IISL/ECSL Space Law Symposium 2004: "New Developments and the Legal Framework covering the Exploitation of the Resources of the Moon"

The annual IISL/ECSL space law symposium was held on the occasion of the 43rd Session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space on Monday, 29 March 2004, the first day of the Legal Subcommittee's session, in Vienna, Austria.

Prior to the Symposium, Delegates were invited to a lunch reception sponsored by IISL and ECSL. The symposium was well attended by delegates from many different countries. **Ambassador Peter Jankowitsch**, Chairman of the Supervisory Board of the Austrian Space Agency and Past Chair of COPUOS, had again agreed to chair the Symposium. His able leadership greatly contributed to the success of the event. **Sergei Negoda** of the UN Office of Outer Space Affairs served as rapporteur, and IISL Secretary **Tanja Masson-Zwaan** had coordinated the programme. The speakers came from different regions (Europe, the USA, Asia Pacific) and backgrounds (legal practice, academia, space agency).

A solid overview, entitled *"Article II of the Outer Space Treaty, the status of the moon and resulting issues"*, was presented by **Dr. Leslie Tennen** of Sterns & Tennen in Phoenix, AZ, USA. Dr. Tennen argued that the non-appropriation principle is "under assault": although a cornerstone of international space law, the doctrine embodied in Article II of the Outer Space Treaty and Article 11 of the Moon Agreement is seen by some as an unwarranted intrusion on the rights of the private sector to conduct business in space. The opportunities for private enterprise in space abound, but the formula for success so far has been elusive, and a disturbing trend has emerged whereby some view the shortest path to profit is by violating space law, especially Article II of the Outer Space Treaty. Dr. Tennen gave an extensive overview of such "assaults", of the solid legal framework to which Article II belongs, and of the political context in which is was adopted. He denounced the claims for abrogation of Article II, and demonstrated that such abrogation would only have adverse effect, contrary to what proponents argue; the cost of doing business in space would increase, not decrease. Dr. Tennen explained that states cannot grant more authority to a private entity that itself possesses, and thus cannot authorize private entities to "appropriate" (parts of) outer space or celestial bodies, just as it cannot privatize its nuclear testing procedures and license a private entity to conduct nuclear testing, contrary to the test ban Treaty. He argued that the legal framework, including the requirement for states to authorize and supervise national activities in space and the provisions regarding liability for damages, will ensure significant protection to private entities, and will safeguard the future of space commerce rather than hamper it.

Then **Prof. Armel Kerrest** of the University of Western Brittany, France, spoke on *"Exploitation of the Resources of the High Sea and Antarctica: lessons for the Moon"*. In his provocative speech, he explained the origins of the Common heritage of mankind concept, and the difference with "res communis" and "res nullius". "Res communis" is a thing (res) which may be used by everybody and thus cannot be appropriated by anyone. Use is allowed as long as it does not impede somebody else's use. Consumable resources of the sea were initially thought to be unlimited; they were "res nullius", things which belong to nobody and may be appropriated by anyone. However, when it became clear that the resources were *not* unlimited, they could not stay "res nullius"; they became the "common heritage of mankind". For a "common heritage" to be exploited, international management is required. Only the owner of the resource - here Mankind - (or its representative) may authorise an appropriation of a part of the common resource. Prof. Kerrest gave some background on the history of the concept in view of the Law of the Sea and Antarctica. Moving to space law, he argued that since the Moon Agreement is accepted by so few States, we should consider mainly the Outer Space Treaty and customary law. He argued that the resources of Outer Space cannot be appropriated by any means (Article II OST), and since authorising the mining of consumable, non-renewable goods is a way of appropriation, it is forbidden. A State may be held internationally responsible for this violation, and use on earth of such a mineral or any product made from it will be illegal. Entrepreneurs are not likely to accept such a risk. Thus, if national appropriation is not possible, Prof. Kerrest argued, then perhaps "international appropriation" would be

the solution. Since the idea of an international body in charge of exploitation has not proved successful, the only solution may be to use the CHM principle and declare the Moon the Common Heritage of Mankind; the concept would enable "Mankind" to authorize partial appropriation; this solution of "international appropriation" might in his view be the only possibility to legally mine the Moon.

Prof. Dr. Stephan Hobe, Director of the Institute of Air and Space Law at the University of Cologne, Germany and General Rapporteur of the ILA Space Law Committee presented the *"ILA Resolution 1/2002 with regard to the CHM principle in the Moon Agreement"*. He gave an extensive overview of the history and deliberations of the ILA Space Law Committee leading to Resolution 1/2002. Special Rapporteurs had been appointed in 2000 to report on the status of the major space treaties. When the reports were presented at the 70th ILA Conference in 2002, the Moon Agreement was given special attention, centering around the question whether the concept should be recommended to be withdrawn or to be upheld. In the end, the consensus was that the concept does not in principle prohibit commercial uses and only certain adjustments should be made to Article 11 of the Moon Agreement. The adjustments suggested by Resolution 1/2002 include

- a licensing system by means of national law of a State party whose non-governmental entities are interested in undertaking relevant commercial space activities,
- the setting up of guidelines for the licensing requirements and
- international registration of licensed Moon activities.

Dr. Hobe concluded that any kind of national appropriation of areas of the Moon is prohibited. States are even under a legal obligation to prevent the coming into existence of private claims to property in order to avoid their international legal responsibility. International space law as contained in Article II of the Outer Space Treaty as well as Article 11 para. 2 of the Moon Agreement exclude those activities from the scope of permitted activities in outer space by virtue of a treaty and customary law obligation.

Lastly, *"The Moon Treaty: The Road Ahead"* was the topic of a refreshing talk by **Dr. Rajeev Lochan**, Assistant Scientific Secretary of ISRO, India. He gave the audience some scientific facts and figures about the Moon and recent missions, including those of Russia, the USA, Japan, China, ESA, as well as India's first mission to the Moon, Chandrayaan-1. He then moved to the Moon Agreement, listing in a positive way everything that it does permit, such as scientific investigation, removing of samples, placement of personnel, stations etc.: in short, virtually everything a scientist would wish to do in order to know more and more about the moon and therefore about the Earth and our solar system. "Scientists could not have asked for more". He then brought up the question of the Agreement's review, as foreseen in its Article 18. Dr. Lochan argued that the need for a serious revision must have been lingering in the minds of the authors of the treaty. The rapid pace of technological development would have made them realise that the legal framework shall not survive very far into the future, and therefore, a reconsideration was introduced in the treaty itself. It is clear in his view that enabling technology for commercial exploitation is round the corner and that exploitation of resources of the moon is inevitable. The Treaty does provide a way for commercial exploitation in Article 11, although not perfect, and it does permit review and reconsideration of the Treaty. He therefore concluded as follows: *"Let us Re Engineer the Treaty. Together. Quickly."*

Several delegates raised questions during the discussion, after which **Prof. Sergio Marchisio**, the newly elected Chairman of the UNCOPUOS Legal Subcommittee, thanked IISL and ECSL for organizing the symposium, and gave some concluding remarks. **Ambassador Jankowitsch** then closed the symposium, expressing the hope that both organisations would be invited to continue the tradition in 2005.

Tanja Masson-Zwaan
IISL Secretary /former ECSL Board Member