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About the Author

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Her areas of research interests include US foreign and security policies, including Indo-US relations, US missile defence issues, military strategies of major Asian powers including China, US, Japan and Russia, nuclear and space security, arms control and ethnic conflicts, particularly in the context of Sri Lanka. She can be reached at rajeswarirajagopalan@gmail.com.

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Introduction

Establishing of an international code of conduct on space is gaining momentum with two codes—the EU Code of Conduct for Outer Space Activities (hereafter EU Code) and the Model Code of Conduct, prepared by the Stimson Center—being keenly debated in relevant fora.¹ The underlying assumption of the West has been that establishing certain ground rules would eliminate the security concerns regarding outer space which is increasingly getting crowded and contested.

A formal adoption of the EU Code by the US even at a later date could step up pressure on India and other Asian space-faring nations to fall in line and adopt the code. Therefore, it is imperative that India and other spacefaring nations debate the utility of a Code in general while examining the provisions of the EU code that might hamper the legitimate interests of Asian countries. They could work to re-shape the current Code or, more ambitiously, even frame a Code of their own. A code that India and other Asian nations frame might not be very different from the EU code, but it would emerge from an Asian perspective.

Therefore, as a first step, India needs to push forward its concerns and options to the European Union and the United States in an emphatic manner, with a clear message that India will not get on board as an afterthought. The West has to take note of the Indian concerns and give due consideration to a modified code. Meanwhile, India should push for greater dialogue with other space-faring countries in Asia, including Japan

and Australia, to shape up their concerns and views on a code in accordance with the emerging security scenario in Asia.

Among the two codes, it is the EU Code which is of particular significance given that it was supposed to come up for adoption in 2012. However this deadline has been put off for a while, thereby providing an opportunity for India and other Asian countries to debate the utility of a code in the first place and thereafter study the EU Code and the utility of its universalisation. The US, on its part, appears to be in agreement with the broad sentiments of the EU Code although there are certain sections of the American political class who feel that the US would be “giving away too much” by a formal adoption of the EU code.² In an analysis on the US stance on the Code, Michael Listner points out that the US may defer a formal adoption till other countries elucidate their positions.³

What is the EU Code?

In October 2010, the EU released a revised version of the EU Code Conduct on Space; the original version was prepared in 2008. A quick reading of the EU Code makes it appear innocuous; it lists a few desirable steps on the part of States to avoid mishaps in outer space. However, the majority of the States outside Europe find the EU Code objectionable on various grounds. The section below discusses some of the major elements and, subsequently, the objections.

The major elements of the EU Code:

- It seeks to codify new best practices while contributing to transparency and confidence-building measures and compliment existing arrangements on outer space activities.

- It would be a voluntary Code open to all States.
- The “inherent right of States for collective self-defence in accordance with the United Nations Charter” would be observed.
- States that are signatories of the Code would be guided by the existing legal framework while ensuring national programmes that would essentially adhere to and implement, among other treaties, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967); the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (1968), the Constitution and Convention of the International Tele-communications Union and its Radio Regulations (2002).
- States that become party to the Code would establish and implement national “policies and procedures to minimise the possibility of accidents in space, collisions between space objects or any form of harmful interference with other States' right to the peaceful exploration and use of outer space.”
- States are also obliged to provide “information on national space policies and strategies, including basic objectives for security and defence related activities.”
- States engaged “in consultations shall seek solutions based on an equitable balance of interests.”

India's Objections

Some of the provisions of the EU Code are considered particularly intrusive or, at least, they have the potential to be so. The Code is also seen as limiting operations and not weapons, which raises objections in terms of the objectives of the Code—is the EU Code meant to protect some vested interests of the West?

What has particularly peeved the Asian powers (India and China, among others) is that the European Union has formulated the Code without consulting them. Because of this oversight, India and some other countries may have reservations to sign on to an otherwise acceptable document. Prior consultation with major Asian space-faring countries should have been a critical step in formulating the Code, given that Asia is where some of the fastest developing space programmes are and the effort would be pointless without having Asian countries on board.

