IN THE

INTERNATIONAL COURT OF JUSTICE

April, 1967

CASE NO. 1

UNITED STATES OF AMERICA,

Applicant,

v.

REPUBLIC OF FRANCE,

Respondent.

MEMORIAL FOR APPLICANT

M. Elizabeth Culbreth,

Daniel W. McAllen III,

Agents for the United States.

On the Memorial:

Alvin P. Adams, Jr.
John J.A. Hossenlopp
Charles J. Pitman

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JURISDICTION

Jurisdiction of the International Court of Justice (hereinafter ICJ) "comprises all cases which the parties refer to it." Stat. Int'l Ct. Just. art. 36, para. 1. Both the United States of America and the Republic of France accept the jurisdiction of the Court. Record, p. 3.

STATEMENT OF FACTS

General Assembly Resolution 2222 (XXI) of December 19, 1966, unanimously approved the Treaty Governing the Exploration and Use of Outer Space (hereinafter Outer Space Treaty) which declares that extra-terrestrial bodies are not subject to national appropriation. France voted for the Resolution and signed, but did not ratify, the Treaty. The Treaty, now in effect, has been ratified by nineteen states.

Shortly after the Treaty became effective, a French military expedition, transported in a Russian spacecraft, landed on the moon. The astronauts raised a flag and proclaimed French sovereignty over the area within a twenty kilometer radius of their lunar station. Notice of this claim was given to the Secretary General with a request that other governments be informed. The United States immediately protested,

denying the French claim and stating that it was contrary to international law. The French expedition returned to earth in ten days.

Three months later, a second French expedition utilizing Soviet equipment reoccupied the original site and reaffirmed the French claim. Five days later, the United States landed a four-man expedition, including two private citizens, Adams and Brown, and two military personnel. Subsequently, the Americans entered the area claimed by France. French officers met them and demanded that they leave French territory. The Americans, not wishing to create an incident, departed under protest, taking certain mineral samples which Adams and Brown gathered within the claimed area.

Both expeditions returned to earth two days later, but the United States spacecraft malfunctioned and was forced to land in the Indian Ocean. The astronauts were rescued by a French warship and taken to a French port. There, French customs authorities confiscated the mineral samples and released the astronauts.

Adams and Brown appealed unsuccessfully to the French courts for return of the samples. The United States protested the French confiscatory acts, demanding return of the samples. The French Government rejected the request.

QUESTIONS PRESENTED

1. Whether the cumulative effect of the practice of nations, General Assembly Resolution 2222 (XXI), and the Outer Space Treaty establishes a rule of international law precluding national appropriation of celestial bodies by claims to sovereignty.
2. Whether recognition of French lunar sovereignty violates the general principle of law recognized by civilized nations condemning frustration of existing agreements by third parties.
3. Whether France has established a valid claim of sovereignty under traditional requirements of international law.
4. Whether France's seizure of mineral samples lawfully in the possession of United States' astronauts was illegal.

RELIEF REQUESTED

The United States requests the Court to declare that France return the mineral samples wrongfully taken and withheld by her. An award of damages would be inadequate because of the unique nature of the samples. Further, the United States requests a declaration that France is not entitled to an apology by the United States.

SUMMARY OF ARGUMENT

This Court must determine which of two competing legal statuses, res communes or res nullius, has been assigned to the lunar surface. The United States contends that international law precludes national appropriation of celestial bodies by claim of sovereignty. This rule has been established by the cumulative effect of the practice of nations, General Assembly Resolution 2222 (XXI) and the Outer Space Treaty.

General principles of law recognized by civilized nations require France to refrain from any conduct which would frustrate the object of the Treaty. The establishment of French lunar sovereignty would abridge the principles of freedom of access and freedom from national appropriation upon which the Treaty is founded, thus defeating the purpose of that agreement: cooperation in the use and exploration of extra-terrestrial territory. France's duty of restraint is particularly compelling because of the significance which international law attaches to the signing of a treaty. France's signature to the Treaty binds her to refrain from wrongful interference with performance pending its ratification. Furthermore, France has not perfected her claim of sovereignty

under traditional requirements of international law.

Regardless of whether the lunar surface is res communes or res nullius, possession by the American astronauts of the mineral samples was lawful. If the lunar surface is characterized res communes, their possession was a reasonable use of celestial territory in accord with the Treaty. If the lunar surface is characterized res nullius, the American astronauts were the first persons to possess physically the mineral samples and, therefore, their possession was lawful.

