International Code of Conduct for Outer Space Activities

Analysis from an Institutional Perspective

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Abstract

The International Code of Conduct for Outer Space Activities developed by the European Union ("Code") is one of the most recent developments in international space law.[1] It is intended to summarize 'rules of the road' for outer space activities in the form of a 'soft law' instrument.

While a lot has been said about the nature of the proposed document, about the effectiveness of the suggested guidelines and principles,[2] less attention has been paid to the mechanism of cooperation advanced by the Code. Although the Code provides a comparatively perfunctory outline of the proposed mechanism of cooperation, the fact that a 'soft law' instrument provides one is a notable development in international space cooperation.

The present paper is aimed at reviewing the mechanism of cooperation endorsed by the Code of Conduct, examining proposed ways and means of international cooperation, and analyzing how that affects its operation. Conclusions are offered about the nature of the envisioned mechanism of cooperation, its distinctive features are identified, and determination is made about the overall effectiveness of the established mechanism of cooperation. It is suggested that the Code of Conduct established a 'hybrid' mechanism of cooperation combining features of an international conference and an international organization. Finally, it is argued that the 'hybrid' nature of mechanisms of cooperation is specific to international space cooperation due to the growing exploitation of outer space and the need to use its resources in an efficient and sustainable way.

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1 Here the analysis is based on the latest version of the Code of Conduct. European Union, *International Code of Conduct for Outer Space Activities*, version from March 31, 2014, http://eeas.europa.eu/non-proliferation-and-disarmament/outer-space-activities/index_en.htm. While conclusions arrived at by the scholars in regard to the previous versions and still relevant for the latest version will also be considered.

2 For such analysis See, A. Lele (ed.), Decoding the International Code of Conduct for Outer Space Activities (2012).

I. Methodology

The analysis of the Code of Conduct mechanism of cooperation will be premised on the following theoretical considerations. Generally, three broad categories of mechanisms of cooperation exist: that of international conferences, international treaties and international organizations. An international conference is defined as a temporary meeting consisting of official representatives of States and often intergovernmental and nongovernmental organizations' observers, following in its work an agreed-upon structure and rules of procedure, and guided in its work by international law. An international treaty is an international agreement concluded between two or more States or international organizations in written from and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[3] An international organization is defined as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities."[4]

Five overarching criteria allow attributing a mechanism in question to one or the other category. The first criterion is the membership/participation criterion referring to the subjects that enjoy the primary status within a particular mechanism of cooperation, as opposed to an *ad hoc* visitor's status. International organizations and treaties primarily have States as their participants, but also allow accession of international organizations, while international conferences might also have nongovernmental entities as their attendants. The second criterion is secretariat referring to the 'entities' performing administrative or other required functions within a particular mechanism of cooperation. International organization's secretariat possesses the following characteristics: (1) it is a separate organ within the structure of the organization; (2) working on a permanent basis and financed from the organization's budget; (3) and acting independently from the will of member States and pursuing in its work goals of the international organization, thus possessing an international character of work. An international conference's secretariat and a secretariat of a meeting commenced with connection to an international treaty are normally either an *ad hoc* entity not meeting the characteristics of the organization's secretariat; or are a secretariat of a hosting international organization working as a meeting's secretariat on a temporary basis.

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3 *Cf*., Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331; and the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, 21 March 1986, A/CONF.129/15.

4 UNGA Res. 66/100, Responsibility of International Organizations, Official Records of the General Assembly, Sixty-sixth session Supp. No. 10 (A/66/100).

The third criterion is existence of international legal personality referring to the status of the subject of international law provided for a particular mechanism of cooperation. Only international organizations possess international legal personality. The fourth criterion is the term of existence. Whereas both international organizations and treaties are normally created for an indefinite period of time, though exceptions exist, international conferences are always created for a limited term. The final criterion is the legal nature of the relevant produced documents. An international organization might be capable of producing both legally binding and non-binding documents. Constituent documents of a particular international organization determine the power to enunciate binding or non-binding documents. An international treaty by definition is always a legally binding document. An international conference produces legally non-binding documents and political or moral value of the produced documents does not affect their legal nature.

II. Overview

The Code of Conduct comes as an exemplary document underlying correctness of a conclusion expressed by many authors that as a consequence of the codification process in space lawmaking there now appears a tendency to produce relevant international instruments containing non-binding principles, norms, standards or other statements of expected behavior in the form of recommendations, charters, terms of reference, guidelines, or codes of conduct.[5] Following two 2006 United Nations General Assembly Resolutions[6] the European Union submitted a joint reply to the General Assembly in 2007, "in which it mooted the plan of a "code of conduct on space objects and space activities," to complement the existing space legal framework."[7] By 2008 the European Union Council adopted the first draft of the Code; ensued bilateral consultations led to the second draft in 2010. When in 2012 the United States announced that it would not sign up to the prospective instrument and proposed to launch a multilateral negotiation process to develop an acceptable text of the Code of Conduct,[8] international negotiations including States other than the European Union members have commenced.

In 2013 the European Union tabled the revised draft of the International Code of Conduct and launched an open-ended multilateral consultations

5 See, F. G. von der Dunk (ed.), *Handbook of Space Law* (2014), at 25.

6 UNGA Res. A/RES/61/58 "Prevention of an arms race in outer space", 6 December 2006; and UNGA Res. A/RES/61/75 "Transparency and confidence-building measures in outer space activities", 6 December 2006.

7 J. Wouters and R. Hansen, "The Other Triangle in European Space Governance: The European Union, the European Space Agency and the United Nations", in *Proceedings of the International Institute of Space Law 2013* (2014), at 666.

