
IN THE INTERNATIONAL COURT OF JUSTICE

March 1980

PEOPLES ASTRAL UNION

Applicant

v.

FEDERATION OF CELESTIAL STATES

Respondent

MEMORIAL FOR APPLICANT

Agents for the
Peoples Astral Union

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TABLE OF CONTENTS

INDEX OF AUTHORITIES 1

JURISDICTION vi

STATEMENT OF FACTS vi

QUESTIONS PRESENTED vi

SUMMARY OF ARGUMENT vii

ARGUMENT AND AUTHORITIES

I. FEDERATION IS ABSOLUTELY LIABLE FOR THE CONSEQUENCES OF ITS DELIBERATE ACT OF AGGRESSION ON PAU'S OBJECT AFTER DECOUPLING 1

A. Federation's Attempt to Destroy PAU's Space Object Was an Act of Aggression Contrary to International Law and Cannot Be Justified As Self Defense or Necessity 1

B. Federation is Solely Responsible for the Effects of Its Act of Aggression Under the Liability Convention and Under General International Law. 4

II. FEDERATION MUST BEAR SOLE RESPONSIBILITY FOR ALL DAMAGE TO THE PROPERTY AND NATIONALS OF BOTH STATES 6

A. Federation and PAU Assumed Joint and Several Liability for Damage Resulting From Their Joint Venture Under Article III of Their Bilateral Treaty. 6

B. Federation Has Agreed to indemnify and Hold PAU Harmless for All Liability Arising out of the Fault of Federation Personnel and UTS. 6

C. The Damage Related to Each of PAU's Space Objects Was Caused by the Failure of Structural Components Designed by UTS. 7

D. Federation is Solely Liable for Damages from the Collision of PAU's Space Objects With the Airliner and the Ground-Launched Federation Object Because of Their Gross Negligence. 9

III.	PAU'S NUCLEAR TESTS WERE SUPPORTED BY INTERNATIONAL LAW. . .	10
A.	<u>PAU's Peaceful Nuclear Tests Were Permitted Under the Outer Space Treaty</u>	10
B.	<u>PAU's Nuclear Tests Were Within the Customary Rules and Norms Which Have Evolved Through the Peaceful Exploration and Use of Outer Space</u>	10
C.	<u>Peaceful Nuclear Tests in Outer Space Which Provide Data Incidentally Beneficial to Weapons Design Are Not Prohibited Under International Law</u>	11
D.	<u>PAU's Nuclear Tests Were Permitted Under the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water</u>	12
1.	PAU's nuclear tests do not constitute "nuclear explosions" within the meaning of the Nuclear Test Ban Treaty.	12
2.	PAU did not consent to be bound to a literal interpretation of the "or other nuclear explosion" provision	13
3.	Even if PAU was literally bound by the "or other nuclear explosion" clause, the effect of that clause has since lapsed, and PAU has effectively withdrawn from the Nuclear Test Ban Treaty	14
IV.	IN ITS ACTIVITIES CONDUCTED IN OUTER SPACE DURING THE DURATION OF THE JOINT VENTURE BETWEEN THE PARTIES, FEDERATION HAS VIOLATED INTERNATIONAL LAW AND TREATY LAW . .	15
A.	<u>Federation Violated Treaty Law and International Law Governing the Sovereignty of a State Over Its Airspace</u>	15
B.	<u>By Placing a Satellite in Geostationary Orbit Over PAU's Territory, Federation Violated the Sovereignty of PAU Over One of Its Major Resources -- the Geostationary Orbit.</u>	16
C.	<u>Federation Violated International Law by Its Unilateral Satellite Broadcast to PAU receivers Without Agreement of PAU</u>	18
1.	Federation violated treaty principles and international law in its broadcasting activities conducted over objections of PAU	18

2.	Federation's broadcast violated norms of international law concerning the sovereignty and noninterference in the affairs of other countries. . .	20
D.	<u>Federation's Remote Sensing Activities Violated The Treaty Between the Parties and International Law</u>	21
1.	Federation's abuse of the remote sensing data acquired by its satellite in geostationary orbit was an act of aggression against PAU and violated international law.	21
2.	Federation's remote sensing of PAU's territory and dissemination of the data without PAU's consent violates international law respecting the sovereignty of each state over its resources	22
3.	Federation activities with the multi-spectral scanner violated the Treaty Between the Parties. . .	23
	CONCLUSION AND PRAYER FOR RELIEF	24

INDEX OF AUTHORITIES

CONSTITUTIONS

United Nations Charter 3

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JURISDICTION

The Government of the Federation of Celestial States (Federation) and the Government of the Peoples Astral Union (PAU) have, by special agreement between the parties, submitted this dispute to the International Court of Justice in accordance with the applicable rules of law described in Article 36 of the Statute of the International Court of Justice. Both parties agree that the Court may where appropriate decide the issues ex aequo et bono. Federation has assumed responsibility and representation of United Technical Services, Inc. (UTS).

STATEMENT OF FACTS

The parties have stipulated that the information in the Statement of Facts is true.

QUESTIONS PRESENTED

- I. Was Federation's destruction of the PAU space object by anti-satellite interceptor an act of aggression under international law?
- II. Is Federation solely liable for all damage which resulted from their intentional acts and gross negligence and for the negligence of UTS?
- III. Were PAU's peaceful nuclear tests in space permitted by international law?
- IV. Did Federation violate international law and its treaty obligations to PAU by, without PAU's consent:
 - A. invading PAU's airspace;

- B. appropriating PAU's geostationary orbit;
- C. unilaterally broadcasting by satellite to PAU's receivers; and
- D. gathering, disseminating and using data on PAU's resources to their economic detriment? .

SUMMARY OF ARGUMENT

Federation's attempt to destroy PAU's space object was an act of aggression under international law. Breaching its duty to consult with PAU about any potential hazard, Federation unreasonably and unjustifiably interfered with PAU's right of exclusive control over its space object. Consequently, Federation is liable for all damage resulting from use of its anti-satellite interceptor.

