

IN THE
INTERNATIONAL COURT OF JUSTICE

April, 1967

CASE NO. 1

UNITED STATES OF AMERICA

Applicant,

v.

REPUBLIC OF FRANCE,

Respondent.

MEMORIAL FOR RESPONDENT

M. Elizabeth Culbreth,
Daniel W. McAllen, III,
Agents for France.

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 France have filed applications accepting the jurisdiction of the Court and all applicable local remedies have been exhausted. R. p.3.

STATEMENT OF FACTS

The Treaty Governing the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (hereinafter Outer Space Treaty) came into force after the deposit of five ratifications, including those of the United States, the Soviet Union and the United Kingdom. France signed the Treaty and voted in favor of a United Nations General Assembly resolution commending the Treaty to its members. France has not yet ratified the Treaty.

Shortly after the Treaty became effective among the ratifying States, France successfully launched a lunar expedition utilizing a spacecraft and launch site provided by the Soviet Union. The Soviets had completed a lunar expedition six months earlier, but had not asserted a claim of sovereignty.

The French expedition established a temporary station,

raised the French flag, and proclaimed sovereignty over the area within a twenty kilometer radius of the station site. France immediately notified the Secretary General and asked that he inform all governments of the French claim.

The initial expedition returned to earth after ten days, leaving supplies and the French flag at the station. Three months later, under the same agreement with the Soviets, a second French expedition was launched, with orders to protect French lunar territory. The expedition landed in the claimed area, reoccupied the initial site for nine days, and reaffirmed the French claim. Five days after the French landing, a four-man United States expedition arrived. The American astronauts entered the claimed area, were discovered by French officers, warned that they were intruding on French soil, and asked to leave. The Americans departed under protest, taking with them certain mineral samples which they had gathered inside the French enclave.

Two days later, the American expedition returned to earth, landing in the Indian Ocean because of a malfunction in their space vehicle. The astronauts and their capsule were retrieved by a French warship and taken to France. At the French port, customs officials recovered possession of the mineral samples. The French courts refused to order the return of the samples to the astronauts. When the United States protested, the French

government refused to return the samples on the ground that they were French public property, and requested an apology from the United States for the violation of French lunar sovereignty. The United States has reiterated its claim to the samples in its application to the ICJ, and has refused to apologize

QUESTIONS PRESENTED

1. Whether temporary occupation and symbolic acts, followed by reoccupation, established a valid claim of French sovereignty over a limited portion of the lunar surface under established principles of international law.
2. Whether Resolution 2222 (XXI) or the Outer Space Treaty have altered the established principle that sovereignty over unclaimed and unoccupied territory may be acquired by "effective occupation."
3. Whether France's repossession of the mineral samples at her port of entry was a proper exercise of the right of self-help to recover property taken from her in violation of international law.

RELIEF REQUESTED

France requests the Court to declare that the United States is legally obligated to apologize to France for violating her sovereignty, and that the Court reject the United States' submission that France has a duty to return the mineral samples.

SUMMARY OF ARGUMENT

Temporary occupation and symbolic acts, followed by reoccupation are sufficient grounds to establish French sovereignty to a portion of the lunar surface under existing rules of international law. International law requires "effective occupation," not permanent settlement; therefore the construction and periodic occupation of a lunar station, the symbolic acts of flag raising and proclamation of sovereignty, together with immediate publication were sufficient to perfect the French claim.

United Nations Resolution 2222 (XXI) has not modified existing rules of international law and, therefore, the French claim was a proper exercise of French sovereign rights. Furthermore, in the absence of ratification by France, the Outer Space Treaty does not invalidate the French claim. In reaching its decision, France urges the Court to apply accepted principles of international law as required by Article 38 of its Statute, since the Court's effectiveness in the world community is

founded upon the premise that its decrees are based upon established, not incipient, rules of international law.

Once the Court recognizes the French claim of sovereignty, it necessarily follows that France's territorial rights were violated and that her repossession of the mineral samples was a proper exercise of the right of self-help. The law of distress does not preclude France from recovering the wrongfully acquired mineral samples. Therefore, since her actions have been entirely in accord with established rules of international law, France urges the Court to declare that she is legally entitled to retain the mineral samples and to receive an apology from the United States.

