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EU law and the governance of Global Spaces: ambitions, constraints and legal creativity

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ABSTRACT

This article addresses the question of how the EU's legal constraints can be overcome in the governance of Global Spaces. It shows, first, that EU law is part of a trend of including language relating to Global Spaces in constitutional documents. The article subsequently highlights a tension specific to the EU as a non-state entity. While the EU Treaties enshrine grand foreign policy ambitions, which are impossible to achieve without a proactive role across the Global Spaces, EU law imposes several obstacles that complicate the pursuit of these ambitions. These concern particularly the need to base EU actions on powers conferred by the member states, the parallel international presence of the Union and the member states, and difficulties for the EU to join relevant international agreements and institutions. The article argues that through legal creativity, these constraints can be largely overcome, enabling the EU to pursue its ambitions nonetheless.

KEYWORDS

Comparative constitutional law; EU law; EU external relations; global governance; Global Spaces; international law

Introduction: the EU law dimension of governing Global Spaces

This article critically reflects on the role of the law of the European Union (EU) in the governance of Global Spaces. Global Spaces are understood here as 'areas that are [largely] beyond the jurisdiction of any one state and from which it is difficult to exclude others from access' (Brimmer 2016, 2) and include the high seas, the atmosphere, the polar regions, outer space, and cyberspace. The term Global Spaces is used because of its relative openness, not implying any common ownership of these spaces, and accessibility from different academic disciplines, including law (Gstöhl and Larik, in this issue).

The intuitive starting point for discussing the legal dimension of this theme would be public international law, where various treaties and soft law instruments exist for each Global Space and thus play an important role in '(re)creating those spaces' (Lambach 2022a, 284) in the first place (see Gstöhl and Larik, in this issue). Some Global Spaces have even been part of debates on the 'constitutionalization' of international law (Peters 2019) such as the 'constitutionalization' of international internet/cyber governance (Gurumurthy and Chami 2021), 'global climate constitutionalism' (Jaria-Manzano and Borràs 2019), which would pertain to the atmosphere, and the law of the sea, where the

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United Nations Convention on the Law of the Sea (UNCLOS) has been referred to as a 'constitution' for the oceans (Harrison 2011, 278; Kim 2019, 14). For the other two spaces, the polar regions and outer space, even though 'constitutional' language is not generally used, they nevertheless represent prominent themes in international legal scholarship (respectively, Lyall and Larsen 2018; Rothwell and Hemmings 2018; Sand and Wiener 2016).

There is, however, also a dimension to the governance of Global Spaces that is 'constitutional' in the more direct meaning of the word. This concerns the rules and norms from the highest domestic laws which shape countries' – and the EU's – approaches to Global Spaces, and which thus have their own, still under-researched, role to play in the framing of Global Spaces and their governance.

Therefore, the article focusses on the tension between the EU's constitutionally codified ambitions, which require a proactive approach to Global Spaces, on the one hand, and a number of specific legal constraints which the EU faces as a non-state entity, on the other. This tension can be considered a legal 'capabilities – expectations gap' (Hill 1993). This gap raises the question of how these legal constraints can be overcome in this context. The article argues that the EU's institutions have shown remarkable legal creativity to overcome or at least mitigate these, enabling the EU to pursue its ambitions nonetheless.

Due to the focus on EU law, while also discussing comparative constitutional law and public international law where relevant, the article's analysis uses legal research methods. In essence, it systematically analyses primary legal sources, above all the EU Treaties, but also relevant EU legislation, case law, and national constitutional texts,¹ as well as key policy documents that speak to the legal points being made. In terms of scope, this allows the article to provide an analysis across the five Global Spaces. The broader political dynamics regarding each Global Space is the subject of the subsequent articles of this special issue.

The article is structured as follows. First, the EU Treaties are put in comparative context, showing a wider global trend to address Global Spaces in constitutional documents. Secondly, the EU's powers with regard to pursuing its objectives in the governance of Global Spaces are analyzed. The section after that highlights the legal constraints particular to the EU and shows how these are largely overcome through legal creativity, above all by patching together disparate EU powers from different fields and using different principles of EU law to amplify the Union's voice in the shaping of the governance of Global Spaces on the international stage. A brief conclusion sums up the article's main findings.

Global Spaces as a topic of comparative constitutional law

This section illustrates that the EU Treaties are not unique in including language that pertains to the governance of Global Spaces. It provides a comparative perspective on the constitutional dimension of the governance of Global Spaces. Traditionally, scholarship on 'foreign relations law', that is, 'the domestic law of each nation that governs how that nation interacts with the rest of the world' (Bradley 2018, 3), concerned itself with procedural questions in terms of treaty-making and the effects of international law in the domestic legal order (Cope, Verdier, and Versteeg 2022).

