

European Aerospace Law

EU initiative for a Code of Conduct in Outer Space: A Critical Analysis

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Abstract:

The European Union draft Code of Conduct for space activities is one of the primary international initiative which are currently active, to improve the safety, security and maintainability of outer space activities. In spite of the fact that the fundamental spirit of this instrument is commonly shared by space-faring nations, significant difference exists among States as to some of its core provisions. This article recommends that the Code of Conduct make an unmistakable distinction between commercial activities and military activities, and consider more adjusted measures on the restriction of military activities in outer space.

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INTRODUCTION

Though the early space age was dominated completely by the two superpowers of the Cold War, the last couple of decades have witnessed critical expansion and broadening of space actors. Today, 11 countries have space launch ability and more than 60 countries work around 1100 active satellites in Earth orbits.¹

Private entities nowadays assume a vital part in human's exploration and utilization of outer space. Hence the fast increase of number of space actors and a possible arms race in outer space calls for a sense of urgency to the preservation of space environment.²

European involvement in space dates back to the early 1960s. Dissimilar to the United States and the Soviet Union, it concentrated mainly on science, innovation and exploration, instead of the military aspect of space. The strategic and security value/concerns were not formally recognised until recently. The European Union set out on its endeavors of improving the multilateral structure concerning the safeguarding of peaceful safe and secure space environment in 2008, by releasing the European Union draft Code of Conduct for outer space activities (hereinafter the Code of Conduct). The initiative has set up European Union(EU) as one of the primary actors in the worldwide space debate. Basically the Code of Conduct means to build up rules for responsible behaviours in space that would decrease the danger of debris

¹ Micah Zenko. A code of conduct for outer space (Council on Foreign Relations Press Policy Innovation Memorandum No. 10, November 2011). <http://www.cfr.org/space/code-conduct-outer-space/p26556>.

² "The European Union draft Code of Conduct for outer space activities: An appraisal"- Article by Jinyuan Su, Xu Lixin, Published on July 2013

generating instances and expand transparency in space operations in order to avoid collisions.³ The 2008 draft Code of Conduct was re-examined accordingly, considering remarks got from different States. Corrections brought about resulted in 2010 version, which was subsequently utilised by the EU High Representative to connect with third nations that have an interest for space activities. Further discussions and modifications were completed from that point. As of now, the EU has discharged no less than five versions of the Code, in 2008, 2010, 2012, 2013 and 2014 respectively.⁴

VITAL ASPECTS OF CODE OF CONDUCT

- **The Soft Law Nature**

The Code of Conduct is not intended to be a legally binding instrument, i.e. adherence to it and measures contained in that is willful for subscribing States. Also, there is no indication of hardening the proposal.⁵ The 2012 version of the Code of Conduct was amended to expressly state that the code is not legally binding (Section 1.4). The 2013 and 2014 version retains the wording. The absence of a provision for a legally binding mechanism in the Code of Conduct is viewed by some commentators as one of its principal shortcomings, consequently an impediment to endorsement. Case in point, it is observed that India

³ Draft Code of Conduct for Outer Space Activities, annex II, Council conclusions and draft code of conduct for outer space activities. Brussels: Council of the EU; 3 December 2008.

⁴ Versions of the EU Code of Conduct; Website: http://eeas.europa.eu/non-proliferation-and-disarmament/outer-space-activities/index_en.htm.

⁵ Pursuing an international code of conduct for the security and sustainability of the space environment. In: Remarks by Frank A. Rose, Deputy Assistant Secretary, Bureau of Arms Control, Verification and Compliance, at National Space Symposium, Colorado Springs, CO. Available from: <http://www.state.gov/t/avc/rls/188088.htm>

favours a legally binding mechanism to be standardised in order to avoid weaponisation and misinterpretation of activities in outer space, as a voluntary instrument such as the EU Code would defeat the very intention of such a code.⁶ But in the meantime defenders of the soft law approach in the field of space activities contend that it could avoid lengthy time-consuming negotiations that are generally needed to achieve international acceptance on the text of a treaty. In addition, informal non-treaty agreements are powerful confidence-building measures.⁷

