Report on the 2014 ECSL Practitioners' Forum

The 2014 ECSL Practitioners' Forum was organised on 14 March at ESA Headquarters in Paris. The organisation was taken care of by the new ECSL Executive Secretary, **Mr. E. Boulle**, in close cooperation with the ECSL Chairman, **Prof. Dr. S. Marchisio**, of the University of Rome 'La Sapienza', and the Coordinator of the Practitioners' Forum, **Prof. Dr. F.G. von der Dunk**, of the University of Nebraska-Lincoln. The Forum addressed 'Recent Developments in Export Control Regulations on Space Technology' and was attended by some 75 participants.

Prof. Marchisio briefly welcomed the participants, introduced ECSL and the Practitioners' Forum, followed by another welcome by **Dr. M. Ferrazzani**, Legal Counsel and Head of Legal Department at ESA, in particular to the main ESA Council room.

Prof. Von der Dunk then introduced the topic of the Forum, and summarized the international background of 'non-proliferation' for the various specific themes of the Forum, which would chiefly address the national (and EU-level) corollary of 'dual-use technology export controls'. He addressed specifically the Non-Proliferation Treaty as well as the Missile Technology Control Regime (MTCR) addressing delivery systems for weapons of mass destruction and the Wassenaar Arrangement addressing dual-use technology broadly speaking, as originating in the CoCom regime which was established early on in the Cold War.

The first speaker of the morning session, which was to address the general framework and the legal regimes on dual-use export controls, was **Mr. C. Hansen**, responsible for Export Controls within the ESA Legal Services Department, comparing the two regional European export control regimes of the European Space Agency under the ESA Convention (notably Articles II and XXIII) respectively the European Union under the latest Regulation, 388/2012. He circumscribed 'export control' as public regulations dealing with commercial activities following foreign policy interests requiring a profound understanding of the technology. From this perspective, he concluded that states will continue to ultimately base themselves on their sovereignty to determine whether export will be granted in any particular case.

Following the coffee break, **Avv. P. Di Palma**, President of the Centre for the Development of European Mediterranean Transportation (DE.ME.TRA) addressed, by way of a national case study, the new Italian law on strategic assets. He explained how the 'Golden Share' concept had traditionally been used to ensure national control for security-sensitive purposes, but was seen to potentially interfere with the operation of the free market within the European Union by the European Court and the European Commission. Following this, Italy now has a new law listing strategic activities in the context of defence and international security, where the government may exercise far-reaching powers – dubbed 'Golden Power' instead of 'Golden Share'.

Then, **D.J. Burnett**, Consultant, Adjunct professor at the University of Nebraska-Lincoln College of Law and retired Vice-President Trade Policy and Export Controls with EADS North America, spoke on recent US developments in the context of International Traffic in Arms Regulations (ITARs). He explained that US efforts in export controls had started with Neutrality Act 1935 in response to the Italian invasion of Ethiopia, and proceeded to

provide a bird's eye view of US export controls, with the 1949 Export Control Act, the 1976 Arms Export Controls Act and the 1998 Strom Thurmond Act following which satellites became the only 'defense items' covered by the ITARs by law – as opposed to being listed by the President. Finally, he explained the latest developments, under which the authority to decide whether certain satellite items would fall under the ITARs were to revert back to the US President.

Following a question from the floor, an interesting debate arose on the lack of any sub-distinction of 'military functions' into 'aggressive military functions', as fundamentally contrary to international law, and 'defensive military functions', as basically allowed. The main conclusion here was that, as even technology with 'exclusively defensive military functions' if exported to potential opponents would tilt the military balance negatively from the perspective of the originating state, such state would not make any principled difference as between 'aggressive military technology' and 'defensive military technology' – to the extent such a distinction could even be made in the first place.

Before the lunch break, a special session of the programme was then dedicated to **Dr. G. Lafferranderie**, former Legal Counsel and Head of the Legal Department at ESA, renowned space law scholar and founding father and first Chairman of ECSL. **Prof. Dr. S. Hobe** of the University of Cologne addressed a laudation of Dr. Lafferranderie to the audience, culminating in the presentation of the very first ECSL Award, which in the unfortunate absence of dr. Lafferranderie was accepted on his behalf by **Prof. Dr. A. Kerrest de Rozavel**, of the University of Western Brittany.