However, as observed by Kotzur (2008, 213; author's translation) 'the more modern a constitution is, the more intensely it breathes the spirit of worldwide interconnectedness and the globalization of law, and thus the more naturally it dares to make references to a world beyond the nation state'. Part of this trend is what Larik (2016, 8) has called the 'dynamic internationalization' of constitutional law. This means that many contemporary constitutions enshrine normative guidelines for foreign and indeed global policy.

To date, direct references to Global Spaces remain rare. Perhaps this is not surprising given that Global Spaces are by definition (largely) beyond national jurisdiction and that the extraterritorial application of a country's national laws remains controversial (Abeyratne 2014, 94). Where such references are present, they fall into two broad categories: first, references to the limits of Global Spaces *vis-à-vis* claims of national jurisdiction; and second, and more interesting for the present purpose, references about *how* countries should contribute to the governance of certain Global Spaces. Examples for each category are provided in the following sub-sections.

Constitutional delimitations of Global Spaces

Several constitutions seek to delimit what is under a country's jurisdiction through so-called 'territory clauses' (Arévalo Ramírez 2022). This often entails a claim to what otherwise could be considered parts of Global Spaces. In other words, these constitutions seek to delineate – and sometimes to extend – states' 'cones of sovereignty' (Gstöhl and Larik, in this issue) as a stark form of reshaping the limits of Global Spaces.

Kenya's constitution, for example, clarifies that its references to 'land' are to be interpreted as including several elements which could be considered part of the Atmosphere or High Seas. According to its Article 260, these elements are:

- (a) the surface of the earth and the subsurface rock;
- (b) any body of water on or under the surface;
- (c) marine waters in the territorial sea and exclusive economic zone;
- (d) natural resources completely contained on or under the surface; and
- (e) the air space above the surface;

Similarly, the Ecuadorian constitution represents an example of a constitution that claims sovereignty over what could be regarded as part of outer space, the high seas, and Antarctica. Its Article 4 stipulates that the country 'shall exercise its rights over those segments pertaining to the geosynchronous orbit, the maritime space and the Antarctic' (Article 4). The Colombian constitution, moreover, stipulates in Article 101(4) that in addition to its territory, 'the continental shelf, the exclusive economic zone, the airspace, the segment of the geostationary orbit, the electromagnetic spectrum and the space where it applies' are to be considered part of Colombia. Finally, the Brazilian constitution declares 'natural resources of the continental shelf and the exclusive economic zone' to be property of the federal government (Article 20(V)).

Among the EU member states, the French constitution does not feature an explicit territory clause, but does contain a subtle reminder of a national claim to part of Antarctica, noting that the 'legislative system and special organization of the French Southern and Antarctic Territories ... shall be determined by statute' (Article 72–3(4)).

This reference showcases the presence and interests of a member state in Antarctica, which the EU needs to take account of, and which may complicate, its own Antarctic policy (see Raspotnik and Stepien, in this issue).

Constitutional guidance for governing Global Spaces

Apart from the abovementioned delimitations and claims, there exist examples of constitutional guidance on the governance of certain Global Spaces. These include separation of powers questions such as who should engage in their governance and normative questions regarding the objectives and purposes of such engagement. Examples exist for all five Global Spaces.

With regard to the high seas, the Ecuadorian constitution, its abovementioned ‘territory clause’ notwithstanding, notes the need for the state to regulate ‘marine ecosystems and seashore ecosystems’ (Article 406), which can be seen as an acknowledgement of the interconnectedness of maritime environments, regardless of whether they fall under or beyond national jurisdiction.

Concerning the atmosphere, the Ecuadorian constitution includes a state objective to ‘adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution’ (Article 414). Moreover, it acknowledges that the ‘territory of the Amazon provinces is part of an ecosystem that is necessary for the planet’s environmental balance’ (Article 250).

Regarding outer space (and the atmosphere), the constitution of Nepal lists issues concerning the ‘atmosphere and space’ among the powers of the federation (Constitution of Nepal, Schedule 5, No. 21). Without providing guidance on how it should exercise these specific powers, they should be interpreted in the light of the constitution’s general directive principles and state policies, which include ‘inter-generation judicious use’ and ‘sustainable use in an environment-friendly way’ of natural resources (Article 51(g)(1)).