8 *Id.*

process in order to get support from the international community. The consultations process consisted of three open-ended multilateral meetings in 2013 and 2014, which were attended by more than 80 States. Until now, however, "it does not appear to be clear for anyone, including member states of the European Union themselves, what the next step for the code is."[9]

The Code of Conduct is a "non-legally binding and voluntary act of guidelines intended to highlight what the international community generally agrees to be responsible behavior in space."[10] Paragraph 1.4 of the Code declares: "Subscription to this Code in open to all States, on a voluntary basis. This Code is not legally binding, and is without prejudice to applicable international and national law." Despite being a legally non-binding document, paragraph 1.1 of the Code establishes an ambitious goal "to enhance the safety, security, and sustainability of all outer space activities pertaining to space objects, as well as the space environment."[11] Leaving aside the analysis of the proposed legal regime of "safety, security and sustainability," an institutional mechanism of cooperation established by the Code in order to achieve the proclaimed purposes will be reviewed.

Section III of the Code entitled "Cooperation Mechanisms" is meant to address in detail means of cooperation between the Subscribing States that include: notification of outer space activities, exchange of information, and consultations. Notification of outer space activities and exchange of information are the least formalized means of cooperation that should be conducted through the channels and by methods determined by the Subscribing States, and only to the "greatest extent possible,"[12] leaving States under no obligation to notify of each and every event related to outer space activities. Similarly, States should share information on an annual basis, but only "where available and appropriate."[13] Consultations, in accordance with Part 7 of the Code, are supposed to be commenced in cases where a Subscribing State or States have reason to believe that activities of another State are or may be contrary to the provisions of the Code. Consultations should be held in any way or manner satisfactory for the interested States, and are supposed to conclude by "mutually acceptable solution in accordance with international law."[14]

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9 G. Irsten, *Code of Conduct for Outer Space Activities ends*, Reaching Critical Will (May, 2014) http://reachingcriticalwill.org/news/latest-news/8907-the-consultation-process-for-the-international-code-of-conduct-for-outer-space-activities-ends.

10 V. Samson, "ICoC: Need of the Hour", in A. Lele (ed.), *Decoding the International Code of Conduct for Outer Space Activities* (2012), at 136.

11 Para. 1.1 of the International Code of Conduct for Outer Space Activities.

12 *Id*. at 5.1.

13 *Id*. at 6.1.

14 *Id*. at 7.1.

Generally, the term 'mechanism of cooperation' should be understood to define an established process asserting legal measures and methods for coordinated activities in achievement of a specific objective. In this sense, mere utilization of diplomatic and other ordinary means of inter-State communication does not amount to creation of a separate mechanism of cooperation. With this definition in mind, the "cooperation mechanisms" set up in Section III of the Code do not present themselves as mechanisms at all. Consultations and exchange of information should be conducted through diplomatic channels or other methods mutually determined by States, and only notifications may be transferred through the Central Point of Contact unless States determine that other method is more convenient. In the end, the Section requires that States engage in certain contacts to promote the Code's objectives, but it does not create a specialized process for doing so; hence, it does not establish a single mechanism of cooperation – contrary to the name of the Section. Weakly worded language used throughout the Section that "States may also consider," "on a voluntary basis," "to the extent feasible and practicable," "when consistent with national law," and the like only underlines the correctness of the inference made.

While that might be a weakly and too broadly worded Section, it does not stand there for no reason. The Section enumerates events that are deemed worthy of taking steps to inform about, for example, launch of space objects, presence of malfunctioning space objects, or collisions. It also encourages States to share information about their space strategies and major space programs. The legally non-binding nature of the Code, however, aggravated by weak and somewhat hollow phrases quoted above, does not make it possible to demand this kind of behavior from States. But it can undoubtedly attract attention to the desirability of proper communication and only practice will show whether the effort has paid off. At this point we are of the opinion that most likely States would provide information about a fraction of planned strategies and projects, that the consultations mechanism would be stillborn and States would instead use their customary means of communication, and that notifications would be a precious rarity, as it turned out to be in the case of the Hague Code of Conduct Against Ballistic Missile Proliferation.[15] Hopefully, practice will prove us wrong.

Section IV entitled "Organizational Aspects," unlike Section III, is the one to set up the mechanism of cooperation endorsed by the Code of Conduct. It calls for convening of annual meetings of the Subscribing States, establishment of the Central Point of Contact, and development of an electronic data-

15 Although the Code was signed by 134 States, in 2009 only 13% of launches subject to the Code regulations were reported, and neither Russia nor the United States has notified of their launches. See, L. Marta, "The Hague Code of Conduct Against Ballistic Missile Proliferation: 'Lessons Learned' for the European Union Code of Conduct for Outer Space Activities", 34 *ESPI Perspectives* (2010).

base and communication system. The Code also allows calling for additional meetings of the Subscribing States "if decided by consensus of the Subscribing States at previous meeting or as communicated through the Central Point of Contact."[16]

Annual meetings are envisioned as a mechanism "to define, review and further develop this Code and facilitate its implementation." The Code lists four topics that "could be included" in the annual meetings' agenda: review of the implementation of the Code, modification of the Code, discussion of additional measures that can be necessary, and establishing procedures regarding the exchange of notifications and other information. Usage of the verb 'could' in the relevant provision might be interpreted as suggesting that the list of topics is not exhaustive; the text, however, is silent on this matter. The very fact that the open-ended clause is missing, recalling years-long drafting history, forces to wonder whether this omission was intentional and, hence, whether this mechanism of cooperation was actually intended to be formal.

