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The Architecture of Authority in Global Space Governance: The Moon Agreement as a Deconflicting Mechanism of Space Activities

ARTICLE

MARIA MANOLI

ABSTRACT

Traditionally, the governance of outer space and the regulation of space activities have been State-centred. During the last decade, however, global space governance has been characterized by the influx of private space actors with the capacity to influence the political decision-making and regulatory scenes. This has led to laws and policies that seek to transform the status of outer space from one beyond property and sovereignty to one subject to territorial dynamics, such as through the institution of private property. Within this context, this article investigates the production of authority in modern global space governance and presents the power of private space actors at the root of such authority. At a second level and recognizing the importance of all space actors, including private actors, the article argues for the establishment of a pluralistic legal order for space activities, harmonizing the traditionally State-centred space law framework with the modern needs of the space industry that bring private actors to the fore. The article suggests the Moon Agreement as a tool for inspiration towards the construction of such a framework.

CORRESPONDING AUTHOR:
Maria Manoli
Lecturer in Space Law, School of Law, University of Aberdeen, UK
maria.manoli@abdn.ac.uk

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1. INTRODUCTION

A large part of the scholarship on international relations describes the creation of actor-based power as strictly linked to the concept of authority.[1] Nevertheless, power alone does not create authority. The blend of power and legitimation is what generates it. 'Authority',[2] writes Ruggie, 'represents the fusion of power with legitimate social purpose'.[3] Within this context, this article claims that the current sociopolitical structures legitimize the power of private space actors leading to authority in modern global space governance with, ultimately, an impact on law and policy development. To mitigate this, the article argues for a pluralistic legal order for space activities, able to accommodate and balance the interests of all space actors, public and private, traditional and modern.

Recent space policies and national laws have displayed the power of the private space sector to mobilize norm-making mechanisms at both the sociopolitical and regulatory levels.[4] One such example can be observed in the case of the National Aeronautics and Space Administration (NASA)'s Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, known as the 'Artemis Accords'.[5] The Artemis Accords are a set of principles relating to space exploration that were proposed by NASA in 2020 and have since been signed by over 30 States.[6] As noted in the Preamble to the Artemis Accords, they aim to 'establish a political understanding regarding mutually beneficial practices for the future exploration and use of outer space'.[7] One of the objectives that the Artemis Accords aimed for was a policy and, eventually, legal environment facilitating ownership rights of space resources,[8] thus raising a concern as to whether such an objective is contrary to the letter and spirit of international space law.[9] Indeed, despite the value of the Accords as a political understanding, they have the capacity to exercise political pressure leading to the creation of further domestic laws and policies responsive to a private actor-centred legal environment and, therefore, having a direct effect at the regulatory level.[10] This example demonstrates the power of private space actors to influence space-related policies and laws that have traditionally belonged to the prerogative of the State.

The transformation of such power into authority, however, requires a process of legitimation, which, in the case of modern space activities, involves the perception of the actions of private space actors as services undertaken in the global interest. For example, the plans of private companies to mine and commercially exploit the Moon and other celestial bodies are often presented as linked to the common interest of all States and peoples. In that way, they are promoted as key to the space economy, with the potential to make space resources a public good, thus contributing to advanced global economic well-being, and leading to a multi-

1 Especially authors such as J Cohen, I Hurd, J Ruggie, and M Zürn. See M Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford University Press, 2018); J Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36(2) International Organizations 379; J Cohen, *Between Truth and Power – The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019); I Hurd, 'Legitimacy and Authority in International Politics' (1999) 53(2) International Organizations 379.

2 Ruggie, *supra note* 1, 382.

3 *ibid*.

4 See for example, US Commercial Space Launch Competitiveness Act, public law 114–90, 25 November 2015; Luxembourg Law on the Exploration and Use of Celestial Bodies, Luxembourg, 20 July 2017.

5 The Artemis Accords, Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, NASA, 13 October 2020 .

6 For the States that have signed the Artemis Accords see: NASA, The Artemis Accords, https://www.nasa.gov/specials/artemis-accords/index.html (last visited13 March 2024).

7 Artemis Accords, *supra note* 5, Preamble.

8 *ibid*, s. 10.

9 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 27 January 1967, 610 UNTS 205 (Outer Space Treaty), Arts. I and II. See also the *travaux préparatoires* to the Outer Space Treaty: *Interim Report by the Chairman*, A/AC.105/C.2/L/16 (1966); *Legal Sub-Committee Report 5th Session*, A/AC/105/35 (1965); *Committee of the Peaceful Uses of Outer Space Report – 7th Session*, report, A/6042 (1964).

10 See for example the adoption of the relevant law in Japan providing that individuals who explore, extract and use space resources can acquire ownership over them. This law was introduced a few months after the publication of the Artemis Accords; Act on the Promotion of Business Activities for the Exploration and Development of Space Resources, Act No. 83 of 2021 (the Space Resources Act), 23 December 2021, Art. 1.