Although PAU and Federation are jointly and severally liable to third parties for damage related to their joint venture, PAU is entitled to indemnification for any claims resulting from the negligence of Federation or UTS. Because failure of the UTS self-destruct mechanism caused the crash of the PAU test satellite, Federation must save PAU harmless for the resulting damage to Federation. Federation must also bear sole responsibility for the damage caused by PAU's space lab. Under the Treaty Between the Parties, Federation was obligated to provide and test the space lab decoupler. Federation's provision of a defective decoupler was grossly negligent, thus PAU cannot be held liable for the resulting harm. Federation's additional wrongful acts, that of launching another satellite and attempting to destroy PAU's space lab, completely exonerated PAU from any liability.

PAU's peaceful nuclear tests complied with the internationally recog-

nized requirement that outer space be reserved for exclusively peaceful use. The discovery of data only incidentally beneficial to weapons design does not alter the tests' peaceful purpose. Since the Nuclear Weapons Test Ban Treaty of 1963 was not intended to prohibit the peaceful use of nuclear material, PAU was acting in accord with internationally sanctioned objectives. Even if the Treaty could be considered applicable, PAU nonetheless is not in violation since PAU's public statements of intent effectively withdrew its consent to be bound.

During the joint venture, Federation conducted numerous activities in breach of both international law and treaty. In returning to earth, Federation's space object deliberately penetrated PAU's airspace in blatant violation of Article XIII of the Treaty Between the Parties and international law. Federation likewise violated PAU's sovereignty by placing a satellite in geostationary orbit over PAU's territory. Federation's effective appropriation of this orbit, is in violation of PAU's legitimate claim to jurisdiction over this limited natural resource, analogous to accepted claims to resources of the moon and the sea. Federation used this illegally placed satellite to unilaterally broadcast into PAU's territory. Such a broadcast constitutes interference in PAU's internal affairs and violates the consensus of most states that such broadcasts may only be permitted upon agreement of the receiving state.

Federation's remote sensing of PAU's territory from the space lab, using PAU's multi-spectral scanner, and its unilateral dissemination of the information obtained was contrary to the general consensus of most states that these activities require consent of sensed states. The sovereignty of each state over its resources, weakened by such dissemination without con-

sent, is a major concern of those states now reaching agreement in the UN on principles to govern remote sensing. Federation's remote sensing actions also violated the Treaty Between the Parties in disregarding obligations to carry out activities in cooperation with PAU. Federation's satellite was also used to carry on remote sensing of PAU territory. Federation used the data obtained to profit at PAU's expense, an act of economic aggression according to UN resolutions to which Federation has concurred.

I. FEDERATION IS ABSOLUTELY LIABLE FOR THE CONSEQUENCES OF ITS DELIBERATE ATTACK ON PAU'S SPACE OBJECT AFTER DECOUPLING.

A. Federation's Attempt to Destroy PAU's Space Object Was an Act of Aggression Contrary to International Law and Cannot Be Justified As Self Defense or Necessity.

The basic norm that space be used only for peaceful purposes and for the benefit of mankind is well established in international law.¹ Federation violated this and other accepted norms of international law when it intercepted and attempted to destroy PAU's space object. The deployment of Federation's anti-satellite interceptor amounts to an act of aggression, defined by the U.N. General Assembly Resolution of December 13, 1979, as a violation of fundamental principles of international law in relation to outer space. An act of aggression is also defined in international law as a deliberate attack by one nation on the ships or aircraft of another.² This definition, assented to by Federation, applies by implication to the deliberate attack on the PAU space object.

Federation's use of force against the PAU space object was also contrary to general principles governing relations between nations on Earth. Article 1 of the U.N. Charter calls for the suppression of acts of aggression and threats to the peace. The Helsinki Accords also direct states to refrain from any use of force.³ As a major threat to peace, the opera-

1. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, done January 27, 1969, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, done (per Jessup Clarifications, December, 1979) July 3, 1979, U.N. Doc. A/AC. 105/113; Treaty Between the Parties, done May 1, 1979, Peoples Astral Union-Federation of Celestial States, 1980 Jessup Problem.

2. Resolution on the Definition of Aggression, U.N. Doc. No. A/AC/77/L/4 (1956); 12 U.N. GAOR Supp. 16, at 30, U.N. Doc. A/3574 (1957) (adopted per Jessup Clarifications, December 1979).

3. Conference on Security and Co-operation in Europe: FINAL ACT (Helsinki

tion of anti-satellite weapons in space violates the internationally recognized principle of nonaggression.⁴

The Outer Space Treaty, the Moon Treaty, and the Treaty Between the Parties specifically protected PAU's interests in its space object.⁵

These treaties provide that each party shall retain control over its space objects and protect the right of noninterference by other states.⁶ Federation specifically agreed that the landing and recovery of the PAU and Federation space modules would remain under the exclusive control and direction of the party owning it. PAU engineers were confident, based on their experience with their space objects, that complete control over their object would be attained. Federation, by firing its anti-satellite interceptor, breached its duty to refrain from interference with PAU's landing operation.

Federation cannot claim that it had the right to destroy PAU's space object based on necessity and self-defense for three reasons. First, the use of force in international relations is strictly governed by treaties and agreements to which Federation is a signatory. The U.N. Charter permits the

Accords) 14 Int'l Legal Materials 1292, 1294 (1975); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 7 U.N. Monthly Chronicle No. 6 at 62 (1970).

4. Galloway, Space Law and Astronautics for Peace and Human Progress, Proc. 21st Colloquium L. Outer Space 175, 179-180 (M. Schwartz ed. 1979); Christol, Article Four of the 1967 Principles Treaty: Its Meaning and Prospects for Its Clarification, Proc. 21st Colloquium L. Outer Space 192, 205 (M. Schwartz ed. 1979).

5. Outer Space Treaty, supra note 1, at art. VIII; Moon Treaty, supra note 1, at art. XI; Treaty Between the Parties, supra note 1, at art. I(b).

