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Le mot du président

Tout d'abord, je vous présente mes meilleurs voeux de Noël et de bonne année et ensuite, je vous demande de bien vouloir nous excuser pour le délai avec lequel ce nouveau numéro paraît.

L'année 1998 a été, comme les autres, bien remplie : départ de Daphné (pour l'ESRIN), arrivée de Thierry qui a fait ses premières armes avec l'organisation de la Moot Court Competition, la participation, en tant que rapporteur, au colloque de l'International Institute of Space Law de Melbourne, le Practitioners' Forum et le Summer Course de Brest (merci encore au Professeur Armel Kerrest).

L'année 1999 sera celle d'Unispace III (voir l'article de K. Bergquist), en marge duquel nous organisons en collaboration avec l'Université de Perugia et le Professeur Marchisio, un colloque original dont j'attends beaucoup. Ce sera aussi l'année de la réunion de l'Assemblée Générale biennale.

L'équipe ECSL-Université d'Helsinki n'a pas remporté cette année la finale de la Moot Court Competition. Peu importe. Je salue votre travail et votre enthousiasme. Rien ne se perd d'une telle aventure personnelle. Vous avez vécu, et nous avec vous, un moment extraordinaire. Ceci m'amène cepen-dant à faire un voeu : Que le droit de l'espace soit mieux connu et reconnu, que vous les étudiants soyez perçus comme membres à part entière de la communauté des juristes et qu'en Europe, dans les facultés, les insti-tutions nationales et internationales, les juristes trouvent la place qui leur revient, l'estime qu'ils méritent. C'est une des ambitions de l'ECSL, alors prouvons notre existence, envoyez vos remarques, voyez l'initiative de Frans von der Dunk au succès duquel j'applaudis, sur ce que tout 'honnête homme' de la fin de ce siècle doit connaître.

Bonne lecture et à bientôt.

G. Lafferranderie

ESA and the preparations for Unispace III

Karl Bergquist

ESA, International Affairs

The General Assembly Resolution 52/56 of 10 December 1997 concluded five years of debate among Member States in the Committee on Peaceful Uses of Outer Space on whether to hold another Unispace Conference and with what objective. The Resolution states that Unispace III "...should be convened at the United Nations Office at Vienna from 19 to 30 July 1999 as a special session of the Committee on the Peaceful Uses of Outer Space, open to all States Members of the United Nations". The idea to host a third United Nations Conference on the Exploration and Peaceful Uses of Outer Space was first mentioned in the Committee on the Peaceful Uses of Outer Space at its 1992 session. The previous two conferences had been held in 1968 and in 1982. The first Conference aimed at "examining the practical benefits of space exploration and the basis for international co-operation in space activities, with special relevance to the needs of developing countries". In 1982 discussions were concentrated on the state of space science and technology, applications of space science and technology, international co-operation and the role of the United Nations.

Following this initiative in 1992 extensive discussions and a thorough debate started between Member States in the Committee on the reasons for holding a third Unispace event. In short to resume the debate discussions were focused on the objectives and goals of holding a third Unispace event. In addition questions of organisation, venue, timing financial implications were raised. Some Countries were being skeptical to the need of organising a meeting of this kind. In 1982 the Conference had produced almost 250 recommendations. Member States wanted to avoid a repetition with yet another unlimited amount of recommendations that did not have any reasonable possibility of being implemented.

European coordination took place through the ESA International Relations Committee (IRC) which meets regularly prior to the COPUOS meetings and also holds informal coordination meetings during the sessions to prepare and coordinate European positions. ESA Member States focused their statements on the overall need for an event of this kind and the fact that if it was to take place it would have to be held within existing budgetary resources.

At the IRC meeting in November 1996, Member States asked the Executive to prepare a joint position document based on their contributions which could be subscribed by all the ESA countries and express the European views and positions on the proposed Unispace III event. The Delegation of

ESA and its Member States participated actively in these deliberations. Intra-

the United Kingdom at the 34th Session of the Scientific and Technical Subcommittee of the COPUOS would then present the document. Following active consultations between Delegations and the Executive this document was eventually produced. The document aims at assisting the committee in the process for taking a decision on whether to hold the Conference. In short the document proposes: (1) background to the agreement to hold a special session of COPUOS; (2) the objectives of holding the Conference; (3) the scope of the event; (4) the structure of the Unispace III event; and finally (5) additional scientific, technical and industrial Components of Unispace III.

ESA Delegations asked the Executive to consult with those European countries having signed co-operative agreements with the Agency (Poland, Hungary, the Czech Republic, Romania, Greece and Portugal) whether these countries would be prepared to co-sign the document. Very little time was left before the session started but finally all the six countries indicated their readiness to co-sign the European

position paper. Needless to say the European document had a great impact on the work of the 34th Session as it expressed the view of 20 countries in a committee with 61 Member States.

This initial success in the intra-European preparations for a UN meeting led to increasing demands for European co-ordination in view of the successful holding of Unispace III event. The next steps were the joint submission of inputs to the background material the United Nations were preparing and that would be distributed to all relevant entities worldwide. The ESA contribution to this background material consists of 12 papers, which follow the structure of the Agenda of the Conference; they describe the Agency and Member States position concerning the various agenda points of the Conference. This contribution will be updated and distributed at the conference.

Following these first successes all ESA preparations so far for the Conference have been undertaken together with the Member States. Through these joint actions ESA and its Member States

reply to article II. a. in the ESA Convention, striving for a consolidated European position in International Fora.

The example cited above concerns one aspect in the work of the COPUOS, but last year at the 37th session of the Legal Subcommittee Germany on behalf of all ESA countries as well as those having signed a cooperation agreement with the Agency presented a European proposal to revitalise the legal Subcommittee.

Actions like the ones cited above are important for various reasons. The first reason is that it answers a call from the founding fathers of the Agency stipulated in the Convention of producing a unified European view on space matters in international fora. Secondly these efforts will assist future European proposals for instance in the Legal Subcommittee where Europe traditionally has been very active. This is particularly true for the future, as many experts believe in an emphasised role for the Legal Subcommittee given the many new space initiatives that are being developed and would need a framework.

Inmarsat goes private

David Sagar

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This has been a momentous year for Inmarsat. Nine years of difficult political and business negotiations among its 84 Member States were successfully concluded when its Assembly of Parties decided to transform the Organisation into a privatised corporate structure, while retaining a limited degree of inter-governmental regulatory oversight. For compelling commercial reasons, the new structure is expected to operate from as early as 1 April 1999.

Inmarsat will be the first inter-governmental organisation (IGO) known to have restructured itself into a private sector entity. The process was quite unlike the familiar privatisation of national telecommunications entities and it was not achieved easily. It was necessary to reconcile widely differing policies of its members, many of whom sought a privatised entity competing equally with separate satellite operators while others, including smaller countries and newer members, wanted to retain the IGO structure. How and why did these events come about?

Inmarsat was set up by governments in 1979, under the auspices of the International Maritime Organisation (IMO), to harness space technology for world-wide maritime communications, especially for safety of life at sea. Aeronautical and land-mobile services were added in the 1980s. Like Intelsat and Eutelsat, the Organisation was a form of cooperative, financed and managed by Signatories to the Operating Agreement, which were public or private telecommunications entities designated by governments to provide global mobile satellite

communications on a commercial, cost-recovery, basis.

However, from around 1990 questions were raised as to whether the institutional and business structures that had served Inmarsat well up to then could cope with the new trends in the telecommunications world. These trends included increasing privatisation of the telecommunications industry generally; the advent of competing, handheld, mobile satellite systems, such as Iridium and Globalstar, which affected the risks associated with new

investment in Inmarsat; the need for a normal corporate structure, with limited liability for investors and a small fiduciary Board able to act quickly and to raise capital from the financial markets for major new ventures; the requirements of regulators including the European Commission for wider access to space segment capacity; and removal of IGO privileges and immunities.

Initially, the Inmarsat membership considered proposals simply to streamline financial and governance procedures within the existing IGO. However, events in the mid 1990s showed these to be inadequate. In 1994, the Signatories took a decision not to finance a new future handheld, personal satellite communications system (Inmarsat-P) within the existing Inmarsat structure. As a result, the system will now be operated by a separate, independent company, ICO Global Communications^[1]. In early 1996, Signatories also rejected a proposal for undertaking an Inmarsat International Navigation Satellite Service. These decisions were taken partly because Signatories wanted to be free to invest up to a level of their choice in the new ventures, rather than in accordance with their existing investment shares. There was also no limited liability in the IGO to protect them from the risks attached to the high levels of investment involved. However, there is a view that the decisions resulted in a loss of valuable business opportunities for Inmarsat.