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levelled unprecedented development.[11] As such, the formation of authority through the actions of modern space actors is linked to the element of common good and global interest, which is often used as a reason justifying the creation of extra-legal normative centres. Such centres often lead to decentralized forms of governance through the creation of local governance centres as well as through their *power to direct*,[12] the effects of which can be realised at the global level and contribute to the formation of new forms of global governance.

Nevertheless, the creation of authority through the action of private actors entails one specificity: it is simultaneously linked to the action of the State. Indeed, a large number of scholars in the field of international relations note that the action of private actors can in no way be considered to be purely private, as they observe that private action is always constituted in the public sphere, whether wholly or partially.[13] This observation is of particular importance for the modern development of international space law and global space governance, especially in investigating whether private action could be considered as an impetus for State-centric forms of colonialism, involving both the physical and social elements of it.

2. PRIVATE SPACE ACTORS: BETWEEN NORMATIVITY AND AUTHORITY

Although the concept of authority has traditionally been thought of as dependent on political power claims, modern international relations scholarship places authority as linked to forms of normativity produced in both the public and private spheres and having impacts at both the local and global levels. Indeed, while mainstream scholarship identifies authority as 'the exercise of powers to create formal obligations',[14] authority can take more flexible forms and can be 'characterized by a lower degree of consolidation and a significant dynamism in the configuration of authority structures, often spurred by the informality and multiplicity of governance institutions and tools'.[15] This understanding of the concept, known as *liquid authority*, allows the perception of normativity created by the action of actors as being capable of generating authority. In this case, the liquidity of authority emerges from the non-fixed structures within which power emerges. Translating this perception about authority into the issue of space governance allows for a better understanding of the different centres of governance that can be created beyond the formally established and traditional space governance structures, for example, the UN.

To understand this *dynamism*[16] of liquid authority in the field of global space governance, it suffices to take the example of the Artemis Accords, where the UN's international law-making processes are bypassed through a soft law multilateral scheme.[17] Space-faring in nature, the States involved in the signing of the Artemis Accords constitute an elite of States acting beyond the formal structures of regulatory authority creation. Therefore, the norm-making process

11 'Asteroid Mining might actually be Better for the Environment' 19 October 2018, MIT Technology Review, https://www.technologyreview.com/2018/10/19/139664/asteroid-mining-might-actually-be-better-for-the-environment/ (last visited 20 July 2023); M Saletta & K Orrman-Rossiter, 'Can space mining benefit all of humanity?: The resource fund and citizen's dividend model of Alaska, the "last frontier"' (2018) 43 Space Policy 1–6; J Dallas et al., 'Mining beyond earth for sustainable development: Will humanity benefit from resource extraction in outer space?' (2020) 167 Acta Astronautica 181–188; M Saletta, 'Could Space Mining Benefit Everyone?' 20 April 2016, World Economic Forum, https://www.weforum.org/agenda/2016/04/could-space-mining-benefit-everyone (last visited 29 July 2023).

12 *ibid.*; A Peters et al., *Non-State Actors as Standard Setters* (Cambridge University Press, 2009).

13 F Neyrat, *The Unconstructable Earth* (Fordham University Press, 2019); I Wallertein, *The Modern World-System: Capitalist Agriculture and the Origins of the European World Economy in the Sixteenth Century* (Academic Press, 1976); S Benn & G Gaus, *Public and Private in Social Life* (St Martin's Press, 1983).

14 N Krisch, 'Liquid Authority in Global Governance' (2017) 9(2) International Theory 237 at 237.

15 *ibid.*

16 *ibid*:
The distinctive feature of *liquidity* is its dynamism. The more liquid an authority structure is, the more its elements are in motion and the more difficult it is to pinpoint a site of authoritative decision making. The actual degree of dynamism depends on the stability and extent of social recognition practices. For example, sustainable forestry regulation has long been characterized by competition and contestation between different sites of non-state market-driven certification schemes and their shifting relations with audiences in the public as well as the private sector.

17 Although the Artemis Accords constitute an international effort involving eight signatories, they did not utilize the traditional international law-making structure of the UN but rather an inter-State agreement in the form of political understanding among a small number of States.

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involved in the example of the Artemis Accords is embedded in a liquid understanding of governance institutions while, at the same time, it demonstrates that authority 'does not have a fixed shape',[18] that is, in the area of space activities, the traditional UN regulatory structures.

At a second level, the same example allows for an understanding of authority as produced by private space actors. Seeking to enable a territory- and property-based use and exploration of outer space and having been inspired by the interests and objectives of private space actors, the Artemis Accords reflect – in a *liquid* form – not only the authority of the involved States, but also – and perhaps even more importantly – of their private actors.[19] Therefore, the liquid understanding of authority allows us to imagine the multileveled sources of power and, ultimately, the authority-creation mechanisms to which they contribute. In the example of the Artemis Accords, both private actors and the involved space-faring States can be qualified as such sources of authority.