6. M. LACHS, THE LAW OF OUTER SPACE 69 (1972); Christol, supra note 4, at 193. See also Almond, Legal Definition of Outer Space, Proc. 21st Colloquium L. Outer Space 81 (M. Schwartz ed. 1979).

use of force in self-defense only in the event of "armed attack,"⁷ which Federation cannot seriously allege occurred. Use of armed force other than in answer to armed attack is illegal.⁸

Second, Federation had a duty to consult with PAU concerning the potential hazard and proper course of action toward the PAU object. The Outer Space Treaty and the Convention on International Liability for Damage Caused by Space Objects⁹ do not grant the right to destroy another state's space object on the possibility of uncontrolled re-entry. The Rescue and Return Agreement does require a launching state to take appropriate action and to notify other states of the danger posed by its space objects¹⁰ but does not permit unilateral destruction of the object owned by another state without that launching state's consent. The Treaty Between the Parties contemplated that such dangerous situations might occur and bound Federation to "consider and undertake such measures as [the parties] may jointly agree will moderate or avoid it."¹¹ Article VII of the Treaty also mandated consultation in situations not fully or specifically covered by the treaty. Federation's unilateral action, violated PAU's right to ownership and control of its objects, and their right to be consulted concerning the measures

7. U.N. Charter art. 51.

8. G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 256 (6th ed. 1976).

9. Convention on International Liability for Damage Caused by Space Objects, opened for signature March 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762, art. II.

10. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, done April 22, 1968, 18 U.S.T. 2410, T.I.A.S. No. 6347.

11. Treaty Between the Parties, supra note 1, art. III (emphasis added).

to be taken.

Third, any action taken in necessity and self-defense must be reasonable and proportionate to the danger.¹² Permissible preventive measures do not include destruction or disablement of another state's satellite. Even reorbiting and reboosting require consultation with the launching state, independent verification of the need to reboost or reorbit, and consent before action may be taken.¹³ Had Federation consulted with PAU as the treaty required, it would have been reassured that destructive action was unnecessary. By preventing control of the PAU object, Federation's action eliminated any possibility of a safe landing of the object in PAU territory. The unreasonableness of Federation's action is further demonstrated by the firing of the anti-satellite interceptor immediately after the decoupling. Federation could not at that point predict accurately the place of ultimate impact.¹⁴ The measure was especially unreasonable in light of the damage which did occur. Federation could and should have foreseen the damage which would be caused by breaking one object into several.

B. Federation is Solely Responsible for the Effects of Its Act of Aggression Under the Liability Convention and Under General International Law.

Article II of the Liability Convention makes a state absolutely liable for damage caused by its space object. Because the anti-satellite device fired by Federation is defined as a space object intended to affect the

12. G. SCHWARZENBERGER & E. BROWN, supra note 8, at 150; Rohlik, Some Remarks on Self-Defense and Intervention: A Reaction to Reading Law and Civil War in the Modern World, 6 Ga. J. Int'l & Comp. L. 395, 415 (1976).

13. DeSaussure, An International Right to Re-Orbit Earth-Threatening Satellites, Proc. 21st Colloq. L. Outer Space 92, 97 (M. Schwartz ed. 1979).

14. Id. at 93.

purpose of another space object,¹⁵ Federation is absolutely liable for the loss of PAU nationals aboard the Federation aircraft. Under Article VI, an act of aggression performed by a space object creates absolute liability without exoneration.¹⁶ Moreover, the mere contributory negligence, if such it were, of the victims who were not wearing seat belts will not serve to exonerate Federation from liability.

PAU also presents a claim under the Liability Convention for deliberate damage to the PAU space object by Federation. Under Article III of the Liability Convention, damage caused by the space object of one launching state to that of another state is to be compensated by the former state if the damage is its fault. Fault is established by the breach of an international obligation that is: 1) against the will of the complainant, 2) unjustifiable, 3) attributable to a subject of international law [a state], and 4) voluntary.¹⁷ Since these requirements are met, PAU is entitled to reparation for damages which resulted from Federation's deliberate act of aggression in violation of international norms, the Outer Space Treaty and the Treaty Between the Parties.¹⁸

15. Christol, supra note 4, at 193.

16. Fenema, P. van, The 1972 Convention on International Liability for Damage Caused by Space Objects, Institute of Air and Space Law, McGill Univ., 1973 (Thesis).

17. D. GREIG, INTERNATIONAL LAW 399 (1970); G. SCHWARZENBERGER & E. BROWN, supra note 8, at 143.

18. See Corfu Channel Case (merits) [1949] I.C.J. 4. That damages are due for an unlawful act is demonstrated by the Chorzow Factory Case [1928] P.C.I.J., Ser. A, No. 17, at 47.

II. FEDERATION MUST BEAR SOLE RESPONSIBILITY FOR ALL DAMAGE TO THE PROPERTY AND NATIONALS OF BOTH STATES.

A. Federation and PAU Assumed Joint and Several Liability for Damage Resulting From Their Joint Venture Under Article III of Their Bilateral Treaty.

The PAU-Federation agreement to share the risks and responsibilities of their joint enterprise¹⁹ is consistent with Article V of the Liability Convention, making joint launching states jointly and severally liable for any damage caused. Federation was a "launching state" of both PAU space objects under the Liability Convention because it "procured" the launchings and provided a launch "facility."²⁰ The launch of the main PAU space lab object was procured by Federation in contemplation of the joint venture under Article II of the Treaty Between the Parties. The test satellite was launched from the joint PAU-Federation space lab facility under the provisions of Article VI. Federation was thus jointly and severally liable for any damage caused under the joint agreement.

B. Federation Has Agreed to Indemnify and Hold PAU Harmless for All Liability Arising out of the Fault of Federation Personnel and UTS.