ARGUMENT

I. TEMPORARY OCCUPATION AND SYMBOLIC ACTS, FOLLOWED BY REOCCUPATION, ESTABLISH A VALID CLAIM OF FRENCH SOVEREIGNTY OVER A LIMITED PORTION OF THE LUNAR SURFACE UNDER ESTABLISHED RULES OF INTERNATIONAL LAW.

The generally recognized principle of international law that a state may acquire sovereignty over territory by the unilateral act of occupation applies to natural satellites of the earth. Brooks, National Control of Planetary Bodies -- Preliminary Considerations, 32 J. Air L. & Com. 315, 318-22 (1966). This conclusion is based upon two premises: first, nations have agreed that existing rules of international law apply to activities of States in outer space, U.N. General Assembly Resolutions

1721 (XVI) and 1962 (XVIII); second, as will be demonstrated below, the lunar surface is properly characterized res nullius and is thus subject to claims of sovereignty. Therefore, the acts of the French expedition effectively establish sovereignty over a portion of the lunar surface.

The lunar surface is properly characterized res nullius because of its similarity to the unsettled regions of the earth during historic periods of exploration. Brooks, supra at 320. See Verplaetse, Can Individual Nations Obtain Sovereignty Over Celestial Bodies, Fourth Colloquium of the Law of Outer Space 311, 317 (1961). The moon and other celestial bodies are no longer considered incapable of exploration, occupation, and perhaps settlement. See Haley, Space Law and Government 1-9 (1963). Current technology permits extended lunar exploration and occupation. Furthermore, the physical characteristics of the lunar surface are similar to those of terrestrial land masses heretofore subject to claims of sovereignty under established principles of international law. Consequently, acts effective to establish sovereignty under customary international law will be sufficient to establish French sovereignty over the area claimed.

International tribunals apply a subjective standard in determining the degree of activity required to support a claim of sovereignty. Island of Palmas Arbitration, 2 U.N.Rep. Int'l

Arb. Awards 829, 877 (1928). The standard, expressed in terms of "effective occupation", recognizes a claim of sovereignty based upon the actual display of sovereign rights coupled with a guarantee of minimum order and protection to persons within the claimed area. Von der Heydte, Discovery, Symbolic Annexation and Virtual Effectiveness in International Law, 29 Am. J. Int'l L. 448, 463 (1935). A claim of sovereignty over uninhabited areas, however, does not necessarily presuppose actual occupation. "[T]he first unhindered appearance of sovereign authority in an uninhabited region involves the actual acquisition of that territory." Id. at 464. In the Eastern Greenland Case the Permanent Court of International Justice upheld a claim to an inaccessible region based upon periodic acts of sovereignty by the claimant. Legal Status of Eastern Greenland, P.C.I.J., ser. A/B, No. 53, 22, 45-49 (1933). The Court indicated that two elements were involved: (1) the intention to act as a sovereign; and (2) some actual display of exercise of sovereign authority. Id. at 45-46. The Court continued:

"...in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." Id. at 46.

Clearly, the French claim is based upon facts which demon-

strate the intent and ability to act as sovereign. The first expedition occupied the claimed portion for ten days. Obviously, the area was previously uninhabited. During occupation the astronauts raised the French flag and proclaimed sovereignty. The French government immediately communicated notice of her claim to all governments through the United Nations. The second expedition, nine days in duration, reoccupied precisely the same area claimed by the first expedition, and immediately reaffirmed French sovereignty. French intention was made particularly clear by objections to the presence of United States' astronauts within the claimed territory. These objections were honored by timely withdrawal. The "effectiveness" of French occupation is in no way lessened by her current reliance upon spacecraft and launch sites provided under an agreement with the Soviet Union. In fact, recent history contains several instances where the exercise of territorial sovereignty was dependent upon the cooperation of another state. Dramatic examples are the British enclaves of Basutoland and Swaziland, which were surrounded by the Union of South Africa, and the Portuguese enclaves of Dadra and Nagar-Aveli in India. See Case Concerning Right of Passage Over Indian Territory [1960] I.C.J. Rep. 1, 40. A ten-year agreement concerning space exploration between France and the U.S.S.R. is evidence that cooperation in this area will continue. N.Y. Times, July 1,

1966, p. 1, col. 7. In addition, France has made rapid progress in the development of her own space program. N.Y. Times, Feb. 9, 1967, p. 14, col. 7. Therefore, any reliance upon future French inability to insure at least periodic occupation is purely conjectural.

