



The European Union draft Code of Conduct for outer space activities: An appraisal[☆]



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ABSTRACT

The European Union draft Code of Conduct for outer space activities is one of the primary international initiatives, that are currently active, to enhance the safety, security and sustainability of outer space activities. Although the spirit underlying the instrument is commonly shared by space-faring countries, substantial disagreement exists among States as to some of its core provisions. This article proposes that the Code of Conduct should make a clear distinction between commercial activities and military activities, and adopt more balanced measures on the restriction of military activities in outer space.

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1. The Code of Conduct as a primary initiative for space sustainability

Whereas the early space age was dominated entirely by the two superpowers of the Cold War, the last few decades have witnessed significant increase and diversification of space actors. Today, 11 countries possess space launch capability and over 60 countries operate approximately 1100 active satellites in Earth orbits [1]. Private entities nowadays play an increasingly important role in human's exploration and use of outer space. What has also been witnessed by the last few decades is the increasing integration of space into society, for civil and military purposes. The human society's growing reliance on space has raised the concern over its malfunction. As is to our knowledge, the environment of outer space is inherently fragile. Human activities in outer space have led to a situation where Earth orbits are increasingly congested and man-made orbital debris proliferate, posing significant threats to the safety of space assets. The rapid increase of the number of space actors and a possible arms race in outer space add a sense of urgency to the preservation of space environment.

Various proposals have been tabled at the international level to cope with the challenges of environmental derogation and a possible arms race in outer space. The prevention of an arms race in outer space (PAROS) has been debated at the Conference of Disarmament (CD), the sole United Nations forum for arms control. In 2008, Russia and China jointly proposed the Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT), which aims to fill the loophole of existing space law in space arms control. The CD, which operates by consensus, has not taken up the PPWT for negotiation. The United States has concluded that it does not meet the threshold of being equitable and effectively verifiable. However, in the academia, there are good arguments contrariwise, namely that a possible space weapon treaty is effectively verifiable. Effective verification measures in space would be dependent upon the treaty's scope (the application area, whether in space or on earth), verification subject (for example, space launch vehicles, weapon principles, satellites) or the mission mode (for example, development, testing, manufacture, deployment, transfer, use, dismantlement) [2]. It is proposed that a treaty regime should stop the creation of an ASAT at the testing stage in the production chain, so that it could be effective and verifiable [3]. The sustainability of space environment has been debated in the United Nation's Committee on the Peaceful Use of Outer Space (COPUOS). In 2010, long-term sustainability of outer space activities became a new agenda item of the COPUOS. A formal Working Group was set up to address

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the issue, aiming to produce a high quality report and useful recommendations when it concludes its work in 2014.

European presence in space dates back to the early 1960s. Unlike the United States and the Soviet Union, it focused mainly on science, technology and research, rather than the military aspect of space. The strategic and security value/concerns were not formally acknowledged until recently. The European Union embarked on its efforts of enhancing the multilateral framework concerning the preservation of a 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 established EU as one of the primary actors in the international space debate. It aims to establish guidelines for responsible behaviors in space that would reduce the risk of debris-generating events and increase transparency in space operations in order to avoid collisions [4]. Unlike the 1975 Registration Convention which aims to increase transparency in outer space at the registration level, the Code of Conduct aims to promote transparency at the operational level. Hence, in this connection, the Code of Conduct does not overlap with, but is complementary to the 1975 Registration Convention. The 2008 draft Code of Conduct was revised subsequently, taking into account comments received from other States. Revisions resulted in the 2010 version, which was subsequently used by the EU High Representative to engage with third countries that have an interest in outer space activities. Further consultations and revisions were carried out thereafter. As of October 2013, the EU has released at least four versions of the Code of Conduct, in 2008, 2010, 2012 and 2013 respectively.

The purpose of the Code of Conduct is to enhance the safety, security and sustainability of outer space activities (Section 1.1). In order to achieve this goal, it is imperative that all space actors, in particular major space-faring countries, are engaged in it. Although the objective of the Code of Conduct appears to be consistent with the interests of all States, international responses to the proposal are far from unitary. On the one hand, the Code of Conduct has gained considerable support from space-faring countries outside the EU, including Australia, Canada and Japan. The United States, notwithstanding declining to sign it straightway, has decided to join with the EU and other nations to develop an International Code of Conduct for outer space activities [5]. The Code of Conduct is regarded by the United States as a useful foundation and constructive starting point for developing a consensus on such an International Code [6].