The structure, organization and phrasing of the Code of Conduct are all significantly more formal than that characteristic for informal legally non-binding documents.[17] The Code covers general principles endorsed by the Code, it reaffirms commitment to the "Charter of the United Nations and existing treaties, principles and guidelines relating to outer space activities;"[18] it emphasizes twice that the endorsed measures and norms are without prejudice to the existing legal framework and should be considered as complementary.[19] Taking into consideration that the Code of Conduct has been redrafted and amended multiple times in the course it its 7-year history, mindful of the strong opposition of the United States to the 2012 version of the Code and ensuing multilateral consultations, it is logical to infer that the Code was indeed aiming at legal precision and unambiguity. Thereby, the conclusion is offered that the mechanism of cooperation endorsed by the Code of Conduct is relatively less flexible, and it aims at establishing a structure, not the process, of cooperation.

As a general rule, decisions at the meetings, both substantive and procedural, are to be adopted by consensus. Decisions with regard to amendment of the Code, however, require unanimity. The Code pronounces that any modifications "are only to apply after written consent is received by the Central Point of Contact via diplomatic note from all Subscribing States." This is a good example supporting our earlier inference that the Code itself and by extension its mechanism of cooperation are not intended to be especially flexible.

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16 Para. 8.1 of the International Code of Conduct for Outer Space Activities.

17 E.g, the underlying documents of the Committee on Earth Observation Satellites. For more information See, the Committee on Earth Observation Satellites Governing Documents at the CEOS official website, http://ceos.org.

18 Para. 3.1 of the International Code of Conduct for Outer Space Activities.

19 *Id*. at para. 15 of the Preamble, 1.3.

Unanimity is rarely required in international practice.[20] It is even more unusual for legally non-binding documents.

One possible explanation for such an extravagant choice of voting procedure is that States, which participated in the lengthy drafting and negotiation process, just do not want this Code to be amended, and establishment of the unanimity requirement would effectively prevent any modifications. The other reason might be that it is a concession: a State or a group of States made their support conditional to the inclusion of this provision that in effect gives this particularly interested State or a group of States confidence that no additional obligations would ever be introduced without their express consent.[21] It has to be kept in mind, though, since the Code is intended to codify 'rules of the road' and evolve along with evolution of best practices, the willingness to preserve the Code's changelessness, if that is the reason behind the unanimity requirement, is contrary to the overarching goal of the Code.

As per paragraph 8.3, "at the end of each regular meeting the Subscribing States are to elect by consensus their Chair for the period until the end of the next regular meeting." Thereby, this procedure guarantees that, first, the Chair is a rotatable short-term position, and second, that election of the Chair necessitates a wide support for the proposed candidacy and, in principle, strong opposition of just one Subscribing State might be enough to effectively veto election of an unwelcome candidate. The cautious approach to the Chair election procedure is somewhat surprising in the absence of any indication of the scope of the Chair's responsibilities. The Subscribing States are left free to endow the Chair with broad rights and responsibilities common for presiding officers in international organizations,[22] or to limit his mandate to symbolical actions of opening and closing the meetings, giving the word to the next speaker, and the like. Moreover, it is not clear whether the Chair is

20 Hirschman explained that unanimity was rarely used in both firms and international organizations because an effective oversight with a possibility to introduce necessary changes to an organization requires unanimous support of all States, making the mechanism of control relatively weak from the standpoint of an individual State. See, A.O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970). From the collective standpoint, the organization whose modification is subjected to unanimous agreement of all parties is in effect the most stable, since even active majority would be incapable to push for changes.

21 Although the Code of Conduct, whether with or without any changes to it, is legally non-binding, 'soft law' documents still bear certain obligations, though of mostly political and reputational character. While binding documents are the main perceived threat to States' freedom of action (e.g. See, A. Guzman, *Doctor Frankenstein's International Organizations*, 24 Eur. J. Int'l L. 999 (2013), at 1023), the more active use of non-binding documents makes States wary of taking upon additional commitments even as established by 'soft law' documents.

22 For more information, See J. Kaufmann, *Conference Diplomacy: An Introductory Analysis* (1988).

envisioned merely as the meetings' presiding officer, or more broadly as the head of the secretariat-like organ and, thus, having a status akin to a Secretary-General-like officer of an international organization.

The Central Point of Contact ("CPC") plays a cohesive role throughout the mechanism of cooperation. On the one hand, it serves as a secretariat at the annual meetings, and on the other, it is responsible for creation and management of the electronic database and communication system. The relevant part of the Code outlining functions of the CPC, however, is rather indeterminate: it is unclear how it will be comprised, where it will be located, how it will be funded. Authors point to the two possible options for its establishment: either one of the Subscribing States could voluntarily take on the role of the CPC following the example of Austria in the Hague Code against Ballistic Missile Proliferation, or, since the Code is the initiative of the European Union, it could reside with a European Union institution.[23] Paragraph 9.4 calling for the best use of existing facilities does not resolve this dilemma, since both potential Subscribing States and the European Union might have resources available to locate, staff and manage the CPC.

The CPC, in addition to secretarial functions and database-related responsibilities, is tasked with: receiving and communicating notifications that a State subscribes to the Code; serving as a mechanism to facilitate communication of exchanged information; exercising organizational functions in connection to preparation and implementation of familiarization activities in the course of information exchange as provided by Section III; and carrying out other tasks as decided by the Subscribing States. It was noted that "the smooth running of the administration of the Code depends greatly on the mandate of the CPC. In this context, the [Immediate Central Contact] of the [Hague Code of Conduct against Ballistic Missile Proliferation] can serve as an example. While it can remind states of their obligations, it cannot pressure them on their declarations on [Transcontinental Ballistic Missiles]."[24] While the comparison is to the point, the Code of Conduct does not entitle the CPC to remind States of their obligations; a close reading of paragraph 9.1 enumerating its responsibilities does not envisage direct contact of the CPC with the Subscribing States on its own behalf, but only as an intermediary to 'facilitate communication' between the States. The Subscribing States are free to task the CPC with other functions, including communicating reminders of States' responsibilities, but somehow formal inclusion of such a function seems unlikely.

