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March 7, 2017

The Honorable Lamar Smith
Chairman
House Committee on Science, Space and Technology
2321 Rayburn House Office Building
Washington, DC, 20515

Dear Chairman Smith:

The following statement is submitted with regards to the hearing scheduled for March 8, 2017, “Regulating Space: Innovation, Liberty, and International Obligations,” and in response to a request to discuss possible “legal warfare” dangers that might arise from excessive regulation.

For the last several years, there have been calls for the United States to pursue an “international code of conduct” or “rules of the road” regarding space activities. The nominal objectives of such a code would be to establish “common sense standards for debris limitation, launch notification, on-orbit monitoring, and collision avoidance.”¹ The purpose is to “stem the rise of uncontrollable debris, add demonstratively to spaceflight safety, and clearly differentiate those who use space responsibly from those who do not.”²

The problem is that the creation of such a code would not necessarily influence key competitors and potential adversaries, who see space first and foremost as a strategic domain that must be controlled. Worse, by extending such a code into the realm of regulatory oversight, it would open the way to legal warfare or “lawfare” measures, undermining American security and competitiveness while doing little to constrain those same competitors and adversaries.

It is essential to note that even advocates of the various iterations of the code of conduct acknowledge that the United States itself already follows the various common sense standards and best practices. So, American companies do not require a code, or an additional set of regulations, to already operate in a responsible manner.

By contrast, certain other states, especially the People’s Republic of China (PRC) are unlikely to be moved to adopt this code of conduct, given their own interests. These include, in the first place, being able to secure their own strategic position in space. This goal is reiterated in the most recent Chinese space white paper, “China’s Space Activities in 2016,” which enunciates the vision of building China “into a space power in all respects.”³ The PRC has made major investments in all aspects of its space capabilities, including space launch, satellite development, anti-satellite and counter-space forces, as well as satellite applications.

¹Douglas Loverro, testimony before Senate Armed Services Committee, Strategic Forces Subcommittee (March 12, 2014), http://www.armed-services.senate.gov/imo/media/doc/Loverro_03-12-14.pdf (accessed March 6, 2017).

²*Ibid.*

³State Council Information Office, People’s Republic of China, *China’s Space Activities in 2016*, December 2016, http://news.xinhuanet.com/english/china/2016-12/27/c_135935416.htm (accessed March 6, 2017).

As important, the PRC has demonstrated a great interest in developing its commercial space industries, including the sale of satellites to a variety of customers ranging from Venezuela to Bolivia to Nigeria. It has succeeded in doing so in part because its state-owned aerospace industries are able to provide a “soup to nuts” set of services from satellite design to launch services to launch insurance at lower prices than comparable Western companies. The space white paper indicates that the PRC government will emphasize expanding China’s commercial space activities. Its competitive edge would only be heightened if American companies had to add another layer of regulatory oversight and compliance.

For the Chinese government, one means of assuring its strategic advantage in space is the employment of “legal warfare,” a form of political warfare, against both commercial and national competitors. As Chinese authors note, legal warfare, at its most basic, involves “arguing that one’s own side is obeying the law, criticizing the other side for violating the law, and making arguments for one’s own side in cases where there are also violations of the law.”⁴ The instruments of legal warfare include not only national laws, but the full range of legal instruments, including

legislation, law enforcement, judicial law, as well as policy consultation, legal pronouncements/propaganda, legal education, and other such techniques to undertake a series of legal conflict activities.⁵

In short, Chinese concepts of legal warfare employ various means, including both laws and regulations, in order to gain an advantage. While this is typically associated with military and strategic advantage, the PRC’s willingness to employ military capabilities in order to support its commercial operations, such as through cyber economic espionage, underscores that Beijing does not necessarily see a distinction between military support to its commercial players and military activities in pursuit of strategic gain. Indeed, given the dual-use nature of space, the PRC is likely to view any foreign space entity, government or commercial, as a potential threat.

Consequently, the likelihood of Chinese adherence or adoption of a space-related code of conduct is unlikely at best. Nor does China appear amenable to being “shamed” into adhering to other countries’ best practices. Instead, Chinese behavior in other domains, such as the maritime realm, illustrates China’s attitude towards non-binding codes of conduct.

Despite the creation of the U.S.–China Military Maritime Consultative Agreement (MMCA) in 1998 and the 2014 Code for Unplanned Encounters at Sea (CUES) in 2014, China has continued to operate in a dangerous manner around US ships and aircraft engaged in surveillance and reconnaissance operations in the western Pacific.⁶ Similarly, China’s ratification of the UN

⁴Han Yanrong, “Legal Warfare: Military Legal Work’s High Ground: An Interview with Chinese Politics and Law University Military Legal Research Center Special Researcher Xun Dandong,” *Legal Daily* (PRC), February 12, 2006.

⁵Wang Mei, “Research on Several Issues of Legal Warfare,” *National Defense University Newspaper*, No. 7 (2004), p. 66. Cited in Song Yunxia, *Legal Warfare Under Informationalized Conditions* (Beijing, PRC: AMS Publishing, 2007).

⁶For two recent examples among many, see Tom Vandenbrook, “Chinese Fighters Buzz Navy Patrol Plane,” *USA Today*, May 18, 2016, <http://www.usatoday.com/story/news/world/2016/05/18/chinese-fighters-buzz-navy-patrol-plane/84560640/> (accessed March 6, 2017), and Jane Perlez, “US Accuses Chinese Jet of Flying Too Close to American Plane,” *The New York Times*, June 8, 2016, https://www.nytimes.com/2016/06/09/world/asia/us-china-military-jet-intercept.html?_r=0 (accessed March 6, 2017).

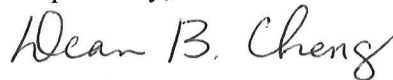
Convention on the Law of the Sea (UNCLOS) did not lead to their submitting to binding arbitration when the Philippines (another UNCLOS member) sought to resolve their maritime disputes in the Spratlys. Given the emphasis placed on the space domain, it is not clear why the creation of the code, or its incorporation into American regulations, would lead Beijing to follow them.

What the PRC *is* likely to do, however, if the United States were to incorporate the provisions of a code of conduct into its regulations would be to argue, whether directly or through surrogates, that any failure to comply with said regulations was tantamount to irresponsible behavior and threatening to other spacefaring states. Just as commercial companies find it hard to defend themselves against nation-state actors intent upon cyber economic espionage, American commercial space companies would likely find that their activities were being scrutinized by foreign nation-states' legal warfare efforts to demand absolute compliance with American regulations.

At a minimum, such efforts could generate major additional costs as companies had to engage in defensive legal measures. But this would be exacerbated by the public relations cost that would emerge—further compounded by the Chinese state-owned media's ability to transmit its message (as part of public opinion warfare, another component of the Chinese political warfare arsenal). For smaller companies, and especially start-ups with limited resources, this is likely to prove prohibitive. It may also discourage venture capital from investing in such companies in the first place. In either case, the publication relations cost would further enhance the competitiveness of China's own space industries.

In conclusion, the incorporation of elements of the proposed “rules of the road” or “international code of conduct” for space into the American regulatory framework only serves to provide potential competitors and adversaries with an easy means of undermining new commercial entrants into the space arena.

Respectfully,

A handwritten signature in black ink that reads "Dean B. Cheng". The signature is written in a cursive, flowing style.

Dean Cheng

Senior Research Fellow, Asian Studies Center
The Heritage Foundation