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# COMPETITIVE OBSERVANCE BY THE RUSSIAN FEDERATION AND THE USA OF THE 1967 OUTER SPACE TREATY**

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Introduction. The Russian Federation and the USA, being parties to the 1967 Outer Space Treaty, in their national legal acts refer to this source. Each of these states recognizes that the 1967 Outer Space regime is to be perfected, while having different legal outer space policy. The USA is a leader of the military outer space infrastructure and of creation national outer space legislation and separate international agreements ("The Artemis Accords"), thus imposing its own track to develop the 1967 Treaty.

Materials and methods. This research addresses relevant international documents on international space law as well as acts of national legislation pertaining to the topic.

Research results. In modern political conditions the quality of a state defense and its economic development is linked to the efficiency of the outer space infrastructure, including communication and reconnaissance satellites. While the U.S. intends to achieve military supremacy in the outer space, the 1967 Treaty seems to be a barrier to such intention although the U.S. provides its own interpretation of the Treaty. Another significant area of competition between Russia and USA in the outer space legal policy is the observance of the natural resources treaty provisions. According to the USA, a state is entitled unilaterally exploit the space resources, and its persons are entitled to commercial use of such resources based on national law. This position of the United States resulted in creation of its national legislation opportunities for natural resources activities in outer space. The Russian Federation continues to defend multilateral approach to the exploitation of space resources and to call upon strictly observance of the 1967 Outer Space Treaty. There are also competitive legal positions of the USA and Russia relating to the notion of "common province of mankind" provided by the 1967 Treaty.

The main results. In this context, the paper after providing prolegomena to the competitive principle in international law, suggests some theoretical ideas for perfecting of the legal position of the Russian Federation as a response to the modern outer space legal policy of the USA.

Discussion and conclusions. In the legal literature on this issue different views are assessed – from a radical rejection of the US model of behavior and continuation of efforts to strengthen the 1967 Treaty regime, to proposals to adopt a new national Russian legislation providing rights of persons to exploit the natural resources of celestial bodies, thus providing incentives for private investors. This track leads to more competition with the USA, observing at the same time the 1967 Treaty as the *"corpus juris specialis"*.

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## 1. Introduction

As noted in the comments to the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereinafter – the 1967 Outer Space Treaty)[1], the launch of the world's first artificial satellite by the Soviet Union in 1957 was a "shock" for the U.S., meaning that the competition between the two "superpowers" in space had begun [1, p. 59-60]. Much earlier scientific competitiveness in the characterization of the legal regime of space was manifested, as evidenced by the article by Prof. E.A. Korovin published in 1934. [2], (cited in [3, p. 21]). That is, the Soviet Union/Russia and the U.S. have long been competing in promoting space legal policy on a number of issues: the applicability to outer space of the basic principles of international law; the altitude limit of a state's sovereignty in the airspace above its territory and, accordingly, the lower boundary of outer space; rights to celestial bodies and their natural resources; registration of objects launched into space; military use of space, etc. (see: [4, pp. 28-30]). At the same time, calls for space leadership in the U.S. were formulated in harsh terms. A representative of the U.S. Department of Defense in 1958 stated that the "capture" of a base on the Moon should become "the main goal of U.S. policy" [3, pp. 6-7]. [3, p. 6-7]. The period after the collapse of the USSR is no longer characterized by such harsh rhetoric in studies on international space law (see: [5; 6, pp. 18-34]). But this does not mean that there is no competition between Russia and the USA in this field.

In this context, the present article recalls the original content of the competitive principle in law, its formation as a general principle of law in the sense of Article 38(1)(c) of the Statute of the UN International Court of Justice (hereinafter – the Court). Then it is shown how, within the framework of competitive international legal policy of the USSR/Russia, on the one hand, and, on the other hand, of the USA, these states - the pioneers of interplanetary space - are currently interpreting the key provisions of the 1967 Outer Space Treaty. The conclusion offers a summary of theoretical statements on the results of the study.