The afternoon session focused on the nexus between the theory and the practice of export controls, in particular from the space industry's perspective. First, **Mr. A. Farand**, Head of the Programme Legal services Division at ESA, spoke on the International Space Station (ISS) and Exomars as two major ESA projects where export controls had to be handled. Following Article 19 of the Intergovernmental Agreement on the exchange of data and goods amongst the ISS participating agencies and the references to national laws and regulations as potentially allowing to deviate from obligations to exchange such data and goods, ESA had to handle numerous Technology Assistance Agreements (TAAs) with US companies, as these companies were not really aware that ESA was effectively exempted and these exchanges should normally be handled between the participating agencies.

He was followed by **Mr. M. Borello**, General Counsel with Thales Alenia Space, who addressed the satellite manufacturer's perspective. He contended that US export controls still were the main issue, in view of the still-prevailing dominance of the US industry; ITAR-free production is usually not feasible or efficient (yet), as it will be likely (much) more expensive. For such reasons, export controls have become major element of satellite sale strategies; and anticipation of potential application of those controls is necessary – for example by way of contracts or insurance.

Mr. D. Guillaume, Chief Export Control Officer with the Astrium Group, then presented together with his colleague **Mr. C. Peters** the launcher manufacturers' point of view. The Airbus Defence and Space export control strategy has to deal with many national export control regulations; for example, in France launchers are classified as military equipment, and subject to French export control regulations but exemptions are possible, and apply for example to the Ariane 5 programme. Interestingly from this perspective, the Multi

Purpose Crew Vehicle (MPCV) will be the first time NASA permits a European module to power craft crewed by US astronauts.

Following the tea break, the next speaker was **Mr. J. Rotteveel**, CEO with ISIS in the Netherlands. He explained in great detail the focus on small satellites of his company's operations, the relevant benefits and drawbacks of small satellites and how export controls would impact this special, growing market. A major problem was that export controls generally assumed that all satellite technology would be cutting edge and hence of a (potentially) strategic and/or security-sensitive nature, whereas precisely with small satellites much of the technology was commercially available, sometimes as common as the technology of a smartphone. Another, related problem for small satellite operators was that the timelines for going through the export control process were incompatible with the timelines on which the small satellite operators were operating. This applied also to the ITU frequency coordination processes. Hence, he basically called for development of a carve-out for low-technology, low-cost, fast-plan satellites from the existing regimes.

Then, **Dr. M. Creydt**, Partner with the AWB Law Firm and with a long track record in dual-use technology export controls in the space sector, explained how the legal profession around export control issues had developed. This includes in particular a role as more proactive consultants helping to avoid or preempt export control issues as much as possible at the outset, rather than finding out about export hurdles in the course of the process. He confirmed the key role in most instances of US manufacturers as discussed before, and pointed out that as if such the satellite market was (still) not one of mass production (yet), although that might change in particular with the increasing role of small satellites in space activities.

The last presentation was by **Mr. A. Soucek**, Legal Officer at the International and EU Law Services Division at ESA, who appropriately started to look ahead, focusing on active debris removal (ADR). Export controls may well apply both to chaser spacecraft and target spacecraft, although the possibility of using earth-based lasers also was discussed, but ADR-relevant technologies as such would likely remain udner the ITARs, as far as the United States was concerned. He concluded that while active space debris removal was not practice yet, it might soon be – and then become involved in export control issues. A new ESA space debris mitigation policy was already internally decided upon, but not yet published, aligning ESA policies in this field to relevant ISO standard.

Prof. Von der Dunk concluded the meeting by summarizing some of the main points to be taken home from the presentations, and thanked ESA for hosting once again the Practitioners' Forum, the chairmen and speakers for their many excellent contributions, the other participants for their active engagement in the discussion, and last but not least **Mr. Boulle** for his excellent organization of the Forum.

Frans G. von der Dunk