The Code of Conduct was discharged when the Prevention of Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT), ran into a stagnation at the Conference for Disarmament (CD). Against such a setting, the soft law approach is by all accounts a suitable detour to accomplish similar objectives. As expressed by Carlo Trezza, a member of the Advisory Board of the UN Secretary General for Disarmament Matters, it was chosen to advance a less ambitious initiative, a soft law instrument which would have more chances of being embraced by the international community.⁸

- **Measures on Security**

'Security' is a fundamental component of thought when States choose whether or not to subscribe to an international instrument. As expressed by previous US Secretary of State, it will not go into a Code of Conduct

⁶ Rajagopalan Rajeswari Pillai. Debate on space code of conduct: An Indian perspective. ORF Occasional Paper # 26. New Delhi: Observer Research Foundation; October 2011.

⁷ Goh Gerardine Meishan. Softly, softly Catchee monkey: informalism and the quiet development of international space law. *Neb Law Rev* 2008; 87:725e46. 731e2.

⁸ Briani Valerio. The EU as a force for stability in space, the EU code of conduct for outer space activities. The European Security and Defence Forum (ESDF); 11 November 2010.

that in any capacity constrains the national security-related activities in space or the ability to protect the United States and its allies.⁹

The longing for a Code of Conduct emerged from dissatisfaction with the space arms control process and out of concern towards the stability of the space security environment.¹⁰ It is thus not difficult to envision that the Code of Conduct comprises of an arms control component. As indicated by its Section 4.2,

the Subscribing States resolve, in conducting space activities, to refrain from any action which brings about, directly or indirectly, damage, or destruction, of space objects unless such action is justified by imperative safety considerations , in particular if human life or health is at risk; or by the Charter of the United Nations, including the inherent right of individual or collective self-defense; or in order to reduce the creation of space debris; and, where such exceptional action is necessary, that it be undertaken in a manner so as to minimize, to the greatest extent practicable, the creation of space debris.

The above provision intends to protect outer space objects from damage or destruction, notwithstanding whether it creates long-lived space debris or not, and be the activity originating from outer space or the Earth. Exceptions are made just with regards to the reduction of space debris, self-defense and safety considerations. As "safety considerations", other than "security considerations", is used, a national security right is not an explicitly authorised reason for the production of space debris.¹¹

⁹ Press statement by Hillary Rodham Clinton. Above Ref.

¹⁰ Kueter Jeff. Do we need a code of conduct for space? Considering recent developments in the effort to change behavior in space. Marshall Institute Policy Outlook; February 2012.p. 2.

¹¹ Tronchetti Fabio. Preventing the weaponization of outer space -Space Policy 2011; 27:81e8. 85.

The Outer Space Treaty just restricts weapons on celestial bodies and Weapons of Mass Destruction in orbit and PPWT's aim is to ban conventional space-based weapons and ground-based Anti-Satellite Weapon's (ASAT), a loophole in current outer space law. An essential question for arms control treaties is at which stage the weapon should to be banned on the chain of research, development, testing, production, storage, deployment, and use or threat of use. As opposed to the Code of Conduct, the above provision of PPWT just expressly prohibits space-based weapons from the stage of deployment and ASATs from use or threat of use.

From security perspective, both the Code of Conduct and the PPWT are defective on space arms control. In a perfect world, it ought to put a prohibition on both the placement of weapons in orbit and the further development of ground-based ASATs. This methodology is reasonable with the interests of EU, which has perceived that the militarisation and possible weaponization of space is a key test for its space security¹². In particular, the militarization of space allows an arms race, strengthening doubt amongst states, which may prompt a weaponization of space when states develop capabilities to defend their space assets and react to the military posing of other states.¹³

- **Measures on Safety**

The safety of space environment is an essential for peaceful exploration

¹² Russia, EU, and Common Security Space: Pros and Cons Arbatova, Nadezhda; A Russian Journal on International Security, 2008, Vol.14(2), p.35-44

¹³ Evers Tobias. The EU, space security and a European global strategy. UI Occasional Papers; 2013. p. 23. No. 18.

and use of outer space. The continuing derogation of space environment, specifically the multiplication of space debris has posed a challenge to it. The 2014 version, as opposed to the 2010 and 2012 variants, takes "safety" as the primary purpose over "security". This change was first introduced in the 2013 version.¹⁴ Space debris and control mitigation is along these lines raised as one of the foundations of the Code of Conduct.