Despite the importance of adequate administrative support in achievement of the Code's goals, a majority of authors agree that a smooth running of the implementation of the Code depends mostly on the number of States supporting

23 See, C. Brünner, A. Soucek, *Outer Space in Society, Politics and Law* (2012), at 543.
24 *Id.*

the Code, and here the Code might face significant difficulties.[25] A panel of experts' symposium entitled "International Code of Conduct for Outer Space Activities – The International Perspective" specifically mentioned that "for the Code to succeed, as many countries should participate as possible via a flexible forum, one that includes civil and military aspects of using outer space, and there should be clear implementation mechanisms."[26] Currently, neither broad support, nor clear implementation mechanisms have been secured.

III. Analysis

Overall, the Code provides a rather rough, broad outline of the envisioned methods of coordination and cooperation. Despite ambiguity of the language used, it provides enough information to work with and to base our analysis on. Subscription, or participation, according to the express provisions of the Code of Conduct, is open to any State, regional integration organization which has competences over the matters covered by the Code – which is presumably a longer definition of the European Union, and international intergovernmental organizations which conduct outer space activities if a majority of its members are Subscribing States to the Code. Non-governmental entities are excluded from participation, presumably, due to the specifics of the substantive part of the Code, which reaffirm rights and obligations established by the Outer Space Treaty and require States to take certain steps to minimize risk of accidents in space and limit activities that might result in space debris. Overall, international space law *strictu sensu* is State-centered,[27] and international organizations possess a 'secondary' status,[28] while non-governmental entities are excluded from direct international regulation altogether. The Code of Conduct continues the tradition of space law 'State-centricity'.

The CPC is envisioned as performing secretarial functions for the annual meetings. That clearly indicates that neither is it an *ad hoc* entity, nor is it a secretariat of a hosting organization, which are the typical entities performing secretarial functions for an international conference or a treaty meeting. The CPC, however, also does not amount to an international organization's secretariat. First, the CPC is clearly a separate organ created within the analyzed mechanism. Second, it might be concluded that the CPC works on a permanent basis:

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25 See, M. Krepon, "Origins of and Rationale for a Space Code of Conduct", in A. Lele (ed.), *Decoding the International Code of Conduct for Outer Space Activities* (2012), at 34.

26 Secure World Foundation, *Experts Confer on "Rules of the Road" for Outer Space Activities* (2012), http://newswise.com/articles/view/586738/.

27 *Cf*., F. G. von der Dunk (ed.), *Handbook of Space Law* (2014), at 45-46.

28 See, W.F. Foster, "The Convention on International Liability for Damage Caused by Space Objects", in C.B. Bourne (ed.), *The Canadian Yearbook of International Law*, Vol. 10 (1972), at 180.

its functions as communications intermediary and database manager require permanent functioning. Funding, as it was discussed above, is not a settled issue, but it is plausible to suggest that it would be funded by the State or the entity taking on the role of the CPC; but the option of funding allocation from the 'Code of Conduct budget' – should anything like that ever be created – remains a possibility until determined otherwise.

Third, an international character of work or its absence is not established by the Code, but based on the functions bestowed on the CPC it is unlikely that it will be acting independently. Quite to the contrary, the CPC seems to have been provided solely for the convenience of the Subscribing States, to ensure that all and any information shared by a State is properly transmitted to the recipient, that an electronic database and communications system are maintained for States' benefit and expediency, and that meetings are properly served and organized by a professional secretariat. The CPC is not responsible for external contacts and, generally, it is not supposed to be active on the international plane. The consensual voting procedure for most questions and the unanimity requirement to amend the text of the Code of Conduct are also indicative of the Subscribing States' desire to preserve control over matters related to the implementation of the Code; in such a situation a secretariat possessing even a limited autonomy distorts the States' complete control.

By way of conclusion, while the organ performing secretarial functions is a separate organ working on a permanent basis and possibly funded from the sources allocated for the mechanism financing, it does not possess an international character of work. If we imagined a linear graph where on the one side is an organization's secretariat and on the opposite is a conference's secretariat, the CPC would be somewhere in the middle, but closer to the international organization side than to the conference side.

Determination of the existence of legal personality is a complicated issue with respect to the Code of Conduct. The text of the Code does not cover this question; it has not yet come into force and, thereby, no practice is available to rely on. In such a situation any argument, whether in favor or opposing existence of a legal personality, is bound to be refutable. Nevertheless, this criterion is an important one and should be addressed, even if in an inconclusive way.

Scholars tend to describe the Code as non-institutional mechanism of self-regulation.[29] But we have already established that CPC – a clearly institutionalized entity – works, or better say, is envisaged to work on a permanent basis. Moreover, the Code provides for annual, read regular, meetings of Subscribing States, which also evidence institutionalization. Therefore, the mechanism of

29 L.E. Martinez, "The ITU's Evolving Regulatory Role for Space Debris 'Rules of the Road': Implications for Space Communications Regulation", in *Proceedings of the International Institute of Space Law 2013* (2014), at 277.

cooperation established by the Code of Conduct cannot justly be characterized as a 'non-institutional' one. But it might be agreed that the Code is indeed a mechanism of self-regulation: a legally non-binding document outlining principles and guidelines of behavior can only be complied with conditional to States' willingness to act accordingly, where each State is responsible for its own decisions and cannot be compelled to act in a certain way.

