Response to comments on the working paper on the principle of Due Regard

Submitted by Noelle Castillo

I thank my co-delegates for their comments on the working paper that I submitted. The comments are important to allow us to clarify and elaborate further on the concept of due regard to arrive at a shared understanding.

1. The duty of “due regard” is a legal obligation under the Outer Space Treaty (OST) that needs to be fleshed out and taken into consideration when discussing the elements of a legally binding instrument on PAROS. Further, security is defined differently now by many states that are now present in space. In the Philippines, safeguarding our space infrastructure for disaster response is a strategic and security imperative. Our national security policy defines national security as a state or condition where the people’s welfare, well-being, way of life; government and its institutions; territorial integrity; and core values are enhanced and protected. Ours is a broader definition that does not only apply to use of force or threat of arms race situations. But these broad security concerns are drivers of an arms race and must therefore be addressed to prevent an arms race.

2. It is a false dichotomy to insist that Article IX of the OST finds application only for safety considerations and not for national security or use of force actions that are prohibited under Article 2.4 of the UN Charter. The strict separation of security and safety issues is outdated and does not reflect reality. As discussions in other forums such as OEWG indicate, safety and security are two sides of the same coin.

3. While the duty of due regard is important in terms of ensuring safety, it is also important in avoiding miscalculation and misinterpretation, which could exacerbate tensions and undermine security and stability. For example, RPOs conducted without consent could be perceived as a threat by the affected state.

4. In fact, there is academic literature indicating that the enshrinement of the duty of due regard arose from security concerns of an activity in outer space, upon pressure from the scientific and international community. This is clear support for the argument that we should not dichotomize safety and security issues in outer space. The reason we find no national security issues that invoked the duty of due regard is because of state practice to deliberately carve it out from the applicability of the principle. National security activities are characterized by secrecy and states shy away from invoking it against another state for fear of creating a state practice norm that may be invoked against that state in the future. But this lack of state practice does not take away its applicability to those situations.¹

5. Due regard in Article IX OST is not a defined term. It is a duty of care, implemented by two legal duties of 1) duty to prevent harm and 2) duty to consult; and one legal right – right to demand consultation. Further, not all space activities are the same - what may be due regard for one activity may not be similar to what due regard is for another. This makes a legal definition of the term impractical since it is dependent on the nature of the activity and other factors that will be identified according to the experience of the space actors concerned.

6. Due regard being dependent on the nature of the space activity, there should be no pressure to give it a specific definition. Being a legal principle, it should be present in the Preamble as a foundational basis of the instrument. The provisions on operationalizing the principle may be left to treaty negotiations that is beyond the mandate of this present GGE.

7. The duty of due regard must be carried over to the legally binding instrument on PAROS as a measure that will prevent a state to undertake activities that will be a security threat to another state. More importantly, it will give other state actors, more specifically and expectedly a weaker space actor in terms of capabilities, the mechanism to demand consultation and notification before a threat or act of force is committed. If this mechanism is not provided, then the threat or act of force would have been allowed to be committed without any impediment. We are not being tasked to provide elements for a legally binding instrument to respond to an actual security threat only. Our task is to provide elements of an instrument to prevent that threat from being committed in the first place. Due regard is an important element of state responsibility during that stage of prevention.

8. The interpretation and elaboration of this duty is enriched by consideration of its application in other domains of international law. UNCLOS is relevant in this regard, because the duty of due regard can also be found there. Comparing the two usages, we cannot expect them to be the same in all aspects. As discussed, due regard is dependent on unique circumstance of the specific situation that is why it is operationalized by the duties of consultation and notification. The value of looking at UNCLOS’ use of due regard is how the principle has been further elaborated and operationalized in UNCLOS compared to OST. UNCLOS being an instrument that defines maritime territories, grants rights to a state with respect to defending its maritime territory, defines offenses and provides mechanisms for state action against offenders, it can be arguably characterized as a security instrument as far as territory in the maritime domain is concerned.