These events were a watershed in the restructuring process which moved closer to full-scale privatisation. In early 1996, the Assembly's Eleventh Session decided that there was an urgent need to change the Organisation's structure to enable Inmarsat to remain commercially viable in the long term, while preserving crucial governmental interests. The Assembly set down five basic principles which should underlie any new structure (see following) along with certain essential elements, including preserving the intergovernmental character of the Organisation, continuing Assembly oversight of the basic principles and ensuring broad ownership and investment.

The new Structure

After two years of intensive political and legal debate among the membership, the Assembly, at its 12th Session in April 1998, adopted amendments to the Inmarsat Convention and Operating Agreement for the restructuring of the Organisation. The main elements of the new structure will be:

(a) The amended Inmarsat Convention will remain in force between the present 84 Member States. The IGO will continue to operate through an Assembly of Parties and a small Secretariat, and will monitor and enforce, as necessary, the five basic principles and public service obligations, namely:

* continued provision of services for the Global Maritime Distress and Safety System (GMDSS) set up by IMO;

* non-discriminatory access to services;

* service to all geographical areas where there is a need, including rural and remote areas;

* peaceful purposes;

* fair competition.

(b) Holding and operating, limited liability, companies will be set up under English law, and will use the name 'Inmarsat'.

(c) The Inmarsat space segment, assets and business, as well as the Directorate staff, will be transferred to the operating company which will continue to manage the global system and provide maritime, aeronautical and land mobile satellite communications services, and observe the basic principles referred to in (a) above.

(d) There will be a fiduciary Board of Directors, with representation for developing countries and small shareholders and independent Directors.

(e) The Inmarsat Operating Agreement will be terminated and the current Signatories will receive ordinary shares in the holding company in

exchange for their existing investment shares in Inmarsat. Strategic investors may be sought, and the holding company will make an initial public offering (IPO) on appropriate stock exchanges approximately two years after restructuring.

(f) The companies will have no privileges and immunities, and will have the same status under national regulation, the World Trade Organisation and in the International Telecommunication Union as any private competitor.

(g) A Public Services Agreement will be signed between the IGO and the companies whereby the companies will undertake legally-enforceable commitments to observe the basic principles, take account of ITU, IMO and ICAO regulatory standards, and work towards the IPO. The IGO will also own a Special Share in the holding company entitling it to veto any changes in the constituent instruments of the companies which would affect the basic principles.

(h) The IGO will continue to cooperate with the UN and the Committee on the Peaceful Uses of Outer Space, and its Specialised Agencies.

(i) The operating company will continue to act as a wholesaler of space segment capacity to the existing and any new land-Earth station operators (which are currently owned by Signatories) and provide the existing services to the mobile end-users.

At its 13th (Extraordinary) Session in September 1998, the Assembly decided that the amendments would be applied provisionally as from 1 April 1999, in view of the need for a new fiduciary Board to take decisions on the scope and financing of new services and satellites on which the future financial survival of Inmarsat would depend. If the Inmarsat Council finds that more time is needed to finalise various conditions precedent to the restructuring, that date might be extended.

Special Legal Issues

During the restructuring process, important public international law problems were faced.

One of the restructuring solutions considered was to establish an international public corporation (IPC) replicating all or most of the features of a national law company, but established by treaty among the members. However, expert advice showed that the limited liability of a corporate body established under a treaty was not sufficiently acknowledged as a general principle of law so as to guarantee automatic recognition in jurisdictions which were either not Parties to the treaty or in which the treaty had not been incorporated into domestic law. For this reason, among others, this option was not pursued.

The most crucial legal problem faced was whether the restructuring amendments could be provisionally applied. The normal ratification process by Member States after the Assembly has adopted amendments takes some years but, as already indicated, it was essential to implement the new commercial structure without delay.

Provisional application, though recognised under Article 25 of the 1969 Vienna Convention on the Law of Treaties, has not been extensively used by governing body of IGOs to implement substantial amendments to their constituent instruments. The ITU has, however, used the procedure in adopting its new constitutions. Legal analysis of the issue concluded that the Inmarsat Assembly had power to implement the restructuring amendments provisionally, even though provisional application was not explicitly mentioned in the amendment provisions of the Inmarsat Convention. Legal certainty about the Assembly's authority in this respect was vital, so as to minimise the risk of any challenge to the validity of the restructuring transactions. For the same reason, steps were also taken to ensure that the Assembly's decision was taken by consensus.

Some Parties had difficulty under their constitutions in accepting provisional application without special legislation and, for them, pragmatic solutions were sought which made it possible for them participate in the restructuring without opposing the provisional application decision.

Conclusion

Inmarsat's restructuring offers an opportunity for ensuring its future viability, which is currently centred on a project called Horizons, aimed primarily at providing laptop PC users with a wide range of mobile multi-media services via satellite by the year 2000. It also establishes a new form of constructive relationship between the private sector and governments as to the way in which space telecommunications are provided to the world community, which is expected to be followed soon by restructuring of Intelsat and Eutelsat.^[2]

¹ For more details, see A. Auckenthaler: 'Recent Developments at Inmarsat', in *Proc. 38th IISL Colloq. on the Law of Outer Space*, 149 (1995).

² For a more detailed account of the privatisation process, including the legal issues, see D. Sagar: '*The Privatisation of Inmarsat*', and its citations, to be published in *Proc. 41st IISL Colloq. on the Law of Outer Space* (1998).

Satellite communications licensing in the European Union

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The purpose of this paper is to discuss the market access authorisations applicable to the operation of satellite networks and the provision of satellite services in the European Union. After reviewing the steps taken by the Commission to open the sector to competition (1) and the initial authorisations conditions (2), we will analyse the application of the market access framework put in place by Directive 97/13 (3), and its specific application to satellite communications (4).

1. Liberalisation of satellite communications

The satellite services sector in the European Union has been opened to competition by Commission Directive 94/46/EEC of 13 October 1994 (OJ L268/15, 19.10.94) (the 'Satellite Directive').

The Satellite Directive amended Directive 90/388/EEC of 28 June 1990 on Competition in the Markets for Telecommunication Services (the 'Services Directive'), which had initiated the telecommunications liberalisation

process, in order to extend its scope to cover satellite communication.

Although the liberalisation achieved by the Satellite Directive was substantial, it was not complete. While voice telephony was excluded from the scope of the Satellite Directive, VSAT (one way or two ways), data transmissions, satellite news gathering, business TV, video conferencing, etc. were all liberalised.

This liberalisation process was completed by the subsequent amendments made to the Services

Directive^[1]. As a result, all telecommunications services, including voice telephony, and networks, whether terrestrial or via satellites, should now be fully liberalised^[2].

Accordingly, EU Member States should have withdrawn all those measures which grant exclusive or special rights for the provision of satellite communication services and satellite network services to given undertakings and should have adopted measures to ensure that any operator is entitled to provide such services^[3].

2. Initial authorisation framework

In spite of the liberalisation of satellite services and networks, some form of authorisation may nevertheless be required to provide them. Indeed, Member States may make the supply of telecommunications services, or the establishment or provision of networks, subject to a general authorisation or individual licensing procedure aimed at compliance with essential requirements^[4].

The authorisation and licensing framework provided by the Services Directive is very basic as it only provides that Member States shall ensure that the relevant licensing conditions must be objective, non-discriminatory, proportionate and transparent, that reasons are given for any refusal and that there is a procedure for appealing against any refusal^[5].

Although requiring that Member States adopt such licensing conditions was essential to get the liberalisation process going, it did not prevent a market fragmentation incompatible with the desire to create a single telecommunications market. Indeed, this limited authorisation framework raised two major problems.

First, in the absence of mutual recognition, authorisations could be required in each Member State in which a given service was offered or a network operated. This implied that fifteen separate authorisation procedures could be required to provide a community-wide satellite communications service or network.

Second, because of the very general terms of the licensing framework put in place by the Services Directive, very wide discrepancies have developed in the European Union regarding the licensing of telecommunication services.

Accordingly, obtaining the required authorisations has proven to be, for new operators entering the market, a time consuming, expensive and often frustrating experience. This incomplete framework impaired the development of Community-wide services and the creation of a single market in the telecommunications sector.

3. Licensing directive 97/13

Conscious of these drawbacks, the Commission pursued its efforts to achieve a more harmonised market access framework and, as a result, Directive 97/13/EC on a Common Framework for General Authorisations and Individual Licences in the Field of Telecommunications Services was adopted on 10 April 1997 (the 'Licensing Directive').

The Licensing Directive provides for two types of market access authorisations: general authorisations^[6] and individual licences^[7].