Articles V and XXIII of the Liability Convention permit joint launching states to apportion potential joint and several liability among themselves. Under Article VIII of the Treaty Between the Parties, each party agreed to indemnify and hold the other harmless for claims resulting from the negligence of its personnel. The agreement reflects the basic principle of the Liability Convention that apportionment should be according to fault.²¹

19. Treaty Between the Parties, supra note 1, at art. III.

20. Liability Convention, supra note 9, at art. I.

21. Id. at arts. III, IV.

The Liability Convention also preserves the right of states held jointly and severally liable to seek indemnification from other participants in the launching.²² United Technical Services, (UTS), a large private corporation domiciled in Federation, was a substantial participant in the joint venture.²³ UTS manufactured and designed the space lab decoupling device and the test satellite's self-destruction mechanism. Federation also utilized UTS personnel to conduct activities on board the space lab. Federation was required to supervise and bear responsibility for non-governmental participants in space activities.²⁴ Since UTS bore the status of Federation's "employee corporation" in the joint venture, Federation must indemnify PAU for all liability which resulted from activities of UTS.

C. The Damage Related to Each of PAU's Space Objects Was Caused by the Failure of Structural Components Designed by UTS.

The failure of the UTS self-destruct mechanism to destroy PAU's satellite caused the satellite to crash in Federation. But for the defective mechanism, neither direct impact nor radiation damage would have occurred. Assuming arguendo that Federation's attempted destruction of the PAU space lab was justified, the decoupling failure and subsequent loss of control of PAU's space lab were still caused solely by internal defects of the UTS decoupling mechanism.

While the rules of product liability in space law have yet to be fully developed, private participants like UTS must be held liable for damage

22. Id. at art. V.

23. Matte, Product Liability of the Manufacturer of Space Objects, 2 Annals of Air and Space Law 375, 413 (1977).

24. Outer Space Treaty, supra note 1, at art. VI.

attributable to them under the basic principle that loss should fall on the party that caused it.²⁵ In deciding this case ex aequo et bono, this Court should look to the product liability principles recognized by civilized nations and applied in customary practice.²⁶ Under the law of many states a manufacturer is given the burden of proving it was not at fault where its device has injured users and innocent third parties. The presumption of fault is particularly appropriate when the accident would not ordinarily have happened in the absence of negligence or where victims would have great difficulty in establishing proof of fault. Manufacturers are also held strictly liable to users and third parties for mechanical failures which the user did not have a reasonable chance to prevent.²⁷

UTS is liable under an equitable application of any of these product liability principles. The obvious dangers posed by the failure of essential space object components places tremendous responsibility on their designers to make them "spaceworthy." Experts have suggested that operational systems in space objects must at least meet International Civil Aviation Organization (ICAO) standards,²⁸ which include construction and pretesting of components to insure effective and reliable operation under all operating

25. Matte, supra note 23, at 390.

26. Statute of the International Court of Justice, art. 38.

27. Matte, supra note 23, at 401-15. (For instance, the United States and United Kingdom apply res ipsa loquitur; the Soviet Union and Germany begin with a presumption of fault in products liability cases.)

28. M. McDOUGAL, H. LASSWELL & I. VLASIC, LAW AND ORDER IN SPACE 530-31 (1962); Menter, Legal Regime of International Space Flight, Proc. 21st Colloquium L. Outer Space 129 (M. Schwartz ed. 1979).

conditions.²⁹

While the ICAO standards also require flight engineers to be competent in emergency procedures and effecting minor repairs,³⁰ the PAU engineer found that customary engineering procedures would not solve the decoupling problem. UTS provided no automatic means of preventing the failure of either the decoupling device or the self-destruct mechanism in the test satellite. This failure to provide effective back-up systems is a further breach of even the minimal ICAO requirements.³¹ UTS, and thus Federation, is liable for all damage associated with PAU's space objects.

D. Federation is Solely Liable for Damages from the Collision of PAU's Space Objects With the Airliner and the Ground-Launched Federation Object.

Assuming arguendo that UTS was not liable for its defective decoupling device, PAU is entitled to exoneration from liability under Article VI of the Liability Convention because the damage resulted from the gross negligence of Federation. Under Article IV of the Treaty Between the Parties, Federation was to pre-test the decoupling equipment to insure that it was in "certain working order." The failure of the device on the first decoupling attempt demonstrates that Federation, by abrogating its duty to test, was grossly negligent in knowingly exposing itself and PAU to unnecessary danger.³² Federation also was grossly negligent in launching an earth-based

29. Chicago Convention on International Civil Aviation, December 7, 1944, 3 Bevans 944, T.I.A.S. No. 1591, 15 U.N.T.S. 295, (I.C.A.O. Convention) Annex-8, Ch. 4.1, 4.1.1 (6th ed. 1973).

30. I.C.A.O. Convention, supra note 29, Annex-1, Chs. 3.2, 1.2 (6th ed. 1973).

31. I.C.A.O. Convention, supra note 29, ch. 4.1.6 (6th ed. 1973)

32. Cheng, B. Wilful Misconduct: From Warsaw to the Hague and from Brussels to Paris, 2 Annals of Air and Space Law 55 (1977).

space object in blatant violation of Article III of the Treaty Between the Parties. The prohibition of such launches during the joint project expressly recognized the risk they would pose to the safety of the mission.

III. PAU'S PEACEFUL NUCLEAR TESTS WERE PERMITTED BY INTERNATIONAL LAW.

A. PAU's Peaceful Nuclear Tests were Permitted Under the Outer Space Treaty.

PAU satisfied the requirements of the Outer Space Treaty in conducting its nuclear tests. Article I sets forth the principle of freedom of scientific investigation in outer space and requires states parties to "facilitate and encourage such investigation." Article III requires exploration and use of space to be "in accordance with international law." Article IX requires that "appropriate measures" be taken to avoid harmful contamination of Earth's environment. PAU's tests not only fully satisfied these requirements, but were necessary to further the peaceful development of outer space.

B. PAU's Nuclear Tests Were Also Within the Customary Rules and Norms Which Have Evolved Through the Peaceful Exploration and Use of Outer Space.

