

The Other Triangle in European Space Governance: The European Union, the European Space Agency and the United Nations

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In European space governance, the term ‘governance triangle’ usually refers to the cohabitation in space matters of the European Union, the European Space Agency and their respective member states. This contribution explores another, less well-known and less clearly structured space governance triangle: that between the EU, ESA and the UN. Its specific focus is on their respective regulatory activities in guaranteeing the sustainability of space activities. Initiatives with this objective have been taken by each of the organisations mentioned. The contribution examines the institutional preconditions for their coherence and complementarity. The historic forum for such coordination is UNCOPUOS, with parallel activities taking place in UN bodies such as the Conference on Disarmament and UNIDIR. ESA, although limited to peaceful purposes by its convention, has been a historic partner in UNCOPUOS deliberations with permanent observer status. ESA has furthermore declared its acceptance of three space treaties - the Astronaut Agreement, the Registration Convention and the Liability Convention. The EU from its side has observer status in UNCOPUOS, but has used that capacity sparingly, not entering the playing field until 2003 for a brief statement on the European Space Policy. With the on-going debate surrounding the future institutional arrangements between ESA and the EU and the EU’s emerging actorness in space law matters (cf. the EU-championed International Code of Conduct for Outer Space Activities), the question arises as to the future institutional constellation between these three players for regulatory activities pertaining to space.

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I. Introduction

That the European Union (EU) would eventually develop into a space actor seems inevitable, the awakening of its interest in space dating back at least three decades.¹ Until recently, this interest had been rather instrumental in nature, aiming to realise specific space objectives or seeking to reap the benefits of space activities and capabilities in pursuit of policies whose main objectives lay in internal EU affairs. More recently, however, the EU has ventured onto the world stage and has started exploring the external relations aspects of its space actorness. Among other ways, it has been doing so by becoming active in several international fora where space law is debated.

Entering the stage of operational space activities at the end of the 1990s with the start of the Galileo programme, the EU was not the first European space actor, as national and intergovernmental space activities had commenced several decades earlier, and continue to play a predominant role today. This has meant that even within Europe and among its Member States, the EU has had to tread carefully, carving out its own niche, respecting the sensitivities of established space actors, cooperating with them and benefiting from their experience and expertise where possible. The history of the rapprochement between the Union and the European Space Agency (ESA) in particular, is well documented.² On the emergence of the EU as a global space actor, and more specifically as a space law actor, less academic research has been done.³ The present contribution examines how the EU has developed its position as an actor in international space fora, especially those within the United Nations System. Specific attention will go to the interplay between the shaping of the EU's external space actorness and the simultaneous solving of internal governance puzzles, notably those relating to the developing relations between the EU and ESA.

We will first browse through the European space governance landscape as it stands almost four years after the entry into force of the Treaty of Lisbon (section II). In view of the Lisbon Treaty and the EU's expanded competences on space, the following section (III) briefly sketches the position and the ambitions of the EU within the United Nations System. Both these sections will demonstrate that, although the EU has significantly gained in competences, its international political and diplomatic posture remains limited when compared to its economic weight. This appears, among others, from a thorough analysis of EU space interventions in the UN General Assembly (GA) and in the

1 See e.g.: Resolution of 17 September 1981 on Europe's space policy, OJ C/260 of 12.10.1981, p. 102.

2 See e.g.: F. Mazurelle, J. Wouters and W. Thiebaut, "The evolution of European Space Governance: Policy, Legal and Institutional Implications", 6 *International Organizations Law Review* 2009, pp. 1-35; S. Hobe, K. Kunzmann, T. Reuter and J. Neumann, *Rechtliche Rahmenbedingungen einer zukünftige kohärenten Struktur der europäischen Raumfahrt* (Lit 2006), lxx + 579p.

3 See however: N. Peter, "The EU's emergent Space Diplomacy", 23 *Space Policy* 2007, pp. 97-107.

UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS). Curiously, since 2008 the EU has been promoting a Code of Conduct for Outer Space Activities, a soft law mechanism aimed at enhancing the sustainability of space activities, but has done so outside UNCOPUOS. We attempt to find out which factors contributed to this (section IV). In conclusion, we offer a number of recommendations for a better future alignment of European space governance both in the European and in the global space arena (section V).