There are some other States, such as China, Russia, India and Brazil, which have reportedly distanced themselves from the Code of Conduct primarily on the ground that they were insufficiently consulted in the drafting process. That the Code of Conduct was initially formulated by EU States calls into question as to its legitimacy and the prospect of wide international endorsement. In order to garner wider participation, the EU has commenced a series of consultations with other countries, starting with bilateral contacts. Informal consultations had been undertaken with the USA, China, Russia, Brazil, Canada, India, Indonesia, Israel, South Korea, South Africa and Ukraine. The Vienna conference of 5 June 2012, which attracted 110 participants from more than 40 countries, marked the launch of multilateral consultations. At the conference, the EU released the 2012 version of the Code of Conduct, which tried to answer some of the questions asked in a number of consultations between the EU and other major space faring countries while keeping the philosophy of the original 2008 draft on avoiding collisions and conflicts in space [7].

The second round of multilateral consultations was held on 16–17 May 2013 in Kiev, Ukraine, and attended by some 140 participants from 61 countries. The two-day meeting, which was originally planned in October 2012, failed to conceive any consensus on the substance of the Code of Conduct. As observed, disagreements

remain among developed countries, developing countries and countries in transition. The United States, Australia, Canada and Japan have reiterated their support of the Code of Conduct. Most other States, such as South Africa, South Korea and Switzerland, were diplomatic in their statements. While acknowledging the constructiveness of the EU proposal, they maintained that the new instrument shall not be contrary to existing space law and should be consistent with new rules being made by UN institutions [8]. China and Russia have refrained from commenting on the substance of the Code of Conduct. But both have expressed their views on the procedural aspect of consultations. First, the agenda of consultations should be decided on multilateral basis. Second, the Code of Conduct, in order to become an international instrument widely endorsed, should be subject to formal multilateral negotiations, rather than informal consultations. Third, the EU is not duly authorized by any international institution to establish an international Code of Conduct and its proposal in large parts overlaps with the international efforts in the COPUOS and the CD, giving rise to doubts on its necessity and legitimacy. Fourth, the EU has been “selective” in absorbing other States’ comments to the Code of Conduct. Fifth, the Code of Conduct does not make any reference to the PPWT which deal with the gravest challenge to the security of outer space, namely an arms race in outer space [9]. Changes based on comments and suggestions the EU received during and after the Kiev conference resulted in the latest version of 16 September 2013, which would be discussed at the Open-ended Consultations held in November 2013 in Bangkok, Thailand.

It is foreseeable that an increasing number of States are to endorse the Code of Conduct, at least to participate in the discussions. At the 5 June 2012 plenary meeting of the CD, Russia stated that it appreciates positively the Code of Conduct and is ready to participate in its finalization on a multilateral basis [10]. It is reported that the Chinese ambassador also indicated that China was “ready to discuss improvements” of the draft [11]. The most important reason that States would choose to participate in the discussions is that the objective of the Code of Conduct is consistent with their long-term interests. For instance, China, as an emerging space power, has a core national interest in strengthening the security and safety of activities in outer space. The fundamental spirit of the Code of Conduct appears to be in line with its national interest and its consistent policy of using outer space for peaceful purposes and opposing weaponization or any arms race in outer space, and developing and utilizing space resources in a prudent manner and taking effective measures to protect the space environment, ensuring that its space activities benefit the whole of mankind [12]. Second, there is a strong international opinion which expects States, in particular major space-faring countries to cooperate and seek a solution to tackle the challenge. Any State which stays outside would be regarded as a potential irresponsible actor. Third, although the Code of Conduct is not intended to become a legally binding instrument, there is a possibility that rules contained therein become customary hence binding on all States if they are widely followed. Hence, it serves their interest for States to participate in the process of drafting and to have their interest sufficiently reflected in the Code of Conduct.

2. Possible impediments to wider endorsement

2.1. The soft-law nature

As mentioned above, the Code of Conduct is not intended to be a legally binding instrument, i.e. adherence to it and measures contained therein is voluntary for subscribing States. And there is no sign of hardening the proposal. Conversely, the 2012 version of the Code of Conduct was amended to explicitly state that the code is

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