## 2. The competitive principle in law : prolegomena

In order to promote their national interests in harmonizing new rules of international law and in complying with existing ones, states develop an appropriate international legal policy. It is not a question of policy as a justification for states to avoid fulfilling their obligations under international law (although this *DE FACTO* takes place) because consideration of international law only as a tool of the state's foreign policy is inadmissible; the key goal of international legal policy is to legitimize the actions of the state, if initially it is not quite clear whether they comply with international law or not [7, p. 112]. Both Russia and the U.S. assume that the 1967 Outer Space Treaty laid down basic principles for states' activities in the exploration and use of outer space. But the two space powers are competing to bring their vision of the meaning of the treaty's provisions, especially those related to its use for defense and environmental purposes, into the international legal consciousness.

In the traditional understanding competitiveness is a principle of proceduralism. L.A. Kamarovsky called "competitive proceedings" as one of the general principles of international courts [8, p. 520]. I.e. "when the parties are sovereign states, it is logical that they should show the main initiative and bear the main responsibility with regard to the presentation of evidence" [9, p. 205]. Competitive proceedings are in harmony with other procedural principles (equality of parties; ensuring access to justice, etc.). From the analysis of the Statute of the International Court of Justice it follows that competitive proceedings are the result of legal equalization of subjects of procedural activity in order to achieve its goals (Art. 53). This provision reflects the general principle known even in Roman law - *"audiatur et altera pars"*: "let the other party be heard". The essence of adversarial proceedings is to ensure equal opportunity for both parties to

[1] Adopted by UNGA Resolution 2222 (XXI) of 19.12.1966. URL: https://www.un.org/ru/documents/decl_conv/conventions/outer_space_governing.shtml (accessed date: 04.04.2023).

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present arguments on the merits of their positions. The effective realization of a party's position leads to the achievement of a better result of a legal decision, compared to the ineffective realization of the other party's position. The competitive process is a quintessence of dispute resolution, which is not limited to procedural documents submitted by the parties to the court. In the conditions of competition of the leading powers for leadership in international relations and attempts to transform international law in their own way, the evolving general legal model of international relations depends to a great extent on the realization of competitive positions of the parties.

The purpose of inter-state harmonization, which is also inherently competitive, is to reach a mutually acceptable legal truth that will meet the test of legal justice. This does not mean achieving a supreme ("God-determined") or general philosophical category of justice. What is regarded as just and "God-determined" according to one religion or in one State may be assessed as unjust in another social sphere. The competitive principle imposes an obligation on states with different legal positions to act in good faith, making efforts to substantiate their positions and to prove the circumstances as relevant to the case. According to this principle, the arguments of each party should correspond to the area of their interaction, and the other party should be able to familiarize itself with them in a timely manner and legally respond to them. When it comes to adversarial proceedings in an international court or arbitration, the issue is simplified due to another general principle - "*JURA NOVIT CURIA*" ("The court knows the law"), that is the court qualifies the disputed legal relationship, establishes the presence/absence of relevant facts, determines the applicable law, gives an interpretation, etc. It is in the interests of the parties to fully disclose each party's understanding of the dispute before the court. If we consider competitiveness in the broader context of the progressive development of international law, the issue is more complicated. International legal relations are a multilevel substance; realization of such relations involves the relevant rules of both national and international systems of law (see: [10, pp. 196-236; 11, pp. 38-44]. Here, the competitive nature is manifested in the influence of specific states on the conciliatory formation of new rules of international law, on their prevailing interpretation; on the results of compliance with such provisions, etc. At the level of psychology, the competitive activity involves mechanisms of comparison, validation, regulation of the exchange of arguments of the parties, manifestation of their multidirectional actions. At the same time, both participants of competitive activity show the following components: 1) an expressed desire to prove their individual positions as the only legitimate and 2) expressed desire to interact with another party and the court in order to obtain a common legal result [12, p. 5]. In the procedures of communication realized in international law, in the construction of political and legal elements of interaction between states, the competitive principle is manifested as a general principle of law (in the sense of Article 38 of the Statute of the Court), as evidenced, in particular, by the interaction of Russia and the U.S. in the use of outer space.