Having agreed that an institutional system is present in this mechanism of cooperation, there is a need to determine whether this mechanism possesses legal personality. Usually, for existence of an international organization's legal personality four criteria should be fulfilled: (1) it is an association of States or international organizations or both with lawful objectives; (2) it has one or more organs, which are not subject to the authority of any other organized communities; (3) legal powers and purposes are distinct between the organization and its member States; and (4) it possesses legal powers exercisable on the international plane and not solely within the national systems of one or more States.[30]

After the preceding analysis a little doubt is left that this mechanism does not possess a legal personality characteristic for an international organization. While it is an association of States and international organizations with lawful objectives and it possesses at least one independent organ, no distinction can be made between the legal powers of participating States and the entity. It has been pointed out that the CPC is not created to work independently, and that overall the mechanism aims at self-regulation, not the regulation with a possibility of control and enforcement – to the extent that this is at all a possibility in international public law regulating relations of sovereign subjects. Furthermore, the overall thrust and tenor of the Code, including the consensual voting procedure and unanimity requirement for the Code amendment, suggest that Subscribing States are not willing to give up a shred of their freedom in outer space activities. The history of the Code of Conduct negotiation and drafting, whereas even after the multilateral consultations completion no steps have been taken to initiate the process of subscription to the Code, speak in favor of such a conclusion. Cautious scholarly assumptions about the value and possible impact of the Code on outer space activities just add ground to

30 See, I. Brownlie, *Principles of Public International Law* (1998), at 679-81. See also, C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2005), at 81-83 (the author points that in the *Reparations Case* the ICJ identified two criteria indispensable for an international organization possessing legal personality. First, it is an association of States or international organizations or both with lawful objects and with one or more organs, which are not subject to the authority of any other organized communities. Second, a distinction exists between the organization and its members in respect of legal rights, duties, power and liabilities on the international plane as contrasted with the national and transnational plane, thus making clear that the organization was intended to have such rights, duties, power and liabilities.).

the conclusion that States are indeed reluctant to join even this legally non-binding document, which is carefully crafted to preserve the 'self-regulation ambience'. The conclusion should be drawn that the mechanism of cooperation does not possess international legal personality.

The Code's mechanism of cooperation has been established to exist and, therefore, work for an indefinite period of time. The necessarily permanent work of the CPC and annual repetition of the Subscribing States' meetings are not limited by a certain time limit or achievement of a goal. To the contrary, the Code is viewed as a codification of the modern 'rules of the road' that, therefore, has to be continuously developed in response to advances in space technologies. Additionally, there is a possibility, which was duly noted by the scholars, of the Code's provisions transformation into customary norms subject to their widespread support and compliance.[31] Without getting into the discussion about the necessary prerequisites for such a transformation, suffice it to say that it would not be possible without continuous and consistent practice, thus underlying a presumably indefinite need for the Code's, and consequently its mechanism's, existence.

Finally, according to paragraphs 1.3 and 1.4, the Code is not only legally non-binding, but is also "complementary to the international legal framework regulating outer space activities." If the Code itself is non-binding, there is no reason to suggest that documents adopted during the annual meetings could be of any other legal nature, precisely because the annual meetings should be convened to review and develop the Code itself.

Overall, the Code of Conduct established a permanently working mechanism of cooperation open to States and international organizations empowered to adopt legally non-binding documents, which has an organ performing secretarial functions not amounting to an international organization's secretariat, and not possessing international legal personality.[32] Some criteria point toward the Code's mechanism designation as a conference, others signal its attribution to the international organizations category, and the CPC performing

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31 *Cf*., J. L. Banos, "EU Code of Conduct on Activities in Outer Space: Issues that Matter", in A. Lele (ed.), *Decoding the International Code of Conduct for Outer Space Activities* (2012), at 100.

32 View has been expressed that, based on the study of regional organizations, "that international legal personality, defined in the classic sense, does not constitute an essential element in the notion of international organization." P. Pennetta, "International Regional Organizations: Problems and Issues," in R. Virzo and I. Ingravallo (eds.), *Evolutions in the Law of International Organizations* (2015), at 111-12. Acknowledging theoretical basis for this and similar views, we premise our analysis on the more traditional understanding of international organizations that has been codified in the UN International Law Commission Draft Articles on Responsibility of International Organizations, UNGA Res. 66/100, Responsibility of International Organizations, Official Records of the General Assembly, Sixty-sixth session Supp. No. 10 (A/66/100).

functions of a secretariat does not fit into any category at all. This puts our analysis in a difficult situation since there are only two options to explain the identified variations. First option is to admit that the preceding analysis was wrong, but obviously that is not something we are prepared to do.

The second option is to ascertain existence of mechanisms of cooperation that do not fit into any of the three major categories of international cooperation: international organization, treaty or international conference. Although classification of mechanisms of cooperation into these three categories is fairly settled in the theory of international law, in reality any one-and-for-all classification cannot fully grasp each and every possible variation, especially in such a modern and dynamic area as exploration and use of outer space. Authors noted that "in recent decades several countries have often chosen to use 'informal' (or soft) international organizations rather than creating international organizations in the traditional sense. Soft international organizations, despite their informal structure, implement goals and values that are sometimes very important for their Member States and, in some cases, also for other States or groups of States of the international community."[33]

Based on these considerations, the perplexing combination of incompatible criteria of the Code's mechanism identified above suggests a conclusion that non-traditional organizations, which can be characterized as hybrids of 'soft' and 'hard' organizations, do exist, and that one of them is in front of us. These organizations, sometimes labeled 'soft international organizations',[34] are hybrid entities playing an increasingly important role in international relations. Having been first used in the area of environmental cooperation,[35] hybrid entities based on and performing their regulatory functions using 'soft law' instruments, have been adopted in space area as well.