II. The European Space Landscape Post-Lisbon

After a long and difficult process of treaty change that has become one of the EU's hallmarks, 1 December 2009 saw the entry into force of the Treaty of Lisbon. For the purposes of this article, the changed treaty structure of the Union holds far-reaching consequences, both in the organisation of European space governance and in the general set-up of the EU's external relations; this section focuses on the former category, while the latter will be explored infra.

The Treaty of Lisbon endows the EU with an explicit competence and legal basis for space activities, more specifically in Articles 4(3) and 189 of the Treaty on the Functioning of the European Union (TFEU).⁴ In doing so, not only does it clarify the extent of the EU's space mandate, it also provides an indication of what goals the EU can use space activities to pursue. Art. 189(1) TFEU puts EU space initiatives at the service of three sets of objectives: the promotion of scientific and technical progress, the promotion of industrial competitiveness, and - rather more generally - the implementation of the EU's policies.⁵ Whereas the first of these objectives is reminiscent of the first generation of EU space initiatives in the 1980s and early 1990s, the use of space as a tool at the service of its whole array of policies is a more accurate reflection of the EU's current conception of its space competence. Although Art. 189 TFEU was the result of the recuperation of the near identical Art. III-254 of the Treaty establishing a Constitution for Europe⁶, it is not without its puzzles. Hence, it has fascinated scholars ever since its entry into force.⁷ The reason for their fascination is that

4 Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 C326 of 26.10.2012.

5 Art. 189 [1] TFEU reads: "To promote scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a European space policy. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space."

6 OJ 2004 C 310 of 16.12.2004.

7 See: F. Mazurelle, J. Wouters and W. Thiebaut, o.c., pp. 25-30; J. Wouters, "Space in the Treaty of Lisbon", in European Space Policy Institute, K.-U. Schrogl, C. Mathieu and N. Peter (eds.), *Yearbook on Space Policy 2007/2008: From Policies to Programmes* (Springer 2009), pp. 116-124.; M. Sánchez-Aranzamendi, "European Commission Communication "Towards a space strategy for the European Union that

the space competence it establishes is atypical within the EU's catalogue of competences in a number of ways. First, Art. 4(3) TFEU ranks space among the EU's shared competences, yet adds the proviso that "the exercise [by the EU] of that competence shall not result in Member States being prevented from exercising theirs." This installs a third type of EU competences, distinct from exclusive and 'ordinary' shared competences, as in the latter case, a Member State can no longer legislate once the EU has done so and has 'occupied the field'. This third type has been called a 'parallel' competence.⁸ Second, and on a somewhat related note, Art. 189(2) TFEU specifically excludes the harmonisation of national laws and regulations from the measures the EU may take when acting on its space competence - the most significant textual departure from its predecessor article in the Treaty Establishing a Constitution for Europe. Such exclusion is rather typical of yet another type of EU competence, namely the so-called 'supporting' kind where the brunt of the competence remains national (like in the cases of culture, education, industry and tourism: see Art. 6 TFEU). Third, Art. 189(3) TFEU tasks the EU with developing "any appropriate relations" with ESA. The next sub-section examines these relations in greater detail.

The Internal Dimension of European Space Policy: The EU and ESA

More than four years after its entry into force, the results of the EU's space competence in the TFEU have fallen short of expectations, not least on the institutional front. From a purely legal point of view, the relations between the EU and ESA have not evolved since 2004, when the Framework Agreement between both organisations entered into force.⁹ This Agreement was originally intended as a provisional mechanism to govern the intensifying day-to-day relations between the EU and ESA for a four-year period as they cooperated on the flagship programmes Galileo and (then) GMES. It has since been prolonged for two further four-year periods, as the organisations have not been able to come up with a replacement, nor have they given formal notice of their withdrawal from the existing Agreement. At the same time the governance mechanisms installed by the Framework Agreement - essentially a joint secretariat and the periodic joint and concomitant meetings of the Competitiveness Council and the ESA Council at ministerial level in the so-called Space Council - are showing signs of institutional fatigue. Taking the frequency of Space Council meetings as an indication, it is telling that between November 2004 and the end of 2005, the Space Council convened three times in just over one year¹⁰, whereas at the time of writing, the 8th and most recent meeting of the Space Council

benefits its citizens" - Towards a Lisbon Generation Competence", *ESPI Perspectives* 46, May 2011.