**3. Competitive observance of clauses on restrictions on the military use of the outer space**

For decades, the USA has traditionally regarded outer space as an arena of power rivalry, promoting new military projects (see: [3, p. 5-7]). For example, the goal of the Strategic Defense Initiative program, declared by President R. Reagan forty years ago, was to create new types of weapons capable of hitting enemies on Earth from the outer space. One of the results of the implementation of this program was the withdrawal of the USA from some arms reduction treaties, in clear violation of the existing strategic balance between the USA and the USSR. In the 21st century, the U.S. actions in this area have become even more defiant. In December 2019, the formation of a separate branch of the military - the United States Outer Space Force - was announced. Significant in international legal terms are also the statements that "NATO recognizes outer space as the alliance's fifth field of operations."[13]. The U.S. Congress voted in favor of legislation to provide funding to "deploy" facilities capable of intercepting ballistic missiles in outer space. Prof. Vereshchetin V.S. noted that at one time the USSR and the U.S. "managed to successfully

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coordinate their positions on some important restrictions on the use of outer space for military purposes"[1, p. 7-8]. Among such restrictions are general obligations: to carry out activities in outer space "in the interests of maintaining international peace and security" (Article III); to use celestial bodies "exclusively for peaceful purposes" (Article IV); to adhere to the "principles of cooperation and mutual assistance" (Article IX) and so on. The principle of non-use of force and threat of force applies to space activities by virtue of Article III of the 1967 Outer Space Treaty (see [14, p. 168]). The Treaty also provides for more specific obligations: "not to place in orbit around the Earth any objects carrying nuclear weapons or any other weapons of mass destruction"; "not to install such weapons on celestial bodies or otherwise place such weapons in outer space" (Art. IV). In this context, there is no doubt that the U.S. policy of "stationing" missile interception facilities in space is inconsistent with the U.S. treaty obligations to use space "in the interests of the maintenance of international peace" and "not to station weapons in outer space". It is also clear that such US installations may be equipped with weapons of mass destruction. The Cologne Commentary notes the tendency to use in space "dual-use vehicles" - peaceful and military - which is allegedly supported by "all" space powers. "Without the support of space capabilities, it is impossible to conduct military operations in the modern world," the authors of the Commentary write, and the prohibition in Article IV on the placement of weapons in space "explicitly refers only to WMD" (weapons of mass destruction), but "the use of outer space for military purposes, including the placement of conventional weapons in space, is quite permissible" [1, p. 167].

Let us clarify: the permissibility of deploying conventional weapons in space and their use "in military actions in the modern world" depends not only on the interpretation of the 1967 Outer Space Treaty. If such military actions contradict the UN Charter, then, of course, the use of space military infrastructure is not permissible either; despite the claims of the authors of the Commentary that it is impossible to conduct military actions without the support of "space capabilities". In other words, if the U.S. military invasion of Iraq in 2003 was a violation of the UN Charter, then the use of space forces by the USA during this invasion cannot be qualified as legitimate. From this broader legal perspective (which is not limited to the interpretation of the 1967 Outer Space Treaty alone) such activities in space should also be assessed as follows: the U.S. testing of anti-satellite weapons; the U.S. development of space-based missile defense components; and the U.S. conducting training cyberattacks from space. At the same time, the U.S. military space infrastructure in outer space is growing. The U.S. is making more efforts to compete with Russia in near-the-earth space. The U.S. attracts "non-governmental" (private) companies to use military space systems, claiming that their activities are "peaceful", which *DE FACTO* is not the case. For example, about 3,000 private low-orbit satellites of Space X (Space Exploration Technologies Corporation), owned by the American Elon Musk, are now in space (see: [15]), including over the zone of the Special Military Operation, assisting the attacks of the Zelensky regime on Donbass. Let us emphasize the idea already voiced in the literature that "the 1967 Outer Space Treaty provides for international legal responsibility of the signatory states for the activities of non-governmental organizations in outer space" [16, p. 230].