The main thrust of this directive is to privilege market access schemes not requiring any authorisations or relying on general authorisations (not requiring any explicit decision by the national regulatory authority (the 'NRA')^[8]). The general authorisation scheme is designed to be simple, informal, fast and to involve limited fees.

Member States may require the more burdensome, time consuming and costly individual licence (requiring an explicit decision by the NRA) only in limited instances. Individual licences may be required *inter alia* to allow the licensee access to radio frequencies^[9]. In addition, the provision of publicly available voice telephony services, the establishment and provision of public telecommunications networks as well as other networks involving the use of radio frequencies may be subject to individual licences^[10].

4. Authorisation regime

To determine the authorisation regime applicable to satellite communications (general authorisation vs individual licence), a distinction must be drawn between the establishment and provision of a satellite network (4.1) and the provision of satellite services (4.2).

4.1 Satellite networks

Regarding satellite networks, Art. 7(2) of the Licensing Directive provides that: "(...) *the establishment and provision of a public telecommunications networks as well as other networks involving the use of radio frequencies may be subject to individual licences*".

Accordingly, a satellite network operator may be required, in each Member State in which access to its network is intended to be offered, to obtain a telecommunications network operator licence, in accordance with the local licensing rules (which should reflect the provisions of the Licensing Directive).

4.2 Satellite services

Regarding the provision of telecommunications services, the general principle stemming from the Licensing Directive is that the service provider should only be subject to the general authorisation scheme. However, if the licensee is given access to radio frequencies, as is the case for satellite communications, or where the service being provided is publicly available voice telephony, then the individual licence procedure may apply^[11]. Thus, a further distinction needs to be made between voice telephony (4.2.1) and other types of satellite communications services (4.2.2).

¹ By Commission Directives 95/51, 96/2, and 96/19.

² Save in Ireland, Spain and Greece which have respectively obtained extensions to implement full competition until 1.1.2000, 1.12.98 and 1.1.2001 respectively.

³ Art 2 of the Services Directive as amended.

⁴ Art. 2(3) of the Services Directive as amended.

⁵ Art. 2(3) of the Services Directive as amended.

⁶ General authorisation is defined as "an authorisation, regardless of whether it is regulated by a 'class licence' or under general law and whether such regulation requires registration, which does not require the undertaking concerned to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorisation".

⁷ Individual licence is defined as "an authorisation which is granted by the national regulatory authority and which gives an undertaking specific rights or which subjects that undertaking's operations to specific obligations supplementing the general authorisation where applicable, where the undertaking is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority".

⁸ Art. 3(3) of the Licensing Directive.

⁹ Art. 7(1) of the Licensing Directive.

¹⁰ Art. 7(2) of the Licensing Directive.

4.2.1 Voice telephony

Accordingly, satellite networks providing publicly available voice telephony services, such as that contemplated *inter alia* by the Iridium, Globalstar and ICO systems, may be required, in each Member State in which access to its network is intended to be offered, to obtain a telecommunications network operator licence together with a voice telephony service provider licence, in accordance with the local licensing rules. While some countries will require two separate licences, one for the network and the other for the voice telephony^[12], others will require only one licence covering both, the network operation and the voice telephony service provision.

4.2.2 Other satellite services

The situation is not so clear regarding other types of satellite communication services. Indeed, given the provisions of Art. 7 of the Licensing Directive, providing that "Member States may issue individual licences (...) to allow the licensee access to radio frequencies or numbers", it may be argued that satellites services providers may be subject to the individual licence procedure because the provision of their service requires the use of radio frequencies. This approach may be comforted by Art. 3(3) of the Licensing Directive which provides that "Member States may issue an individual licence only where the beneficiary is given access to scarce physical and other resources (...)".

However, if the establishment and operation of a satellite network requires a licence, because it involves the use of radio frequencies, why then should a service provider using transmission capacity on an already licensed satellite network be required to obtain an individual licence in order to be authorised to provide a service (other than publicly available voice telephony)? Why should the use of a given frequency be subject to two licensing procedures: one for the satellite network and the other for the provision of the service itself?

In spite of the ambiguity of the above referred provisions, the following underlying principles of the Licensing Directive argue against such a restrictive interpretation:

- general authorisation and individual licensing systems should provide for the lightest possible regulation compatible with the fulfilment of applicable requirements^[13];
- priority should be given to market access schemes not requiring authorisations or relying on general authorisations, to be supplemented where necessary by rights and obligations requiring individual licences for those elements which cannot be suitably dealt with by general authorisations^[14]; and
- conditions attached to authorisations should be objectively justified in relation to the service concerned and should be non-discriminatory, proportionate and transparent^[15].

Although the above principles tend to show that satellite services^[16] should not require an individual licence but should be subject to the lighter general authorisation procedure, the following excerpt taken from the preamble to the Satellite Directive, contributes to resolve the issue:

"where the provision of satellite services is concerned, licensing or declaration procedures are justified in order to ensure compliance with essential requirements, subject to the proportionality principle. Licensing is not justified when a mere declaration procedure would suffice to attain the relevant objective. For example, in the case of provision of a satellite service which involves only the use of a dependent VSAT earth station in a Member State, the latter should impose no more than a declaration procedure."^[17]

Accordingly, the provision of satellite communication services (save publicly available voice telephony) should normally only be subject to a general authorisation in each Member State where the services are being provided. Where the satellite operator is both the service provider and the satellite network operator, then a network operator licence should be required for the operation of the satellite network and a general authorisation should be required for the provision of the satellite service.

One can regret the ambiguity of the licensing directive which requires to go through a difficult construction exercise to be properly understood (even more so as such ambiguity could be used by Member States to require licensing where a general authorisation should be sufficient).

* * *

The Licensing Directive establishes a significantly higher degree of harmonisation of the Member States' licensing framework than that initially put in place by the Services Directive and the Satellite Directive.

However, the main problem remains the requirement to apply for the appropriate authorisation in each Member State in which the network or services will be offered and to be subject to different market procedures, conditions, delays and licence fees in each State.

Because of the limits of the Licensing Directive, a mechanism has been established therein in order to achieve a higher degree of harmonisation. First, the Commission may give mandates to harmonisation bodies in order to harmonise the procedure for general authorisations^[18]. Second, the Commission may take the steps necessary for the operation of a one-stop-shopping procedure for the grant of individual licences and, in the case of general authorisations, for notification procedures^[19].

It remains to be seen whether these mechanisms will effectively be used and will lead to creation of a simpler authorisation process necessary to achieve a single market in the field of satellite communications.

¹¹ Art. 7(2) of the Licensing Directive.

¹² For example Germany and France. In some cases the application for both licences may be made in the same document.

¹³ Para. n° 4 of the preamble of the Licensing Directive.

¹⁴ Para. n° 7 of the preamble of the Licensing Directive.

¹⁵ Para. n° 10 of the preamble and Art. 3(2) of the Licensing Directive.

¹⁶ Save publicly available voice telephony.

¹⁷ Para. n° 15 of the preamble of the Satellite Directive.

¹⁸ Art. 12 of the Licensing Directive.

¹⁹ Art. 13 of the Licensing Directive.

L'Etat 'responsable' dans la directive Télévision sans frontières

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La Directive du Conseil du 3 octobre 1989 visant à la coordination de certaines dispositions législatives, réglementaires et administratives des Etats membres relatives à l'exercice des activités de radiodiffusion télévisuelle, appelée plus communément 'Directive télévision sans frontières' (ci-après dénommée 'Directive') régit le contenu des programmes européens tout en proclamant la liberté de diffusion et de réception des émissions. Le texte laisse apparaître une conception européenne de la liberté d'information à mi-chemin entre la conception ultra-libérale soutenue par les américains et la thèse du consentement préalable de l'Etat de réception exigée par les Etats en voie de développement puisqu'il accorde la libre circulation des programmes en échange d'un contrôle étatique du contenu des émissions. En effet, la contrepartie de la libéralisation des ondes en Europe est le respect de certaines obligations minimales relatives au contenu des programmes inscrites dans la Directive¹. Le 23 juin 1997, une nouvelle version de la Directive a été adoptée. Elle clarifie la détermination de l'Etat responsable du contrôle (1) alors que la jurisprudence communautaire a parallèlement précisé la nature de ce contrôle (2).

