DISCUSSION SESSION IISL COLLOQUIUM AMSTERDAM 1999

The Chairmen and Rapporteurs of the four sessions first gave a short overview of points raised in the various papers that were interesting for further discussion.

The IISL President then reiterated those issues, which included, inter alia:
- Implications of territorial integrity and national legislation for space activities
- National versus international legislation (patents, conflicts of law, space station, translating international agreements into national legislation, legal status of space debris, rules of the road for space transportation, proliferation of space activities...)
- Telecommunications, third generation satellites and their implications, are new standards needed?, a role for companies within ITU?, uniform standards GNSS, can high altitude space platforms be considered as space objects?,...
- Privatisation and Commercialisation, property rights in space, when and how?, setbacks of privatisation such as lack of public service, regulation of entrepreneurs, export controls, launching from Australia as an economic alternative, use of the Baikonur launching site and the recent accident leading to a ban,...
- CHM, sovereignty, protection of the moon; establishment of a licencing authority for resource exploitation,
- Special legal protection for the SAHA crater
- Launching from the high seas or from outer space
- Marketing of remote sensing data
- Intellectual property rights
- NASDA's two-tier policy
- Nature of international cooperation, organizations
- Solar power satellites.

Subsequently, an open discussion focussed mostly on the question of property rights in space and on a few other matters. The remarks have been grouped per topic. The following notes give a general indication of the discussions but do not claim to represent official views by any of the participants in the discussion. The author apologises if any remarks have not been properly recorded.

PROPERTY RIGHTS IN SPACE

Dr. von der Dunk started off the discussion session on the topic of property rights in space, which had been raised by various authors. He distinguished between three different "properties"; first, in the case of property on your possessions such as a camera, ownership is not affected by their presence in space. Second, real property, the problem is that there are no sovereign territorial rights in space, therefore in his view such property can not exist in space without further ado. Thirdly, intellectual property, this is in most cases limited to a certain territoriality, therefore also difficult to maintain in outer space.

Dr. Doyle proposed to add a fourth category, i.e. movable property created in outer space with materials from space. You would have similar rights as on earth on movable property. Since "use" of outer space is free, you may move materials and use them for gain.

An engineer worried whether such movable property would be considered as the "Common Heritage of Mankind", and whether he would really have true ownership.

Dr. Jasentuliyana noted that for instance in the field of telecommunications, you need a licence to carry out activities. Once you have that, you may gain profit with your activity. As for the CHM concept, nothing in the Moon Agreement says that you can not make use of your property, it only says then when it becomes feasible to exploit the moon, a regime shall be established (article 11), and such a regime should take into account both the interests of the countries who made the investments, and the countries who do not have the resources to go into space. Under the law of the sea convention, there is also a licensing authority and that works quite well.
Dr Doyle was of the opinion that the CHM is an ideological and philosophical principle, and not a legal principle. The Moon agreement has received only 9 ratifications in twenty years, so it rather proves the NON-applicability of the CHM principle! In any case, it is not a principle of international law and still subject to much debate.
Dr Jasentuliyana disagreed that the non-ratification of the agreement proves the non-applicability of the CHM concept.The USA did not ratify the Law of the Sea convention until a few years ago, and the moon agreement may well come into effect for the US one day as well.
Prof Lyall proposed that someone should write a paper for the Rio colloquium on the question whether something new you make in space with space materials becomes your property.
Prof. Andem reminded that we should not do in space what we did on earth, law brings harmony and we must remember that we all need each other.
Dr. Jakhu supported Prof. Lyall's ideas as presented in his paper. We live under the rule of law, privatisation is the current trend, and this must be encouraged but it also needs to be regulated, in order to smoothen the process. Obviously, private companies want to make a profit, but the public interest may be at risk if there is no regulation. You need regulation to allow competition, and to protect the public interest. We have to look at the global level and not just the national level.
Dr. Tennen reacted to what Dr. White had said in his paper, i.e. that Article 2 of the OST had resulted from a "secret meeting", because no agreement could be reached on the question of private property rights. He had contended that Article 2 leaves room for private appropriation, as only national appropriation is prohibited. Dr Tennen strongly disagreed with that contention, as merely the fact that national appropriation is forbidden does not imply that private appropriation is allowed! A state cannot authorize its citizen to do what it may not do itself! As regards the historical background of the principle of non-appropriation Dr. Tennen also made reference to the earlier UN GA Resolution of 1962, which in its third principle has the same wording as Art. II Outer Space Treaty and which also did not differentiate between 'public' or 'private' national appropriation.
Mr White replied by stressing that there had been strong disagreement between the US and the USSR on the question of private property rights, and that several organisations wanted private appropriation included in the article. States may delegate authority to their citizens, and his proposal was not to grant them rights they do not have. His proposal stays within the limits of the OST. States would delegate rights to the private sector without affecting their responsibility.
Mr. Mayer said he bought a piece of the moon and asked if he could sell it.
Dr. von der Dunk replied that he could do whatever he wants, but someone else could sell exactly that same piece to another person and you could not do anything to prevent that.
Dr Gal reminded of the "nemo plus" rule, i.e. you can never sell what you do not have first.
Mr. Jasentuliyana agreed that enforcement is the issue here.
Dr Doyle stated it was simply fraud, and against US federal law, to sell a piece of the moon.Mr Mayer should see a lawyer and get recovery.