Concerning cyberspace, the constitution of Greece contains since its 2008 amendment a reference to cyberspace with guidance on how Greek policy should approach it. It states an individual ‘right to participate in the Information Society’ and obliges the state to facilitate ‘access to electronically transmitted information, as well as of the production, exchange and diffusion thereof’ (Article 5A(2)). The Cuban Constitution of 2020 acknowledges the security dimension of cyberspace, listing among the country’s foreign policy objectives ‘disarmament’, which includes ‘new forms of waging war, such as cyberwarfare, that transgress International Law’ (Article 16(k)). Furthermore, it expresses a commitment to ‘the democratization of cyberspace’ (Article 16(m)).

A brief mention should also be made of the recent draft constitution of Chile of July 2022 (Convención Constitucional 2022).² Although it failed in a national referendum in September of the same year, it is of interest as it would have introduced several innovative features reflecting ‘global currents in constitutional design’, including references to Global Spaces governance (Landau 2022). In particular, it would have added mandates for Chile to contribute constructively to the governance of the atmosphere and outer space (Article 135). It would have included, moreover, a duty of the state ‘to conserve, preserve and care for continental, insular and Antarctic marine and coastal ecosystems, fostering the various vocations and uses associated with them and ensuring, in any case, their preservation, conservation and ecological restoration’ (Article 139(2);

author's translation). On cyberspace, lastly, it would have enshrined, among other things, the right of every person to digital connectivity (Article 86(1)) and a duty of the state 'to overcome the gaps in access, use and participation in the digital space and in its devices and infrastructures' (Article 86(4); author's translation).

The failure of the new Chilean constitution shows that the topic of Global Spaces is contested all in contemporary constitutional design. With an eye to the EU, the overall comparative overview shows that the EU is not unique but part of a nascent trend in addressing the governance of Global Spaces in constitutional documents. However, as a non-state entity, the EU cannot claim sovereignty over, and thus territorialize different spaces, and faces a number of specific challenges.

The EU's constitutional objectives and powers in Global Spaces

Approaching EU law from a constitutional perspective has become the mainstream approach for the past decades (Boerger and Rasmussen 2014). Following the Lisbon Treaty reform of 2009, its constitutional law commonly includes the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU), the EU's Charter of Fundamental Rights, and general principles of EU law. As noted by the Court of Justice of the EU (CJEU), the EU Treaties constitute 'the constitutional charter' of the Union (Court of Justice of the EU 1991, para 21; Court of Justice of the EU 2008, para 281). The EU Treaties in their current form only mention outer space explicitly from among the five Global Spaces, nonetheless, EU constitutional law exhibits objectives and powers ('competences' in legal parlance) relating to Global Spaces, both of a cross-cutting nature and more specific to particular Global Spaces (as summarized in Table 1).

The EU's constitutional ambitions

During the Lisbon Treaty reform, the legal framework of the EU's external relations received a significant overhaul. On the one hand, the reform brought about institutional innovations such as the creation of the European External Action Service (EEAS), which in turn led to the creation of EU representatives dedicated to three of the Global Spaces, namely the ambassador at large on Arctic matters, the ambassador at large for climate diplomacy (addressing key aspects of atmospheric governance), and the special envoy on (outer) space. On the other hand, the EU Treaties were turned into the repository of a range of substantive foreign policy objectives. Criticized by some as a 'wish list for a better world' (Drescher 2010, 279; author's translation) and as being 'redolent of motherhood and apple pie' (Dashwood et al. 2011, 280), these innovations put the EU in the vanguard of the global trend of the dynamic internationalization of constitutional law.

Probably less well known is that at the Convention on the Future of Europe, which drew up the Draft Treaty Establishing a Constitution for Europe in 2002–2003, there were several suggestions for explicitly 'constitutionalizing' a mandate for the EU to be active in the governance of Global Spaces. For example, several members of the Convention suggested that the 'pursuance of scientific and technological advancement including the exploration of ocean and outer space' be included in what is now Article 3 of the TEU on the general objectives of the Union (Convention on the Future of Europe 2003c).

Table 1. The EU's Treaty-based objectives and powers to operate in Global Spaces.