As far as safety measures are concerned, the Code of Conduct to a great extent overlaps with initiatives by some other international bodies.¹⁵ In spite of the fact that to minimise the creation of outer space debris and to mitigate its impact in outer space is clearly consistent with the long-term interests of space-faring nations, it ought to be noticed that there is a trade off between environmental protection and development.

Another core issue is regarding the environmental requirements. To subject States at various developmental stages to the same environmental requirements gives rise to the issue of equity. In the international politics of environmental protection, it is contended that the special needs of the developing countries must be accommodated in the development, interpretation and application of environmental rules.¹⁶ Henceforth, developed and developing States ought to assume common but differentiated responsibilities. The principle of "common but differentiated responsibilities" comprises of two components: the

¹⁴ http://www.eeas.europa.eu/non-proliferation-and-disarmament/pdf/spca_code_conduct

¹⁵ Supra footnote 13;

¹⁶ Advancing an International Space Code of Conduct, Jana Robinson, Jul 13 2012.

primary component is the basic obligation of states towards protection of the environment; the second concerns the need to make note of differing circumstances, especially in connection to every state's contribution to the formation of a specific environmental problem and its capacity to prevent, reduce and control the threat.¹⁷ Somewhat echoing this sentiment, a few developing countries opined at the Kiev conference that, in the mitigation of space debris, developed countries should assume more responsibilities.¹⁸

- **Transparency and Confidence Building Measures**

Part III of the Code of Conduct is devoted to cooperation mechanisms. Section 5.1 and 6.1 states respectively as;

The Subscribing States resolve to notify, in a timely manner, to the greatest extent practicable, all potentially affected Subscribing States of any event related to the outer space activities they are conducting which are relevant for the purposes of the Code (Section 5.1).

The Subscribing States also resolve to share, on an annual basis, where available and appropriate, information with the other Subscribing States on their space strategies and policies, including those which are security-related, in all aspects which would affect the safety, security, and sustainability of current and planned activities in outer space; their major outer space research and space applications programmes; their space policies and procedures to prevent and minimize the possibility of accidents, collisions or other forms of harmful interference and the creation of space debris; and efforts taken in order to promote universal adoption and adherence to legal and political regulatory instruments concerning outer space

¹⁷ Sands Philippe. Principles of international environmental law. 2nd ed. Cambridge University Press; 2003. p. 286.

¹⁸ Zhenjun Zhang. Above Ref. p. 51.

activities (Section 6.1).

Transparency and Confidence Building Measures (TCBMs) would add to the diminishment of ambiguities, questions and suspicions amongst States and the betterment of international cooperation.¹⁹ Be that as it may, a qualification ought to be made between strategies and policies with respect to civil space activities and those related to security and defence. One of the advancements of the 2012 version, the adaptation from the 2008 and 2010 versions is the expulsion of the commitment to share information on basic objectives for security and defence related activities in outer space.²⁰ In any case, this was re-grabbed again by the 2013 version and also included in the 2014 version of the Code of Conduct, in which the Subscribing States resolve to share, where available and appropriate, information with the other Subscribing States on their space strategies and policies which are security-related. It is surely that TCBMs in civil activities are much more realistic to execute than those related with security.

As secrecy is a vital component of customary military strategies, transparency also, openness on an intentional premise challenge the idea of military-based national security.²¹ Henceforth, it is just far-fetched that States would share data on fundamental goals of security and defence related activities in space. Regardless of the possibility that they do, the

¹⁹ Council Decision (CFSP) 2015/203 of 9 February 2015 in support of the Union proposal for an international Code of Conduct for outer-space activities as a contribution to transparency and confidence-building measures in outer-space activities

²⁰ Supra foot note 16;

²¹ Takaya-Umehara Yuri. TCBMs over the military use of outer space. *Acta Astronaut* 2010; 67:1299e305. 1303.

information shared would be kept to the minimum.

