REPORT OF THE 3RD EILENE M. GALLOWAY SYMPOSIUM ON CRITICAL ISSUES IN SPACE LAW

'Article VI of the Outer Space Treaty: Issues and Implementation'

It was already for the third time, that the last month of the year in Washington, D.C., witnessed a Symposium on Critical Issues in Space Law being held in honour of Dr. Eilene M. Galloway. This time discussing "Article VI of the Outer Space Treaty: Issues and Implementation", the Symposium (organised by the National Center for Remote Sensing, Air and Space Law at the University of Mississippi School of Law, the Journal of Space Law, the International Institute of Space Law (IISL) and Arianespace, Inc.) took place 11 December 2008 at the Cosmos Club in Washington, attracting some 60 participants in the process.
Dr. Eilene M. Galloway is generally considered to be one of the founding giants of space law, as one of the leading participants in the legislative process on the national US level leading to the establishment of NASA in 1958 and subsequently one of the great contributors to the evolution of space law at the international level through the UN space treaties of the 60's and 70's and beyond.

The Symposium kicked off by opening remarks on behalf of the various organizing entities. Thus, **Prof. Gabrynowicz** welcomed the participants on behalf of the National Center for Remote Sensing, Air and Space Law and the Journal of Space Law, explaining the history and background of the Symposium. She pointed to the fact that the first symposium had been held two years ago to celebrate the hundredth birthday of Dr. Galloway, and had been such a success that the Center and the Journal had been stimulated to organise a second, and now a third symposium.
Mrs. Masson-Zwaan, President of the International Institute of Space Law (IISL), highlighted in her welcoming remarks the reflection of international cooperation in the Symposium and its themes over the past few years, pointing in particular to the presence of participants also from other parts of North and South America, as well as Europe – notably from the European Centre for Space Law (ECSL). Also this could be judged reflective of Dr. Galloway's career, as she had always laid the greatest importance in her work and writings on international cooperation for the peaceful uses of outer space.
On behalf of the third main sponsor of the Symposium, Arianespace Inc., **Mr. Mowry** provided an overview of some current developments in space activities and space law. He noted that, while 'change' was a very popular word these days in Washington, the question for space would still be whether such change would be going in the right direction. In terms of today's issues with space activities, and in particular (with an eye to the theme of the symposium) those resulting from the increasing commercialisation and privatisation of many space activities, he noted problems with the allotment of frequencies and slots with the ITU (which in one case has some 400 applications filed for the same slot), and with the total lack of international coordination of the launch services sector now that the launch services agreements of the early 90's with Russia, China and the Ukraine had all expired as the global environment has changed profoundly.

As Dr. Galloway herself had not been able to join the Symposium, her son, **Prof. Galloway**, presented a message of welcome and thanks on her behalf. He noted in particular the appropriateness of the Symposium's theme with a view to the career of his mother, with one of the key features of Article VI being the requirement of authorisation and continuing supervision of non-governmental entities' 'national activities' in outer space.
In this context, the discussion of Article VI of the Outer Space Treaty – providing essentially for international responsibility of states for their national activities in outer space – was a very appropriate theme in the context of the obligations of mankind, in particular the leading spacefaring nations, to use outer space responsibly, which have always been defended staunchly by Dr. Galloway. During the negotiations leading to the final text of this Treaty, perhaps the most salient question

raised was whether both governments and nongovernmental actors could be recognized as legitimate space actors. Article VI, stating that "activities of non-governmental entities shall require authorization and continuing supervision by the appropriate State Party to the Treaty" is the compromise that recognizes both as legitimate space actors, as part of the broader focus on responsible usage of outer space.

Since the text of Article VI was repeatedly put up on the powerpoint screen during various presentations in order to remind the audience and the discussants of the exact wording, it is appropriate also to reproduce that text here:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.

The first speaker of the first substantive session, on ***"Article VI: The Legal Landscape"***, was **Prof. Gabrynowicz**, providing an *"Overview of State Responsibility in a Global Commons"*. She noted that, whilst the concept of a 'global commons' was nowhere authoritatively defined in international law treaties or other documents, few would dispute that this was what the 1967 Outer Space Treaty referred to in an indirect manner. In that context, usually concepts such as *res communis* or *terra communis* were used, but they essentially amounted to the same. She then noted that currently there would be three areas falling under that heading: Antarctica, the high seas and space; and proceeded to analyse the application of the general concept of 'responsibility' in its various incarnations of 'state responsibility' and 'international responsibility' as per Article VI of the Outer Space Treaty in those three different areas. In response to a question from the audience bringing up the concept of the 'common heritage of mankind' finally, the speaker clarified that that concept should not be seen as interchangeable with that of the 'province of all mankind' – a concept indeed officially referred to in the Outer Space Treaty.

