

Principles of Peaceful Purposes and the Obligation to Undertake Appropriate International Consultations in Accordance with Article IX of the Outer Space Treaty

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The OST: Principles to Guide State Action

The *Outer Space Treaty* is an international agreement that is primarily a codification of principles to guide State action. Within the text of the Treaty these guiding principles are elaborated to varying degrees, sometimes articulating specific legal rights and obligations that can be called upon by State Parties for legal and/or political purposes. Article IX is an embodiment of this duality.

Contextualizing Art.IX Rights and Obligations

On the one hand Article IX states broadly guiding principles, but on the other hand references particular rights and obligations. To properly understand Article IX, its obligations and rights must be placed within the context of their guiding principles.

Article IX Guiding Principles

The three guiding principles of Article IX are the principles of:

- (a) Cooperation,
- (b) Mutual Assistance, and
- (c) Due Regard*

Principle of Due Regard

- The term due regard, in the context of Article IX, should be understood as an obligation to *take into account, both prior to (planned) and during (ongoing) space activities and experiments the legal rights of other States Party in the peaceful use and exploration of outer space, the moon and other celestial bodies .*
- The rationale for including the principle of due regard in the *Outer Space Treaty* stems first and foremost from the practicality of States Party undertaking activities and experiments in a shared global common analogous to the high seas and/or international airspace.

Scope of Application of Due Regard

- The application of due regard is not granted carte blanche to all of the interests of other States Party. Instead, due regard is limited to the corresponding interests of other States Party in their peaceful use and exploration of outer space.

Conditions Triggering the Prior Consultation Obligation

- *1st*: There must be a planned activity or experiment in outer space,
- *2nd*: There must be reason to believe that a planned activity or experiment would cause potentially harmful interference, and
- *3rd*: with activities of other States Parties in the peaceful exploration and use of outer space.

Note: For a detailed legal analysis of these conditions please refer to the following article
Michael C. Mineiro, “FY-1C and USA-197 ASAT Intercepts: An Assessment of Legal Obligations under Article 9 of the Outer Space Treaty” 34(2) Journal of Space Law 321 (2008) at 338.

What are appropriate international consultations?

- Consultation requires, at minimum, that States be provided with information sufficient to take appropriate action to prevent potentially harmful interference with their peaceful uses or explorations in outer space, the Moon and other celestial bodies.
- Imposing any less of an obligation would emasculate the international consultation clause of Article IX, a result that is unreasonable in light of the Treaty and its purposes.

Political Consequences of Non-Compliance

- Violating the consultation obligation of Article IX will provide a legal norm that can be leveraged against the violating State in a political context.
- The legal violation of the consultation obligation raises the political spectre of States responding to the violation through bilateral, multilateral, and/or U.N. sanctioned responses.
- Depending on the result of the activity/experiment that was undertaken but not consulted, the response of States may range from ignoring the violation, to requesting U.N. Security Council action, to the unilateral use of force on the basis of self-defence under Article 51 of the U.N. Charter.

State Practice: Possible Erosion of Art.IX Obligation

- Article 31(3)(B) of the Vienna Convention states: “[t]here shall be taken into account, together with the context...any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” “It is not necessary to show that each party has engaged in a practice, only that all have accepted it, albeit tacitly.”
- Subsequent state practice has not yet established that Article IX’s appropriate international consultation obligation excludes consulting for kinetic ASAT activities or experiments in outer space. However, if States continue to perform kinetic ASAT experiments without conducting appropriate international consultations, the argument in favour of subsequent State practice establishing an agreement among States Party to exclude kinetic ASAT activities from Article IX’s international consultation provision is strengthened.

Maintaining International Peace and Security: Art. IX Prior Consultations as a Confidence and Security Building Measure

- Ability to serve as a confidence and security building measure, preventing and/or deescalating incidents of inadvertent interference.
- Requires States to consult even on military space activities*
- Art. IX should be strengthened with a non-legally binding “code-of-conduct” for prior and ongoing space activity consultations

Conclusions

- Art. IX language allows for significant subjectivity in interpretation and application of the consultation obligation
- Nonetheless, ad minimum States must be provided with information sufficient to take appropriate action to prevent potentially harmful interference with their peaceful activities in outer space.
- Improving State practice and supplementing Art. IX with a “code-of-conduct” will serve enhance international outer space peace & security.