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Panel 1 3rd speaker

“How can the principle of due regard be applied to address threats arising from State behaviours with respect to outer space?”

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1. Introduction: potentials of “due regard” test

Thank you so much for giving me the opportunity to talk on the subject of “how can the principle of due regard be applied to address threats arising from State behaviours with respect to outer space?” My name is Setsuko AOKI, professor of law, Keio University Law School, Tokyo, Japan.

It is not sufficiently recognized that the Outer Space Treaty, the most important treaty in the field of international space law, has an effective principle of “due regard” to substantially mitigate threats arising from State behaviors with respect to outer space. The first sentence of Article IX provides that “States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and 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.” Article IX has other three sentences providing obligations to avoid harmful contamination in outer space and adverse changes of the Earth environment, the obligation to seek a prior international consultation when a State is likely to cause potentially harmful interference with activities of other States, and the right of a State to request consultation to the State which is likely to cause potentially harmful interference with its space activities. The obligation of due regard is independent of these three obligations and the right, and as such, the meaning and the criteria to apply due regard obligation have to be analyzed independently.

Reading only the first sentence of Article IX leads to the understanding that due regard is self-restraint in space activities on the part of States Parties based on reciprocity and equality of States, and it is strengthened by the obligation of international cooperation. This interpretation is reinforced by other articles of the Outer Space Treaty that reassure the legal obligations of common interests and the freedom of space activities on a basis of

equality.

As “due regard” is clearly mentioned as a legal obligation in Article IX, non-compliance with due regard in a specific space activity would be the violation of the Outer Space Treaty that could lead to the pursuit of international responsibility of the State attributable to that violation. A new legally-binding instrument is not needed to pursue international responsibility. This merit should not be underestimated.

However, as relatively less attention has been paid to due regard in international space law up until now, the meaning, contents or criteria to determine “due regard” is not clear enough to directly apply this test to address threats in space activities. Therefore, with the help of other fields of international law that have established “due regard” rule for allocating responsibilities between relevant States, the meaning and criteria of “due regard” obligation is presented. Then, necessary measures and steps for the effective application of “due regard” in space activities will be contemplated.

2. “Due regard” principle in other fields of international law

Looking into other fields of international law, with respect to treaties, “due regard” obligation was first appeared in the 1944 Convention on International Civil Aviation, which provides that States Parties undertake that State aircraft shall have due regard for the safety of civil aviation.

The term “due regard” is found about 10 times in the United Nations Law of the Sea Convention (UNCLOS), among which the reference to high seas freedoms that shall be exercised with due regard for the interests of other States (Art. 87(2)) seems to have close resemblance to due regard obligations specified in the Outer Space Treaty. Similar terminology, “reasonable regard”, is also used in the Law of the Sea Convention and the High Seas Convention, and it is assessed that “due regard” and “reasonable regard” have the same implications. Thus, State practice on the criteria of “reasonable regard” is also a useful reference.

Fisheries Jurisdiction Case of the International Court of Justice (ICJ) as well as some cases in international arbitration and the International Tribunal for the Law of the Sea (ITLOS) are quite useful to study the meaning and the methods of the application of due regard. Besides, International Committee on the Red Cross (ICRC) has assessed due regard

obligations as a rule of customary international law to the protection and preservation of natural environment during an armed conflict. Its commentary is also useful in considering due regard test applicable to space activities.

3. To develop specific criteria of “due regard” in space activities

Survey based on sources just mentioned resulted in five preliminary findings on the meaning and criteria of “due regard” as below. For saving time, for each finding, I also add space law perspectives. Concerning space law perspectives, I think it has to be especially taken note of that outer space is unique as the whole area is that beyond national jurisdiction and its environment is vulnerable, for instance, toward the generation of space debris that might stay several decades or more, and that will adversely affect any on-orbit activities. Besides, the Outer Space Treaty in general and specifically Article IX expressly underline the strengthened obligation of international cooperation among States Parties. These points are not necessarily found in other fields of international law.

(1) The first finding is that due regard is a duty of self-restraint in exercising the rights given to all or multiple States. Due regard as a duty is similar to the prohibition of an abuse of rights. Stronger self-restraint may be required in space activities owing to the strengthened obligation of international cooperation.

(2) The second finding is that due regard is a balancing mechanism between States that have identical rights (such as the freedom of navigation) or different concurring rights (such as the right of the fishing and the right for military maneuver) or even the colliding rights and duties.

(3) The third finding is that duty of due regard is satisfied if a State exercises its rights without resulting in any unjustifiable interference with the rights of other States.

The question of what is an “unjustifiable interference” should be ideally answered through the interpretation of Article IX of the Outer Space Treaty, but it is not necessarily expected as due regard principle has not been actively used by States Parties. But this may change once States are determined to use due regard as a tool to regulate responsible behaviours in outer space, for subsequent State practice would not only determine the treaty interpretation, but also clarify the criteria of the duty of due regard.

We already have a precedent concerning the interpretation of “potentially harmful interference with activities of other States Parties” stated in Article IX of the Outer Space

Treaty. At the time of drafting, it was understood radio and electronic interferences resulting from various innovative military tests started in early 1960s. Since around the mid-1990s, however, generating space debris became the central subject of potentially harmful interference by State practice, and the legal obligations to mitigate space debris had been gradually established. Urged by the shared recognition and helped by various technically-based guidelines including especially the 2007 Space Debris Mitigation Guidelines endorsed by the UN General Assembly, increasing number of States today have national regulatory frameworks for implementing space debris mitigation.

The same path is quite possible for due regard principle. If maintaining responsible behaviour is believed to observe due regard obligation, and State practice is accumulated with the help of detailed guidelines and implementing national regulatory frameworks, due regard would be effectively applied to space activities. In this regard, the 2019 Long-Term Sustainability Guidelines would appropriately help State practice.

(4) The fourth finding is that States often exercise regulatory and enforcement actions to satisfy the due regard obligation. This also applies to space activities especially because duty of due regard to other countries cannot be attained only by the actions and omissions of governmental agencies due to increased privatization of outer space and inherently dual-use nature of space activities.

(5) Finally, the fifth finding is that the standards of due regard in each case is determined by the specific circumstances and the nature of rights exercised by States. This has to be identified in disputes settlement mechanisms. In the future, space law may need disputes settlement mechanisms in addition to prior consultation in Article IX. However, this does not seem to fit at present.

4. Conclusion

As a conclusion, I would like to emphasize two things. First, due regard is a legal obligation for States Parties to abide by. In other words, we already have a legally-binding tool to pursue international responsibility against the violation of due regard. Second, accumulated State practice will identify responsible behaviours in space activities as those due regard obligations are satisfied. Already existent the Long-Term Sustainability Guidelines and increasing national regulatory frameworks to implement them will help develop methods on how most effectively due regard principle be applied to State behaviours.