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Safety Zones on Celestial Bodies and in Outer Space (5)

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FRAMEWORKS FOR REASONABLE SAFETY ZONES USING THE DUE REGARD PRINCIPLE

Abstract

This paper considers how States could use the due regard principle in designing safety zone regimes in orbit and on celestial bodies that are not only in compliance with, but supported by, international law. Specific examples of how safety zones could be addressed within the International Telecommunication Union and UN Committee on the Peaceful Uses of Outer Space frameworks are addressed.

The principle of due regard is an underutilized space law tool that could, if embraced, play a significant role in establishing norms of responsible behavior in space. With an understanding of what due regard entails and with consequences for acting without due regard, States could create a regime establishing safe operation zones on celestial bodies and in orbit. This paper is part of a larger project by the author to address opportunities to use the due regard principle across issue areas in international space law.

The due regard principle, enshrined in Article IX of the Outer Space Treaty, requires that “States Parties to the Treaty . . . shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty.” Importantly, this provision modifies the broad right granted to all states under Article I of the Outer Space Treaty to freely use and explore outer space. It constrains the Article I right to a logical scope, essentially - exercise your freedom of use in a way that does not unreasonably limit other States’ congruent freedom of use. The principle is found not only in space law, but also in other areas of international law including maritime law (examples, UN Convention on the Law of the Sea and related arbitral awards; customary law as evidenced in the 1974 Fisheries Jurisdiction case).

Norms of behavior in line with the due regard principles could be developed in different ways. One method would be incremental development; States could proactively invoke “due regard” when addressing behavior by other States (example, the Luch close approaches) to evolve an understanding of the principle. States could also use technical documents like the 2011 NASA Recommendations to Space-Faring Entities to express expectations for behavior around certain equipment/activities. More comprehensively, States could design an agreement that could be used as an interpretation tool in line with customary law rules of treaty interpretation.