Cross-cutting Union objectives relevant for all Global Spaces	Global Space	Specific Union objectives	Union powers
Art. 3(5) TEU <ul style="list-style-type: none"> • peace and security • strict observance and development of international law Art. 21 TEU <ul style="list-style-type: none"> • multilateral solutions to common problems, in particular in the framework of the UN • preserve peace, prevent conflicts and strengthen international security • help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources • promote an international system based on stronger multilateral cooperation and good global governance 	<i>High seas</i>	Art. 3(5) TEU <ul style="list-style-type: none"> • sustainable development of the earth Art. 21 TEU <ul style="list-style-type: none"> • preserve and improve the quality of the environment and the sustainable management of global natural resources Art. 191 TFEU <ul style="list-style-type: none"> • preserving, protecting and improving the quality of the environment • prudent and rational utilization of natural resources • promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change 	Art. 3(1)(d) TFEU (EU exclusive) <ul style="list-style-type: none"> • conservation of marine biological resources Art. 4(2)(d) & 43 TFEU (shared) <ul style="list-style-type: none"> • fisheries Art. 4(2)(e) TFEU (shared) <ul style="list-style-type: none"> • environment Art. 4(2)(g) & 192 TFEU (shared) <ul style="list-style-type: none"> • transport Art. 24 TEU (shared) <ul style="list-style-type: none"> • Common Foreign and Security Policy (CFSP) Art. 42 and 43 TEU (shared) <ul style="list-style-type: none"> • Common Security and Defence Policy (CSDP)
	<i>Polar regions</i>		Art. 3(1)(d) TFEU (EU exclusive) <ul style="list-style-type: none"> • conservation of marine biological resources Art. 4(2)(d) TFEU (shared) <ul style="list-style-type: none"> • fisheries Art. 4(2)(e) & 192 TFEU (shared) <ul style="list-style-type: none"> • environment Art. 4(2)(e) & 192 TFEU (shared) <ul style="list-style-type: none"> • environment Art. 4(3) & 189(2) TFEU (shared) <ul style="list-style-type: none"> • space
	<i>Atmosphere</i>		
	<i>Outer space</i>	Art. 189(1) TFEU <ul style="list-style-type: none"> • scientific and technical progress; industrial competitiveness • promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space 	
	<i>Cyber space</i>	Art. 26 TFEU <ul style="list-style-type: none"> • internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured 	Art. 4(2)(a) TFEU (shared) <ul style="list-style-type: none"> • internal market • Art. 16 TFEU • data protection • Art. 114 TFEU • approximation of laws

Source: compiled by the author.

Another suggestion was to include ‘the sustainable management of global natural resources, and ensure sustainable development and provide global public goods’, including the ‘preservation of the atmosphere’ (Convention on the Future of Europe 2003a). Also other members of the Convention requested explicit references to the protection of the atmosphere (Convention on the Future of Europe 2003b). Those requesting amendments to include these references at times referred back to the Laeken Declaration of 2001 in their explanation, in which the European Council vowed for the EU to become a ‘power seeking to set globalisation within a moral framework, in other words to anchor it in solidarity and sustainable development’ (European Council 2001, 20).

However, most of these proposals were ultimately not taken on board by the Convention’s Praesidium. While the Constitutional Treaty never entered into force following the negative referendum results in France and the Netherlands, much of the innovations became part of the subsequent Lisbon Treaty (Maganza 2007, 1611). However, a constitutional mandate to play an active and constructive role in the governance of Global Spaces is visible, albeit in more implicit terms. The only Global Space that is explicitly mentioned is ‘space’ (Article 189(1) TFEU), which was absent from the Treaties pre-Lisbon (Liebermann 2021; Wouters 2009).

Nevertheless, several foreign policy objectives codified in the Treaties are of overall relevance for the EU’s engagement in the governance of Global Spaces. In essence, they commit the EU to play an active role in international security, to respect but also develop international law, and do so with a preference for multilateral solutions. Seeing the crucial role of Global Spaces for humanity’s survival, well-being, and progress, it would seem impossible to pursue the EU’s foreign policy objectives in a meaningful way by not playing an active role in the governance of these spaces.

The EU Treaties mandate the EU to ‘contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights’ and to the ‘strict observance and the development of international law’ (Article 3(5) TEU). To achieve this, the TEU expresses a clear preference for ‘multilateral solutions to common problems, in particular in the framework of the United Nations’ (Article 21(1)(2) TEU) and for the promotion of ‘an international system based on stronger multilateral cooperation and good global governance’ (Article 21(2)(h) TEU). Moreover, the preservation and improvement of ‘the quality of the environment and the sustainable management of global natural resources’ (Article 21(2)(f) TEU) can be considered a cross-cutting aim.

Regarding the Global Spaces of the high seas, the atmosphere, and the polar regions, moreover, the Treaty-based environmental objectives provide constitutional guidance. In addition to ‘the sustainable development of the Earth’ (Article 3(5) TEU), the part of the TFEU dealing with environmental policy contains further objectives that matter for these three spaces such as the ‘prudent and rational utilisation of natural resources’ (Article 191(1) TFEU). The preference for multilateral solutions is reiterated, furthermore, with a specific reference to climate change (‘promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change’, Article 191(1) TFEU).