- **The Negotiation venue, the Necessity and the Authenticity**

Another obstacle on the way to a future International Code of Conduct for Outer Space Activities is the negotiation venue. The Code of Conduct has been discussed by an ad hoc process, rather than existing UN fora, such as, the CD or the Committee for Peaceful Uses of Outer Space (COPUOS).²² Reactions have been raised as to its necessity and authenticity. From one perspective, the EU proposition in extensive parts covers with international efforts in the COPUOS and the CD. Then again, the EU is not duly authorised by any international institution to build up an international Code of Conduct for outer space activities. Recognising that the existing treaties governing the outer space activities are deficient to safeguard the security, safety and sustainability of outer space, there are two choices for the international community: one is to fortify existing outer space law by arranging legally binding treaties on space arms control and space environmental protection; the second is to propose a non-binding instrument.²³ The two dimensions are exemplified by the PPWT in the CD and the Code of Conduct by the EU respectively. A legally binding instrument would be a perfect leap forward. Be as held by the EU, the COPUOS and the CD just accumulate a constrained number of countries, and it might want to widen global interest in the initiative and bring discussions to a swifter conclusion. In addition, the CD operates on consensus and its progress in negotiating arms control agreements is rather slow; and the COPUOS, on the other hand, tends

²² Code of conduct on space activities: unsolved critics and the question of its identity
Note de la FRS n°26/2015; Lucia Marta, 17 December 2015.

²³ Decoding the International Code of Conduct for Outer Space, Part 1 Debate; Code of Conduct an Inadequate Mechanism. Ajay Lele (Ed.) Published on 2012;

to limit its authority on civil activities in outer space. As a matter of fact, the two approaches are not either-or situations, but rather could keep running in parallel. Mindful that a legally binding instrument like the PPWT is a definitive objective²⁴ and the Code of Conduct is no substitute thereof, the international community should not exclude soft-law instruments such as the Code of Conduct categorically.

By lessening suspicion and building certainty between States, it is contributive to the accomplishment of the ultimate goal. The Code of Conduct expresses that the proposition is without partiality to progressing furthermore, future work in other appropriate fora, such as, the COPUOS and the CD (Preamble). In the interim, the consequences of the Meeting of Subscribing States are to be acquired in an appropriate way to the consideration of relevant international platforms including the UN General Assembly, the COPUOS and the CD (Section 8.4).

Now, the question remains as to the authenticity of the Code of Conduct, given the absence of an international mandate. The issue of authenticity comprises of two dimensions, in particular the internal dimension and the external dimension.²⁵ The power of the EU to directly negotiate negotiate international space agreements derives from the Treaty of Lisbon 2009. In any case, at the internal level, the Code of Conduct does not appear to represent a cohesive European space security strategy of its own. Thus in order to improve the internal

²⁴ Negotiating a code of conduct for outer space activities, authored by Joseph Rogers; June 4 2105.

²⁵ Security in Space: The Next Generation: Conference Report 31 March-1 April 2008

legitimacy in space security, it is recommended that the EU should follow up the Code of Conduct with other initiatives, incorporate these with each other and build up connections to existing EU-institutions and strategies.²⁶ Though the internal legitimacy of the Code of Conduct is a matter among EU States, its external legitimacy is more frequently raised by non-EU states.

KEY CHANGES IN THE LATEST DRAFT CODE OF CONDUCT

The latest draft of the Code dated March 31 2014, is one page longer than the September 2013 draft. A more critical look at the Code reveals essential changes that influence not only the purpose of the Code but its scope as well. Two such increments are found in the Preamble²⁷ opening with Box 6, which references the Prevention of Arms Race in Outer Space (PAROS) and states, "Noting the importance of preventing an arms race in outer space."

This addendum drops any misrepresentation that the Code is not intended to promote arms control as one of its as well as the interests of the arms control community.²⁸ What is more, the dialect of Box 6

²⁶ Evers Tobias. The EU, space security and a European global strategy. UI Occasional Papers; 2013. p. 26

²⁷ In simple terms, the preamble in an instrument states the reasons for and underlying understandings of the instrument's drafters and adopters. In the context of legally-binding international instruments it also used to help interpret the meaning of terms and provisions within the instrument. See Vienna Convention on the Law of Treaties, Article 3(2).