As recognized by the Scientific and Technical Sub-Committee of the U.N. Committee on the Peaceful Uses of Outer Space (COPUOS), nuclear power may be used in spacecraft and satellites as a power supply for experimental or other on-board equipment, main rocket propulsion systems, orbit correction, and maneuvering. Launching states use nuclear power sources for satellites in deep space, interplanetary missions and lunar landings as well as for various low orbital tasks. Nuclear devices provide greater power and reliability than solar batteries in remote, hostile and special environments

such as the earth's radiation belts.³³

Because of their superior energy producing capabilities, further exploitation of outer space requires the research and development of nuclear reactors.³⁴ The COPUOS Scientific and Technical Sub-Committee has adopted the position that nuclear reactors may be safely used even in low orbits provided such space objects include a self-destruct system to insure safe dissipation of radioactive material.³⁵

PAU also satisfied the request of the U.N. General Assembly that launching states of nuclear space objects inform states concerned of potential re-entry problems so that precautionary measures may be taken.³⁶ PAU communicated with Federation from the point when the possibility of uncontrolled re-entry first appeared through and beyond the time of impact. Moreover, the nature of the planned experiments had been made known to Federation, and by registration, to the Secretary General of the United Nations.

C. Peaceful Nuclear Tests in Outer Space Which Provide Data Incidentally Beneficial to Weapons Design Are Not Prohibited Under International Law.

The definition of "peaceful uses" of space has been much discussed in the context of disarmament and the outer space treaties. One view is that not all military activities in space can be prohibited since instruments

33. COPUOS, Report of the Secretariat on the Question Relating to the Use of Nuclear Power Sources in Outer Space, U.N. Doc. A/AC.105/220 (1978).

34. Id. at 11 (Reply of the U.K.), at add. 1 at 17 (reply of the U.S.S.R.).

35. Report of COPUOS, 34 U.N. GAOR Supp. (No. 20), U.N. Doc. A/34/20 (1979).

36. G.A. Res. on International Co-operation in the Peaceful Uses of Outer Space U.N. Doc. A/RES/33/16 (1978).

tested for peaceful purposes may also have military application.³⁷ A second position is that determination of the permissibility of particular tests must be made by looking to their purpose.³⁸ Since the purpose of PAU's tests was peaceful and military information was a mere byproduct, it is clear that under either view the receipt of incidental weapons data constitutes no violation of international law. Furthermore, peaceful nuclear tests are within Article IV of the Outer Space Treaty which specifically provides for the use of "any equipment or facility necessary for peaceful exploration."

D. PAU's Nuclear Tests Were Permitted Under the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water.³⁹

1. PAU's nuclear tests do not constitute "nuclear explosions" within the meaning of the Nuclear Test Ban Treaty.

The title and the preamble of the Nuclear Test Ban Treaty explicitly purport only to ban all nuclear weapons tests in outer space. The original parties did not see the "or any other nuclear explosion" clause as an extension of the object of the treaty. The provision was declared to have no application to the use of atomic energy reactors or atomic powered submarines.⁴⁰ The original parties have not considered themselves prohibited

37. Address by Dep't Legal Advisor Leonard C. Meeker, of the U.S. Dept. of State, at the Inst. of Air & Space Law, McGill University, Montreal (April 13, 1963); Dept. of State press release No. 191 (revised) April 12, 1963, XLVIII Bulletin, Dept. of State, No. 1246 at 746, 749-50 (1963).

38. U.N. Doc. A/C.1/ PV 1289 at 57 (1962) (Soviet Rep. (Morozov) on December 3, 1962, before 1st Comm. of G.A.).

39. Treaty Banning Nuclear Weapons Tests in the Atmosphere in Outer Space and Under Water, done August 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

40. 109 Cong. Rec. 17086-87, 17555-56 (1963).

by the Test Ban Treaty from using peaceful nuclear explosions in outer space but have recognized the need for nuclear reactors and self-exploding dispersal devices.⁴¹

When the context of the treaty and actual practice conflict with its literal meaning recourse to supplementary means of interpretation is appropriate.⁴² The negotiating and drafting history of the Nuclear Test Ban Treaty demonstrate that the urgent need to put a halt to the nuclear arms race was the primary concern of the original parties. The final negotiations were based on a draft treaty by the United States and United Kingdom which banned all weapons tests but provided for peaceful nuclear explosions under on-site controls. Because the Soviets, concerned about espionage, refused to submit to test inspections, the "or any other nuclear explosion" provision was substituted.⁴³ In light of this, the provision is no more applicable to PAU's tests than it is to nuclear power plants and submarines on the earth.

2. PAU did not consent to be bound to a literal interpretation of the "or any other nuclear explosion" provision.

PAU signed the Nuclear Weapons Test Ban Treaty after public statements and actual practice of the original parties had established that peaceful

41. COPUOS, Report of the Secretariat, supra note 33; Report of COPUOS, supra note 35.

42. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, arts. 31, 33, U.N. Doc. A/CONF.39/27 (Vienna Convention).

43. SENATE COMM. ON FOREIGN RELATIONS, THE NUCLEAR TEST BAN TREATY, S. Ex. Rep. 3, 88th Cong., 1st Sess. 5-6 (1963); 11 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 792-98 (1968). See also G.A. Res. 1762 (XVII) on The Urgent Need for the Suspension of Nuclear & Thermo-Nuclear Tests, 17 U.N. GAOR, Supp. (No. 17) 3-4, U.N. Doc. A/5217 (1962); U.N. Progress Report of the Conference of Eighteen Nations, 16 DCOR Supp. (Jan. 1961-Dec. 1962) U.N. Doc. DC/203 (1962).

uses of nuclear power such as those contemplated by PAU were not affected. PAU also made known its position that such tests are required for further peaceful exploitation of space for the benefit of mankind. Therefore, PAU's consent to the Nuclear Test Ban Treaty was qualified by the reservation that it not be bound by a technical interpretation of this provision. Since neither Federation nor any other party has objected, PAU's reservation has become binding upon all parties.⁴⁴

3. Even if PAU was literally bound by the "or any other nuclear explosion" clause, the effect of that clause has since lapsed, or PAU has effectively withdrawn from the Nuclear Test Ban Treaty.