As for outer space, the TFEU notes several specific objectives. These are the promotion of ‘scientific and technical progress, industrial competitiveness and the implementation of [EU] policies’ and ‘the exploration and exploitation of space’

(Article 189(1) TFEU). Lastly, the EU Treaties do not contain a specific cyberspace (or digital or internet) policy that could have its own set of objectives. Instead, next to general objectives on international security, data protection is included not as a foreign policy objective but in both the provisions on general application of the TFEU (Article 16) and as a fundamental right in the EU (Article 8 Charter of Fundamental Rights of the EU).

The foreign policy objectives found in the EU Treaties do not create any powers for the EU, nor do they confer rights on individuals. They are, nonetheless, binding norms of constitutional law that guide the exercise of public powers (for example, through legislation and policy formulation and implementation), help to determine the outer bounds of these powers, and can be used by courts to interpret other legal provisions and to justify restrictions on fundamental rights (Larik 2016, 172–73). The EU's powers to take action with regard to the Global Spaces, however, need to be identified separately.

The EU's powers to operate in Global Spaces

Given that the EU is an entity of 'conferred powers' – a limitation for the EU's international actorness compared to states – it would not be able to operate in Global Spaces and in pursuit of its constitutional normative mandate without provisions authorizing it to do so.

In the current EU Treaties, the Union has been conferred competences by its member states in both quite specific and more wide-ranging areas, which together enable it to act regarding Global Spaces and to pursue its external action objectives (as summarized in Table 1). They relate to Global Spaces in varying degrees of directness. In practice, patched together, all of these are being used by the EU to operate in Global Spaces. This is thus the first form of legal creativity, allowing the EU to act in the first place. The second form of creativity, discussed below, relates to overcoming related legal obstacles and thus enabling the EU to pursue its objectives.

The 'competence catalogue' at the start of the TFEU explicitly lists 'space' among the powers shared by the EU and its member states (Article 4(3) TFEU). Subsequently, under the Title on 'Research and Technological Development and Space' the EU is empowered to 'establish the necessary measures, which may take the form of a European space programme, excluding any harmonisation of the laws and regulations of the member states' (Article 189(2) TFEU). Unsurprisingly, Article 189(2) TFEU served as the legal basis for the EU's space programme launched in 2021 (European Parliament and Council of the EU 2021).

Moreover, the absence of dedicated maritime, atmospheric or polar policies in the Treaties has not stopped the Union to become active in these spaces as well. Legally, it has been relying here on its powers in the areas of fisheries, including the conservation of marine biological resources (Articles 3(1)(d) and 4(2)(d) TFEU), the environment (Articles 4(2)(e) and 192 TFEU), and the Common Security and Defence Policy (CSDP), which is part of its Common Foreign and Security Policy (CFSP). For oceans governance in the sense of keeping shipping lanes safe and fighting piracy, the EU's mission relies on Articles 42(4) and 43(2) TEU (Council of the EU 2020a) on the CSDP. In practice, the EU's positions to be taken in international fora for the Polar regions identify as their substantive legal bases the Common Fisheries Policy (Council of the EU 2019, 2020b). International measures on

restricting persistent organic pollutants in the atmosphere are based on the EU's environmental policy (Council of the EU 2022).

Regarding cyberspace, which has a clear external dimension, it is noticeable that the EU institutions rely on general and internal competences, as well as fundamental rights protection in the digital sphere. The General Data Protection Regulation (GDPR), whose global ripple effects through the 'Brussels effect' have been highlighted (Bradford 2020, 131), is based on Article 16 TFEU from the provisions on general application (European Parliament and Council of the EU 2016). Its aim is 'to contribute to the accomplishment of an area of freedom, security and justice and of an economic union, to economic and social progress, to the strengthening and the convergence of the economies within the internal market, and to the well-being of natural persons' (European Parliament and Council of the EU 2016, second preambulatory clause). The Regulation refers, furthermore, to Article 8(1) of the Charter of Fundamental Rights of the EU, which enshrines every person's 'right to the protection of personal data'. The EU's Cyber Security Act of 2019, by contrast, was based on Article 114 TFEU on the approximation of laws for the functioning of the internal market (European Parliament and Council of the EU 2019). The EU Digital Services Act, adopted in October 2022, is also based on Article 114 TFEU (European Parliament and Council of the EU 2022), as is the proposed Artificial Intelligence Act (European Commission 2023).

As this section showed, the EU not only has a range of normative objectives relevant for Global Spaces, and indirectly demanding an active role in their governance, it can also rely on a variety of different powers that have been conferred onto it, which, patched together and used creatively, are being used to take up this mandate. At the same time, several specific factors, enshrined in the EU's constitutional law, complicate its activities in these spaces.