In light of her successive and deliberate acts of occupation and her unequivocal intention to impose sovereignty over the limited area claimed, France has satisfied the international legal prerequisites for establishing a claim of sovereignty. See Verplaetse, supra at 321. Therefore, French sovereignty has been violated by the intrusion of the United States' astronauts. This intrusion was contrary to the general principle of international law that one state "...may not exercise its power in any form in the territory of another state." Case of the S.S. Lotus (France v. Turkey), P.C.I.J., ser. A. No. 10, 18 (1927).

II. THE ESTABLISHED PRINCIPLE THAT SOVEREIGNTY MAY BE ACQUIRED OVER UNINHABITED REGIONS HAS NOT BEEN ALTERED BY RESOLUTION 2222 (XXI) OR BY THE OUTER SPACE TREATY.

A. Resolution 2222 (XXI) has not established a principle of international law prohibiting claims of sovereignty over celestial bodies.

General Assembly Resolutions do not normally have binding legal effect. The United States delegation's interpretation that Resolution 2222 (XXI) reflects international law "as

accepted by members of the United Nations" is not supported by the attitude or conduct of the members toward this and prior resolutions. Schick, Problems of Space Law in the United Nations, 13 Int'l & Comp. L. Q. 969, 971 (1964). Resolutions have frequently been disregarded by member states, even where the delegates of the disregarding state have supported the resolution. Ibid. In addition, the history of the San Francisco Conference clearly indicates that the authors of the U.N. Charter did not intend to grant the General Assembly legislative power. Falk, The Quasi-Legislative Competence of the General Assembly, 60 Am. J. Int'l L. 782, 783 (1966). Financial resolutions have been considered binding, but only because budgetary authority is expressly conferred. Certain Expenses of the United Nations Case, [1962] I.C.J. Rep. 51. Resolutions regarding matters other than those over which the Assembly has express authority are not binding. Voting Procedure on South West Africa Case, [1955] I.C.J. 155 (Lauterpacht J., separate opinion); Brierly, The Law of Nations 110 (6th ed. 1963).

For resolutions to become legally binding as custom, they must be accorded general recognition, demonstrated by conforming acts. Sloan, The Binding Force of a 'Recommendation' of the General Assembly of the United Nations, 25 Brit. Yb. Int'l L. 1, 19 (1948). At present, there is insufficient evidence of conforming activity to conclude that Resolution 2222 (XXI) em-

bodies a rule of customary international law. Moreover, while supporting Resolution 1962 (XVIII), which preceded Resolution 2222 (XXI), France explicitly rejected the possibility that approval might be interpreted as an intent to be legally bound:

...while supporting and subscribing to the principles contained in the declaration... my delegation could not...give this declaration more value than that of a declaration of intention. We do not...consider that a resolution of the General Assembly, even though adopted unanimously, can in this case create...juridical obligations incumbent upon member states. Such obligations can flow only from international agreements. U.N. Doc. No. A/C.1/PV.1545, at 21 (1963).

Thus, detrimental reliance upon French approval of Resolution 2222 (XXI) cannot reasonably be urged as a ground for imposing a legal, or moral, obligation to refrain from claiming sovereignty. The French position has been clear from the outset, and any reliance upon a contrary position is unjustified.

In any event, if the Resolution were interpreted as expressing a rule of established international law, the Outer Space Treaty would, in effect, become unnecessary. Assuredly, neither the General Assembly nor the parties to the Treaty intended the Treaty as a mere formalization of an existing rule.

B. In the absence of ratification, France is not bound by Article II of the Outer Space Treaty prohibiting claims of sovereignty over celestial bodies.