A fundamental change of circumstances has taken place, and new customary international rules and norms have emerged and developed⁴⁵ permitting the use of nuclear reactors and nuclear dispersal devices in outer space.⁴⁶ While the obsolescence of the provision in question may not result in its automatic lapse, it is apparent by the conduct of the parties that they have tacitly consented to abandon its literal meaning.⁴⁷

Even if the provision remains technically binding upon parties to the treaty, PAU's public statements that peaceful nuclear tests are necessary in space exploration has satisfied the notice requirement for withdrawal under

44. Vienna Convention, supra note 42, at arts. 19, 20.

45. Fisheries Jurisdiction Case (United Kingdom v. Iceland) (Jurisdiction of the Court, Judgment) [1973] I.C.J. 41 (dissenting opinion of Judge Padilla Nervo).

46. Report of COPUOS, 34 U.N. GAOR, Supp. (No. 20), U.N. Doc. A/34/20 (1979).

47. Nuclear Tests Case (Australia v. France), [1974] I.C.J. 337-38 (Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Arechaga, and Sir Humphrey Waldock).

Article IV of the treaty. That public statements of intent are enough to satisfy Article IV of the treaty is apparent by its minimal, three-month notice requirement.⁴⁸

IV. IN ITS ACTIVITIES CONDUCTED IN OUTER SPACE DURING THE DURATION OF THE JOINT VENTURE BETWEEN THE PARTIES, FEDERATION HAS VIOLATED INTERNATIONAL LAW AND TREATY LAW.

A. Federation Violated Treaty Law and International Law Governing the Sovereignty of a State Over Its Airspace.

Under the Treaty Between the Parties, Federation bound itself to avoid crossing airspace below 110 km unless subjected to conditions depriving it of control. The passage of the Federation space object through PAU airspace at less than 110 km violated this contractual agreement. As between PAU and Federation the agreed limit should control even though PAU declared itself subject to the customary practice regarding where outer space begins. It is customarily a national affair to fix the height of the air mass over which a country asserts its sovereignty.⁴⁹ For instance the Convention on International Civil Aviation, while stating that every state has complete and exclusive sovereignty over the airspace above its territory,⁵⁰ does not prescribe a limit to each nation's sovereignty.

The limit set by PAU is consistent with the prevailing view on the proper boundary between outer space and airspace. A consensus among states is developing in COPUOS that 100 ± 10 km. is a reasonable estimate of the beginning of outer space.⁵¹

48. 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 278-80 (1970).

49. G. RELJNEN, LEGAL ASPECTS OF OUTER SPACE 88 (n.d.).

50. I.C.A.O. Convention, supra note 29, at art. I.

51. G. RELJNEN, supra note 49, at 85.

Federation's breach of its treaty obligation is not justified by the presence of PAU astronauts on board the Federation object. The PAU astronauts temporarily became subject to the jurisdiction of Federation and this did not alter the status of the space object as being owned and controlled by Federation.⁵²

Neither is there a right of "free passage" in space law for the space objects of one nation through the territorial airspace of another. Although some commentators have suggested that such a right may exist,⁵³ the essential requirement that a rule reflect customary practice or a consensus of states is lacking.⁵⁴

Since the Treaty Between the Parties specifically required that airspace sovereignty be respected, Federation had an obligation to do so. Passage through PAU's airspace over its stated objection is a violation of PAU's territorial sovereignty, an "essential foundation of international relations."⁵⁵

B. By Placing a Satellite in Geostationary Orbit Over PAU's Territory, Federation Violated the Sovereignty of PAU Over One of Its Major Resources--the Geostationary Orbit.

International law and the parties herein recognize that the geostationary orbit is a limited natural resource.⁵⁶ International law also recog-

52. Diedericks-Verschoor, Legal Regime of International Space Flight, Proc. 21st Colloquium L. Outer Space 113, 115 (M. Schwartz ed. 1979).

53. See, e.g., Goedhius, Some Observations on the Problem of the Definition and/or the Delimitation of Outer Space, 2 Annals of Space Law 287, 305 (1977).

54. Id. See also C. JENKS, SPACE LAW 232 (1965).

55. C. JENKS, supra note 54, at 232.

56. International Telecommunication Convention, opened for signature December 21, 1959, 12 U.S.T. 176, T.I.A.S. No. 4892 (amended October 25, 1973,

nizes each state's permanent sovereignty over its natural resources.⁵⁷

Because this resource is of particular use and interest to the nation under it, equatorial states like PAU have jurisdiction over the orbit and any uses to which it may be put.

The principles of freedom and nonappropriation which Federation argues govern the geostationary orbit are not peremptory norms of international law. These "principles" are urged only by highly developed countries whose interests are served by unrestricted use of the geostationary orbit. That the principles asserted no longer reflect even customary international law is manifested by the Bogota Declaration of strategic equatorial states⁵⁸ and by U.N. acceptance of claims of equatorial states that the geostationary orbit has a special tie to their nations.⁵⁹

Treaties governing the activities of states in outer space and on the moon do not apply ipse dixit to the geostationary orbit because of its status as a limited resource. The use of the resource is a de facto monopolization of the orbit and prevents states such as PAU from ever realizing the riches of that orbit. This monopolization by a few countries is an illegal "appropriation by use or occupation,"⁶⁰ forbidden by the

T.I.A.S. No. 8572), Art. 33, and Radio Regulations Annexed thereto, 12 U.S.T. 2377, T.I.A.S. No. 4893 (amended June 8, 1974, T.I.A.S. No. 859).

57. G.A. Res. 1803 (XVII), U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/Res/1803 (1962) (Permanent Sovereignty over Natural Resources).

