
The Outer Space Treaty and Military Activities

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History

COLD WAR

NEGOTIATING HISTORY

Rules of Interpretation

Plain language governs (drafters should say what they mean, and mean what they say)

If treaty text is ambiguous

- Courts may look at negotiations
- Courts may look at intent

Customary international law

- May apply when treaty is silent or contains undefined terms
- Elements:
 - Evidence of a general practice accepted as law
 - This means “settled state practice” and a sense of legal obligation

Article IV: *States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.*

Prohibition of nuclear weapons or other WMD in full orbit is clear.

Definition of weapon of mass destruction is less clear.

- Scholars suggest ambiguity creates considerable leeway, but
- We have treaty negotiating history for a starting point: whether a weapon's capacity for annihilation is on par with a nuclear weapon's capacity.

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Other weapons in orbit are not forbidden

- Pistols for fighting bears and wolves
- ASAT weapons, jamming, cyberattacks.

Military reconnaissance, navigation, and communications satellites are not forbidden.

But see, Article IX, which calls for States Parties to the Treaty to conduct their activities in the exploration and use of outer space “with due regard to the corresponding interests of all other States Parties to the Treaty.”

Article IV. *States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.*

Clearly, no WMD allowed in a full orbit

Clearly, ICBMs aren't forbidden (they aren't "stationed")

What about a partial orbit?

- Soviet FOBS (state practice? 18 silos)
- Chinese hypersonic glide vehicles
- DOD legal assessments

Article IV. *States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.*

Probably it's the USG's position), the OST prohibits WMD on the Moon.

- This provision doesn't mention the Moon.
- Under the rules, we should assume its exclusion is deliberate.
- However, there are other strong indicators that the drafters included the Moon as a celestial body.

In any event, putting WMD on the Moon looks like "stationing." Stationing also includes lunar orbit and orbit around other celestial bodies.

Article IV.

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Where is outer space?

- Object in orbit are in outer space.
- So is the Moon.
- Airspace is not. High altitudes remain part of a nation's sovereign airspace.

Where does it start?

- We don't say. And that's a good thing.

Article IV.

The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes.

The OST is silent about orbits or interplanetary space, so they do not have to be exclusively peaceful.

- State practice: military satellites in orbit, ASAT tests

The United States views this requirement as allowing the use of force in self-defense.

- USSR originally claimed “peaceful” meant non-military.
- U.S. consistently took the contrary position, even prior to the OST.
- Article III incorporates the UN Charter, which allows for self-defense.

Article IV. *The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.*

Does this prohibition apply to the Moon?

- Arguably not.
- U.S. DOD Law of War Manual says it does apply to the Moon.

Military personnel shall not be prohibited. Any equipment or facility necessary for peaceful exploration shall also not be prohibited.

Article XII.

All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity. Such representatives shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited.

Inspections apply to Moon and other celestial bodies.

Does not apply to

- Stations, installations, equipment, or vehicles on the ground on Earth
- Orbiting facilities

Reciprocity requirement is unclear according to the Senate ratification hearings.

Advance notice required for safety and to avoid interfering in normal operations.

Article XIII.

The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, ...

Does the Treaty apply during War?

- General Wheeler testified during 1967 ratification hearings that the Treaty would not apply during war.
 - DOD Legal Statements from 2002 and 2016: Treaty would likely not apply
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