The law of distress prohibits France from seizing the minerals from their possessors. The distressed condition of the American astronauts at the time of the seizure clothed them with immunity from the exercise of French legislative jurisdiction.

In conclusion, France is not legally entitled to an apology.

ARGUMENT

I. THE CUMULATIVE EFFECT OF THE PRIOR PRACTICE OF NATIONS, GENERAL ASSEMBLY RESOLUTION 2222 (XXI) AND THE OUTER SPACE TREATY ESTABLISHES A RULE OF INTERNATIONAL LAW PRECLUDING NATIONAL APPROPRIATION OF CELESTIAL BODIES BY CLAIM OF SOVEREIGNTY.

Established principles of international law preclude national appropriation of celestial bodies by claims of sovereignty, occupation, or by any other means. This conclusion is based upon the cumulative effect of three distinct but interrelated elements: first, the practice of nations as evidenced by their reasoned expectations regarding the development of Antarctica and Outer Space; second, General Assembly Resolution 2222 (XXI); and third, the Outer Space Treaty itself. When considered together, the totality of these elements creates a viable source of international law -- that is, the consent of nations.

The consistent practice of nations indicates general recognition of the principle that celestial bodies have been accorded a legal status which insures their freedom from exclusive appropriation by national states. This status, commonly termed "res communes," precludes the application of traditional rules of international law regarding claims of sovereignty. It prevents exclusive appropriation, thereby

encouraging the advancement of community interests through free access and cooperative endeavor.

The concept that the interests of the world community are best served by mutual assistance and cooperation, rather than by exclusivity, is not new in international law. The Antarctica Treaty of 1959 reflects international awareness of the importance of equal opportunity and cooperation in the exploitation of large, unoccupied land masses, where conditions are inhospitable to normal human activity and to which access is difficult. Antarctica Treaty, T.I.A.S. No. 4780, Dec. 1, 1959. Furthermore, within the last decade, the activities of the world community indicate an acute sensitivity toward the potential international benefits to be derived from a legally protected, free development of outer space. Generally, all nations have accepted, at one time or another, the premise that outer space should be explored and exploited for the benefit of all mankind. Specifically, the United States and the Soviet Union, world leaders in space technology, have continually favored freedom of exclusive occupation. See Lipson & Katzenbach, Report to the National Aeronautics and Space Administration on the Law of Outer Space, American Bar Foundation 19-21 (1961); Crane, Soviet Attitude Toward International Space Law, 56 Am. J. Int'l L. 685, 699 (1962). This

principle was respected by the Soviet Union when her astronauts made the first manned lunar landing. Record, p. 1.

Moreover, the consent of nations to the principle urged by the United States is specifically shown by two General Assembly Resolutions. In 1961, the Assembly unanimously approved Resolution 1721 (XVI) declaring that "outer space and celestial bodies are free for exploration and use by all States . . . and are not subject to national appropriation." Two years later, the Assembly decisively reaffirmed this principle. See Declaration of Legal Principles, General Assembly Resolution 1962 (XVIII). Thus, one writer concluded that "[t]he general principle that outer space and celestial bodies are not subject to national appropriation can therefore, and indeed must, now be regarded as firmly established." Jenks, Space Law 200 (1965).

General Assembly Resolution 2222 (XXI) clearly manifests international consensus regarding the freedom of celestial bodies from national appropriation. The General Assembly has an independent legal existence and significant inherent power. Johnson, The Effect of Resolutions of the General Assembly of the United Nations, 32 Brit. Yb. Int'l L. 97, 122 (1955). As a forum for crystallizing the desires and expectations of the international community, its primary efforts in the field of

space law have been devoted toward insuring international acceptance of the legal principle urged by the United States. Its decisions, therefore, are worthy evidence of the evolution of legal principles which nations recognize as applicable to their activities in outer space. Thus, the Assembly's unanimous approval of Resolution 2222 (XXI) is a climactic achievement and must be regarded as an authoritative statement of a principle of international law recognized and accepted by the community of nations. Schwelb, The Nuclear Test Ban Treaty and International Law, 58 Am. J. Int'l L. 642, 645 (1964). In any event, France's vote in favor of the Resolution must necessarily estop her from taking affirmative action in derogation of the principles stated in the Resolution. Higgins, The Development of International Law by the Political Organs of the United Nations, Proc. Am. Soc. Int'l L. 116, 122 (1965).