It is in Asia that new challenges concerning space would emerge. Hence, including the Asians as an integral part of the debate for formulating the Code would have been useful. In the absence of an inclusive mechanism, what is likely is a repeat of the H-COC (the Hague Code of Conduct against Ballistic Missile Proliferation) experience where the majority of the Asian countries that contribute to the challenge of missile proliferation remain outside the mechanism.

Even as fresh efforts are being made to reach out to Asian and other countries, there has been resistance to accepting and universalising the EU Code.⁴ There are already divisions on what should be included in the Code, indicating certain inflexible positions that are evolving in Asia.⁵ At a recent

conference in Paris, there was an intensive discussion on what was the important issue: an arms race in space or the issue of space debris.⁶ Meanwhile, China has made it clear that space debris should not be a major objective for the Code, which suggests that the Chinese may possibly continue with Anti-Satellite (ASAT) tests. China is also critical of the provision of sharing information on national space policies and strategies, including basic objectives for security and defence-related activities in outer space.

Beijing has categorically stated that it would be “impossible” to share information on its security and defence policies.⁷ The impression in many non-western capitals is that this is a Western ploy to limit capacities for Asian space-faring nations in outer space.

Europe and the West in general need to recognize that the geo-political weight of Asia would dictate new terms and conditions and not the other way around. Therefore, the West, the EU in particular, has to sit across the table to understand Asian concerns and positions and amend the Code accordingly if it is to get universalised. Asia's position in the space debate is particularly relevant given that the region is characterized by competition, rivalry and conflict. In addition, the trend of increasing securitisation of issues in Asia has heightened the threat of an arms race even in the space domain.

The EU initiative to lay out some basic rules and guidelines is admirable but there are problems with the EU approach. The lack of a provision for a legally binding mechanism, a long-standing demand of some of the Asian countries, is one such hurdle. India favours a legally binding mechanism to be institutionalized so as to avoid weaponisation of outer space and also

avoid mishaps and misinterpretation of activities in outer space. In fact, the Group of 21 (Non-Aligned Nations at the Conference on Disarmament) of which India is a member has argued that while transparency and confidence-building measures (TCBMs) are good supplementary measures, the importance of legally binding mechanisms cannot be overlooked.

While the US and the other western nations' position that there are adequate legal measures in the current treaties and agreements may be correct, there are clauses and definitions, for instance, in the Outer Space Treaty, that have become rather expansive in their understanding and explanation and States have found enough loopholes to circumvent the terms.

Similarly, while the EU Code is a voluntary arrangement, States are expected to “establish and implement national policies and procedures” so as to manage the increasing congestion in space that could lead to potential collisions and accidents. Such measures are considered rather constraining on a State's legitimate interests, however indirect they may be. On the other hand, there is the argument that the Code, being a voluntary mechanism lacks the teeth to enforce, for instance, any penalty on States that may violate terms. It is, therefore, argued that a voluntary mechanism such as the EU Code defeats the very purpose of such a code.

So, why should States adopt, institutionalize and universalize a Code that has no investigative or enforcement role? What is the incentive for a State to bind itself to such a mechanism? Does a Code significantly enhance state security? The answer to all these questions may be in the negative. The general set of principles and guidelines suggested in the Code already exists

in various forms, either as national space policies of countries like the US or statements in Parliament in countries like India or even in bilateral and regional CBMs.

Another objectionable issue is the vague manner in which the Code is written, giving ample scope for misinterpretation. Phrases like, “to promoting the common and precise understandings” and “shall seek solutions based on an equitable balance of interests” are highly idealistic objectives but that can be applied subjectively. Whose interests are being referred to here? Such phrases are open to misinterpretation and the more powerful can dictate terms to the less powerful in an international system. For instance, the Asian States are likely to look at equitable balance of interests very differently from those of the European States or the US and the Asian interests are likely to be affected quite adversely if the US-EU combine were to exploit the situation. The Code, therefore, has given scope for more suspicion than assurance among the Asian countries.