58. Bogota Declaration, ITU, Broadcasting Satellite Conference, Doc. No. 81-E (January 17, 1977) (English trans.), 6 J. Space L. 193 (1978).

59. See, e.g., Report of the Legal Sub-Committee on the Work of its Eighteenth Session (12 March-6 April 1979), U.N. Doc. A/AC. 105/240 at 8-10 (1979) (Report of Legal Sub-Committee).

60. Haanappel, Article II of the Outer Space Treaty and the Status of the Geostationary Orbit, Proc. 21st Colloquium L. Outer Space 28, 28 (M. Schwartz ed. 1979).

Outer Space Treaty.

PAU's claim to the geostationary orbit is analogous to claims made in the Law of the Sea, where it is universally recognized that a state may exercise limited jurisdiction over certain resources beyond the territorial limits of the country.⁶¹ Resources of the Moon not normally subject to appropriation, once removed from the moon, may be subject to a different legal order.⁶² Likewise, if the geostationary orbit is recognized as an exhaustible resource, the right of the state underlying the geostationary orbit to exercise jurisdiction over this resource becomes obvious.

Federation's appropriation to itself and its private corporation of the geostationary orbit over PAU territory thus violates the sovereignty of PAU over a resource naturally belonging to it.

C. Federation Violated International Law by Its Unilateral Satellite Broadcast to PAU Receivers Without the Agreement of PAU.

1. Federation violated treaty principles and international law in broadcasting over the objections of PAU.

The principle that direct broadcasting into the territory of another state requires the consent of that state is established in international law.⁶³ The International Telecommunication Convention (ITC), its radio regulations, and the 1977 Plan of the ITC are intended to give effect to full recognition of "the sovereign right of each country to regulate its

61. U.N. Third Conference on the Law of the Sea, Informal Composite Negotiating Text, Revision 1 (ICNT, Rev. 1), U.N. Doc. A/ CONF. 62/ WD.10/ Rev.1, parts V & VI.

62. D. SMITH, SPACE STATION: INTERNATIONAL LAW AND POLICY 102 (1979).

63. UNESCO Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, The Spread of Education and Greater Cultural Exchange, U.N. Doc. A/AC.105/109 (1972), Art. IX (UNESCO Declaration on Satellite Broadcasting).

telecommunications."⁶⁴ Regulation 428A in particular reflects this principle by requiring that a broadcasting satellite service use "[a]ll technical means available . . . to reduce, to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries."⁶⁵ The regulatory plan developed by the 1977 World Administrative Radio Conference for the Planning of the Broadcasting-Satellite Service also insures that states broadcast only into their own territory unless otherwise agreed.⁶⁶ In order to broadcast to PAU home receivers, Federation violated the letter and spirit of the Plan and Regulation 428A, in deliberate derogation of the principle it purported to recognize in the ITC.

All existing international satellite information exchanges, except Federation's, have been carried out subject to de facto consent.⁶⁷ The draft principles on direct broadcasting by satellite⁶⁸ reflect the consensus of most states that agreements and consultations between states are necessary before satellite broadcasts from one state directed at another may be permitted. Most nations have agreed to this consent requirement, and commentators see future negotiation on the draft principles to be in the

64. International Telecommunication Convention, supra note 56, at preamble.

65. Regulation 428A annexed to International Telecommunication Convention, supra note 56.

66. The Radio Conference was convened by the International Telecommunication Union Administrative Council. The plan developed is discussed in N. Jasentuliyana, Regulations Governing Space Telecommunication, in 1 MANUAL ON SPACE LAW 195, 205-08 (N. Jasentuliyana & R. Lee eds. 1979).

67. Chayes & Laskin, A Report of the Panel on International Telecommunications Policy, DIRECT BROADCASTING FROM SATELLITES: POLICIES AND PROBLEMS 1, 28 (Studies in Transnational Legal Policy No. 7, 1975).

68. Report of the Legal Sub-Committee, supra note 59, at Annex II, App. A.

direction of bilateral agreements and the right of the receiving state to exercise prior consent.⁶⁹

In maintaining a unilateral broadcast system against the wishes of PAU, Federation breached its duty of cooperation with other states embodied in Article IX of the 1967 Outer Space Treaty. Article IX also imposes a legal duty on those states party to the treaty to conduct all their activities in outer space "with due regard to the corresponding interests of all other States party to the Treaty."⁷⁰

Federation's willingness to disregard both the good will of the international community and its binding legal agreements in broadcasting into PAU territory is further demonstrated by its refusal to register the broadcast satellite in violation of the Convention on Registration of Objects Launched into Outer Space.⁷¹

It is thus apparent that Federation has refused to assume the responsibilities of the agreements which it has signed in that good faith necessary to the workings of international law.

2. Federation broadcasts violated norms of international law concerning the sovereignty and noninterference in the affairs of other countries.

By broadcasting into PAU territory without consent, Federation violated two universally acknowledged norms of international law to which it is bound. Federation's unilateral broadcasts contravened the basic principles of world order permitting each state to determine for itself, in its

69. D. SMITH, supra note 62, at 169 (1972).

70. Outer Space Treaty, supra note 1.

71. Convention on Registration of Objects Launched into Outer Space, opened for signature January 14, 1975, 28 U.S.T. 695, T.I.A.S. No. 8480.

sovereign capacity, the growth of its culture and the course of its internal affairs.⁷² Unilateral broadcasts infringe upon the concept of sovereignty and are a direct foreign intrusion into domestic affairs.⁷³ Because of broadcasting's ability to adversely affect cultural values,⁷⁴ a form of cultural imperialism results from intrusive unilateral broadcasts imposed upon a state. The danger is that a country may lose much of its unique cultural identity. It is not possible to pinpoint when a broadcast ceases to be persuasion and becomes coercion.⁷⁵ The right to free flow of information, not considered an absolute in any document, is not inconsistent with the right of sovereignty.⁷⁶ Moreover, it is no more likely that satellite technology development will be restricted in the absence of a prior consent rule than by the presence of one.⁷⁷

D. Federation's Remote Sensing Activities Violated the Treaty Between the Parties and International Law.

1. Federation's abuse of the remote sensing data acquired by its satellite in geostationary orbit was an act of aggression against PAU and violated international law.

