Mr. Benson stated that NASA was on record that it would defer to the private sector if the private sector could do something better, that is, the private will make the public get out of the way. Fourth, he stated that the analogy to the Law of the Sea was not exact, as you can still travel in space, and space is not related to Earth. Finally, Mr. Benson stated that he believed in the rule of law, but that the Outer Space Treaty does not address the matter of private property rights in space.

Pres. Jasentuliyana commented that Mr. Benson started by saying he would throw out the law, but now concedes he believes in the rule of law, so we are making progress.

Dr. Doyle raised an historical point, that is, contrary to the position of Mr. Benson, the government did not create the telecommunications industry and then get out of the way of the private sector.

This rapporteur then raised three points: first, Mr. Benson claims that his mission is a purely private endeavor, yet it is soliciting payload experiments funded by the government; second, the intent to assert a claim of appropriation will result in a substantial problem in seeking a license for the mission, as the government cannot license private entities to do that which is clearly prohibited to the state itself; and third, although there may be an abstract free speech right to express an intent to assert a claim of appropriation in space, there could be serious civil and criminal repercussions when such a statement is coupled with a solicitation to purchase stock or otherwise invest in that endeavor.

Mr. Benson responded that the mission is "private" in that the company will not have a contract with the government, and the source of funding for the scientific payloads to be flown is irrelevant. He acknowledged, however, that his company was working with various government agencies. Regarding the intent to assert a claim of ownership, he simply wanted to "have some fun" with the issue.

By written submission, *Prof. Galloway* commented on a statement of Mr. Benson that the matter of property rights in space will be "decided by popular opinion." Prof. Galloway wrote: "This is ludicrous. Will it be decided by a poll? What if public opinion changes? It's a flimsy basis for asserting a property right."

Prof. van Fenema turned the discussion back to Kistler Aerospace, and stated that Kistler USA created Kistler Australia for tax purposes. In addition, Australia was prepared to assist the company, even without specific regulation, by a contract between the parties, subject to the issuance of an appropriate license by Australia. He noted that the licensing process in the United States will start after the necessary legislation has been approved. Thus, although the matter of licensing is being resolved, other issues may arise, for example, liability could be asserted against both the United States and Australia under certain circumstances.

Pres. Jasentuliyana inquired if there were any comments concerning Session 2, *Confidence Building and Commercial Interests in Space. Dr. Doyle* stated that he would like to respond to a question asked of him outside of the session, that is, whether the developing world has a role in building confidence through space activities. The response is that the developing states have a definite role to play with the spacefaring states to enhance and build confidence, as, for example, through an international organization.

The balance of the discussion concerned a variety of topics raised in Session 4, *Other Issues of Space Law, Including the 30th Anniversary of the Rescue Agreement of 1968. Prof. Lyall* was concerned with the issue of claims to geostationary orbital slots, as mentioned in the presentation by *Prof. Kosuge*. In Prof. Lyall's opinion, there may be difficulties in the supervision of activities by the ITU. Specifically, there is the possibility that very small states, lacking appropriate personnel for verification and regulation, may find themselves in complex circumstances without the capability for effective supervision. By written submission, Prof. Lyall raised an additional concern, relating to states authorizing space activities to be conducted by companies which in reality are based in other countries. He observed that the intent could be to avoid more rigorous supervision that might be exercised elsewhere, and the analogy to the "flag-state" problem in the law of the sea illustrates the matter. Prof. Lyall questions whether there is some way to be devised to ensure that only states which are technically competent to supervise space activities do license space activities, and noted this is perhaps a question for the future.

Dr. Hoskova addressed concerns regarding article VI of the Outer Space Treaty, noting that the interpretation is evolving with the participation of the private sector. By written submission, she suggests that this could be a topic for a future Colloquium session.

Prof. Christol questioned where the leadership will come from. He asserted that it must be provided by individual states and international organizations, such as the Committee on the Peaceful Uses of Outer Space, with input from private groups.

Prof. Andem stated that the space treaties are important and necessary, and need to reflect activities currently being conducted, with a view to effects of space activities on Earth.

Prof. Hobe stated that in the area of globalization, the role of private entities is very important, but has not received sufficient attention in outer space law. In particular, Prof. Hobe questioned whether the approaches expressed in article VI of the Outer Space Treaty, and the common heritage of mankind, together with the sharing of benefits, were still appropriate.

Dr. K. Gorove noted that the General Agreement on Trade and Services could apply to space activities, but may require a separate protocol. *Prof. van Fenema* stated that in the early 1990's, the matter was brought up in the negotiations for the GATS, which applies to launch services, but only in a limited context, that of a spaceplane. Thus, what is covered is point to point transport by space, but not launch services directly. He noted that this matter was not currently under discussion, and since such activity was more bilateral than multilateral, GATS was not needed for that purpose.

Finally, *Prof. Andem* raised the issue of the Common Heritage of Mankind, and stated that what belongs to mankind should be equally shared. The benefits of space can and have benefitted all mankind, and that humanity is *one*.

Leslie I. Tennen
Rapporteur, Session Four