1. La détermination de l'Etat responsable

Le schéma initial adopté reposait sur un régime de responsabilité en cascade relativement complexe et peu efficace. L'article 2§1 de la Directive non amendée, obligeait les Etats membres à veiller à ce que toutes les émissions de radiodiffusion télévisuelles transmises par des organismes relevant de leur compétence respectent le droit national de cet Etat membre. Ceci incluait donc les dispositions de la directive qui devaient nécessairement faire l'objet d'une introduction dans l'ordre juridique interne. Si l'organisme de radiodiffusion était situé dans un pays tiers, l'Etat responsable était celui qui avait accordé l'utilisation d'une fréquence ou la capacité d'un satellite ou une liaison montante vers un satellite situé dans cet Etat membre. Ces critères techniques accompagnés d'une référence assez large à la 'compétence' se sont avérés inefficaces en permettant aux opérateurs de contourner le droit européen. L'imprécision de la formule sur les motifs pour lesquels un Etat doit faire valoir sa compétence sur un organisme de radiodiffusion donné conduisait à des conflits de compétence négatifs ou positifs qui compromettaient le fonctionnement du système.

Il ressort des solutions jurisprudentielles successives que l'élément central du système qui n'apparaît pourtant pas clairement dans la rédaction première est celui de l'établissement. Ainsi, dans l'affaire *Commission contre Royaume-Uni*, la Cour a précisé que la notion de compétence d'un Etat membre au sens

de la directive "doit être entendue comme englobant nécessairement une compétence *ratione personae* à l'égard des organismes de radiodiffusion"². Or ajoute la Cour, "une compétence *ratione personae* d'un Etat membre à l'égard d'un organisme de radiodiffusion télévisuelle ne peut être fondée que sur son rattachement à l'ordre juridique de cet Etat, ce qui recouvre en substance la notion d'établissement au sens de l'article 59, premier alinéa du traité CE (...)"³. Ainsi, afin d'améliorer le système initial de la Directive, il n'était pas besoin de retenir de nouveaux critères mais de les clarifier par une nouvelle formulation (a). De plus, une définition du radiodiffuseur a été introduite (b).

(a) Une reformulation des critères de compétence. Le nouveau texte devait confirmer le principe selon lequel les Etats sont responsables des organismes de radiodiffusion relevant de leur compétence. Ainsi, l'article 2§2 stipule: "Chaque Etat membre veille à ce que toutes les émissions de radiodiffusion télévisuelle transmises par des organismes de radiodiffusion télévisuelle relevant de sa compétence respectent les règles du droit applicable aux émissions destinées au public dans cet Etat membre." L'article 2§2 ajoute que "relèvent de la compétence d'un Etat membre les organismes de radiodiffusion télévisuelle qui sont établis dans cet Etat membre". L'affirmation du critère d'établissement est claire. Il reste à savoir comment transcrire ce critère dans le domaine de la radiodiffusion en évitant tout conflit de compétence.

En premier lieu, il est mentionné dans l'article 2§3 a) qu'un organisme de radiodiffusion est établi dans un Etat membre s'il y a "son siège social effectif" et si "les décisions de la direction relatives à la programmation" y sont prises. Le critère prioritaire de compétence combine donc le lieu du siège social effectif et le lieu où les décisions de la direction relatives à la programmation sont prises. Les rédacteurs ont ici transposé les critères déterminés par la Cour de Justice des Communautés dans son arrêt du 25 juillet 1991, relatif à l'affaire *Factortame*, selon lesquels, la notion d'établissement comporte l'exercice effectif d'une activité économique au moyen d'une installation stable pour une durée indéterminée⁴. La CJCE dans son arrêt du 10 septembre 1996, *Commission contre Royaume-Uni* proposait une interprétation plus complète du critère d'établissement qui serait "le lieu où sont prises les décisions concernant la politique de programmation et l'assemblage final des programmes à diffuser"⁵.

¹ Publicité, protection des mineurs, accès aux événements majeurs, origine européenne des programmes...

² Arrêt de la CJCE du 10 septembre 1996, *Commission des Communautés européennes contre Royaume-Uni de Grande-Bretagne et d'Irlande du Nord*, affaire C-222/94, Recueil de jurisprudence 1996, p. I-4025, point 40.

³ Idem, point 42.

⁴ Affaire C-221/89, *Factortame Ltd et autres*, 25 juillet 1991, Recueil de jurisprudence 1991, p. I-3905, point 20.

⁵ Précité, point 58.

En second lieu, conformément à l'article 2§3.b), lorsqu'un radiodiffuseur a son siège social effectif dans un Etat membre mais que les décisions de la direction relatives à la programmation sont prises dans un autre Etat membre, l'organisme est réputé être établi dans l'Etat membre où s'opère une partie importante des effectifs employés aux activités de radiodiffusion. Cette solution diverge quelque peu de celle dégagée par la CJCE dans son arrêt du 5 juin 1997, VT4 lorsqu'elle avait affirmé que selon la Directive (non modifiée), lorsqu'un radiodiffuseur est établi dans plus d'un Etat, l'Etat membre qui a juridiction sur le territoire où le diffuseur dispose du centre de ses activités, c'est-à-dire notamment où sont prises les décisions de programmation^[6]. Le même article ajoute lorsqu'une partie importante des effectifs employés aux activités de radiodiffusion opère dans l'Etat membre où l'organisme de radiodiffusion a son siège social effectif et dans l'Etat membre où les décisions relatives à la direction relatives à la programmation sont prises, le critère du siège social prime. Il est enfin prévu que lorsqu'une partie importante des effectifs employés aux activités de radiodiffusion n'opère ni dans l'Etat membre du siège social effectif, ni dans celui de la direction de la programmation, le radiodiffuseur est réputé établi "dans le premier Etat membre où il a commencé à émettre conformément au droit de cet Etat membre, à condition qu'il maintienne un lien économique stable et réel avec cet Etat membre".

En troisième lieu, lorsqu'un radiodiffuseur a son siège social effectif dans un Etat membre, mais que les décisions relatives à la programmation sont établies dans un Etat tiers, ou vice-versa, il est réputé être établi dans l'Etat membre en question, si une partie importante des effectifs employés aux activités de radiodiffusion opère dans cet Etat membre (article 2§ 3.c de la Directive).

A défaut de pouvoir obtenir le rattachement par application des critères prioritaires, le texte propose d'appliquer les critères établis dans la Directive de 1989: utilisation d'une fréquence accordée à un Etat membre, utilisation d'une capacité satellitaire relevant d'un Etat membre, utilisation d'une liaison montante vers un satellite,

située dans un Etat membre (article 2§4 de la Directive). Enfin, si aucun de ces critères ne permet de déterminer un Etat membre compétent, l'Etat membre compétent est celui dans lequel l'organisme de radiodiffusion est établi au sens des articles 52 et suivants du traité de Rome (article 2§5 de la Directive).

Notons par ailleurs que la Cour a précisé qu'un Etat ne peut se fonder sur d'autres critères comme l'origine des programmes - affaire *Paul Denuit*^[7] ou la destination des programmes - affaire *VT4*^[8]. La CJCE a également condamné toute inversion des critères en sanctionnant l'article 43 du Broadcasting Act de 1990 lequel retenait comme critère prioritaire la transmission - affaire *Commission contre Royaume-Uni*^[9].

(b) La définition de l'organisme de radiodiffusion. Selon la Directive, l'organisme de radiodiffusion télévisuelle désigne "la personne physique ou morale qui a la responsabilité éditoriale de la composition des grilles de programmes télévisés (...) et qui les transmet ou les fait transmettre par une tierce partie" (article 1.b).

2. La nature du contrôle de l'Etat compétent

L'article 3§2 de la Directive stipule que "Les Etats membres veillent, par les moyens appropriés, dans le cadre de leur législation, au respect effectif, par les organismes de radiodiffusion télévisuelle relevant de leur compétence, des dispositions de la présente directive". La jurisprudence de la CJCE a souligné deux aspects fondamentaux de la nature du contrôle de l'Etat compétent. Il doit être complet (a) et exclusif (b).

(a) Un contrôle complet sur l'ensemble des supports. L'Etat doit appliquer les règles minimales relatives au contenu des programmes à tous les supports - hertzien, câble et satellite - et étendre son contrôle du respect de ces dispositions à l'ensemble des opérateurs. La CJCE a notamment condamné le Royaume-Uni pour avoir transposé de manière incorrecte et incomplète la Directive en établissant une distinction entre les services satellitaires^[10]. La section 43 du

Broadcasting Act de 1990 distingue en effet deux types de services de télévision par satellite: les services intérieurs - 'domestic satellite service' et les services autres qu'intérieurs - 'non-domestic satellite service'. Ils sont tous deux considérés comme des 'services de programmes de télévision' et doivent, en vertu de la section 13 de la même loi, obtenir une licence pour pouvoir être diffusés. Des dispositions spécifiques sont prévues à la section 44 de la loi pour l'octroi des licences pour les services intérieurs et à la section 45 pour l'octroi des licences les services autres qu'intérieurs. La section 44, paragraphe 3, de la loi applique aux services intérieurs les obligations relatives à la promotion des programmes européens qui découlent des articles 4 et 5 de la Directive. Mais la section 45, paragraphe 2, ne transpose pas les mêmes obligations aux services autres qu'intérieurs.