In addition, the Outer Space Treaty, currently in force between nineteen states, represents substantial national consent to those legal principles encouraging cooperation and prohibiting exclusive appropriation. The fact that three major powers, the United States, the Soviet Union and the United Kingdom, have ratified the Treaty is persuasive evidence, in light of the prior practice of nations and Resolution 2222 (XXI), that

international law now precludes national appropriation of celestial bodies by claim of sovereignty.

It is arguable that France's signature on the Treaty could bind her to its terms, Harvard Research in International Law, Treaties, 29 Am. J. Int'l L. 778, 780 (Spec. Supp. 1935), and that France's vote in favor of the Resolution legally commits her to abide by its principles, Cooper, Who Will Own the Moon? The Need for an Answer, 32 J. Air L. & Com. 155, 162-63 (1966); Jenks, op. cit. supra at 200, or that a rule of customary international law has been established apart from the Treaty and the Resolution which precludes recognition of sovereignty over celestial bodies. The United States' position, however, does not depend upon the validity of any one or all of these arguments. In this case, the whole is greater than the sum of its parts, and the cumulative effect of established international practice, the Resolution, and the Treaty creates a rule of international law prohibiting the French claim of lunar sovereignty.

In the final analysis, prior to the launching of Sputnik I on October 4, 1957, the scope of human activity did not require the application of international law in outer space, or in relation to celestial bodies. These bodies were then legally neutral. Since that date, man's technological capabilities have

advanced to the extent that we are now able to occupy the lunar surface for short periods of time. This capability raises the problem of the legal status to be accorded celestial bodies. The pervasive issue before the Court is which of two competing legal statuses has been assigned to the moon, res communes or res nullius. By recognizing the latter, the Court will, in effect, encourage the division of lunar territory in accordance with unilaterally motivated claims of sovereignty. Such a result is contrary to the reasoned expectations of the international community. On the other hand, if the Court considers the lunar surface as res communes, its decision will comport with international law as reflected by the practice of nations, Resolution 2222 (XXI) and the Outer Space Treaty. Therefore, to insure the exploration and exploitation of outer space for the benefit of all mankind, and to prevent the extension of a divided world order into a new environment, the Court should accord the lunar surface the status of res communes which precludes national appropriation by claim of sovereignty.

II. THE ESTABLISHMENT OF FRENCH LUNAR SOVEREIGNTY WILL DESTROY THE EFFECTIVENESS OF THE OUTER SPACE TREATY IN VIOLATION OF THE GENERAL PRINCIPLE OF LAW RECOGNIZED BY CIVILIZED NATIONS CONDEMNING INTERFERENCE WITH EXISTING AGREEMENTS BY THIRD PARTIES.

In civil and common law countries, it is illegal for a third party to knowingly interfere with an existing agreement. Prosser, Torts § 123 (3d ed. 1964); Payne, The Tort of Interference with Contract, 7 Curr. Leg. Prob. 94 (Eng. 1954); Code Civil art. 1382 (Fr. 53d ed. Dalloz 1954); Judgment of 2 Juillet, 1918, Cass. Req. [1918] Sirey Recueil General 1, 200; Judgment of 9 Mai, 1919, Cour d'Appel de Paris [1920] Sirey Recueil General 2, 57; Judgment of 9 Avril, 1921, Cass. Req. [1922] Sirey Recueil General 1, 160; Bürgerliches Gesetzbuch § 826 (Rosenthal-Bohlenberg 1966); RG JW 326 (Ger. 1913) (II Senat Reichsgericht); RG JW 866 (Ger. 1913) (VI Senat Reichsgericht). This principle acknowledges that parties to an agreement have a legal interest which protects the integrity of their contract from willful frustration by strangers. Prosser, op. cit. supra at 950. Therefore, as a principle of law generally recognized by civilized nations, it is applicable in international adjudications. Stat. Int'l Ct. Just. art. 38, para. 1(c).