8 This third category has also been called "a shared competence without pre-emption"; see respectively: F. Mazurelle, J. Wouters and W. Thiebaut, *o.c.*, pp. 26-29; M. Sánchez-Aranzamendi, *o.c.*, p. 1.

9 Framework Agreement between the European Community and the European Space Agency, Official Journal of the European Union, 6 August 2004, L 261.

10 Respectively on 25 November 2004, 7 June 2005 and 28 November 2008.

dates back to 2 December 2011. Never have two Space Council meetings been further apart.

At the same time the EU, or rather the European Commission (Commission), from its side has been busy giving shape to its conception of the Art. 189 TFEU competence in a series of policy documents.¹¹ Especially the November 2012 Communication by the Commission deserves our attention, as it gives some insight into the Commission's interpretation of the puzzling phrase "The Union shall establish any appropriate relations with the European Space Agency" in Art. 189(3) TFEU. In this Communication, on the basis of the very open-ended mandate for the evolution of European space governance, the Commission, by way of "initial ideas"¹², adds several important elements to the debate. However, the nature and selection of ideas presented seems to betray rather more calculation on the Commission's part than it would be willing to admit. First, it establishes 2020-2025 as a vague target date by which the long-term goal should be reached.¹³ Second, as it talks explicitly of rapprochement *by* ESA *towards* the EU, it is clear whom the Commission expects to be moving.¹⁴ Third, it identifies five structural shortcomings in the current governance scheme: a mismatch of funding rules; an asymmetry in membership; an asymmetry in defence mandate; the absence of mechanisms for policy coordination; and the fact that ESA, through lack of a link with the European Parliament, lacks democratic legitimacy.¹⁵ Fourth, it presents three possible long-term outcomes for the institutional relationship between the EU and ESA, ranging from enhanced cooperation under the status quo to "bringing ESA as an intergovernmental organisation under the authority of the European Union", or transforming ESA into an EU agency.¹⁶ This Communication, although in itself without any consequence as it is strictly a policy document, was adopted on the eve of the 2012 ESA Council at ministerial level, and apparently without concertation with ESA. It is to be seen as a pre-emptive counter-declaration to a political declaration by the ESA Council at Ministerial level that was under preparation

11 Three policy documents deserve particular mention:

- Communication from the Commission: "Towards a space strategy for the European Union that benefits its citizens", Brussels, 11 April 2011, COM(2011) 152;
- Communication from the Commission: "Establishing appropriate relations between the EU and the European Space Agency", Brussels, 14 November 2012, COM(2012) 671;
- Communication from the Commission: "EU Space Industrial Policy. Releasing the potential for economic growth in the space sector", Brussels, 28 February 2013, COM(2013) 108.

12 COM(2012) 671, p. 3.

13 Ibid, at p. 4

14 Ibid.

15 Ibid, at pp. 3-4.

16 Ibid, at p. 4.

at the time.¹⁷ While it is true that today's apparent impasse may in part be due to the current stage of the respective political cycles of both organisations - with European elections and the installation of a new Commission close on the horizon in 2014, and a new Director General taking up office at ESA in 2015 - it still warrants concern. As we shall see in the following sections, unclear internal governance arrangements may make for unclear external representation mandates.

III. The External Dimension of EU Space Policy

At the intersection of the EU's space competence and the streamlining of its external relations setup, both of which were objectives for the drafters of the Lisbon Treaty, one finds the external relations aspects of the EU's newly found space actorness. It would therefore not be illogical to expect from the EU at least some first steps towards the external projection of its space competence and space ambitions. Indeed, in the September 2008 Space Policy Progress Report, a Commission working document, it was highlighted that "European stakeholders involved in space [should] speak with one voice on the international scene" and that "international cooperation in space must be coherent with the EU's external policy priorities".¹⁸ An examination of the possible venues on the international scene where space may be debated reveals two possible options: initiatives are undertaken either bilaterally, or they are undertaken within the framework of an international organisation. Whereas the former is the case for many instances of operational international cooperation in space - the example of ESA notwithstanding -, the latter is the predominant way of working in the adoption of international rules and regulations on space. In the present contribution, our focus lies on the second type of international cooperation, and more specifically on the activities of the EU in UN organs concerned with space law.