Scholars generally favor 'soft law' instruments and mechanisms of outer space cooperation due to their ability to accommodate Washington consensus-inspired reluctance to adopt legally binding documents[36] and, at the same

33 A. Di Stasi, "About Soft International Organizations: An Open Question," in R. Virzo and I. Ingravallo (eds.), *Evolutions in the Law of International Organizations* (2015), at 44.

34 We suggest that a term 'soft international organization' is confusing given the long-standing tradition to equate 'international organizations' and 'intergovernmental organizations', the latter being described in fairly rigid terms, and propose using the broader term 'hybrid mechanism of cooperation'.

35 *Cf.*, M.-C. Runavot, "The Intergovernmental Organization and the Institutionalization of International Relations," in R. Virzo and I. Ingravallo (eds.), *Evolutions in the Law of International Organizations* (2015), at 36.

36 See, F. G. von der Dunk (ed.), *Handbook of Space Law* (2014), at 13 ("Its principal aim was "to liberalize and deregulate national and international markets and as a consequence reduce the influence of states and governments in economic and social matters.").

time, to provide a solid basis for necessary cooperation.[37] With respect to the Code of Conduct, however, there is no concurrence as to its effectiveness.[38] Though not numerous, the existing hybrid 'soft law-based' mechanisms of cooperation have proved to be an effective instrument in coordination of activities in space applications, and the Committee on Earth Observation Satellites is one such example.

In the realm of practical space applications, cooperative efforts have tangible results that can be experienced in a short-term perspective. For example, coordination makes valuable data publicly available, promotes technical compatibility, helps avoiding redundant experiments, thereby, minimizing costs. Legal regulation in its pure form, by contrast, cannot bring immediate practical results. On the one hand, it ensures that all parties are behaving within the framework of relevant regulation promoting stability and security of the regulated activities. On the other, it restraints parties' freedom of action through subordination of their activities to a mandatory set of rules. But that is only true for a legally binding regulation. In case of a 'soft law' regulation, neither the stability of regulated activities can be guaranteed, nor the parties are restrained by a mandatory set of rules.

While the choice of a legally non-binding document *ipso facto* does not predetermine (in)effectiveness of a particular mechanism of cooperation, the change of the objective of cooperation might well affect effectiveness of the mechanism of cooperation that has proved itself successful in different circumstances. We will now proceed with evaluation of the mechanism's appropriateness for achievement of the ambitious goals of the Code. In the absence of practice to support or refute inferences made, they should be accepted as hypotheses based on the limited data currently available.[39]

In furtherance of the Code's 'regulatory' goal,[40] the Subscribing States are required to engage in extensive communication as provided by Section III and meet on an annual basis to review and develop the Code. We have earlier opined that effective compliance with Section III requirements is unlikely; but it is plausible that annual meetings might see extensive attendance. They are capable of facilitating greater understanding between the Subscribing States,

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37 *Cf.*, M. Ferrazzani, "Soft Law in Space Activities", in G. Lafferranderie and D. Crowther (eds.), *Outlook on Space Law over the Next 30 Years* (1997), at 439-41.

38 Compare A. Lele, "Space Code of Conduct: Inadequate Mechanism", in A. Lele (ed.), *Decoding the International Code of Conduct for Outer Space Activities* (2012); and M. Krepon, "Space Code of Conduct: Inadequate Mechanism – A Response", in A. Lele (ed.), *Decoding the International Code of Conduct for Outer Space Activities* (2012).

39 Acknowledging that non-compliance with substantive provisions would inevitably lead to uselessness of any mechanism, no matter how effective it is on its own, for the purposes of the present analysis it will be presumed that the substantive provisions of the Code are being implemented to some degree, and overall States are being supportive.

40 Para. 1.1 of the International Code of Conduct for Outer Space Activities.

and to serve as a forum for information exchange and Code's substantive provisions enhancement. Collective discussion at most times is a crucial prerequisite for gathering comprehensive information, while consultations and similar methods are capable of supplying sporadic, patchwork-like pieces of data.[41] And with this perspective a hybrid mechanism created by the Code is justified. The CPC performs all tasks necessary for annual meetings' effectiveness: it ensures meetings' proper administrative organization and support, guarantees proper flow of exchanged information, and facilitates communications beyond annual meetings. Since external communication is taken away from the CPC, a figure of a Secretary-General representing the mechanism on the international plane becomes unnecessary, thereby making the Chair a ceremonial office – something an annually rotated Chair elected among States' representatives can effectively do.

