

**5th Eilene M. Galloway Symposium on Critical Issues in Space Law
Art. IX of the Outer Space Treaty and Peaceful Purposes:
Issues and Implementation**

Consideration of 'Heavenly Matters' and the Evolution of Article IX

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There are three basic interests expressed in art. IX of the Outer Space Treaty¹ vis-a-vis the planetary protection policy: first, the prevention of contamination of pristine celestial environments by terrestrial sources; second, the prevention of the contamination of the Earth by the return of extraterrestrial materials; and third, the prevention of interference with the activities of other states in the peaceful exploration and use of outer space.

The subject of protecting natural celestial environments was considered in 1956 at the Congress of the International Astronautical Federation in Rome, under the foresight of Andrew Haley. As discussed in detail by other panelists at this Symposium, the international scientific community took an active role in the development of policies for the protection of natural environments of space, from the initial leadership of the U.S. National Academy of Sciences in 1957, to the International Council of Scientific Unions (ICSU) establishing the *Ad Hoc* Committee on Contamination by

Extraterrestrial Exploration (CETEX), to the publication by the Committee on Space Research (COSPAR) of recommended planetary quarantine requirements in 1964.

The international diplomatic community also had an active role in the development of the policies expressed in art. IX. The focus however, was not on the intrinsic value of preserving pristine natural environments, and the attention came from the highest sources. A remarkable exchange of correspondence occurred between Nikita Khrushchev and John F. Kennedy which had a direct bearing on the evolution of article IX. In a letter in March, 1962, Chairman Khrushchev wrote to President Kennedy:

The growth of space research by individual States undoubtedly makes it necessary to come to an agreement that in carrying out experiments in outer space, no one should create obstacles to the study and use of space for peaceful purposes by other States. It should, perhaps, be specified that any experiments in outer space which may hinder the exploration of space by other countries should be the subject of

1. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, entered into force Oct. 10, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

preliminary discussion and of an agreement concluded on a proper international basis . . . Those, Mr. President, are our views on, as it were, heavenly matters.²

This letter articulated the nexus between the protection of celestial environments and the right of states to conduct activities in the exploration and use of space. Chairman Khrushchev made another connection in his letter, that of the relationship of space cooperation to the broad issue of disarmament:

Considerably greater prospects for co-operation, for pooling our scientific and technical efforts, including even joint development of space-ships which can be sent to other planets – the moon, Venus, Mars – will be opened up when agreement is reached on disarmament.³

Later that year, the Soviet Union submitted a proposal to COPUOS for the adoption of a “Declaration of the Basic Principles governing the Activities of States pertaining to the Exploration and Use of Outer Space.” Paragraph 6 of this Proposal provided:

6. Co-operation and mutual assistance in the conquest of outer space shall be a duty incumbent on all States; the implementation of any measures

that might in any way hinder the exploration or use of outer space for peaceful purposes by other countries shall be permitted only after prior discussion of and agreement upon such measures between the countries concerned.⁴

On 22 November, 1963, COPUOS unanimously approved modifications to the original Soviet proposal as paragraph 6 of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,⁵ which was adopted by the General Assembly as Res. 1962. Paragraph 6 of the Declaration provided:

In the exploration and use of outer space, States shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space with due regard for the corresponding interests of other States. If a State has reason to believe that an outer space activity or experiment planned by it or its nationals would cause potentially harmful interference with activities of other States in the peaceful exploration and use of outer space, it shall undertake appropriate international consultations before proceeding

2. Letter dated 21 March 1962 transmitting letter of 20 March 1962 from Chairman Khrushchev to President Kennedy, U.N. Doc. A/AC.105/2, 21 March 1962, p. 5.

3. *Id.* p. 6.

4. COPUOS, Report of the Legal Sub-Committee, U.N. Doc. A/AC.105/6, 9 July 1962, pp. 3 - 5.

5. Additional Report of COPUOS, U.N. Doc. A/5549/Add.1, 27 November 1963, p. 2.

with any such activity or experiment. A State which has reason to believe that an outer space activity or experiment planned by another State would cause potentially harmful interference with activities in the peaceful exploration and use of outer space may request consultation concerning the activity or experiment.

COPUOS reported that paragraph 6 took into account the conclusion of the scientific sub-committee that there was urgency to the problem of preventing potentially harmful interference with the peaceful uses of outer space.⁶ The Canadian delegation commented that although states were not specifically asked to take part in consultations if an experiment would harm the natural environment of the Earth, the representatives felt confident that any state contemplating such an experiment "would spontaneously undertake consultation."⁷

Following the adoption of Res. 1962, it was recognized that there was a need to elevate legal principles to the level of a formal treaty. In June, 1966, both the U.S. and the U.S.S.R. submitted proposed texts of a treaty governing the exploration of outer space, the Moon and other celestial bodies. Article VIII of the Soviet draft repeated the substance of paragraph 6 of the Declaration of Principles, and inserted a new provision: "States Parties to the Treaty shall conduct research on celestial bodies in such a

manner as to avoid harmful contamination."⁸ The United States' draft expressed the rights of all states to freedom for scientific exploration,⁹ but it did not provide for consultations for activities which may cause interference. However, Article 10 of the U.S. Draft Treaty provided that "States shall pursue studies of, and, as appropriate, take steps to avoid harmful contamination of celestial bodies and adverse changes in the environment of the Earth resulting from the return of extraterrestrial matter."¹⁰ Thus, both the US and USSR draft treaties went significantly beyond the Declaration of Principles by the inclusion of the mandate for states to conduct activities as to avoid harmful contamination.