General principles of international law indicate that an unratified treaty is an inchoate agreement which imposes no

legal duty upon its signatories. Harvard Research in International Law, Treaties, 29 Am. J. Int'l L. Spec. Supp. 779 (1935) (hereinafter Harvard Research). By its very terms the Outer Space Treaty remains inchoate until its stated requirements are performed by each signatory. The Treaty provides: "This Treaty shall be subject to ratification by the signatory states." Outer Space Treaty, art. XIV, para. 2. When ratification is expressly required, mere signature does not legally bind the signatories. Restatement (Second), Foreign Relations Law of the United States § 122 (1965); Harvard Research, supra at 765; Papers Relating to the Foreign Relations of the United States, H. Rep., Doc. No. 1, 58th Cong., 2d Sess. 285 (1905). The Outer Space Treaty contains no specific obligation to act consistently with its provisions prior to ratification. Therefore, acts inconsistent with its provisions are not prohibited, even when such acts are performed by its signatories. Harvard Research, supra at 787.

The Outer Space Treaty does not create international law effective against all States. "A treaty never by its own force alone creates obligations for non-parties." Comments, Draft Art. 58 Int'l L. Comm'n. as cited in Kelsen, Principles of International Law 487 (1966). Treaty rules may, in time, become binding upon third party States if such rules become

international law. But in those instances it is the customary observance and not the treaty itself that creates law. In the instant case, only nineteen States of more than one hundred and thirty had ratified the Treaty at the time this dispute was submitted to the Court. This is insufficient evidence to indicate the present existence of a customary rule of law embodying the Treaty's terms.

Any good faith obligation which might be imposed upon a signatory prior to ratification would be a moral, not a legal one. Harvard Research, supra at 781. In the instant dispute, even a moral duty does not arise. The opinions of tribunals and writers asserting the moral duty of a signatory to adhere to treaty provisions assume that the alleged violation occurs pending ratification, and that ratification is in fact obtained subsequent to the alleged violation. "Any arrangement, whether express or implied, that a treaty take effect for any purpose prior to the completion of the contractual relationship. . . is obviously subject to the condition that the relationship is perfected." 2 Hyde, International Law 1451 (2d ed. 1947). Since one of the purposes of ratification is to provide time for careful consideration of whether a State should bind itself to a treaty, mere signature cannot be given obligatory effect. Brierly, The Law of Nations 320 (6th ed. 1963). Absent the ex-

explicit intention to consider mere signature binding, France cannot be deprived of her right to rely on the Treaty's express requirement of ratification. Restatement (Second), Foreign Relations Law of the United States § 122 (1965).

In any event, there is no indication that the Outer Space Treaty has been registered with the Secretariat as required by the U.N. Charter. U.N. Charter art. 101, para. 2. Therefore, the United States is expressly foreclosed from relying upon the Treaty by the provision precluding invocation of an unregistered treaty, by a party, ". . . before any organ of the United Nations." U.N. Charter art. 102, para. 2.

Recognition of limited French lunar sovereignty will not frustrate the purpose of the Treaty. Cooperative development of celestial resources can be accomplished in a manner compatible with French sovereignty and, in fact, the recognition of limited claims may prove essential to achieving maximum benefits from resource exploitation. Jenks, Space Law 202 (1966). Indeed, France's lunar activities do not evidence her unwillingness to pursue cooperative undertakings in outer space.

- C. The Court of Justice will best serve the development of the international legal system by applying accepted principles of international law, rather than amorphous expressions of general expectations.

Judicial restraint has played a key role in the growth of

the international legal system. Its importance arises from the fact that the International Court of Justice is unique among judicial bodies. Unlike municipal courts, submission to its jurisdiction is essentially voluntary. Stat. Int'l Ct. Just. art. 35. In addition, the absence of an overriding sovereign renders the effectiveness of its decrees dependent upon the interaction of many forces. To a great extent, compliance with the Court's decisions is necessarily founded upon the respect commanded by the tribunal. The Court's authority and the ultimate strength of its decisions as an effective means of ordering international relationships are based upon the tradition of restraint. Clearly, governments not prepared to entrust legislative functions to representative international bodies will not rely upon analogous activity by a tribunal directed by its own statute to apply established rules of international law. Lauterpacht, The Development of International Law by the International Court 76 (1958).

France recognizes that "judicial legislation" has been universally instrumental in the development of domestic law. But a domestic court's decisions are subject to modification by the will of a legislature. In the international context a system of "checks and balances" and "separation of powers" is absent, compelling an international court to act with caution and restraint in determining the applicable law. There-

fore, the Court will best serve the continuing development of the international legal system by reaching its decision in accordance with existing rules of international law. Stat. Int'l Ct. Just. art. 38, para. 1.