(b) Un contrôle exclusif. Le contrôle de l'application du droit européen "n'incombe qu'à l'Etat membre dont les émissions émanent"^[11]. L'Etat membre de réception n'est pas autorisé à exercer son propre contrôle à cet égard^[12]. Conclure autrement serait aller à l'encontre de l'objectif principal des textes: libérer les entraves à la circulation transfrontière des émissions. Le consentement préalable de l'Etat de réception matérialisé par un 'double

⁶ Arrêt de la Cour (sixième chambre) du 5 juin 1997, VT4 Ltd contre Vlaamse Gemeenschap. Demande de décision préjudicielle: Raad van State - Belgique, affaire C-56/96, Recueil de jurisprudence 1997, page I-3143.

⁷ Arrêt de la CJCE (sixième chambre) du 29 mai 1997, Procédure pénale contre Paul Denuit - Demande de décision préjudicielle: Tribunal de première instance de Bruxelles - Belgique, affaire C-14/96, Recueil de jurisprudence 1997, page I-2785, points 25-26.

⁸ Précité, point 22.

⁹ Précité, point 61.

¹⁰ Précité.

¹¹ Arrêt de la CJCE du 10 septembre 1996, Commission des Communautés européennes contre Royaume de Belgique, affaire C-11/95, Recueil de Jurisprudence 1996, p. I-4115, point 34.

¹² Idem.

contrôle' ou un 'contrôle secondaire' est définitivement proscrit du droit européen. Il s'agit là de la conséquence logique du contrôle exclusif de l'Etat compétent dans un espace audiovisuel européen libéré. La CJCE a affirmé ce principe dans son arrêt du 10 septembre 1996 *Commission contre Royaume de Belgique* en condamnant l'attitude de la Belgique dont la Communauté française et la Communauté flamande avaient maintenu un régime d'autorisation préalable pour la retransmission d'émissions en provenance d'autres Etats membres afin de contrôler le respect du droit communautaire^[13]. Dans son arrêt du 29 mai 1997, *Paul Denuit*, la CJCE a confirmé cette approche en se fondant sur une interprétation littérale de la Directive basée sur les considérants du texte. Le quinzième considérant précise notamment que "l'obligation de l'Etat membre d'origine de s'assurer que les émissions sont conformes à la législation nationale telle que cordonnée par la présente directive est suffisante, au regard du droit communautaire, pour garantir la libre circulation des

émissions sans qu'un second contrôle pour les mêmes motifs soit nécessaire dans les Etats membres de réception.

Mais la logique du mécanisme ne vaut que pour les matières cordonnées par le droit communautaire. Ainsi, dans l'arrêt de la Cour du 9 juillet 1997 *De Agostini*, la Cour a fait une distinction entre une réglementation générale qui ne faisait pas à l'époque l'objet de dispositions spécifiques dans la directive à savoir la protection contre la publicité trompeuse et un domaine cordonné, la protection des enfants. Dans le premier cas, la Cour a rappelé qu'en l'absence d'une harmonisation, le droit communautaire matériel général s'applique. Or l'article 59 du traité CE ne s'oppose pas à ce qu'un Etat membre prenne sur la base de son droit national des mesures à condition que celles-ci soient nécessaires et proportionnées^[14]. En revanche dans le second cas, la Directive comprend "un ensemble complet de dispositions spécifiquement consacrées à la protection des mineurs (...)"^[15]. Dès lors, "l'Etat membre de réception n'est (...) plus autorisé à appliquer des

dispositions ayant spécifiquement pour objet de contrôler le contenu de la publicité télévisuelle à l'égard des mineurs"^[16] puisque le respect de ces dispositions est assuré par l'Etat d'émission. Mais un Etat de réception peut toujours adopter une réglementation générale sur le sujet si son application n'empêche la retransmission sur son territoire d'émissions en provenance d'autres Etats.

¹³Précité.

¹⁴ Arrêt de la Cour du 9 juillet 1997, *Konsumentombudsmannen (KO) contre De Agostini (Svenska), Förlag AB et TV-Shop i Sverige*. Demande de décision préjudicielle *Marknadsomstolen - Suède*, affaires jointes C-34/95, C-35/95 et C-36/95, point 54.

¹⁵Idem, point 57.

¹⁶Idem, point 60.

Establishment of a National Point of Contact in Switzerland

In order for ECSL to develop its activities in an efficient fashion throughout Europe, it was rapidly felt that relays at national level were needed. The primary purpose of such national relays is to stimulate the activities of the ECSL community. In addition, they were understood both as a relay between ECSL and its Members, but also the other way round. This two-way traffic is essential to a proper flow of information between ECSL and its Members, and to the support to be given by ECSL to national initiatives. These national relays are known under the name of National Points of Contact (NPOCs).

The main interest of the NPOC network within ECSL development is that more activities can be expected on the initiative of NPOCs in cooperation with ECSL or other NPOCs. Since the establishment of ECSL, NPOCs were set up in Belgium, Finland, France,

Germany, Italy, The Netherlands, Spain, Sweden and the UK.

Following a meeting with the partners of the Geneva based Law Firm Fasel Bochatay Tsimaratos in their offices on 20 November; it was agreed that they would act as ECSL's NPOC in Switzerland. Within the Law Firm, the person to contact is Me Frédéric Meyer, attorney at law, who recently joined Fasel Bochatay Tsimaratos, having previously specialised in space law at the Institute of Air and Space Law, McGill University, Montreal. He can be reached at the following address:

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This new co-operation has already taken a very concrete form: the next ECSL Summer Course will be organised in Geneva in collaboration with Fasel Bochatay Tsimaratos and l'Université de Genève.

Project 2001: A legal framework for the commercial use of outer space

Susanne Reif

Senior Research Associate, Institute of Air and Space Law of the University of Cologne,
Coordinator of Project 2001

A Joint Research Project on the Legal Framework of the Commercial Use of Outer Space - named 'Project 2001' - has been initiated by the Institute of Air and Space Law of the University of Cologne and the German Aerospace Center (DLR) since the beginning of this year. Altogether 88 experts from all over the world, experienced in legal questions related to space activities and mostly genuine business lawyers with special knowledge on privatisations, competition law or trade issues, have meanwhile agreed to continuously participate in this Project.

The Project aims at exploring further into the law related to outer space activities and to make proposals for the development of space and business law in order to improve legal conditions for commercial and private space activities. Parallel to existing space activities, it focuses on the areas of launch and associated services, remote sensing, telecommunication and space stations. For each of these areas, a Working Group of international experts has been established for exchange of information and views. In order to examine general and basic questions on privatisation in relation to space activities, additionally a special Working Group on Privatisation has been created. The work of each of these five Working Groups is supported and organised by two Working Group Co-ordinators. The administration and organisation of the entire Project, and coordination of the Working Groups is in the hands of a Project Coordinator.

Each Working Group will hold or has already held an International Workshop on the subjects relevant in its particular field. The results achieved by the Project and its Working Groups will be presented and discussed at an international conference at Cologne, Germany, in the year 2001, where also recommendations will be adopted. The whole Project is scientifically supervised and directed by Prof. Dr. Karl-Heinz Böckstiegel, Member of the ESCL Board, who for a period of more than 23 years has been Director of the Institute of Air and Space Law of the University of Cologne.

Present framework insufficient

Background for the initiation of the Project has been the fact that the existing legal framework for space activities does not reflect the current developments in space activities. In the early stages of spaceflight only a few national states engaged in outer space activities. Although even those early activities were not only limited to research and exploration, but very soon also included the use of outer space for Earth-bound applications, in particular in the field of telecommunications, they mainly were operations of national states. More recently however commercial space activities have been growing dramatically. This growing commercialisation is supported by national states and space agencies that no longer see activities, which are characterised by the existence of a market with products and services supplied by specialised providers to their customers, as activities within the classical tasks of governmental involvement based on a government's obligation to provide otherwise unaffordable basic necessities to their citizens.

The existing legal framework for space activities, dominated by the international instruments of space law, yet in general is still characterised by the original situation of exploration of outer space by national states, and only contains very few and sometimes unfitting provisions for commercial use and particularly the use by private enterprises. Furthermore, although according to Art. VI of the Outer Space Treaty states bear the responsibility for national activities in outer space, including those of non-governmental entities, and are required to authorise

and continuously supervise those activities, only very few national states have sufficiently developed national legislation on space activities. In order to provide the necessary legal security for private investment and to reduce risks and thus costs for private enterprises as well as customers, it has become necessary to improve this insufficient legal framework.