A good deal of academic research has been done on the external relations of the EU, including on more specific topics such as the EU's relations with international organisations (IOs).¹⁹ Broadly speaking, two sets of rules interact to determine the freedom of movement the EU enjoys in an IO: on the one hand, internal EU law determines the level of competence which the Member States

17 Political Declaration by the ESA Council at Ministerial Level: "Towards the European Space Agency that best serves Europe", 20 November 2012, ESA/C-M/CCXXX-IV/Res. 4 (Final) attached to ESA/C(2012)186.

18 European Commission, *European Space Policy Progress Report*, COM(2008) 561 final, 11 September 2008.

19 See e.g.: M.B. Rasch, *The European Union at the United Nations. The Functioning and Coherence of EU External Representation in a State-Centric Environment* (2008 Martinus Nijhoff), xxii + 360p.; J. Wouters, T. Ruys and F. Hoffmeister (eds.) *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser 2006), xvii + 434p.

have conferred on the EU in a specific domain; on the other hand, the constituent treaty of the IO determines how other IOs can take part in its workings.²⁰ We will examine each dimension in turn, briefly at first for the general position of the EU at the UN, next in greater depth for the particular case of the EU in UN space organs.

The EU at the United Nations

As a reflection of their largely coinciding objectives and values, the EU and the UN have often been called ‘natural partners in multilateralism’.²¹ This section examines to what extent this partnership has resulted in cooperation between the two organisations, or involvement of one organisation in the framework of the other. First of all, the EU’s own constituent Treaties contain a firm commitment to cooperation with the UN: according to Art. 21(1) Treaty on European Union (TEU), the EU “shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.”²² Art. 220(1) TFEU echoes this provision and tasks the Union to establish “[...] all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies [...]”. The EU’s Treaties contain many other references to the UN and the UN Charter.²³

A closer examination of EU legal provisions related to space reveals no specific mention of any involvement in UN space organs. Even in policy documents, such mentions are scarce - and apparently uncoordinated. The first recent mention of the UN in space affairs took the form of a succinct reference to the UN space legal framework in the preamble of the 2007 European Space Policy, a document jointly adopted by the EU Council and ESA in the Space Council.²⁴

20 See: F. Hoffmeister and P.J. Kuijper, “The status of the European Union at the United Nations” in J. Wouters, T. Ruys and F. Hoffmeister (eds.) *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser 2006), pp. 10-15.

21 J. Wouters, T. Ruys and F. Hoffmeister, “Introduction” in J. Wouters, T. Ruys and F. Hoffmeister (eds.) *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser 2006), p. 1; see also: UN Regional Information Centre (UNRIC), *Saving and improving lives: Partnership between the United Nations and the European Union in 2011*, available at: <www.unbrussels.org/un-eu-partnership-report-2011.html> (last visited 13.12.2013).

22 Consolidated version of the Treaty on European Union, OJ 2012 C326 of 26.10.2012.

23 Apart from the reference in Art. 21(1) TEU, the UN / UN Charter is being referred to in 14 other instances in the EU Treaties: Art. 3(5), Art. 21(2)(c), Art. 34(2), Art. 42(1) and (7) TEU, 7th recital of the preamble of the TFEU, Art. 208(2), Art. 214(7), TFEU, 3th and 8th recital preamble, as well as Art. 1(b) Protocol No 10 on permanent structured cooperation, 3th paragraph Declaration No 13 concerning CFSP, Declaration No 14 concerning CFSP.

24 Council Resolution on the European Space Policy, 22.05.2007, as attached to Council Doc. 10037/07.

Strangely, however - although perhaps a result of the lack of a formal space competence on the EU's part at that time - the section on international relations of the same document contains no mention of relations with the UN. Subsequent Space Council resolutions were somewhat more outspoken, the resolution the Council's fifth meeting containing references to the treaty framework for outer space, the interest of space technology in the fight against climate change and the UN's role in coordinating those efforts²⁵, and the seventh Space Council meeting underlining the use of space technology in achieving the Millennium Development Goals.²⁶ Of the three Communications by the Commission on space that have been adopted since 2011, none contains any mention of the UN.²⁷

A final peculiarity of the EU's involvement in international organisations on space affairs is related to the space competence conferred to the Union, which, as we have seen above, differs from other competences giving occasion to the EU's involvement in IO's.²⁸ This poses a number of questions where the EU's representation by or alongside Member States in the relevant bodies is concerned. Under Art. 189 TFEU, the Union enjoys a space competence in parallel with Member States, although the Treaty terms this as a shared competence with significant restrictions. As this competence lacks the pre-emptive effect of a traditional shared competence, the question arises to what extent the freedom to act for EU Member States in an IO would be impaired by the Union's already having legislated on the topic. Further assurance to this effect is given by the explicit proviso in Art. 189 TFEU that no harmonization of national legislation can be imposed by the Union. In conclusion, the TFEU space competence leaves the Union in a rather weak position when it comes to taking part in UN space deliberations in an autonomous and coordinated manner.