Data acquired from remote sensing was used by Federation to profit from the failure of PAU's wheat crop and to increase inflation in PAU. This

72. These principles of primary significance are set forth in the Helsinki Accords, supra note 3, and in the U.N. Declaration on Principles Concerning Friendly Relations and Co-operation Among States, supra note 3.

73. Sarkar, Introduction to Space Telecommunications Regulations, Proc. 21st Colloquium L. Outer Space 2, 8 (M. Schwartz ed. 1979); see also Chayes & Laskin, supra note 67, at 26.

74. Price, First Amendment Constraints and the Direct Broadcast Satellite Controversy, in DIRECT BROADCASTING FROM SATELLITES, supra note 67, at 44.

75. B. MURTY, PROPAGANDA AND WORLD PUBLIC ORDER 286 (1968).

76. UNESCO Declaration on Satellite Broadcasting, supra note 63.

77. D. SMITH, supra note 62, at 169.

abuse of information at PAU's expense threatened the basis of PAU's economic life and was therefore an act of economic aggression, as defined by the United Nations and recognized by Federation.⁷⁸ Federation's actions violated its obligation to refrain from interference with the economic elements of other states--a basic principle of international law.⁷⁹ The COPUOS Working Group on remote sensing has reached a similar consensus on a draft principle requiring each state to use such information in a manner compatible with the rights and interests of other States.⁸⁰

Moreover, Federation has in the Outer Space Treaty bound itself to conduct its space activities for the benefit of all countries. The misuse of the data gathered by its survey satellite without concern for PAU's legitimate economic interests is a violation of the language and spirit of this treaty and an offense to international comity, which should be soundly condemned.⁸¹

2. Federation's remote sensing of PAU's territory and dissemination of the data without PAU's consent violates international law respecting the sovereignty of each state over its resources.

The absolute authority of each state over its resources is a fundamental principle of international law.⁸² Use and dissemination of information which specially concerns the natural resources of a state without the

78. Resolution on the Definition of Aggression, supra note 2.

79. See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, supra note 3, at 67.

80. Report of Legal Sub-Committee, supra note 59, Annex 1 at 9.

81. Vlastic, Remote Sensing of the Earth by Satellites, in 1 MANUAL OF SPACE LAW 303, 333 (N. Jasentuliyana & R. Lee eds. 1979).

82. G.A. Res. 1803 (XVII), supra note 57.

sensed state's consent is recognized by many nations as a deprivation of sovereignty over resources.⁸³ Most states favor inclusion of sovereignty principles in any draft concerning remote sensing,⁸⁴ indicating that international law prefers consent of the sensed state before dissemination and use of data concerning that state.

In analogous situations, states restrict gathering of information concerning their resources in order to prevent exploitation by other entities. In the law of the sea, research related to a state's resources in the exclusive economic zone and territorial sea are permitted only with the consent of the state.⁸⁵ This same viewpoint has been expressed in debates of the COPUOS Working Group,⁸⁶ and at a minimum the cooperation of the sensed state before sensing will be required under evolving treaties.⁸⁷

3. Federation activities with the multi-spectral scanner violated the Treaty Between the Parties.

The multi-spectral scanner belonging to PAU was used by Federation and UTS personnel for the collection of earth data and scanner testing in violation of the Treaty Between the Parties. Under Article VI of the treaty, before an experiment not covered by the terms of the treaty could be undertaken, consultations were required and a joint agreement had to be reached between the heads of both space teams. Federation did not seek

83. Cocca, Remote Sensing of Natural Resources by Means of Space Technology: A Latin American Point of View, in LEGAL IMPLICATIONS OF REMOTE SENSING FROM OUTER SPACE 63, 67-68 (N. Matte & H. DeSaussure eds. 1976).

84. G. RELJNEN, supra note 49, at 102 & 109.

85. ICNT, Rev. 1, supra note 61, at arts. 40 & 56.

86. Vlastic, supra note 81, at 332.

87. Report of Legal Sub-Committee, supra note 59, at Annex I at 8-9, Principles II, IV, VII; see Outer Space Treaty, supra note 1, at art. III.

cooperation with PAU and also refused to share the data acquired from testing PAU's scanner in violation of Article VI of the treaty. Federation, on notice that PAU considered such activities illegal, appropriated this experiment to its own uses, contrary to the requirements of cooperation and mutual assistance upon which the joint venture was originally undertaken.

CONCLUSION AND REQUEST FOR RELIEF

The basic tenet governing international law is that parties to a treaty must act in good faith in accordance with the agreement under which the parties have consented to be bound.⁸⁸ In its deference to this principle, PAU may be distinguished from Federation, where Federation's claims involve damages for mishaps and attempts by PAU to further world progress, PAU's claims against Federation involve those areas in which Federation has deliberately disregarded and made light of its solemn international obligations, declaring itself opposed to principles governing the remainder of the world in the conduct of outer space activities, and has earned the formal condemnation of the international community and this Court.

Therefore, PAU respectfully requests that the International Court of Justice;

1) DECLARE that Federation committed unpardonable acts of aggression in attacking the PAU space object and in illegally using remote sensing data to PAU's detriment;

2) DECLARE that PAU's peaceful nuclear test was sanctioned by international law;

88. Vienna Convention, supra note 42, at art. 26.

3) DECLARE that Federation violated international law and PAU's sovereignty by its activities in remote sensing and satellite broadcasting, by appropriating the geostationary orbit, and by invading PAU's airspace;

4) DECLARE that Federation has disregarded its obligations under the Treaty Between the Parties, the Outer Space Treaty, and the Registration Convention;

5) ORDER that Federation compensate PAU for all damages and for all violations of international law in an amount this Court deems equitable.

6) PROVIDE any and all additional relief this Court deems equitable.

Respectfully submitted,

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