The second speaker of the session was **Prof. Von der Dunk**, who addressed the subject of *"Article VI of the Outer Space Treaty in the European Context"*. Whilst noting at the outset that there was no such thing as a European context for – let alone a European approach to – Article VI, he proceeded to discuss the various European levels at which outer space activities were addressed (the European Space Agency, the European Community, then Union, and the 'geographical Europe' as this included Russia and the Ukraine). In addition, noting the fundamental absence of any comprehensive authority at any of those levels to replace the individual sovereignty of (member) states in dealing with Article VI at their national discretion, he also discussed those states where Article VI had given rise to establishment of a more or less comprehensive national space law – in chronological order: Norway, Sweden, the United Kingdom, Russia, the Ukraine, Belgium, the Netherlands and France. Comparing those pieces of national law using five aspects – their scope in terms of (space) activities *ratione materiae*; their scope in terms of license obligation *ratione personae*; how they dealt with issues of liability and insurance; the licensing and registration authority(/ies); and their respective implementation experience – the speaker came to the somewhat ironic conclusion that the two European national space laws that were most identical to each other were the Russian and Ukrainian ones, for obvious historic reasons.

The third speaker of the session was **Prof. Jakhu**, who spoke about *"Implementation of Article VI of the Outer Space Treaty in North America"*. Addressing, from this perspective, essentially developments in the United States and Canada, he defined implementation as incorporation in, alternatively giving effect under, national law to a provision of international law. He furthermore noted in this regard that the

traditional requirement of state responsibility under general international law, of imputability / attributability of a certain act as a 'state act' to a certain state, has been done away with in space law as per Article VI. From the international perspective therefore, there is not so much a difference between public and private activities, but between "national activities" and 'non-national', in other words 'international' activities. He highlighted in this respect that 'national activities' at the time of drafting the clause was meant to include everything linked or connected to a state or its national or its territory or its facilities. Coming to the issue of implementation proper finally, he analysed that Canada had followed very much the US approach in terms of enunciating national space legislation.

The last speaker of that session was **Mrs. Masson-Zwaan**. She discussed "*Article VI of the Outer Space Treaty and Private Human Access to Space*", by starting to refer to Article I of the Outer Space Treaty as that declared space to be the "province of all mankind", and wondering what the legal consequences thereof would be for, for example, space tourism. The speaker considered Article VI from that vantage point to provide substance to the general obligation of due diligence of a state, and proceeded to analyse, using 'space tourism' as the test case, whether current space law would still be up to the task of guaranteeing such due diligence. The fundamental answer to this should be 'yes', although adaptation and further implementation would certainly be necessary – at the national, regional (European) as well as international levels. She finally remarked that Article VI only was to apply to international spaceflight (as long as the label of 'international' of course included effects as opposed to merely who the partners were), and proposed to apply space law to space tourism primarily on a functional basis.

After a coffee break, the second session dealt with the ***"National Implementation of Article VI by Governments"***. The first speaker in the session was **Mr. Clerc**, tackling the subject from his position as Head of the Legal Service of the French space agency CNES. He essentially dealt with the brand new French national space law, explaining first of all that there had existed a *sui generis* legal framework all along for the operations of Arianespace. This was not only a matter of *de facto* control; there were also international agreements operative in the 'triangle' of key stakeholders France-ESA-Arianespace. As for Eutelsat, since until relatively recently it was an intergovernmental organisation, it had only been affected by national electronic communications regulations. With the fundamental reorganisation of the French 'spacescape', however, CNES now was no longer allowed to undertake commercial activities, and a law was necessary to deal with future private space activities falling within French jurisdiction. Since Arianespace is already authorised through the aforementioned international agreements, it does not require authorisation under the new law, whereas Eutelsat was also provided with a general license extending the existing situation, but any other space activities should be covered by the new law, the provisions of which he finally analysed in considerable detail.

The second speaker of the second session was **Mrs. Roberts**, sharing her perspective as Senior Attorney at the Office of General Counsel of the US National Aeronautics and Space Agency (NASA) with the audience. She went through an extensive analysis of how, in the various areas concerned, the US government had implemented its general obligations to authorise and continuously supervise under Article VI of the Outer Space Treaty, from the Communications Act and follow-on acts on telecommunications as they applied to satellite communications, to the various Acts and policies on remote sensing, the Commercial Space Launch Act in various incarnations and the Commercial Space Act of 1998. Finally, pointing to a key issue in any implementation exercise as far as the international responsibility of Article VI is concerned, she noted that within the United States the Crew Code of Conduct for the International Space Station was implemented through the Code of Federal Regulations, in order to ensure enforceability of the relevant provisions.