Aside from EU rules, the UN legal framework also determines what part IOs can take in its activities. The latter is to some extent specific to the UN body concerned, and will therefore be examined in turn for the General Assembly and the Committee on the Peaceful Uses of Outer Space. For both bodies, we analyse empirically what use the EU has made of its presence.

In the UN General Assembly

The EU (previously the European Economic Community (EEC) and since 1 November 1993 the European Community (EC)) has been admitted to the meetings of the UNGA for almost forty years, and the rules governing its status were last adapted in 2011. The EU now enjoys 'enhanced participation rights'.²⁹ Dis-

25 Council Resolution: "Taking forward the European Space Policy", 26.09.2008, as attached to Council Doc. 13569/08.

26 Council Resolution: "Global Challenges: Taking full benefit of European space systems", 25.11.2010, as attached to Council Doc. 16864/10.

27 Cf. *supra*, note 1832.

28 To see the contrast, one need only think of the EU's position in the World Trade Organization, which is based on an exclusive competence conferred by Art. 3(1) TFEU.

29 See: A/RES/65/276 of 03.05.2011.

tinguishing features from normal observers lie in the fact that the EU has been granted the right to speak early among other major regional groups, circulate communications, present proposals and amendments orally, and exercise the right of reply. Even before this status upgrade, the EU had been progressively increasing its posture in debates relating to space in the UNGA, having regularly delivered statements on the subject in the First and Fourth Committees since 2000, as well as in the UNGA Plenary. A specific topic of interest, which will also be debated in the following section, are the statements on the EU's project for an International Code of Conduct.³⁰

However, what happens in the area of space during the autumn in New York's First and Fourth UNGA Committees has by and large already been debated in the spring and early summer in Vienna, where the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS) and its two subcommittees, the Scientific & Technical Subcommittee and the Legal Subcommittee, each have their annual meeting. Established in 1959 as an ad hoc committee under the UNGA, UNCOPUOS has been the preeminent forum for international debates on space law since the dawn of the space age. 17 out of 28 EU Member States are also members of UNCOPUOS, and ESA has been a permanent observer since 1975, when the Agency was created. As the following section shows, the EU has recently attempted to upgrade its participation there too.

In UNCOPUOS

In UNCOPUOS, the EU does not enjoy the same upgraded status as in the UNGA itself. Instead, in recent years, the Committee has recognised the EU as an observer at the beginning of each annual session. This subsection lists all EU interventions in the main committee of UNCOPUOS and in the Legal Subcommittee. The analysis is based on the official reports of the relevant committee, referring to verbatim records where clarification is needed.

The first trace of the EU's presence in UNCOPUOS dates back to 2003, when representatives of the EC attended the meetings³¹, and when a representative of the Commission presented the green paper on European space policy under agenda item 7: "Implementation of the recommendations of the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space".³² The next appearance was only in 2006, when in a symposium on "Space and Forests" on 12 June 2006, a representative of the Commission presented the

30 See e.g.: EU Statement delivered by Mr. Andras Kos, Minister Counsellor, Delegation of the European Union, at the First Committee of the 67th session of the General Assembly of the United Nations on Outer Space, 22.10.2012, available at: <www.eu-un.europa.eu/articles/en/article_12753_en.htm> (last visited: 13.12.2013); EU Statement at the 67th session of the United Nations General Assembly Fourth Committee "Peaceful Uses of Outer Space", 17.10.2012, available at: <www.eu-un.europa.eu/articles/en/article_12737_en.htm> (last visited: 13.12.2013).

31 Report of the Committee on the Peaceful Uses of Outer Space on its 46th session, 11-20 June 2003, A/58/20, at para. 9.

