



**Open-ended working group on reducing space threats
through norms, rules and principles of responsible behaviors**

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Item 6 of the agenda

**Consideration of issues contained in paragraph 5
of General Assembly resolution A/RES/76/231**

The duty of “due regard” as a foundational principle of responsible behavior in space

Submitted by the Republic of the Philippines

I. Introduction

1. Upholding the duty of “due regard” in the conduct of activities in outer space is essential to reducing space threats through norms, rules, and principles of responsible behaviors.

2. This duty is enshrined in the five main treaties on outer space, particularly the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (OST), and in its precursor which is the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. It has also been noted in discussions by the Group of Governmental Experts (GGE) established by United Nations General Assembly Resolution 72/50 as an important principle in the context of exploring possible substantive elements of a legally-binding instrument on preventing an arms race in outer space.

3. Having “due regard” to the interest of others in the conduct of activities in outer space is beyond being a voluntary norm of state behavior. It is a legal obligation of all spacefaring nations. Elaborating the concept of due regard and its application in outer space would enrich considerations on responsible behavior in space.

II. “Due regard” in the law of the sea

4. The duty of “due regard” is a legal principle that transcends international space law and is well-entrenched in other regimes of international law, most notably the law of the sea. In these regimes, norms were developed alongside the clarification and application of the concept of “due regard.”

5. The initial phase of the development of the law of the sea was anchored on the centrality of freedom in the oceans, as embodied in the doctrine of *mare liberum*. It later became clear, however, that one state’s unchecked and indiscriminate exercise of freedom in the high seas could impinge upon the exercise of the same freedom by other states. This paradox necessitated the development of new norms that recognized the need for limits on the so-called “*laissez-faire* treatment” of the high seas.



6. In 1956, the International Law Commission (ILC) stated that “states are bound to refrain from acts which might adversely affect the use of the high seas by national of other states.” This concept of self-restraint was debated at the First United Nations Conference on the Law of the Sea (UNCLOS I). The said conference settled on the principle that states using the high seas should have “reasonable regard” to the interest of other states. The conference enshrined this idea in the 1958 Geneva Convention on the High Seas.

7. While discourse leading to the enshrinement of the duty of “reasonable regard” in the 1958 Geneva Convention at UNCLOS I was, at the surface, an effort to bridge the two concepts of *mare liberum* and “self-restraint,” the International Court of Justice (ICJ) declared that in fact the principle of “reasonable regard” represented a replacement of “the former *laissez-faire* treatment” of the high seas. The ICJ’s pronouncement prompted the evolution of the principle from the more judicious language of “reasonable regard” to the more normative and demandable duty of “due regard.” The latter term was eventually enshrined in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

8. Subsequent jurisprudence on the law of the sea has since clarified that the duty of “due regard” represents a balancing of rights and interests between and among states, and between states and the international community as a whole.

III. “Due regard” in outer space

9. Similar to the evolution of norms on the use of the high seas, the enshrinement of the duty of “due regard” in the 1967 OST implies the same departure from a “*laissez-faire* treatment” of outer space towards a regime characterized by the accommodation of competing rights and interests. In the context of outer space, this balancing of rights and interests should involve two dimensions: first, between and among spacefaring nations; and, second, between a spacefaring nation and the wider international community.

10. Like the high seas, outer space is not subject to sovereign appropriation and its resources form part of the “common heritage of mankind.” Given these similarities, consistency of international law demands that the interpretation of the duty of “due regard” in the context of international space law does not dramatically depart from its existing application under the law of the sea.

11. Interpretations of the application of the duty of “due regard” arising from law of the sea jurisprudence could offer practical guidance in the context of clarifying the application of the same duty in outer space. The following ideas are instructive:

- While the duty of “due regard” does not constitute a blanket limit on state conduct, it also does not permit states to merely note other states’ rights and still do as they wish. Instead, its application depends upon the nature of the rights and duties involved, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated, and the availability of alternative approaches.
- In most cases, the duty of “due regard” would necessarily involve consultations on the basis of good faith, and require that the avenues for such consultations are exhausted. Such consultations, which is already provided for under Article IX of the 1967 OST, should encompass a conscious balancing of rights and interests, including extensive concern regarding the other party’s reaction; suggestions of compromise and willingness to offer assurances; and an understanding of other parties’ concerns in connection with any proposed activities.
- The duty of “due regard” imposes “due diligence obligation” upon states over the conduct of their nationals and vessels, with the view to ensuring that their conduct do not prejudice the rights and interest of other states.