A permanently working organ with secretarial functions, thus, is a necessity in achievement of the Code's goals. The CPC, however, has not been created as an entity capable of catalyzing achievement of these goals since it is only entrusted with administrative tasks. There is a good reason for it, though. The non-binding form has been chosen intentionally to accommodate States' reluctance to sign up for any new obligations in the space area;[42] and the whole scheme of cooperation is concentrated on guaranteeing that every State feels confident that nothing contrary to its will is 'slipped into' the Code. In such an almost paranoid atmosphere of distrust and rejection of anything that has not been scrutinized by a State itself, an independent secretariat entrusted with

41 See e.g. International Law Commission, *Preliminary Report on the protection of the environment in relation to armed conflicts*, Sixty-sixth session, 5 May-6 June and 7 July-8 August 2014, A/CN.4/674, at 6-8. (The International Law Commission filed a request for information from States about their practice, international and domestic law interpretations pertaining to the theme of the Report, and only 5 States have responded to the request within a year, while 3 out of these responses were very concise and did not provide all requested information. The Special Rapporteur expressed hope that other States will provide further information to the questions posed by the Commission.); M. Benkö and K.-U. Schrogl (eds.), *International Space Law in the Making: Current Issues in the UN Committee on the Peaceful Uses of Outer Space* (1993), at 199. (In 1988 and 1989 two notes verbales from the UN Secretary General asked the States to provide information about their national legal frameworks relating to the development of the application of the principle contained in Art. 1 of the Outer Space Treaty. Only 30 countries, out of more than 170 Member States of the UN and 53 Member States of COPUOS responded to these two notes verbales.).

42 For an argument about unlikelihood of the majority of spacefaring nations agreeing to a fundamental outer space treaty, See F. G. von der Dunk (ed.), *Handbook of Space Law* (2014), at 43. For an argument that the legally binding PPWT will not work, while the Code of Conduct for Outer Space Activities may, See F.G. von der Dunk, *Cutting the Bread* (2013). Space and Telecommunications Law Program Faculty Publications. Paper 73. http://digitalcommons.unl.edu/spacelaw/73.

substantive, as opposed to administrative functions, would have been unthinkable.

By extension, it is equally logical that no new subject of international law has been created. Formality of the Code mentioned above coupled with the need to ensure that any and all changes to the Code are properly agreed upon by the States, has resulted in the need to establish a permanently working organ with secretarial functions, at the same time rejecting the possibility of such an organ independency and any measure of legal personality of the entity. In hybrid mechanisms of cooperation focusing on practical applications, an amalgamation of an organization-like secretariat and a conference-like absent legal personality is necessitated by the demand to provide a flexible and informal mechanism of coordination beneficial for all participants, while the Code of Conduct's hybridity is of a different nature.

Getting back to the Code's goal, it can now be understood that the hybrid mechanism of cooperation was not triggered by it. There are multiple options to achieve the proclaimed goals: an agreement providing for regular review meetings and a practice-oriented mechanism akin to the Committee on Earth Observation Satellites aimed at coordination of space debris mitigation practices are just two alternatives. The current option seems to have been chosen because the Code is not only about 'safety, security and sustainability' measures, but it also covers the principles pertaining to peaceful uses of outer space. This issue has always been contentious in outer space regulation;[43] it is being discussed within the United Nations Conference on Disarmament without any substantial progress; and it has been a part of the Code since its inception. Although multiple redrafts have watered-down relevant provisions, which can now be found only in the General Principles Section, the approach has been preserved: if we touch upon the issue of peaceful uses of outer space, no intermediaries are allowed.[44]

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43 F. G. von der Dunk (ed.), *Handbook of Space Law* (2014), at 331-32 ("The controversy over military uses of outer space has been largely related to four factors: (1) the use of outer space for military reasons is a highly sensitive issue and states are often reluctant to accept legal restrictions or prohibitions to such a use; (2) a unitary legal framework governing military operations in space is missing – instead, the applicable rules are distributed among various sources of law, including general public international law, international humanitarian law and international space law; (3) these rules fail, at times. To provide a clear understanding of key terms and concepts; and (4) space technologies (especially as for launch vehicles) and space objects (notably satellites) are usually of a dual-use character, as they have the potential to be used fir civil and military applications.").

44 It was suggested that "Arms are not only a symptom of mistrust, they may also be a cause of it." S.D. Bailey and S. Daws, *The United Nations: A Concise Political Guide* (1995), at 79.

IV. Conclusion

The scholars have opined that "because of the recent and impressive growth of space activities with international cooperation elements in them, various forms of establishing such relations have flourished."[45] A more recent trend has emerged in addressing general issues, which might have political implications, to use an informal institution able to represent views of its participants, while preserving their distinct identity, and to act in practical areas of outer space exploration and use.[46] The conclusion is offered that these trends were engendered by the growing exploitation of outer space and the need to use its resources in an efficient and sustainable way.[47] A growing utilization of outer space, where space programs and projects become more intensive and regular, generated a need for a rational use of space capabilities. Indeed, it was estimated that a total of approximately five-thousand and five-hundred launches were made since 1957, providing a convincing evidence of how busy outer space has become.[48]

"Space has started to host all sorts of human activities, or better, play a fundamental role in them: military, scientific, administrative, crime fighting and anti-terrorism, commercial, and humanitarian – and thus in regulating the behavior of all sorts of humans to go with them."[49] A logical extension to the intrinsic connection between outer space and the world as we know it today is that an "everyday life would be seriously degraded, if not impossible, without the utilization of space-based science and technology. This holds true for the present generations, but also for the ones to come. Accordingly, space has to be preserved for the future. Sustainability can be achieved through a fair and responsible use of space."[50] Against this background, cooperation becomes more relevant and rewarding for spacefaring States. It has been noted that in today's world there is no longer room for 'solitary adventures' on the part of individual States, and creation of integrated entities seems to be the 'postmodern passport to globalization'.[51] While States are open to cooperation, there is much less longing for creation of formal, rigid mechanisms of

45 M. Ferrazzani, "Soft Law in Space Activities", in G. Lafferranderie and D. Crowther (eds.), *Outlook on Space Law over the Next 30 Years* (1997), at 439.

46 *Id.* at 439-41.