Finally, where will the administering authority reside? A Code is implementable when the administering authority enjoys sufficient clout and hard power. Europe is clearly seen lacking on both these counts. As mentioned earlier, a Code enforced by the EU is likely to face the same fate as that of the H-COC. The H-COC can take pride in claiming that it has been adopted by 128 countries but the Asian countries which matter in this regard—China, Pakistan, Iran, North Korea—remain outside this regime, raising questions about the effectiveness of such a mechanism.

India's Evolving Position on a Space Code

While India is all for setting up norms and regulations, whether it should actually become party to an instrument that has already been created is a

matter of concern. “The Not Invented Here” syndrome is probably what characterises India's position on the EU Code. The perception is that India is resistant to the Code because it has not been part of the “creative process” that would give it “ownership,” even if the document by itself might be acceptable. India certainly has an interest in such a Code, but India has a viewpoint and the EU should have engaged New Delhi in preparing a Code from the start. India's space programme dates back to the 1950s; it is recognized as a major space-faring power that should have an important voice in the formation of norms.

It is important for India and other Asian space-faring nations in general to debate and decide on some aspects: what the norms should be, what sort of future they want to achieve in space and what sort of behaviour could be perceived as counter-productive.

To arrive at a consensus among Asian countries on these points may not be easy with China already stating that space debris should not be a major objective in the proposed Code. This is evident also in the Russia-China sponsored draft on the “Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects” (PPWT) at the Conference of Disarmament (CD), which makes no mention of ASATs.

On the other hand, if India were to take the lead in putting together a code, it would help New Delhi in many ways, directly and indirectly. For one, India's security would be taken into account in a holistic manner. Such a framework could gradually move towards a legal framework, which is lacking in the EU Code and of which India is a votary. However, India would need to have built-in clauses to keep options open in space if there

were to be a significant deterioration in the security environment in Asia. Indirectly, taking the lead in starting an Asian dialogue on a space code would boost India's stature as a responsible power capable of setting norms, establishing its leadership credentials and global governance role.

Setting up a code certainly would have other useful benefits as well. As argued at a discussion at the Marshall Institute in Washington DC, such a code would bring about lot of clarity on issues such as debris mitigation standards and space traffic management, among others.⁸

What are India's Options?

The US getting on board on the EU Code and, thereafter, a combined US-EU pressure on India and other Asian countries is a likely scenario. The need now is for India and other Asian countries to debate and shape a code that is beneficial to them, a code that takes into account the geo-political realities of Asia, while keeping the weaponisation of outer space issues under control.

Is the EU Code in India's interest? How does it beef up India's security options? An instrument that centres on general set of guidelines, with no action plan and verifying/investigating mechanism, would be a futile exercise. However, an instrument that does not have all space-faring nations on board can be equally pointless.

Meanwhile, the Code does not lay out policies and procedures for dealing with the three most important challenges—space debris, an over-crowding space and space mishaps and collisions. It is also naïve to assume that countries like the US and China would announce their national policies and

intents to a voluntary mechanism such as the EU Code. China has already made it known that it will not be in a position to declare its policies.

Lastly, as mentioned earlier, a Code does not establish responsible behaviour. The western emphasis on TCBMs as a possible way out is not reassuring. Europe needs to be realistic about the geopolitics in Asia that dictates the increasing securitisation and weaponisation of the continent. In fact, this factor could facilitate or block the universalisation of the Code.

As in many other regimes, the more powerful are likely to dictate terms. While EU does not enjoy such a clout, an EU-US combine could exert pressure on Asia. However it is quite likely that the numerical superiority of Asian countries and the geopolitical weight of Asia would take the debate in a different direction, making the universalisation process more difficult.

Also, in the absence of enforcement and verification provisions and the lack of any penalty for states that violate provisions, the code would be toothless, and will be more like another arms control instrument. Should Asian countries accept this? In the absence of Asian acceptance, how would the West take the Code forward? Will it be another “H-CoC”?