A decision upholding French sovereignty will effectively frustrate the objective of the Treaty. This objective is

cooperative exploration and exploitation of outer space and celestial bodies for the benefit of all mankind. Its bases are Articles I and II of the Treaty which insure freedom of access to celestial territory and prohibit appropriation of celestial bodies by claim of sovereignty. The cooperation envisaged by the Treaty is absolute. It endows the lunar surface with a legal status which cannot be altered by the individually exercised will of any nation merely on the basis of unilaterally determined political necessity. Thus, by assuring access and prohibiting national appropriation, the Treaty liberated celestial bodies from the restraint which has long obstructed the scientific investigation and efficient use of terrestrial resources, that is, the necessity of regularly obtaining permission to gain access from the territorial sovereign, a permission which can be withheld arbitrarily. Recognition of the French claim would deny the effect of Articles I and II and, thereby, render the Treaty meaningless by permitting not only France, but all other nations, to frustrate its primary objective. Such a result is repugnant to the general principle of law which declares it illegal for a third party to knowingly interfere with an existing agreement. Therefore, recognition of the French claim would necessarily violate international law.

Because France has signed the Treaty, her obligation to refrain from interfering with its objectives is even more compelling. As a general rule, a signatory state is, at least, under a duty to refrain from any act pending ratification which would render impracticable the performance of treaty obligations by the parties. Harvard Research in International Law, Treaties, 29 Am. J. Int'l L. 779 (Spec. Supp. 1935); Counter Memorial of Poland, German Interests in Upper Silesia, P.C.I.J., ser. C, No. 11, 631-32 (1926); McNair, Law of Treaties 204 (1961); Letter of Secretary of State Hay, Jan. 5, 1904, U.S. For. Rel. 299 (1903).

Moreover, the practice of nations indicates that actions similar to those taken by France may destroy the value of a particular international agreement. The doctrine of rebus sic stantibus is a direct response to situations created, as here, by a vital change in external circumstances having the effect of frustrating the objective of a treaty. Specifically, the doctrine recognizes that such situations may warrant unilateral denunciation. Oppenheim, International Law § 539 (7th ed. Lauterpacht 1948); Opinion of Acting Attorney General Biddle with Respect to the International Load Line Convention, 4 Ops. Att'y Gen. 119 (1941). This doctrine illustrates that certain external acts may substantially alter the context in which a treaty

operates and, thus, render it meaningless. This, indeed, would be the effect of a decision favoring the Republic of France.

Finally, a decision for France would seriously impede the world community's efforts toward developing a rational extra-terrestrial legal order. Such a decision would permit non-parties to appropriate celestial bodies, or portions thereof, while forcing other nations to choose between continuing to honor their obligations or abrogating the Treaty by asserting their own sovereign claims. Considering the potential strategic and economic importance of the lunar domain, a decision for France might provoke the immediate denunciation of the Treaty by its parties in the interests of national security. Such a rejection of the Treaty's framework for peaceful activity would destroy the prospects for cooperative exploration and utilization of outer space and celestial bodies.

III. FRANCE HAS NOT ESTABLISHED A VALID CLAIM OF SOVEREIGNTY UNDER TRADITIONAL REQUIREMENTS OF INTERNATIONAL LAW.

Traditionally, occupation must be "effective," to support a claim of sovereignty over uninhabited territory. That is, it must offer certain guarantees of minimum order to other states and their nationals. Island of Palmas Arbitration, 2 U.N. Rep. Int'l Arb. Awards 831, 846 (1928). These guarantees, at the

very least, must reflect the beginnings of an administration over the claimed area. Legal Status of Eastern Greenland P.C.I.J., ser. A/B, No. 53, 45-64 (1933); Brooks, National Control of Natural Planetary Bodies -- Preliminary Considerations, 32 J. Air L. & Com. 315, 320-21 (1966). The French claim is based only upon two isolated incidents of temporary occupation, accompanied by the purely symbolic acts of flag raising and proclamation. The French position is further weakened by her dependence upon the Soviet Union for spacecraft and launch sites. Such dependence requires continuing harmony in Franco-Soviet relations, as well as Soviet technological ability to support, in effect, two space programs. Thus there is no assurance that France will maintain even periodic occupation of her lunar station.

Moreover, in the Eastern Greenland case, the Court observed that the requirements of establishing sovereignty are less stringent where there is no competing claim. Legal Status of Eastern Greenland, supra at 46. In this case, the world community is, in a very real sense, "competing" against the self-interest of a single sovereign; thus France must be held to the highest standards of "effective occupation" rather than to those applied in the absence of adverse claimants. Therefore, because

France's occupation has been of limited duration, because she is unable to guarantee minimum order within the claimed area, and because there is no assurance that she will maintain even sporadic occupation of her lunar station, this Court must deny France's claim under traditional rules of international law.