32 Ibid, at para. 63.

“Global TREES Project: monitoring global forest cover change through collaboration and partnership”.³³ From then on, the EU has been an annual presence at UNCOPUOS, the Commission (not the EU!) having been granted observer status for the first time in 2007, when a representative gave a presentation on “Advances in systemic observations of surface water and the marine environment in Africa” in a symposium on “Space and Water” held on 11 June.³⁴

A significant upgrade of the EU’s profile came about in 2008, when a representative of the Commission gave a presentation on the European Space Policy.³⁵ More importantly, the French delegation (France holding the rotating Council presidency at that time) made a statement “on behalf of UN Member States that are members of the EU” on the budding EU project for a code of conduct *for outer space*, as it was then known, that had been presented to the UNGA for the first time in September 2007.³⁶ The Committee took note of this statement, and a debate ensued, particularly on the coordination and complementarity between this initiative and the Committee’s own work on sustainability of space activities, and the relation between this instrument and the existing body of international space law. The Committee concluded that the matter merited further consideration.³⁷ The following year, the Czech delegate in UNCOPUOS made a statement, once more “on behalf of the Member States of the UN that are members of the EU”.³⁸ The Committee furthermore debated the Code of Conduct project once more, now having before it the 2008 draft of the text, adopted in December 2008 by the EU Council.³⁹ The Committee, at that time already, was resigned to its fate that the consultations with space faring nations and negotiations with a view to the adoption of the code would take place in an ad hoc forum, outside UNCOPUOS.⁴⁰ The 2010 session of UNCOPUOS, the first after the entry into force of the Lisbon Treaty, shows a very similar picture, although the Spanish delegation could now make statements *on behalf of the EU itself*.⁴¹ The Committee furthermore took note of the present state of the negotiations in the Code of Conduct project.⁴² Since 2011,

33 Report of the Committee on the Peaceful Uses of Outer Space on its 49th session, 7-16 June 2006, A/61/20, at para. 311.

34 Report of the Committee on the Peaceful Uses of Outer Space on its 50th session, 6-15 June 2007, A/62/20, resp. at paras. 9 and 318.

35 Report of the Committee on the Peaceful Uses of Outer Space on its 51st session, 11-20 June 2008, A/63/20, at para. 23.

36 Ibid. at paras. 296-302; *see also*: UN Doc. A/62/114/Add.1.

37 Ibid. at paras. 298-302.

38 Report of the Committee on the Peaceful Uses of Outer Space on its 52nd session, 3-12 June 2009, A/64/20, at para. 13.

39 Council Doc. 17175/08 of 17.12.2008.

40 Ibid. at para. 45.

41 Report of the Committee on the Peaceful Uses of Outer Space on its 53rd session, 9-18 June 2010, A/65/20, at paras. 15 and 29.

42 Ibid. at para. 38.

UNCOPUOS has steadfastly invited the EU observer to attend its meeting.⁴³ In that year, the EU was represented by the Hungarian delegation, which made several statements on behalf of the Union.⁴⁴ At the same time, the Committee took note of the status of the Code of Conduct process, especially of the new draft text that had been adopted in September 2010.⁴⁵ Furthermore, the Committee took note of the initiative by the UNGA to establish a group of governmental experts (GGE) to conduct a study on space-related transparency- and confidence-building measures (TCBMs).⁴⁶

In 2012, another step was taken in the gradual upgrading of the EU's status at UNCOPUOS: for the first time, the system of co-representation was employed, whereby the representative of one Member State of the Union, together with the observer for the Union, made a single statement.⁴⁷ From 2012 onwards, the invitation of the EU observer was extended to include the right to "[...] address [the meeting], as appropriate [...]"⁴⁸ The exact same arrangement was maintained for the 2013 session of UNCOPUOS.⁴⁹

As for UNCOPUOS' Legal Subcommittee, which would in all likelihood be the forum most appropriate for deliberations on a code of conduct-type measure, the picture of the EU's presence is still somewhat bleak. Before 2010, there were no signs of EU activity in this forum. In 2010, the report of the Legal Subcommittee makes mention of a statement by some delegations that would like to debate the EU-proposed Code of Conduct for Outer Space Activities in UNCOPUOS.⁵⁰ Checking the verbatim records shows that the representatives of France, Belgium, Italy and Russia commented on this project, and that, whereas the former three states were supportive of the Code, Russia voiced grave concerns over its effects, possibly including the fragmentation of the space legal

43 "[...] the Committee decided to invite, at its request, the observer for the European Union to attend its fifty-fourth session, on the understanding that doing so would be without prejudice to further requests of that nature and that it would not involve any decision of the Committee regarding status.", Report of the Committee on the Peaceful Uses of Outer Space on its 54th session, 1-10 June 2011, A/66/20, at para. 11.