The EU's constitutional constraints and principles

The EU is marked by several legal factors which complicate its capacity to live up to the expectations that its highest laws, alongside numerous strategy and policy documents, raise. This section addresses three key limitations, namely, the principle of conferral, the parallel presence of the Union and its member states on the international stage, and the EU's character as a non-state entity as an obstacle to join international organizations. For each of these, however, the EU has also developed certain workarounds, which is the second form of legal creativity exhibited by the Union in the context of Global Spaces.

The principle of conferral

The fact that the EU always must identify a 'legal basis' in order to act, something the Court of Justice of the EU (2001, para 5) has noted to be of 'constitutional significance', reveals an important difference with states, including as international actors. As an entity of 'conferred powers', the EU remains similar to international organizations, which lack what German legal scholarship calls a '*Kompetenz-Kompetenz*', that is, 'a state's competence to decide freely what the sphere of its competences shall be' (Perrez 2000, 44). This includes a presumption that states have powers across the board to act internationally.

From a constitutional law point of view, states are empowered to bring to bear all their powers in all Global Spaces.

As could be seen in the previous section, the EU has been legally creative in patching together or broadly interpreting certain powers to mount policies and legislation in all Global Spaces. In this sense, it has been able to work around the principle of conferral as an obstacle. Nonetheless, having to rely on these legal bases also gives its activities in Global Spaces a particular, sometimes rather narrow outlook. For instance, the EU's activities in the polar regions are primarily seen legally through the lens of fisheries and environmental protection, which also translates into the EU's actual practice (Raspotnik and Stepien, in this issue). Similarly, as intended by the EU Treaties, outer space was originally approached as an area for research and 'exploitation', but not (yet) as a military operational domain, as several countries and NATO (2019) have already done. Nevertheless, the EU adopted in March 2023 a European Union Space Strategy for Security and Defence (European Commission and High Representative 2023a; see also Wouters and Pavesi, in this issue). This shows that at least for the drafting of policy documents, the language of the EU Treaties does not form an obstacle to reframe, and here specifically to 'securitize', the EU's approach to space by making it the object of the CSDP as well. Such a securitization has been noted as already being in progress (Klimburg-Witjes 2021) and may also emerge regarding other Global Spaces such as the atmosphere in the context of climate change (Dupont 2019; European Commission and High Representative 2023b).

This may not hinder the EU in developing comprehensive strategies for these Global Spaces (see Table 1 of Gstöhl and Larik, in this issue), but whenever it wants to operationalize these strategies through legal acts, it is bound to return to fitting each action neatly into the available legal bases as provided by the Treaties. At the same time, the choice of legal basis, which is connected to different configurations of institutional prerogatives, has been the source of various inter-institutional disputes within the EU (Ott 2020, 88–98). For example, the Council has based the EU's mission to fight pirates to keep sea lanes safe, including activities such as transferring pirates for trial in other countries, on the CSDP (Council of the EU 2020a), which is institutionally favourable to the Council and the member states while keeping the Parliament and Commission on the side-lines. The Parliament unsuccessfully challenged this approach, trying to convince the CJEU that the operation should be regarded as law enforcement, governed by the more supranationally designed rules on the Area of Freedom, Security and Justice (Court of Justice of the EU 2016).

A legal principle that is supposed to mitigate this fragmentation into different competence domains is that of 'consistency' (Marangoni and Raube 2014). The EU Treaties anticipate that tensions will arise between the pursuit of the EU's different objectives and its various policies based on different competences. In Article 21(3)(2) TEU, the EU mandates the Council and the Commission, assisted by the High Representative, to ensure consistency between its different policies. In the above-mentioned dispute about the correct legal basis for the EU's anti-piracy mission, the Court highlighted this principle to underscore the Council's duty to keep the Parliament informed, notwithstanding the CSDP nature of the operation (Court of Justice of the EU 2016, para 72). For the Global Spaces more generally, this means,

for example, reconciling environmental, economic, and security interests in the EU's approach to the Arctic, high seas or climate matters.

Parallel presence of the EU and its member states

The parallel presence of the EU and its member states on the international stage is another legal complication prompted by the principle of conferral. Powers not transferred to the Union remain with the member states. In some cases, once the EU exercises powers and established 'common rules', the member states become pre-empted from acting internationally. This is the CJEU's 'ERTA doctrine' (named after the European Road Transport Agreement at issue in the case), which certain member states contest until the present day (Chamon 2018; Kuisma and Larik 2022). In other areas of shared competences, such as development cooperation and humanitarian aid, the member states ensured that regardless of Union action, they would remain free to act in their own name internationally (Article 4(4) TFEU).