Dr. von der Dunk then made clear that his previous remark was only the superficial answer; he summarised the relevant parts of his paper for IISL-Torino on Mr. Hope, Mr. Jürgens and the ownership of the moon, adding ref. to the Lunar Embassy-website which is now 'selling' plots of the moon, and concluding that the US were very probably internationally at fault in letting Lunar Embassy going ahead, since allowing a US entity operating from US soil to sell privately parts of the moon for US dollars and under US jurisdiction amounted to a *de facto* exercise of US jurisdiction over the moon which was contrary to the non-national-appropriation principle of Art. II OST.
Dr Jakhu said that the discussions on national appropriation took place at a time when there were not yet any private activities, so we should not try to read into that article what simply is not there Private companies only became active at a later stage. We should not confuse what the law is and what the law perhaps should be.
Mr. White noted that although local judges are required to adhere to treaty law, they are not always aware of the space treaties, and thus the person selling pieces of the moon may have acted in good faith selling his part of the moon, when a laywer had earlier registered his deed (thus ignoring treaty law). It is therefore important to bring space law to the attention of local judges.
Ms Sterns said that actually no judge had been involved in this particular case, the "property" had simply been recorded with a county recorder and the sale was fraudulous.
In concluding this debate, Mr. Jasentuliyana briefly reviewed the historical means by which sovereignty over property is established and noted that the traditional means have not been exercised concerning the moon or other celestial bodies, and the OST forbids that any sovereignty can be exercised. Absent sovereignty, the alleged "owner" would have no rights to convey in the unoccupied moon property case.

LEGAL STATUS OF STRATOSPHERIC OBJECTS

Dr Perek recalled the proposal made in session 2 that stratosperic object be called space objects, even though they operate at only 20 km altitude. He disagreed, as this would lead to confusion, and he hoped that this would not be discussed for the next twenty years, as was the case with the question of delimitation of outer space. In his view, a space object is an object in outer space, and a stratospheric object is an object in the stratosphere.
Dr Gal reminded that even without delimination, the functional theory had worked very well in practice. Since the stratospheric object is not in an orbit, it is not a space object. Otherwise, Concorde could also fall within the definition of a space object; however it is not a space object because it is not orbiting; this is the functional theory.

STATUS OF PRIVATE COMPANIES IN ITU

Dr Jakhu disagreed with the proposal that had been made by Mr R. Moore, to allow private companies to be autonomous actors within ITU, because it is not feasible; there can be no rights for private companies at a global level, we are not yet ready for that. But if it does happen sometime, there will be a need for a regulatory body.

LIABILITY FOR SPACE TRANSPORTATION

Dr Gaubatz raised the issue of liability for the operation of space transportation systems; of course the public was not involved until now, so this has not been an issue, but when the general public gets access to outer space transportation, this needs to be addressed. An IISL working

group may be the right forum to do that. (Dr. von der Dunk again brought up this proposal at the General Assembly, which Mr. Gaubatz, not being an IISL member, did not attend. The IISL Board requested him to submit a specific proposal to the next Board meeting.)

Dr Jasentuliyana concluded that apparently there is a lot of business for the IISL and that lawyers will have a busy agenda solving all these questions, after which he had to close the discussion for lack of time.

Tanja Masson-Zwaan
IISL Secrtary