The intermingling of imperial ambitions and references to "the interests of the world and all mankind", which are pleasant to the international legal space policy of the USA, is quite characteristic. Thus, the U.S. Vice President stated: "...We have chosen to lead in space because we know that the rules and values of space ... will be written by whoever gets there first; and our obligation to humanity is to bring American values to the limitless expanse of the heavens" [17]. Note: the U.S. refers to its "duty to mankind," but implements a policy of military superiority of its space infrastructure. Against the background of the U.S. efforts to ensure dominance in outer space, it is appropriate to recall Article IV of the 1967 Outer Space Treaty, namely the obligation "not to place in orbit around the Earth any objects carrying nuclear weapons or any other weapons of mass destruction, not to install such weapons on celestial bodies, and not to place

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such weapons in outer space in any other manner. When defining the term "weapon" it is hardly appropriate to determine whether it is offensive or defensive; it is difficult to draw such a line today [18, p. 107].

Russia's successful political and legal response to the U.S. policy of military superiority in outer space was the Russian-Chinese draft treaty on preventing the deployment of weapons in space. The draft contains a definition of the concept of "weapons in space"; it provides for guarantees that anti-satellite weapons will not be used[2]. The adoption at the 69th session of the UNGA in 2014 of a resolution proposed by Russia on non-first deployment of weapons in space should also be attributed to Russia's success in this international legal battle. To date, Russia has already signed bilateral statements on non-first deployment of weapons in space with more than 30 states[3].

Despite the competitive nature of interaction in the outer space, both Russia and the U.S. assume that they are in compliance with the 1967 Outer Space Treaty. For example, both Russia and the U.S. believe that the Treaty does not prohibit the passage of missiles carrying weapons through the outer space. For the U.S., this is a part of its military policy of allowing an outer space first strike. For Russia, on the other hand, this clause ensures the realization of the Russian concept of retaliatory strike. But movement toward a universal agreement on the non-deployment of all weapons in space is currently blocked by the Washington's legal policy.

**4. The competitive nature of international legal environmental policy in the outer space**

Another reality are multidirectional efforts of Russia and the U.S. to clarify the legal regime of natural resources of celestial bodies. After the adoption of the Commercial Space Launch Competitiveness Act of 2015 (Pub. L. 114-90 "Commercial Space Launch Competitiveness Act of 2015") (see: [19]), the USA is increasingly developing national legislation on natural resources of celestial bodies. Legal scholars criticize this U.S. policy, referring to the wording of Article II of the 1967 Outer Space Treaty that outer space, including celestial bodies, "shall not be subject to national appropriation", because of which the U.S. Act of 2015 "contravenes a number of international treaties and customary international law"[4]. Russian legal experts note that the 1967 Outer Space Treaty operates in the "system" of international space law, while the U.S. is trying to "selectively use" the elements of this system [20, p. 33-34]. According to the U.S. position, U.S. legislation on celestial bodies and their natural resources "does not violate" the 1967 Outer Space Treaty provisions. [21, c. 142, 147].

It should be recognized that the USA earlier than the USSR and modern Russia paid attention to the importance of favorable legislative conditions for investments in space activities. This is evidenced by the U.S. Commercial Space Launch Promotion Act adopted back in 1984[5]. In 1984 there were no private investors in outer space activities in the USSR. In the U.S. legislative system, outer space activities of persons (individuals and legal entities) are supported by the state. According to the U.S. Commercial Space Launch Competition Act of 2015, any U.S. citizen wishing to develop "natural resources of asteroids (asteroid resources)" or other "non-living natural resources (abiotic resources)" of celestial bodies can formalize their right to develop such resources[6]. Is this legislative approach

[2] Treaty on the Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects. Draft. International Life. 2008. № 3. С. 143-148. URL: https://interaffairs.ru/jauthor/material/1295?ysclid=lks78g66wx98391847 (accessed date: 04.04.2023).

[3] UN General Assembly Resolution No. A/RES/69/85 of 05.12.2014. International cooperation in the peaceful uses of outer space. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/674/58/PDF/N1467458.pdf?OpenElement (accessed date: 04.04.2023).