Therefore Project 2001 first identifies, on the different levels of international, European and national law, the present state of the law for the commercial use of outer space, then the gaps in the legal framework and the practical demand to clarify certain legal questions. The first of those questions is the determination of the law applicable to the relevant space activity. Other questions are the legal options and methods of privatisation with respect to the particular activity concerned, the responsibility and liability in national and international law, insurance issues, the desirability of national codification regarding space activities, intellectual property rights, options and methods of cooperation involving state institutions as well as private enterprises, and the settlement of disputes.

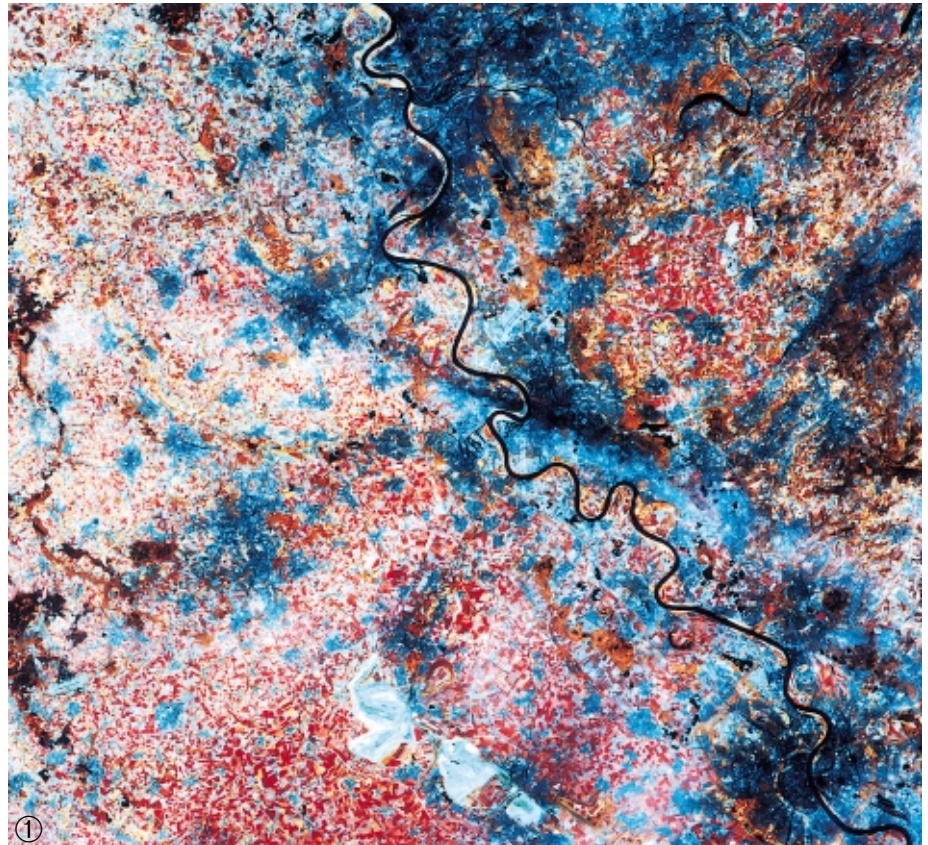
Research of international Working Groups

To solve this task and in order to avoid overlaps as far as possible, the different Working Groups concentrate on issues relevant within their particular scope of work.

The scope of work for the *Working Group on Privatisation*, dedicated to general issues of privatisation and

related questions of governments turning more to private producers, with respect to the international legal frame thus includes common practical questions, such as e.g. the international liability of the launching state according to the Outer Space Treaty and Liability Convention and the liability of private entities for space activities as well as the right of private entities to claim damages. In view of increasing space activities, which entail the higher probability of disputes between and among public and private entities as well, the encouragement and reassurance of private activities also embody, beside others, the issue of how to provide an enforceable settlement of disputes in relation of space activities. But mainly, the efforts of the Working Group on Privatisation thematically will concentrate on the process of privatisation as such, including not only the transfer of public activities into private hands in the strict sense, as e.g. with respect to current privatisations of the various international organisations involved in the use of outer space such as Intelsat, Inmarsat and Eutelsat, but also first-phase privatisation or commercialisation attempts, like rules on government procurement in the space sector (i.e. contracting of states with private entities), technology transfer in the form of licensing of patents, national and international private-public partnerships, as well as government financial involvement in the form of subsidies for private space activities. While the process of privatisation mainly concerns the diverse national laws, deviating on the available forms of associations for private-public partnerships and regulatory restrictions on commercial activity of public entities, in this context also the law of the European Union, e.g. on procurement and subsidies is of course most relevant.

While the Working Group on Privatisation plans the next Workshop within the Project by the middle of next year, the *Working Group on Remote Sensing* already has held the first Workshop of the Project at Toulouse, France. The Workshop concentrated on two main issues. The first part was on commercial activities regarding the collection and distribution of Earth observation data and the second part dealt with the available legal protection of Earth observation data, as a vital

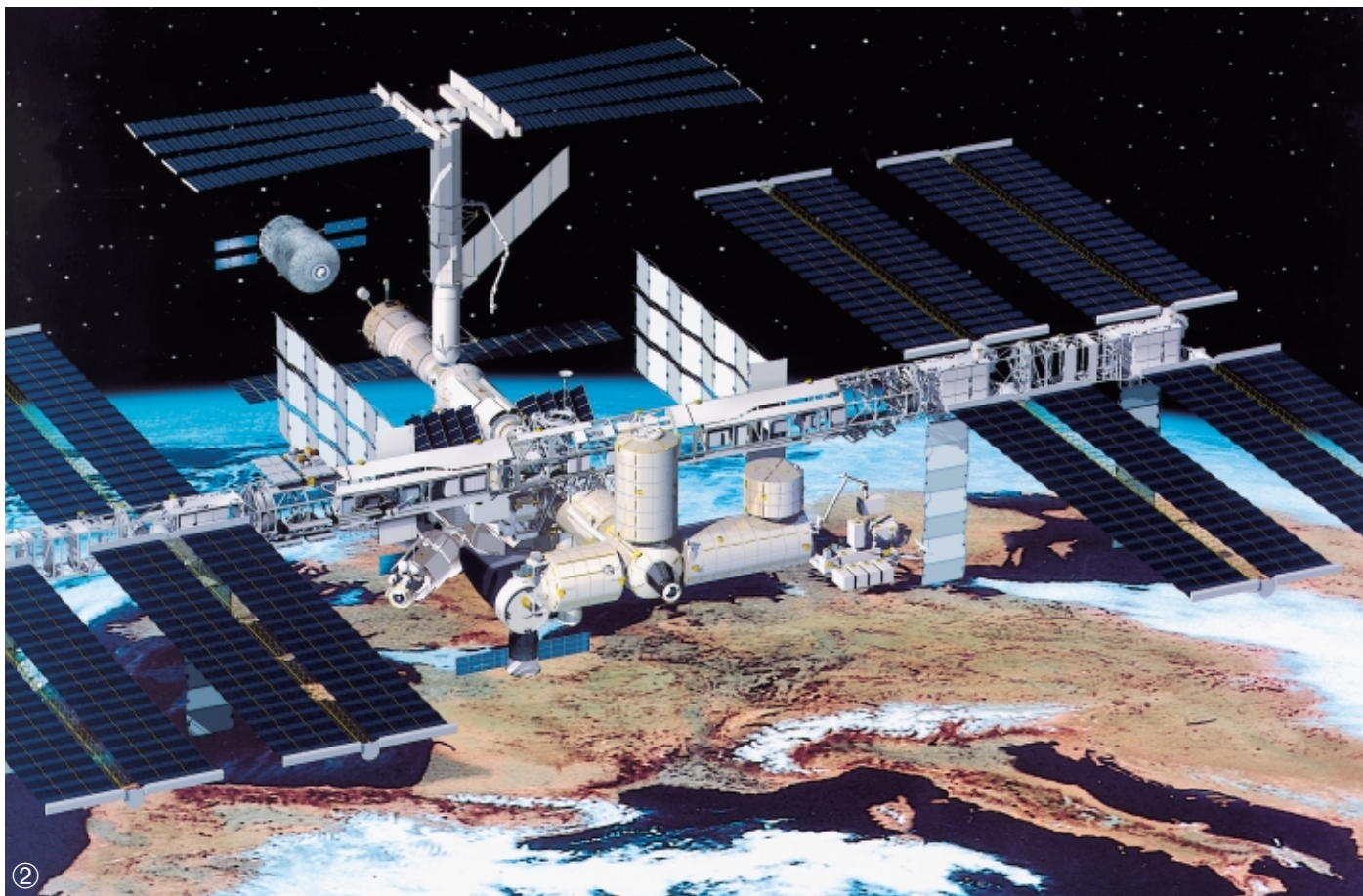


Landsat-5 image of the Cologne/Düsseldorf region.