The Japanese delegation expressed concern that neither draft was sufficient to protect natural celestial environments, and stated that "Great care must therefore be taken to preserve their resources and their natural milieu."¹¹ Japan proposed an amendment that states should exercise maximum care for the preservation and conservation of the natural resources and

6. *Id.* Annex p. 3.

7. *Id.* Annex p. 10.

8. Report, Legal Sub-Committee of COPUOS, U.N. Doc. A/AC.105/35, 16 September 1966, Annex I, p. 14.

9. U.S. Draft Treaty Governing the Exploration of the Moon and Other Celestial Bodies, U.N. Doc. A/AC.105/32, 17 June 1966, p. 4.

10. *Id.* p. 6.

11. Legal Sub-Committee, COPUOS, Summary Record of the 68th Meeting, U.N. Doc. A/AC.105/C.2/SR.68, 21 October 1966, p. 6.

environments of celestial bodies.¹² Japan also proposed that references to activities in outer space, as referred to in the language carried over from paragraph 6 of the Declaration of Principles, be amended to specifically include celestial bodies.

The U.S. welcomed the merging of the two drafts, and also concurred with the Japanese amendment to add celestial bodies. Ambassador Goldberg noted that:

Knowledge of the questions dealt with in the two texts was still meager and they required scientific study. Consultations were being conducted on the subject, particularly through the COSPAR Consultative Group. Care must be taken, however, not to establish too rigid procedures, which might hinder research.¹³

Ambassador Morozov of the U.S.S.R. reported that he had no objection to article 10 of the U.S. draft, and that the two proposals could be combined. The U.S.S.R. further had no objection to the Japanese amendment to expand references to contamination of outer space to include celestial bodies.¹⁴ The Japanese had

proposed an additional amendment, however, to which the U.S.S.R. could not agree. Specifically, the Japanese proposed that advance notification be provided to the Secretary General of an activity that may cause harmful interference with the activities of other states. Discussions ensued among the delegations concerning the disclosures to be made, whether they were compulsory, and the role of the Secretary General in the receipt of voluntarily disclosed information.

The U.S.S.R. insisted on its proposal for the voluntary, direct disclosure and consultations between the states. The Soviets were not seeking to enter into an agreement detailing the nature of the information to be disclosed, nor was the delegation prepared to entrust the Secretary General with functions connected with the implementation of the treaty. It was noted that the Secretary General was not to be a depository of the treaty. It further was the position of the U.S.S.R. that information would be given to parties more quickly through direct disclosure rather than through the Secretary General, although the information also could be given on a voluntary basis to the Secretary General. However, the information subject to disclosure by this draft article was of a special nature, as it is to be provided in advance, and thereby distinguished from information which is to be provided after the fact concerning activities which have been conducted.¹⁵ Bulgaria concurred that there was no link between voluntary disclosure of results of activities conducted and advance disclosure of activities

12. Legal Sub-Committee, COPUOS, Summary Record of the 71st Meeting, U.N. Doc. A/AC.105/C.2/SR71 and Add.1, 21 October 1966, p. 13.

13. Legal Sub-Committee, COPUOS, Summary Record of the 68th Meeting, *supra* note 11, p. 7.

14. *Id.* p. 3.

15. *Id.* p 4.

which could cause interference with the activities of other states.¹⁶

Lebanon raised a question concerning the absence of an obligation for states to agree to a request to engage in consultations. The U.S.S.R. was of the opinion that as part of a treaty having compulsory force, a state would be required to comply with a request for consultations. Canada considered that the principle that states should conduct activities with due regard for the corresponding interest of other states constituted one of the most important points of international law concerning the exploration and use of outer space.¹⁷

The Japanese delegation supported its proposal by explaining that since the number of states participating in space activities would certainly increase, they believed that the surest and most straightforward method of providing prior notice would be through the Secretary General. Japan offered a compromise where the information could be given directly to states or alternatively through the Secretary General.¹⁸ Nevertheless, this did not persuade the U.S.S.R. to alter its position, and the Soviets refused to accept the compromise formulation.

The representative of Japan stated that his delegation was not convinced that the text was sufficient to require states to:

exercise maximum care for the preservation and conservation of the natural resources and environment of celestial bodies. [His delegation] suspected that the space Powers had not accepted its amendment mainly because they feared that it might tie their hands in future activities on celestial bodies. In his delegation's view such fears were groundless, but in a spirit of co-operation it would not press the amendment.¹⁹

With this proposed amendment withdrawn, COPUOS was able to achieve consensus on the text of art. IX. As adopted, the text was very similar to the provisions of paragraph 6 of the Declaration of Principles. Added to the language of the Declaration was the proposal by the Soviets to protect against forward and back contamination. Pursuant to the Japanese amendment, references to outer space were expanded to expressly include "the moon and other celestial bodies." Other than minor grammatical adjustment, the final modification from the Declaration was to replace the reference to "other parties" with "states parties," thereby limiting the applicability of art. IX to only the subset of nations which have become party to the international instrument rather than the entire global community.

16. *Id.* p 9.

17. *Id.* pp 9 - 10.

18. Legal Sub-Committee, COPUOS, Summary Record of the 71st Meeting, *supra* note 12, p. 13.

19. *Id.*