²⁸ The tack of the Code towards arms control is not a subjective viewpoint. The annotations note the language of Box 6 make a reference to PAROS. In addition to that reference, the suggestion was made by participants to reinforce the language of Box 6 by adding the phrase "as well as refraining from actions that may lead to a militarization of outer space". It was

likewise gives a certain gesture to the vacuous issue of "space weapons" and seems to offer a conciliation to Russia and China, both of whom have declined to embrace the Code. The Preamble proceeds with an arms control topic in Box 15:

*Without prejudice to ongoing and future work in other appropriate international fora relevant to the peaceful exploration and use of outer space such as the United Nations Committee on the Peaceful Uses of Outer Space and the Conference on Disarmament;*²⁹

In essence, Box 15 recognizes the continuing work on PAROS and the proposed PPWT space arms control treaty, and provides an assurance to their sponsors the Code is designed to neither affect nor supplant either of the proposed accords.³⁰

The following noteworthy change in the most recent draft of the Code is found in the "Purpose and Scope" segment of the Code. In particular, Section 1.1 of the Code states:

The purpose of this Code is to enhance the safety, security, and sustainability of all outer space activities pertaining to space objects, as well as the space environment.

Critical in this area is the expression "space object," which is not given any definition by the Code, but appears to resemble the term "space object" used in the Rescue Agreement. The term "space object" is

further proposed by some participants to include language around legally binding arrangements, and some participants recommended to draw from language from the Group of Government Experts (GGE) when referring to PAROS. Apparently, these further suggestions were not included in this draft, but that does not preclude them from being included in future drafts if the Code is resurrected.

²⁹ Without prejudice as used in this context means the provisions of an implemented Code would not be used to interpret or otherwise affect the ongoing efforts in the Conference of Disarmament, which infers PAROS and the PPWT.

³⁰ See Tommaso Sgobba, IAASS Statement On International Code of Conduct for Outer Space Operations, Space Safety Magazine, August 5, 2015.

defined in Article I(d) of the Liability Convention:

The term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof.³¹

The meaning of "space object" in the Liability Convention is for purposes of that Convention only, yet absent a particular definition in the Code, it is sensible to believe a similar usage would apply.³²

The last and most noteworthy change is found in Section 1.4, which relates with the non-binding nature of the Code. Consider Section 1.4 of the September 16, 2013, draft of the Code, which states:

Subscription to this Code is open to all States, on a voluntary basis. This Code is not legally binding.

By examination, the March 31, 2014 draft reads Section 1.4 as follows:

Subscription to this Code is open to all States, on a voluntary basis. This Code is not legally binding, and is without prejudice to applicable international and national law.³³

Importantly, Section 1.4 would seem to guarantee that the national law and domestic usage of how customary international law is created would not be affected by subscription to the Code.³⁴

CONCLUSION

³¹ The Austrian Outer Space Act, which was adopted by the Austrian National Council on December 6, 2011, and entered into force on December 8, 2011, has its own definition where Section 2.2 of the Act defines "space object as: "...an object launched or intended to be launched into outer space, including its components;" This is more refined than the definition found in the Liability Convention.

³² Aside from the inclusion of the term "space object," Section 1.1 also defines the intended scope of the Code to cover all outer space activities. The annotations to this draft of the Code point out that some participants suggested that this Section 1.1 refer to the "...safety, security and sustainability of the *peaceful uses* of outer space activities". However, other participants, considered the term "all" was inclusive to cover all outer space activities.

³³ There were no annotations discussing the change to the Section 1.4 of the Code nor the intent of the "without prejudice" language.

³⁴ For instance, the 11th Circuit Court of Appeals articulated a legal definition of customary law in *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1252 (11th Cir. 2012). The definition of customary international law pronounced by the 11th Circuit in this case is unanimous throughout the Federal Circuit Court of Appeals.

The Code of Conduct was tabled when the endeavors to arrange a legally binding instrument forbidding weaponisation of outer space in the CD ran into stagnancy because of contradiction among States. Against that backdrop Code of Conduct is a success. But in any case, the instrument needs further refinement with due account of concerns of as many States as possible. One of the developments of the Code of Conduct in the last few years is the gradual softening of the instrument, for example, the explicit statement of non-bindingness, and terminological changes from "commit to" to "resolve to", from "avoid" to "limit", from "to the greatest extent possible" to "to the greatest extent practicable".

But the primary obstacle remains the intertwined approach in the regulation of military and non-military space activities. It ought to make a clear distinction amongst security and safety, and manufacture a consensus on security-related matters. Any advancement with this very core issue, would be an achievement in the advancement of space law.

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