precondition for private investment. Regarding the first part, speakers from different countries reported on the international legal framework and on the regulations and practice in the US, France and at ESA. In a contribution reporting on the attempts to privatise the German MetService, more recent experience with respect to a practical example was revealed. Central points were different commercialisation attempts, the role of governments in data collection and distribution, and the effects of governmental investment in Earth observation on subsequent data distribution, e.g. in form of the charges levied for Earth observation imagery from private users and from governmental or other public entities. Regarding the second part, speakers from the US, France, and the EU gave an introduction on the existing legal protection of the imagery in the US and in France under law and contract, as well as under the EU Directive on Databases of 11 March 1996. While in respect of this second part of the Workshop the general opinion was positive that Earth observation imagery enjoys some kind of protection, opinions deviated on the degree of that

protection and participants were sensible vis-à-vis the lack of an explicit and clear regulation of such protection. The Workshop on Remote Sensing taking place at the premises of Spot Image, it also profited from a general presentation of that company and information on the current developments of the Earth observation market, Earth observation images meanwhile having become one of the 'goods from space' with emerging success, as they are used in the management of natural resources, inventory and survey of agricultural and forestry activities, and urban as well as project planning (Fig. 1). Following the Workshop there will be a volume of proceedings published, containing an introduction on the results of the Workshop, the speakers' papers and further materials as well as a collection of related legal material, that had already been used as Working Documents for the Workshop itself. The proceedings of the Workshop will be available to all interested persons.

Relevant subjects of the *Working Group on Launch and Associated Services*, covering a field where private initiative



The International Space Station.

has been and is still currently very much concentrated in the United States, mainly concern questions of licensing launch activities of private enterprises and the required preconditions for such licensing. In this context the lack of national space legislation in most countries is particularly painful, when compared with the few countries, where such legislation exists. With respect to possible licensing preconditions the limited or unlimited liability of private launch providers towards third parties will have to be an issue, depending on the insurability of damages, which sometime ago still had been critical due to the high risks involved. As insurance rates for payloads in any case are still quite high, individually negotiated cross-waivers of liability among private parties to a launch contract, as usually applied in payload agreements, might not provide the necessary legal security and environment for private enterprises. Other preconditions will have to regard the launcher's responsibility for space debris and the definition of safety standards. Further, the relation to air law and aviation control has to be considered. On the international level,

solutions have to be found for sea-launch projects, where the law of the sea and thus even more international concerns become involved.

Members to the Working Groups on Telecommunication and on Space Stations with the support of ECSL have recently had a meeting at ESA Headquarters on 5 November 1998, in order to define the practically relevant subjects with regard to these space activities. The *Working Group on Telecommunication*, on the basis of a Draft Outline of the Working Group Coordinators, discussed the subdivision of its work into thematic fields, taking into account the diversity and plurality of legal problems in this area, where private activities and initiative already dominate. Needs of discussion and regulation in view of these private activities have so far been found by this Working Group to lie in the fields of licensing, frequency issues, trade issues and the privatisation of international organisations. In the telecommunication field also the effects of globalisation are especially outstanding, e.g. in international global mobile

telecommunication networks for voice telephony or in the communication possibilities on the Internet. Therefore an additional subject will deal with the current globalisation effects and possible regulatory adjustments to that process in view of current telecommunication and space law. With respect to licensing issues the Working Group, departing from a review of different national and European practices, wants to examine the possibilities of a global harmonisation. The field on frequency issues will be dominated by current problems of administration by the ITU and future improvements, with regard to licensing and registration as well as the role of private parties within the ITU decision-making process.

The *Working Group on Space Stations* has as well discussed a proposed table of subjects, prepared by the Project and Working Group Co-ordinators. While with regard to other fields private space activities are quite developed, the use of space stations by private entities is very scarce and still in its beginnings. On the other hand, the first module of the International Space Station was

launched in November 1998, and the International Space Station (Fig. 2) will be built and operated on the basis of the international agreement among the Member States signed relatively recently, on 29 January 1998, and its related MoU's and arrangements. The Working Group will therefore mainly focus on the examination of the currently existing provisions in view of their fitness for commercial uses of the International Space Station. Particular legal questions in this context are the fitness of general provisions, like legal regime and decision-making procedures, but also and moreover the question of equal access and equal conditions for access for private companies to space station use. Other

issues will be the sufficient protection of intellectual property acquired on the space station and de facto protection of transfer of innovative results to Earth.

Impact of international business law

In view of the issues considered by the participants of the Project to be practically relevant, it becomes more and more clear, that as much as space activities are increasing and as much as these activities are not only performed by national states, but private interests become concerned, the original field of space law and its few regulations on private activities become intertwined with the general network of national and

international business law, including competition and intellectual property issues. It is also clear that space activities, in particular in the sector of telecommunications, have become quite 'normal' and soon might lose much of their specificity. They are in the process of becoming a field, which is as much regulated by law and as to which the regulations are as clear, nationally or internationally, as with respect to holding and operating cars or aeroplanes. It is this clarity to which Project 2001 on the Legal Frame for the Commercial Use of Outer Space at the beginning of the 21st century wants to make its contribution.

7th ECSL Summer Course on Space Law and Policy Brest, September 1998

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This year's ECSL Summer Course on Space Law and Policy was held at l'Université de Bretagne Occidentale. More than 30 students had the opportunity to follow a basic introduction on Space Law and could get an insight of recent problems which will be focused on briefly.

1. The UN and Space Law

Dr Jasentuliyana who gave the introductory lecture as head of the UN Office for Outer Space Affairs pointed out that one of the pending legal issues at COPUOS is still the status of the geostationary orbit. A general agreement could be reached on the fact that the GSO is a limited natural resource which has a character *sui generis*. Under this regime, the access rights which are coordinated by the International Telecommunication Union (ITU) can be safeguarded as well as the freedom of outer space.

In July 1999, Unispace III, the third UN Conference on the Exploration and Peaceful Use of Outer Space, will take place in Vienna. A youth forum will be organised by the International Space University (www.isunet.edu/).

2. Telecommunications

Recently, the major international space organisations became aware of the

global trend of privatisation of space activities. So far, the Member States of ITU used to apply for the allocation of satellite positions and frequencies but, nowadays, private telecommunication companies have entered the market so that a fair allocation of satellite positions and frequencies becomes more and more difficult. It is argued that the ITU should be given FCC (Federal Communications Commission) duties to regulate frequencies and orbital positions. Inmarsat is facing the problem of being changed into a private company. Accordingly, the most crucial legal question will be whether public service obligations, such as maritime distress services, can still be controlled by a private company. Intelsat has also taken a step into the private market by transferring transponders to a private company.

3. International cooperation in space

The new Intergovernmental Agreement (IGA 1998) for the International Space Station was examined. The Russian

participation in the programme is of special interest because of the experience Russia can provide in the field of manned missions. Regarding the IGA for example, the notion of 'peaceful purposes' is still highly disputed between Japan and ESA as Japan interpret this as 'non-military'.

4. New trends

One of the most adventurous space launching systems is on its way to the Pacific Ocean: Sea Launch, a multinational project conducted under US law. Legal questions are already imposing: which will be the launching State that can be held responsible/liable when a launch is carried out from the high sea? Which will be the appropriate State exercising control over the spacecraft? Possible solutions can be found in the Law of the Sea. This could result in international companies escaping the control of States in order to benefit economically.

On 25 March 1998, NASA released a report on space travel ("General public Space Travel and Tourism Study") dealing with the question of commercialising space for individuals. Studies on a spacecraft capable of taking 'tourists' onboard are currently carried out throughout the world. These spacecraft are to be used both in air and space. This brings out the question of how an individual can be legally protected when using such 'space planes' in the future.

Furthermore, the students discussed the future role of ESA as a driving force behind Europe's space industry as well as the coordination of a European Space Policy through ESA's collaboration with the European Commission.

The legal aspects of remote sensing activities, global navigation satellite systems operation, insurance in the field of space activities and disputes settlement procedures, were also thought to the students by leading experts in the field.