44 Ibid. at paras. 16, 29 and 281.

45 Ibid. at paras. 53-54; Council Doc. 14455/10 of 11.10.2010.

46 Ibid. at para. 55.

47 It is unclear what the precise division of tasks was, as the time of writing, the verbatim records of the 55th session of COPUOS were not yet available; Report of the Committee on the Peaceful Uses of Outer Space on its 55th session, 6-15 June 2012, A/67/20, at paras. 17, 31 and 325.

48 Report of the Committee on the Peaceful Uses of Outer Space on its 55th session, 6-15 June 2012, A/67/20, at para. 11; Report of the Committee on the Peaceful Uses of Outer Space on its 56th session, 12-21 June 2013, A/68/20, at para. 9.

49 Report of the Committee on the Peaceful Uses of Outer Space on its 56th session, 12-21 June 2013, A/68/20.

50 Report of the Legal Subcommittee on its 49th session, 22 March-1 April, A/AC/105/942, at para. 23.

framework.⁵¹ The 2011 report shows no trace of the debate continuing in the Legal Subcommittee.⁵² Since 2012, mirroring (or rather foreshadowing, as the Legal Subcommittee meets two months earlier) the evolution in the main Committee, the EU has been invited to attend the meetings of the Legal Subcommittee, and to address them, as appropriate.⁵³ Until present, the EU has not made use of its right to address the Legal Subcommittee.

IV. The European / International Code of Conduct Process

The origins of the European project for a Code of Conduct for Outer Space Activities lie in two recurring UNGA resolutions, Res. 61/58 on Prevention of an arms race in outer space and Res. 61/75 on Transparency- and confidence-building measures in outer space activities, both of 6 December 2006. The EU submitted a joint reply to the UNGA 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.⁵⁴ On this basis, the initiative was picked up under the French presidency in the second half of 2008 and a first draft text was agreed upon in the EU Council in December 2008.⁵⁵ Bilateral consultations led to a second draft in September 2010.⁵⁶ The aim of the Code of Conduct project has always been to render the draft text acceptable to the greatest number of nations possible. However, international bilateral consultations suffered a hiccup in January 2012, when the US announced it would not sign up to the EU-proposed instrument in its draft form of that time. Instead, the US said it would be willing to take part in a multilateral negotiation process to develop an International Code of Conduct for Outer Space Activities based on the European proposal.⁵⁷

51 *See respectively*: Unedited transcript of the 803rd meeting of the Legal Subcommittee, 22 March 2010, COPUOS/LEGAL/T.803, at p. 12; Unedited transcript of the 805th meeting of the Legal Subcommittee, 23 March 2010, COPUOS/LEGAL/T.805, at pp. 4-5; Unedited transcript of the 806th meeting of the Legal Subcommittee, 23 March 2010, COPUOS/LEGAL/T.806, at p. 4.

52 Report of the Legal Subcommittee on its 50th session, 28 March-8 April 2011, A/AC.105/990.

53 Report of the Legal Subcommittee on its 51st session, 19-30 March 2012, A/AC/105/1003, at para. 6; Report of the Legal Subcommittee on its 52nd session, 8-19 April 2013, A/AC/105/1045, at para. 6.

54 UN Doc. A/62/114/Add.1.

55 Draft Code of Conduct for Outer Space Activities, 8-9 December 2008, as attached to Council Doc. 17175/08.

56 Revised Draft Code of Conduct for Outer Space Activities, 27 September 2010, as attached to Council Doc. 14455/10.

57 Secure World Foundation, *Draft Code of Conduct for Outer Space Activities Fact Sheet*, updated May 2013, available at <http://swfound.org/media/83247/icoc_fact-sheet_may2013.pdf> (last visited 25.09.2013).