47 *Cf.*, M. Hofmann, "Sustainability of Space Environment: Draft UNGA Resolution", in *Proceedings of the International Institute of Space Law* (2012), at 639-40.

48 It was estimated that since 1957 till December 31, 2014 a total number of 5438 launches were performed, including the unsuccessful ones. See, www.spacelaunchreport.com/logyear.html.

49 F. G. von der Dunk (ed.), *Handbook of Space Law* (2014), at 125.

50 R.Wolfgang, K.-U. Schrogl (eds.), The Fair and Responsible Use of Space: An International Perspective (2010), at 12.

51 See, P. Pennetta, "International Regional Organizations: Problems and Issues," in R. Virzo and I. Ingravallo (eds.), *Evolutions in the Law of International Organizations* (2015), at 80-81.

cooperation. The last three decades showed that States have become more wary of legally binding mechanisms than they were in the beginning of space era; and there is no evidence that States are ready to break this equilibrium between the need to cooperate and reluctance to become bound by additional legal obligations. With that perspective, emergence of hybrid mechanisms of cooperation seems consequent and logical.

The hybrid mechanism exemplified by the Code of Conduct, however, is not a generation of the need to combine flexibility with a continuous character of work. It is a creation of the need to regulate complex controversial matters, which in turn require a high level of formality and legal precision, and unwillingness to accept any legally binding obligations.[52] The mechanism itself, however, has not been properly tailored to address inherent differences between cooperation in the area of practical applications and that in the 'regulatory sphere', making it less effective in achievement of the proclaimed goals; simply put, the goals are too grand for a hybrid mechanism.

Nevertheless, it is likely that further regulation of outer space activities will continue through hybrid mechanisms of cooperation. "As has been said, soft IOs are 'children of their time'; and as such they reflect the paradoxes of an international society dealing with the possible forms of enlargement of the subjects and also of sources of law production. They represent a response to the renewed need for interstate cooperation as a consequence of the more general process of re-interpretation of State sovereignty; they also try to resolve the tension between formal independence among States and substantial interdependence between them, which leads to cooperation."[53] States are not willing to take on any more obligations than they already have, but the contemporary issues of outer space exploration and use, including the one emphasized by the Code of Conduct – space debris – demand coordination on some level.

It is our view that usage of hybrid mechanisms of cooperation was necessitated by the growing exploitation of outer space and the need to use its resources in an efficient and sustainable way.[54] Space debris is obviously a

52 Mere mentioning of issue of peaceful use of outer space made States worried beyond reason that they might create a monster, just as Dr. Frankenstein did. And the result, unfortunately, is significantly less impressive than it could be if States were not afraid to take bold steps. For an argument in favor of creating international organizations with broader scope of functions and powers, even if it means creating Dr. Frankenstein's monster See, A. Guzman, *Doctor Frankenstein's International Organizations*, 24 Eur. J. Int'l L. 999 (2013).

53 A. Di Stasi, "About Soft International Organizations: An Open Question," in R. Virzo and I. Ingravallo (eds.), *Evolutions in the Law of International Organizations* (2015), at 68.

54 *Cf*., M. Hofmann, "Sustainability of Space Environment: Draft UNGA Resolution", in *Proceedings of the International Institute of Space Law* (2012), at 639-40.

pressing issue.[55] The Space Debris Mitigation Guidelines were drafted in 2007. But even complete abidance by their provisions for every future launch will not solve the problem because the debris that is already there will not disappear. With constant development of space technology, there is a chance that ten years from now these Guidelines become outdated and ineffective.[56] These two considerations point toward a dynamic mechanism of cooperation, receptive to the latest developments and able to promote best practices. The hybrid mechanism ensuring flexibility and adaptability, but capable of constant monitoring of the recent trends with their timely communication to all interested States and international organizations might prove helpful.[57] The more subjects engage in outer space exploitation, the more pressing the issue would become.

The Code of Conduct was largely stimulated by the troubling display of non-transparency and insensitivity to the space environment shown by China in its 2007 anti-satellite test.[58] By way of introducing the Code of Conduct – a 'soft law' document – the European Union supported the notion that voluntary rules of the road, founded in 'best practices' among space actors, offer the most promising approach to achieving space behavioral norms. "The EU emphasized that the Code of Conduct represents a pragmatic and incremental process which can assist in achieving enhanced safety and security in space."[59]

Despite the pragmatic choice of a legally non-binding type of document and a hybrid form of cooperation, the Code struggles to achieve a necessary level of control and collaboration between Subscribing States. We propose that inclusion of the issues of peaceful uses of outer space has been a strategic mistake – after all, relevant provisions have been all but wiped out from the text of the Code – which might well prove to be fatal for the Code's success.

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55 For a general overview See, N. Jasentuliyana, *International Law and the United Nations* (1999), 321-49.

56 *Cf.*, H.R. Hertzfeld, "A Roadmap for a Sustainable Space Law Regime", in *Proceedings of the International Institute of Space Law* (2012), at 299.

57 The Space Debris Mitigation Guidelines gained substantive support following their endorsement by the UNCOPUOS and later by UNGA. The recent reports of the UNCOPUOS Subcommittees showed States' interest in further development of these guidelines with possible transformation into legally binding treaty. The limited effectiveness of UNCOPUOS in drafting of new documents, however, might preclude it from living up to States' expectations, and a hybrid entity might well serve an effective substitute in this and other similar areas.

58 See, J. Robinson, "Europe's Space Diplomacy Initiative: The International Code of Conduct", in A. Lele (ed.), *Decoding the International Code of Conduct for Outer Space Activities* (2012), at 27.

59 *Id.* at 28.