[4] Oduntan G. Who Owns Space? US Asteroid-Mining Act Is Dangerous and Potentially Illegal. NSNBC International. – 25 November 2015. – URL: theconversation.com.

[5] Public Law 98-575-Oct. 30,1984 An Act to facilitate commercial space launches, and for other purposes. URL: http://uscode.house.gov/statutes/pl/98/575.pdf (accessed date: 04.04.2023).

[6] Public Law 114-90-Nov.25, 2015 U.S. Commercial Space Launch Competitiveness Act. URL: https://www.congress.gov/114/plaws/publ90/PLAW-114publ90.pdf (accesses date: 04.04.2023).

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consistent with U.S. obligations under the 1967 Outer Space Treaty?

In May 2019, the United States launched the Artemis Program, which envisages a mission to the Moon in 2024, construction of a lunar station, landing on the Moon, and creation of infrastructure for human habitation on it; partners in the implementation of this program, including private companies, have been identified (see: [22]). In May 2020 the U.S. National Aeronautics and Space Administration (hereinafter - NASA) began negotiations on the conclusion of bilateral "Artemis Accords" with partners in the program. As of 2023, more than 25 nations are parties to such agreements. The stated purpose of these agreements is to carry out commercial activities in space, again, "for the benefit of all mankind" (see: [23, p. 825]). Both the huge "space" budget and the policy of attracting private business "work" for the U.S. success in competition with Russia in space exploration: for example, the program of commercial flights of the U.S. on the international space station is carried out jointly by NASA and Space X. By some estimates, the U.S. has already won the competition for "world" leadership in space, and "within the legal framework." Is this so? Sometimes the U.S. is resorting to a sophisticated interpretation of the 1967 Outer Space Treaty, which distorts it; then it "subtracts" the meaning that was not originally embedded in the Treaty. This is a track to change the legal regime created by the 1967 Outer Space Treaty. Meanwhile, in view of the significance of the Treaty, its parties, anticipating the possible need to amend it, provided in Article XV that any party to the Treaty could propose amendments to it, which would enter into force for each State party accepting them upon their adoption by a majority of the States parties to the Treaty, and subsequently for each remaining State party to the Treaty on the date of their adoption. Among the states parties to the 1967 Outer Space Treaty, many developing states view the U.S. position as undermining its purpose, as leading to damage to the natural resource interests of the majority of states [24, p. 5].

According to the competitive approaches of Russia and the U.S. described above, both states declare their national interests as corresponding to international law. Moreover, some analysts have advocated the development (without waiting for the clarification of the regime for the exploitation of natural resources of celestial bodies on the basis of the 1967 Outer Space Treaty) of national space legislation in accordance with the current realities. Proponents of another approach emphasize the necessity to clarify international legal regulation of natural resources activities in the outer space only on the basis of the 1967 Outer Space Treaty [25; 26].

**5. Conclusions**

The competitive relationship between Russia and the USA in interpreting and applying the 1967 Outer Space Treaty is a modern reality. It is the universal international legal paradigm of the use of outer space, including celestial bodies and their natural resources, strictly corresponding to the letter and spirit of the 1967 Outer Space Treaty, that meets the long-term national interests of both Russia and the U.S. The potentially conflicting path of adopting a multidirectional national legal acts on the development of natural resources of celestial bodies does not meet such interests. But the U.S. practice of aggressively promoting its interpretation of the 1967 Outer Space Treaty and creating a "parallel" space law (based on U.S. law and its Artemis agreements) is to be addressed by Russia for ignoring of such a practice is becoming increasingly counterproductive. In this situation, Russia's optimal legal space policy is unlikely to be merely a focus on its compliance with the 1967 Outer Space Treaty. It is more reasonable to proceed from the irreversibility of the U.S. and its allies' departure from the Treaty. It seems rational for Russia to improve its national space legislation and create no less favorable national legislative conditions for private investments in the domestic space industry. At the same time, it is advisable to support the efforts of China and other states that seek to compel the USA and its partners to "return" to the field of the good faith compliance with the universal international space law.

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