The third speaker was **Mr. Tallia**, who spoke from his perspective as Senior Counselor for Atmospheric and Space Services, and Research with the US Department of Commerce, more precisely with NOAA as the national authority responsible *inter alia* for licensing private remote sensing operators in the United

States. Such licensing, speaker pointed out, also took Articles III and VII of the Outer Space Treaty into account. He discussed amongst others the Kyl-Bingaman Amendment National Defence Authorization Act of 1997, placing limits in dissemination of imagery of Israel, and the licensing regulations enunciated in the Code of Federal Regulations. Then he addressed the question whether participants to the Google Lunar Prize potentially making pictures of the earth would require a NOAA license. In his view, if they would orbit the earth for a week and do so, the answer would likely be 'yes', whereas if they would just be blasting off in the direction of the moon, the answer would probably be 'no'. Speaker's final remark pertained to the requirement under the UN Principles on Remote Sensing to allow foreign governments access to unenhanced data regarding its territory on reasonable (cost) terms, which was included in any license granted: so far such a request has never occurred.

The fourth and final speaker of that session was **Mr. Crowther**, from the Science and Technology Facilities Council of the British National Space Centre (BNSC) in the United Kingdom. Going through the UK Outer Space Act as it entered into force in 1986, he highlighted several aspects regarding how it implemented key aspects of the space treaties, including Article VI of the Outer Space Treaty. This concerned especially the scope and further relevant parameters of the licensing obligation under the Act, down to such important practical details as applicable time limits, fees, sanctions and environmental impact assessments. The speaker also, however, pointed out the same overarching issues that all national implementation activities with respect to Article VI have to deal with, such as liability arrangements and insurance requirements, where he noted in particular a need for international standards applicable to in-orbit activities, to avoid the potential negative impact of widely varying national regulations.

During lunch, the participants were informed by **Mr. Dodge** of the establishment of an Andrew G. Haley Archive at the National Center for Remote Sensing, Air and Space Law, announced as "The Work Product of the World's First Space Law Practitioner", and he proceeded to present the audience with a number of highlights from the documents thus archived.

After the lunch break, the third and final session focused on the private sector, ***"Operating a Space Business Under National Laws that Implement Article VI"***. The first speaker here was **Mr. DalBello**, in his capacity as Vice-President of Government Affairs with Intelsat General. He started out by saying that Article VI implies an ongoing responsibility, through the concept of "continuing supervision". The speaker further analysed what this meant in the context of Article VI: could failure to comply with such an ongoing responsibility, especially if over time more sophisticated technical means would have become available and hence would have raised the applicable standards of reasonableness, invoke the application of strict liability under the Liability Convention, if relevant damage were to result? Finally, speaker went in depth into the various technical aspects involved in the possibility for governments to actually control any licensees, to ensure continuing conformity of their activities with the pertinent international responsibility of those states.

The second speaker was **Mr. Gold**, the Legal Counsel for Bigelow Aerospace, who amongst others went into considerable detail when sharing his experience with the audience with national implementation of Article VI in the US context *vis-à-vis* his private company, bent on developing new technology for space habitats – and contracting with a Russian launch service provider for the launch of the first two space objects involved in that development process. His talk thus also brought the US International Trade in Arms Regulations, the much-feared and -loathed ITAR's, into the discussion, as these certainly were one particular form of national authorisation and continuing supervision considered a pain in the neck by most (US) private enterprise. He finally noted that, in the United States, currently no regulatory authority exists for crewed on-orbit activities; in his view the establishment of any relevant authorisation and continuing supervision here would need a specific Congressional statutory act.

The final speaker of that session was **Mrs. Schroeder**, of Fish & Richardson in Washington, who succinctly remarked that the United States had taken the lead

globally speaking in implementing domestically not only the Outer Space Treaty but also the Liability Convention and the Registration Convention, the two other international treaties relevant here. Speaker considered all of them sufficiently broadly drafted to allow for ongoing relevance and to allow individual states to tailor their national regulations to their national activities as they develop – and consequently suggested that changes to be made to that regime should only be undertaken at the national level.

Thus, another interesting Symposium lived up to the expectations as following from the link to the Galloway-name, and as it seemed from various comments either during the sessions or during the informal gatherings around drinks and food immediately following, this time in particular the relatively substantial international involvement could be seen as another plus. Which made yours truly ever more pleased with having been able to participate!

Frans von der Dunk
Member of the Board, ECSL