Regarding the Global Spaces, the areas where the EU is exclusively competent are limited to 'the conservation of marine biological resources under the common fisheries policy' (Article 3(1)(d) TFEU). This alone already shows that there will be very few instances where the EU alone will be represented in the governance of the Global Spaces.

Shared but 'pre-emptive' competences exist in the areas of the environment, but also fisheries (minus the abovementioned conservation of marine biological resources, which is an exclusive competence), and the internal market (Article 4(2) TFEU). Pre-emption can have a real curtailing effect on the member states' legal ability to become active internationally. Where they have lost this power, they may even be forced to represent EU positions in international fora, as it happened in a case concerning maritime safety (Court of Justice of the EU 2009). However, given the breadth of scope in Global Spaces such as the high seas or the atmosphere, the member states remain present alongside the EU in many international agreements and organizations. For instance, UNCLOS, the Paris Agreement, and the Montreal Protocol (including its Kigali Amendment) are all 'mixed agreements' from the point of view of the EU, i.e. both the Union and its member states are contracting parties. This brings with it the potential for conflicts between the member states or between the member states and the EU institutions to be carried out internationally rather than internally according to the EU's rules and procedures.

A maritime example of a 'mixed' setting in which a dispute between the EU and its member states occurred is the Convention on the Conservation of Antarctic Marine Living Resources (also known as the Canberra Convention), to which both the EU and several member states are parties. The dispute concerned the establishment of marine protected areas (MPAs) in the Antarctic Seas by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), which was set up by the Canberra Convention as part of the Antarctic Treaty System. The European Commission attempted to exclude the member states through legal action before the Court of Justice, arguing that from an EU law point of view, this initiative fell under the exclusive competence pertaining to the conservation of marine biological resources. However, the CJEU disagreed, concluding that the proposals for MPAs concerned environmental protection more widely, and thus allowed the participation of the member states. According to the Court of Justice of the

EU (2018, para. 126), moreover, '[i]n the specific context of the system of Antarctic agreements, exercise by the European Union of the external competence at issue in the present cases that excludes the member states would be incompatible with international law'.

Regarding outer space, the TFEU stipulates that the exercise of the EU's powers in that area 'shall not result in Member States being prevented from exercising theirs' (Article 4(3) TFEU). The CFSP/CSDP is subject to a set of 'specific rules and procedures' altogether, which excludes legislative acts, largely excludes the jurisdiction of the CJEU, and makes decision-making by unanimity in the Council the rule (Article 24(2) TEU). In the case of the CSDP, moreover, the absence of the EU's 'hard power' in the form of a navy (or 'space force') is also noticeable and denies the EU as such 'substantial powers of area command or area denial' usually associated with great powers (Lambach 2022b, 44).

By comparison, navies have been the traditional tool of exercising power on the world's oceans. They can be used to 'enforce' international rules such as the freedom of navigation on the high seas and the interdiction of piracy, but also underwrite claims over parts of these spaces. An example is the standoff between the Chinese People's Liberation Army Navy (PLAN) and the U.S. Navy in the South China Sea. While the former is asserting Chinese claims over certain maritime features (often artificially enhanced to claim that they are islands), the latter asserts that these areas continue to belong to the high seas (Odom 2019). At least on the governance of the high seas, this shows the EU's limitations to operate like other (great) powers.

Further complications that can arise from this situation of parallel representation are a failure to 'speak with one voice', to bring the EU's resources to bear in a combined fashion for maximum effectiveness, and questions about the implementation of international legal obligations. This concerns both the EU's ability to develop and to respect international law. The general legal principle that is to overcome these challenges is the 'duty of sincere cooperation' enshrined in Article 4(3) TEU, which obliges the member states to 'refrain from any measure which could jeopardise the attainment of the Union's objectives'. It is a justiciable principle, with the CJEU having handed down several judgments finding member states to be in violation through their international actions (Eckes 2020). The duty applies to situations of shared competence, as was clarified by the Court of Justice of the EU (2010) in a case concerning persistent organic pollutants, where one member state had deviated from a concerted EU strategy in this area. The Court has also used the duty of sincere cooperation to establish that the member states are obliged to fully implement mixed agreements as a matter of EU law, even where shared competences are concerned (CJEU 2004). Thus, the duty of sincere cooperation, as expansively interpreted and applied by the CJEU and internalized by the member states in many of their international dealings, mitigates the challenges posed by the parallel presence of the Union and member states in governance arrangements for Global Spaces.