III. FRANCE'S REPOSSESSION OF THE MINERAL SAMPLES AT HER PORT OF ENTRY WAS A PROPER EXERCISE OF THE RIGHT OF SELF-HELP TO RECOVER PROPERTY WRONGFULLY TAKEN FROM HER.

When property has been taken from a nation in violation of international law, the aggrieved sovereign may engage in self-help to recover that property. The right of self-help is well established in international law when the invoking State's acts are defensive in nature, even if its exercise results in conflict with the legal rights of other States. See 1 Hyde, International Law 106 (1922); Hall, International Law 278 (7th ed. 1917). In fact, under appropriate circumstances it would permit France to enforce her prescriptions even into contiguous zones and the more distant reaches of the oceans. Rosseau, Droit International Publis Apposofondi 218-22 (1958); Schwarzenberg, A Manual of International Law 123-25 (4th ed. 1960). In the instant case, application of French customs law was merely a protective measure in vindication of a violation of French sovereignty. Therefore, France has properly invoked the remedy of self-help to recover possession of public property removed from French territory in

violation of her sovereignty.

The law of distress does not protect a possessory interest of a distressed party when that interest was created by the party's violation of international law. Cf., The Enterprise, The Hermosa, and the Creole cited in 2 Moore, Digest of International Law 350-62 (1906) and 4 Moore, International Arbitrations 4349-78 (1898). International tribunals applying the distress doctrine have protected only that property which is lawfully held by the distressed possessor. E.g., United States ex rel. Hoff v. United Mexican States, Gen. Cl. Comm'n. (1929), Opinions (1929). In the instant case, the possessory interest of the American astronauts was obtained by violating French sovereignty. Therefore, under the territorial principle of jurisdiction, France was competent to apply its customs law to repossess its public property.

Even if France could not lawfully appropriate the claimed lunar mineral samples while those resources had celestial situs, it is well established that a sovereign nation may appropriate to her own use property located within her borders. See 3 Hackworth, Digest of International Law 652-65 (1942). Therefore, the French taking at her port of entry, in any event, was lawful, and France would be obligated only to provide adequate compensation for the property taken.

In the alternative, France relies upon the 'general principle

of law recognized by civilized nations," Stat. Int'l Ct. Just. art. 38, para. 1, that a party whose lawful possession of property has been wrongfully interrupted may recover that property from the unlawful holder. Holmes, The Common Law 221-26 (1881); Bürgerliches Gesetzbuch 958 (Ger. 15th ed. Rosenthal 1966); R.S.F.S.R. Civil Code arts. 151 & 157 (Gray ed. 1965) (U.S.S.R.). This right of possession will arise if the claimant simply possesses the locus wherein the article rests. Holmes, supra at 222. France had possession of the mineral samples as component parts of the limited portion of the lunar surface over which she exercised control. This union of France's physical power over the locus and her manifest intent to exercise control resulted in a legally protected right of possession, regardless of the validity of her claim of sovereignty. Homes, supra at 216; Pollock & Wright, Essay on Possession in the Common Law 14 (1888). Therefore, the United State's astronauts improperly interrupted the peaceful exercise of that possession, and France had the right to repossess that property when it came again within her power.

IV. FRANCE HAS A LEGAL RIGHT TO AN APOLOGY.

The deliberate intrusion of the United States' astronauts into French lunar territory was a violation of French sovereignty and, the seizure of mineral samples was a wrongful taking of

French public property. These acts reflect a flagrant disregard for the sovereign rights of France and have seriously injured the international prestige of the Republic. Where sovereignty has been violated, international law expressly recognizes that the ensuing injury to national honor and prestige may be redressed by apology from the nation responsible. See 2 Hackworth, Digest of International Law 282-334 (1942); 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

France has established the validity of her claim to sovereignty under customary principles of international law. The Outer Space Treaty and Resolution 2222 (XXI) do not affect these established rules; therefore, French sovereignty was violated by the intrusion of the American astronauts into the claimed territory. Accordingly, France asks the Court to declare that she be allowed to retain the mineral samples taken from French soil, and that the United States apologize for its violation of French sovereignty.

Agents for France:

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Daniel W. McAllen, III

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