The event, although by no means fatal for the Code of Conduct process, was exemplary of the perception the EU has been struggling with along the way: that the Code of Conduct was a Brussels-devised, take-it-or-leave-it instrument. Having allayed at least some of the concern in the international community, international negotiations have been going on for the past one and a half years, with a first meeting taking place in Vienna in June of 2012 on the basis of a new draft text⁵⁸, a round of ‘open-ended consultations’ open to all UN Member States taking place in Kiev mid-May 2013, and a second round of ‘open-ended consultations’ in Bangkok on 20-22 November 2013, on the basis of yet another draft text, dated 16 September 2013.⁵⁹

To facilitate this process, the EU has concluded a contract with UNIDIR, the UN Institute on Disarmament Research for a project titled “Facilitating the Process for the Development of an International Code of Conduct for Outer Space Activities”. UNIDIR is an independent research institution within the UN Framework. Based in Geneva, it was created by a UNGA resolution in 1984. In accordance with its statute, its purpose is “undertaking independent research on disarmament and related problems, particularly international security issues, and working in close relationship with the Department for Disarmament Affairs of the Secretariat.”

Several reasons could be cited why the European External Action Service may have elected to employ the services of UNIDIR to facilitate the negotiation instead of proposing it within the framework of UNCOPUOS, although each reason’s relative contribution is uncertain. First, UNCOPUOS’ track record over the last three decades does not speak to its advantage: the work pace of the Committee has slowed to the point that it has been unable to generate binding norms since the 1979 Moon Agreement. Although its record on non-binding and technical rules is somewhat better, it is uncertain that the EU’s present status in UNCOPUOS would enable it even to submit such a proposal without resorting to representation by one of its Member States. Second, the ad-hoc way of working is arguably speedier, with several rounds of negotiation per year being possible. A third factor acting to the detriment of UNCOPUOS in this regard is that it is consensus-oriented; at present it does not look likely that the proposed Code of Conduct will attain consensus among all 74 UNCOPUOS members, making the choice for a variable geometry multilateral setup a logical one.

58 Revised Draft International Code of Conduct for Outer Space Activities, 5.06.2012, available at: <http://eeas.europa.eu/non-proliferation-and-disarmament/pdf/12_06_05_coc_space_eu_revised_draft_working_document.pdf> (last visited: 25.09.2013).

59 Draft International Code of Conduct for Outer Space Activities, 16.09.2013, available at: <http://eeas.europa.eu/non-proliferation-and-disarmament/pdf/space_code_conduct_draft_vers_16_sept_2013_en.pdf> (last visited 18.11.2013).

V. Evaluation & Outlook

Whatever the exact reasons behind the choice for an ad hoc diplomatic process as the culmination of the Code of Conduct process, the experience is highly instructive on the actual workings of EU space governance, internally as well as externally. The growing pains that accompany the EU's coming of age as a space actor point to situations and arrangements that may need refinement or overhaul. With this in mind, we propose three axes of recommendations.

First, it is disconcerting that four years after the entry into force of the Lisbon Treaty, the intra-European constellation of space governance remains mired in much the same debates that have plagued it for the past two decades. Legally, the Framework Agreement between the EU and ESA, itself a stopgap measure that was put in place to enable the cooperation between two organizations without forcing either to modify its constituent treaty, is still in place and risks becoming an impediment rather than an asset to the further evolution of European space governance. The EU needs the technical, operational and managerial expertise of ESA as much as ESA needs the political clout and the advantages of scale and scope of the EU. In this respect, one should applaud that in recent policy documents the Commission has set a target date of 2020-2025 for the attainment of a long-term institutional arrangement between ESA and the Union.

Second, on the external front, signs are not good as regards the EU's involvement in classical UN space organs such as UNCOPUOS. Although there are recent indications, especially from the main Committee at UNCOPUOS and from the UNGA that the UN's upgraded participation is starting to have its effects, the present situation remains that UNCOPUOS has a significant number of members who are also represented by the EU, and - albeit at a less ambitious level of observership - by ESA. At this moment, this triple representation is arguably unavoidable, but over time, this arrangement too should evolve to reflect the eventual institutional arrangements between both organisations and their Member States. Likewise, if UNCOPUOS wants to safeguard its position as a relevant forum for initiatives of the sort the EU is currently undertaking in space law, reform is needed on its part. Two possible suggestions would be to facilitate the participation of regional organisations such as the EU, and to reconsider the consensus requirement of its decision-making.

Third, if the EU counts on upgrading its status as a space actor continually, having become an operational space power as the owner of GMES/Copernicus and Galileo, it should practice as it preaches in the Code of Conduct it proposes, accepting the obligations of at least the Outer Space Treaty of 1967, the Liability Convention of 1972, and the Registration Convention of 1975.