IV. FRANCE'S SEIZURE OF THE MINERAL SAMPLES LAWFULLY IN THE POSSESSION OF THE UNITED STATES' ASTRONAUTS WAS ILLEGAL.

A. The taking of the mineral samples by the United States' astronauts was lawful regardless of whether the moon is characterized res communes or res nullius.

The French claim to the lunar surface is invalid if the moon is characterized res communes because the purpose of that characterization is to secure the lunar surface from appropriation by claim of national sovereignty. It is essential to the accumulation of useful knowledge that lunar materials be taken to earth for analysis. Cocca, Legal Status of Celestial Bodies and Economic Status of Celestial Products, Seventh Colloquium of the Law of Outer Space 15, 20 (1964); McDougal, Lasswell & Vlasic, Law and Public Order in Outer Space 790-802 (1963). Therefore, the res communes characterization would not make the transportation of the mineral samples to earth by the American astronauts illegal.

Assuming that celestial bodies are subject to national appropriation, the American astronauts lawfully acquired the mineral samples. Traditional principles of the law of discovery recognize that a res nullius is the property of the first party to possess the res physically. Since the French claim was not perfected under traditional principles, the samples collected by the United States' astronauts were subject to appropriation. Therefore, under either characterization, the possession acquired by the American astronauts was lawful.

B. The international law of distress prohibits France from seizing the mineral samples under the aegis of her customs regulations.

The United States' astronauts and their possessions are entitled to immunity from French customs jurisdiction because of their distressed condition, regardless of the validity of France's claim of lunar sovereignty. Consent to rescue in an emergency is not consent to submit to the legislative jurisdiction of the rescuing nation. The United States' space capsule was forced to land in the Indian Ocean because of a malfunction in the return vehicle. The importance of effecting an immediate rescue in these circumstances was dramatically illustrated when a United States' spacecraft sank in the Atlantic Ocean, nearly

resulting in the death of an American astronaut. N.Y. Times, July 22, 1961, p. 1, col. 8. Measured by any reasonable standard, the United States spacecraft in the case at bar was analogous to a ship in distress needing immediate assistance. Therefore, the American astronauts, forced by distress to seek the shelter offered by France, had a right to immunity from French customs authority.

The reason for the distress through force majeure exception to general principles of legislative jurisdiction in international law is a recognition of the manifest injustice which would result if non-nationals were punished for a breach of laws by reason of circumstances over which they have no control. Callaghan (United States v. Mexico), 4 Moore's Int. Arb. 4346 (1898); The Creole (United States v. Great Britain), 4 Moore's Int. Arb. 4375 (1898); The Enterprise (United States v. Great Britain), 4 Moore's Int. Arb. 4349 (1898); The York (United States v. Great Britain) 4 Moore's Int. Arb. 4378 (1898). The exception is recognized even under French law. Ships forced by distress to enter a French port are not subject to general regulatory law. Thus, French law dispenses with the visit of maritime police and customs officers. Jessup, Law of Territorial Waters and Maritime Jurisdiction 206-07 (1927).

The exception is applicable to the case at bar and entitles the United States to claim, as of right, an immunity for the seized minerals from the exercise of French jurisdiction through her customs authority. The spacecraft was at all times under the protection of the United States flag. Mere circumstance brought the American astronauts within the physical power of the French government. Their consent to be saved and carried to safety cannot be construed to include a consent to submit to the jurisdiction of French customs authorities.

Since the mineral samples were never legally present within French jurisdiction, France had no right to appropriate them. France should have permitted the American astronauts to retain the samples and, then, if she believed her rights had been violated, instituted an action before a domestic or international tribunal for the samples' return. However, in this case, the improper exercise of French authority amounted to a breach of international law, resulting in injury to the United States and her nationals.

V. FRANCE IS NOT LEGALLY ENTITLED TO AN APOLOGY.

Since France did not and could not have sovereignty over the territory in question, she is not legally entitled to an

apology by the United States. 2 Hackworth, Digest of International Law 282-334 (1941); 2 Moore, Digest of International Law 362-428 (1906); Wright, Legal Aspects of the U-2 Incident, 54 Am. J. Int'l L. 836 (1960).

CONCLUSION

The United States respectfully requests the return of the mineral samples and a declaration by the Court that France is not entitled to an apology from the United States.

Respectfully submitted,

M. Elizabeth Culbreth

Daniel W. McAllen, III

On the Memorial:

Alvin P. Adams, Jr.
John J.A. Hossenlopp
Charles J. Pitman

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