The EU as a non-state entity

The third complication concerns the non-state character of the EU, which – in international law – structurally limits its ability to formally engage in the governance of Global Spaces. This concerns in particular becoming a party to international agreements or acceding to international organizations (Govaere, Capiu, and Vermeersch 2004; Wessel

and Odermatt 2019). International agreements and organizations are often open only to states. For the EU to join, they must specifically provide for that possibility, or more generically allow for membership of 'regional (economic) integration organizations' (R(E)IO) (Wessel 2011). Special R(E)IO clauses have allowed the EU, for instance, to become a party to UNCLOS and to the Paris Agreement. By contrast, the EU cannot become a party to the Antarctic Treaty, the Outer Space Treaty, or even the UN Charter.

Working around these limitations, the EU has explored different ways of engagement with international institutions. For example, it obtained 'enhanced observer status' at the UN General Assembly in 2011 (Wouters, Odermatt, and Ramopoulos 2014). As the example of the Arctic Council shows, however, such requests for observer status can also be rebuffed (Coninx 2020, 186). Where the EU is barred by international law from joining, but has the internal competence to act, it can use the member states as 'trustees of the Union interest' to act on its behalf (Cremona 2011), another expression of the duty of sincere cooperation noted above.

Another possible way around this is by glossing over this parallel existence by using the umbrella 'Team Europe'. Prominently used in the global response to the COVID-19 pandemic, but also in development and humanitarian policy of the EU and its member states, it serves to signify 'a single framework of action for European external responses that combines contributions from all EU institutions, EU member states, and EU financial institutions' to provide a 'critical mass' (Burni et al. 2022, 529). This approach could also be applied the EU's approach to Global Spaces, as the parallel presence of Union and member states in their governance is bound to remain for the foreseeable future.

Conclusion: an enduring mandate and enduring constraints

The governance of Global Spaces has a strong, and quite well-documented, international law dimension. This article set out to critically reflect on the role of EU law in the European Union's engagement in governing these Spaces. It raised the question of how the EU can overcome its legal 'capabilities-expectations' gap in this regard, seeing both its constitutionally enshrined global ambitions and constraints as a non-state entity. The article sought to demonstrate that through a legally creative approach, the EU institutions have largely managed to overcome these constraints, both allowing the EU to act across the five Global Spaces and enabling the pursuit of its objectives through a set of legal principles.

Starting from a comparative perspective, it was shown that the EU is not unique in codifying normative foreign policy guidance on, and in some cases even explicit references to, Global Spaces. In the case of the EU, objectives that its external action is mandated to pursue raise expectations of what it can achieve in Global Spaces. It is undeniable that any meaningful pursuit of the totality of the EU's objectives, including the fostering of 'good global governance', is unthinkable without including an active and constructive role in the governance of all five Global Spaces.

However, due to the EU's peculiar nature, several complications become visible already through the legal framework. First, not being a state with all-encompassing powers, there is the legal necessity to base each EU action on powers conferred upon it by the member states. Through a patched-up and creative use of EU powers, the EU has been able to use its legislative and regulatory power in the governance of all five Global Spaces. Second,

even though certain more narrowly defined policies provide the EU's engagement with certain Global Spaces with a particular outlook, this has not withheld the EU from starting to develop comprehensive strategies and making Global Spaces also the object of different policy areas, including notably the Common Security and Defence Policy. The principle of consistency, moreover, provides a framework for reconciling the different EU policies and the competences on which they are based. The EU's engagement in the governance of Global Spaces is complicated, furthermore by the parallel activity of the member states on the international stage. However, the duty of sincere cooperation contributes to strengthening the unity of the EU and its member states and ensures that EU positions can be conveyed even where the EU is prevented from being present due to its non-state nature. Lastly, the EU is barred from joining international agreements and organizations relevant for the governance of Global Spaces due to these being only open to states. Also here, the duty of sincere cooperation helps the EU to represent its position through the member states, while the development of international law to include the EU through R(E)IO clauses and enhanced forms of observer status, increase its ability to be present and active in direct ways.

For the foreseeable future, EU law continues to impose a constitutional commitment to a foreign policy that essentially requires the Union to be an active player in the governance of Global Spaces. At the same time, the legal constraints which it faces in contrast to states will remain in place as well. While these legal constraints ought to be taken seriously, they are obviously not the only ones the EU is facing in a world with increasingly acute global challenges and geopolitical tensions. What opportunities the EU has been able to seize in practice and what additional challenges it faces in each Global Space, is explored further in the subsequent articles of this special issue.

Note

1. Texts of constitutions, in their English translations, are taken from the Constitute Project (2023).

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