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THE EVOLVING PRINCIPLES OF DUE REGARD AND SPACE GOVERNANCE: HAZARDOUS
RISK AND HARM INHERENT TO SPACE AS INDEPENDENT VARIABLE

Abstract

Space is more than ever a contested and congested domain with increasing number of launches and payloads varying from state-led remote-sensing satellites to private-launched constellation satellites. However, discussion on the practice of due regard as a legal obligation has remained stagnant along with general provisions that have endured under the 1967 Outer Space Treaty and many agreements. This is due to two reasons. First, general statements on space law consider general state responsibility and liability due to already existing and applicable provisions of general international law. Second, the continuing lack of so-called Space Situational Awareness and Space Traffic Management makes it hard for ill-equipped states or entities to sufficiently perceive the risk and gain confidence in finding complicated cases of causation and liability in the vast and dark space.

This paper examines the harm and risk inherent to space and their effect to the general principle of due regard in space activities. Mainly stipulated under Article IX of the 1967 Outer Space Treaty, states parties must perform due regard when they have reason to believe there is 'harmful interference' with their activities. Unlike many arguments on the descriptive nature of this principle, however, the independent variable of space risk or harm (e.g., Kessler syndrome, air and ground traffic control) is not seriously taken into account in a legal sense. While current state and private practices are seen to follow the general principles of international space law per se, this paper reviews incidents and risks that are inherent to the characteristic of space which would need clarification for actors when performing due regard against 'hazardous and deleterious' harms and risks.

This paper further survey rules and cases of harm and the due regard principle in other sectors such as telecommunication and environment. For instance, Section IV, Article 15 of ITU Radio Regulations stipulate the avoidance of harmful interference that are different from permissible or accepted interference which should be resolved on the basis of goodwill and mutual assistance, obligating administrations and encouraging operators to take practicable and necessary steps. Upon comparative analysis, this paper finds that practice of due regard in fact varies upon the risk inherent to the case and not solely relying on the general interpretation of law. As both legal obligation and guide to responsible behaviors for space governance, the due regard principle would also evolve with the inherent risk and growing practice in space.