To sum up, three points remain particularly important from India's point of view—a proposed Code should have a legal framework, an in-built enforcement and verification mechanism, and a mechanism that would provide for penalty in case of States violating the Code.

It has also been suggested to keep the EU Code outside the UN framework to ensure speedy passage so that it is not blocked for several years like the Fissile Material Cut-off Treaty (FMCT).⁹ India has to be cautious in this

respect; in the past the CTBT was also taken out of the CD for quick passage.

It is important that India sits at the bargaining table with a proactive position that is considered and constructive, not reactive and defensive. If India manages to get its act together in shaping a Code, a formal adoption itself may not be necessary. But more importantly it will form part of the discussion as a norm-shaper.

Endnotes

1. The revised version of the EU Code of Conduct on Space is available at http://spacepolicyonline.com/pages/images/stories/EU_revised_draft_code_of_conduct_Oct_2010.pdf; and the Stimson Code of Conduct is available at <http://www.stimson.org/research-pages/model-code-of-conduct/>.
2. Eli Lake, “Republicans Wary of EU Code for Space Activity,” *The Washington Times*, February 03, 2011, available at <http://www.washingtontimes.com/news/2011/feb/3/republicans-wary-of-eu-code-for-space-activity/?page=all>.
3. Michael Listner, “An Update on the Proposed European Code of Conduct,” *The Space Review*, August 08, 2011, available at <http://www.thespacereview.com/article/1900/1>. For an earlier debate on the space code of conduct, see Michael Listner, “TCBMs: A New Definition and New Role for Outer Space Security,” *DefencePolicy.org*, July 07, 2011, available at <http://www.defensepolicy.org/2011/michlis/tcbms-a-new-definition-and-new-role-for-outer-space-security>.
4. The European Union, in an effort to universalise the EU Code, has been in dialogue with other governments in the recent months. Reporting at a recent conference in Paris, one of the senior officials from the European Union, noted that the national ambassadors for Foreign Affairs to the EU have agreed to move from bilateral to multilateral consultations and they plan to have the first multilateral experts' meeting in November / December 2011. He added that the UN too is engaged in a similar exercise although it “would start work in July 2012.” For details, see Julian Hale, “EU Urges Nations to Join Space Code of Conduct,” *DefenseNews*, September 13, 2011, available at <http://www.defensenews.com/story.php?i=7666771>.
5. While China has made open its reservations to the EU Code, even countries like South Africa have raised reservations on a perfectly acceptable document on account of the fact that it has not been part of the dialogue and creation process. Director General of China's Arms Control and Disarmament Association, Li Hong, recently wrote in an OpEd that “truly effective and generally accepted

international rules on space can be established only if they are based on equal participation of all countries.” He also stressed on the need to have these processes under the UN framework. For details, see Li Hong, “Make Outer Space Safe for All,” OpEd, China Daily, August 03, 2011, available at http://www.chinadaily.com.cn/cndy/2011-08/03/content_13037219.htm.

6. See Julian Hale, “EU Urges Nations to Join Space Code of Conduct,” *DefenseNews*, September 13, 2011, available at <http://www.defensenews.com/story.php?i=7666771>.
7. Reporting on the progress of consultations with non-EU nations on the Code, one of the senior officials from the European Union, speaking at a recent conference in Paris, noted that consultations with China in July this year had proved “very difficult” while making the Chinese position clear that it would be “impossible” for them to provide information on their national security policies.
8. George C. Marshall Institute, “Codes of Conduct in Space: Considering the Impact of the EU Code of Conduct on US Security in Space,” a discussion Featuring Paula DeSutter, Scott Pace and Peter Marquez, February 04, 2011, available at <http://www.marshall.org/pdf/materials/927.pdf>.
9. Julian Hale, “EU Urges Nations to Join Space Code of Conduct,” *DefenseNews*, September 13, 2011, available at <http://www.defensenews.com/story.php?i=7666771>.

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