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THE RELATIONSHIP BETWEEN “EXPLORATION” AND “USE”: THE DUE REGARD PRINCIPLE
AS A TOOL TO PROTECT SPACE SCIENCE

Abstract

It is essential to address the relationship between “use” and “exploration” in the context of the due regard principle, establishing how commercial activities can be expanded while providing the necessary protections for critical scientific endeavors in space. This paper suggests legal tools to strike that appropriate balance.

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 to protect space science and exploration activities. 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. The principle is found not only in space law, but 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 release of tardigrades on the Moon) to evolve an understanding of the principle. States could also use technical documents like 2011 NASA Recommendations to Space-Faring Entities to express expectations for behavior around certain scientific 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. Such an agreement could be a modernized outgrowth of the COSPAR Planetary Protection Policy and address expectations for acting with due regard for different types of activities.