5. Mock international conference

The students of the Summer Course had to prepare a case for an international conference. The issue dealt with was of actual interest: "How can a satellite constellation, placed on a



Participants at the 7th ECSL Summer Course.

specific orbit, be protected under patent law?" The main problem is that granting a patent for a certain configuration of satellites on a specific orbit would exclude other providers from using the same configuration on a similar orbit. This can be seen as an extension of a State's sovereignty to outer space and, therefore, as a violation of the Outer Space Treaty as outer space is not subject to national appropriation. With Prof. P. Malanczuk and Dr. B. Smith as Chairs of the conference, the students had an opportunity to express their contrary

views on the case acting as representatives of the different parties.

On this occasion the tremendous organisation of Prof. Kerrest (Université de Bretagne Occidentale) and Thierry Herman (ECSL Executive Secretary) to make this Summer Course a (7th) success should be mentioned. The course ended with a typical 'breton' dinner in Le Fret accompanied by Mr Lafferranderie.

Au revoir et à l'année prochaine à Genève...

7th ECSL Practitioners' Forum

On 6 November over 120 practitioners and students gathered at ESA's Headquarter in Paris to take part to the 7th ECSL Practitioners' Forum. The Forum was an occasion for lawyers to discuss the specific legal issues and other problems they encounter in their daily practice when dealing with space activities.

Professor K-H Böckstiegel, director of the Institute of Air and Space Law at Cologne University chaired the morning session. Various space law specialists brought the audience up to date on current legal issues surrounding space activities. The issues addressed by the speakers were: Satellite Communi-

cations: Market Access Issues (Mr S. Le Goueff, Lawyer); Update on Pending US Space Legislation (Dr P. Salin, Research Associate, Institute of Air and Space Law, McGill University; Intergovernmental Agreement on the Space Station (Mr A. Farand, ESA, Legal Affairs); Satellite Navigation: Legal Issues (Mr S. Kaiser, Motorola); and Global Navigation Satellite System: A European Perspective (Mr M. Ferrazzani, ESA, Legal Affairs).

The afternoon session took the form of a panel discussion. The panel, composed of Mr J. Da Costa (Cecar & Jutheau), Mr C. Forsyth (ICO Global Communications), Ms L. Falvella

(Iridium), Dr T. Howell (European Commission – DG XIII), Mr M. Jany (Alcatel) and Mr C. Saporito (Iridium), was chaired by Professor L. Rapp. The topic submitted to the panel was the legal implications of the operation of the new satellites' constellations. It led to a very informative discussion. ECSL wish to thank all the speakers and attendees for their kind participation and hope to see them again next year!

International Organisations and Space Law: Their Role and Contributions

An International Colloquium, Perugia, Italy, 6-7 May 1999

ESA and ECSL are in the process of organising the Third ECSL International Colloquium, which will be devoted to the above topic. The meeting, co-organised with the University of Perugia and the Italian National Research Council (CNR), will take place at the Palazzo Cesaroni in Perugia, Italy on 6 and 7 May 1999.

To be seen as a precursor to the Unispace III Conference in Vienna in July 1999, this 3rd ECSL International Colloquium will focus on the growing problems and policy issues faced by International Organisations involved in conducting and regulating activities in space. All of the major European players are expected to participate,

including the European Union, Eumetsat, Eutelsat, Intersputnik and Eurocontrol, as well as many of the UN family of organisations, Inmarsat, Intelsat, ITU, ICAO and WIPO.

Day 1 of this unique Colloquium will cover the implementation of Space Law in the context of International Organisations, including the problems arising from the privatisation of international space organisations. Day 2 will focus on the contributions that the International Organisations themselves can make to the future development of Space Law will address the latest developments in the field and ample opportunity for discussion will be scheduled after each session.

Further information regarding the final programme and eventual participation in the Colloquium can be obtained from:

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E-mail: ecsl@hq.esa.fr or
mjay@hq.esa.fr

The Proceedings of the Colloquium will be published in June 1999 as an ESA special publication (SP-442), and will be available from ESA Publications Division.

From the Library

Books

Legal Aspects of Cooperation between the European Space Agency and Central and Eastern European Countries, Proceedings of the International Colloquium – Charles University, Prague, Czech Republic. Kluwer Law Intl. 1998.

Lebeau, *L'Espace : Les enjeux et les mythes*, Hachette 1998.

F. Durand, *De la fusée Véronique au lanceur Ariane – Une histoire d'hommes 1945-1979*, Stock 1998.

Proceedings of the 6th ECSL Summer Course on Space Law and Policy, University of Lapland, Finland, 8-24 Nov. 1997, published by ECSL.

PRIVATE ENTERPRISE AND PUBLIC INTEREST IN THE 'EUROPEAN SPACESCPE'

TOWARDS HARMONIZED NATIONAL SPACE LEGISLATION FOR PRIVATE SPACE ACTIVITIES IN EUROPE

Frans G. von der Dunk

A detailed Table of Contents and Bibliography, as well as a short summary of the book, can be found at the Internet home-page of the International Institute of Air and Space Law :
<http://www.leidenuniv.nl/law/air&space>, under 'News and agenda'.

Reviews of the book will be published, inter alia, in the forthcoming issues of the Zeitschrift für Luft- und Weltraumrecht (in English) and the Revue française de droit aérien et spatial (in French).

The book has been published with the International Institute of Air and Space

Law. Price: Dfl. 85,--/US\$ 45,--. You can order the book by transferring the aforementioned amount to bank account no. 61.82.02.153, ABN/AMRO Bank, Breestraat 81, Leiden, The Netherlands, PAC: CC 9005, 710605, to the name of "Stichting Internationaal Instituut voor Lucht- en Ruimterecht", mentioning Private Enterprise as well as your name, and send a fax or letter at the same time to the Institute (fax +31(0)71-527.76.00; mail address: Hugo de Grootstraat 27, 2311 XK Leiden, The Netherlands), attention of the author, in which you indicate where you want the book to be sent.

Articles

Prof. Dr. K-H. Böckstiegel, Dr. P. M. Krämer, Ass. Jur. I. Polley : "Patent Protection for the Operation of Telecommunication Satellite Systems in Outer Space", *German Journal of Air and Space Law*, 47 (1/1998), pp. 1-17, pp. 166-178.

Prof. J-M. de Faramiñan Gilbert : "Análisis Jurídico Sobre el Concepto de Objeto Aeroespacial", *Revista Española de Derecho Internacional*, Vol. XLIX (1997) 1, pp. 333-341.

Prof. A. Kerrest : "Le Rattachement aux Etats des Activités Privées dans l'Espace: Réflexions à la lumière du droit de la mer", *Annales de Droit Aérien et Spatial*, Vol. XXII-II (1997), pp. 113-139.

Prof. M. Lehmann : "The European Database Directive and Its Implementation into German Law", *International Review of Industrial Property and Copyright Law*, Vol. 29 (7/1998), pp. 776-793.

Calendar 1999

- Vienna, 2-5 March: Next Meeting of the Legal sub-Committee of the UNCOPUOS.
- Perugia, 6-7 May: Colloquium on International Organisations and Space Law: Their Role and contributions.
- Vienna, 19-30 July: Unispace III.
- Amsterdam, 4-8 October: 42nd IISL Colloquium on the Law of Outer Space.

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ECSL on the Internet: what's new?

In the last year many changes have occurred on the ECSL homepage and we hope it is now more informative and a real tool for users. Apart from the regular updates of the "Events and Announcements" and of the list of ECSL publications, the main menu has been expanded and now includes the ECSL Charter, and the composition of the ECSL Board.

But the main improvements can be found under 'all about ECSL'. Let us elaborate a little bit on the matter. Besides the description of the main activities of the ECSL, each of these activities is explained in more details as a separate item: for example, the official rules, past cases and schedule of the Manfred Lachs Moot Court Competition

are now accessible; the report of the Practitioners' Forum is on-line; etc.

A special effort has been put on the 'Frequently asked questions' or 'Everything you always wanted to know about Space Law, but were afraid to ask' written by Mr. von der Dunk (Co-Director of the International Institute of Air and Space Law, The Netherlands). It is a selection of the 10 basic questions related to the law of outer space, which are listed with their corresponding answers. This section is intended for students or anyone who is curious about space law. Also worth mentioning is the list of commonly used abbreviations in the field of space law and their links to the corresponding Internet sites.

We hope to get some feed back from you, please complete the on-line questionnaire. Any further information, ideas or comments on the "Space Rules - Everything you always wanted to know about Space Law, but were afraid to ask" would be very much appreciated. Also, ECSL would be very appreciative for any written or printed follow-up materials used or produced relative to the use of "Space Rules - Everything you always wanted to know about Space Law, but were afraid to ask".

Don't forget to regularly consult the ECSL site on
<http://edms.esrin.esa.int/ecsl/>
and the ESALEXdatabase on
<http://edms.esrin.it/esalex/login>