The importance of this observation lies in the capacity of such authority producing mechanisms to intervene in and alter the existing governance structures at the global level or produce new ones. Zürn's work[20] observes that global governance occurs through the authority produced by more than one type of actor.[21] For example, he notes that global governance can be conducted by a government, more than one government, or transnational regimes and centres of independent action, in which governments may or may not be involved.[22] Irrespective of the type of governance, however, what they all have in common is the presence of a 'pluralization of governance actors',[23] including more than public structures and State actors. Connected with this, Zürn suggests that to be considered as an actor capable of producing, participating in, or altering governance structures, both the actors themselves and the relationships they take part in must entail an element of authority 'that spans national borders'.[24]

This *beyond the local* element of authority, that is characteristic of the concept of global governance, is evidenced in the modern governance of outer space both through the emerging soft law multilateralism, e.g. the initiative of the Artemis Accords, and through the advent of private authority at the domestic level, as well as through the expression – or, institutionalization – of such authority through domestic regulatory structures. In both examples, the effects of such locally produced forms of authority are seen in structures of global governance through the production of non-traditional norm-making centres that involve the governance of human action over a *global* – as opposed to *local* – space. Therefore, the theory of the liquid understanding of authority and its expression in modern global governance structures allows for the identification of informal and extra-legal forms of authority-producing actors.

2.1 LIQUID AUTHORITY AS GENERATOR OF DIRECTIVE POWER IN A DECENTRALIZED GLOBAL SPACE GOVERNANCE

Several international relations scholars identify in this liquid understanding of authority a directive power and the construction of local governance centres, which can be thought of as tools towards the de- and re-formation of normative global governance mechanisms.[25] The

18 Krisch, *supra note* 14, 243.

19 See for example the private-centred rationale involved in the *US Executive Order 13914 'Encouraging International Support for the Recovery and Use of Space Resources'*, 6 April 2020, as well as in the Preamble to the Artemis Accords. See also E Rothermich, 'NASA's Artemis Accords Boost Commercial Space Activity', 23 December 2020, The Regulatory Review, https://www.theregreview.org/2020/12/23/rothermich-nasa-artemis-accords-boost-commercial-space-activity/ (last visited 29 July 2023); J Manner, 'Building on the Artemis Accords to address Space Sustainability', 22 December 2020, Space News, https://spacenews.com/op-ed-building-on-the-artemis-accords-to-address-space-sustainability/ (last visited 29 July 2023); G Wang, 'NASA's Artemis Accords: The Path to a United Space Law or a Divided One?', 24 August 2020, The Space Review https://www.thespacereview.com/article/4009/1 (last visited 29 July 2023); J Foust, 'The Artemis Accords take Shape', 26 October 2020, The Space Review, https://www.thespacereview.com/article/4054/1 (last visited 29 July 2023).

20 M Zürn, A Theory of Global Governance: Authority, Legitimacy, and Contestation (Oxford University Press, 2018).

21 Zürn, *supra note*, 2–22.

22 *ibid,* 3–4.

23 *ibid*.

24 *ibid*.

25 Krisch, *supra note* 14; C Brown, *International Relations Theory: The New Normative Approaches* (Harvester Wheatsheaf, 1992); D Archibugi et al. (eds.), *Global Democracy: Normative and Empirical Perspectives* (Cambridge University Press, 2012).

'companies' power to influence policy input, and to set and interpret norms and rules',[26] writes Mende, 'is particularly connected to global governance', and she continues by observing that this power 'comes into play in companies' participation in international organizations, public-private partnerships, multi-stakeholder initiatives and roundtables'.[27]

This observation is of particular importance in identifying the shifts in the governance of outer space from the public to the private and from the global to the local. In fact, this process entails an element of directive power. For example, it was not long after the emergence of private space mining companies that the United States added onto its political agenda the introduction of space policies and the adoption of legislation accommodating the interests of private space actors through the proposed objectification of outer space, introducing the institution of private property in the governance of outer space.[28] Similarly, it was not long after the US Commercial Space Launch Competitiveness Act, that Luxembourg followed with its own national space law enabling a property-based exploration of outer space and its natural resources,[29] together with several other spacefaring nations and middle space powers, such as Japan[30] and the United Arab Emirates.[31] 'We are setting regulations and laws with the future in mind. This will help inspire investor confidence and allow companies to clearly understand the rights a state could grant them when domiciled in that country',[32] noted Mohammed Al Ahbabi, the head of the United Arab Emirates' Space Agency, further stating that '[m]aterials and resources mined on celestial bodies such as the moon or asteroids could be utilised in space for manufacturing or if the economics make sense be brought back to earth and monetised'.[33] As noted at the beginning of this part, this directive power of the authority-making private space actors has also been observed in the Artemis Accords initiative, which aimed to promote private investment and the interests of private space actors.[34]

One more example that demonstrates the directive power of private space actors and its impact on the global governance of outer space is the creation of local governance centres through participation in initiatives, through which their interests and objectives become part of both formal and informal decision-making processes. For instance, a number of public-private partnerships between private space companies and governments with the objective of enabling the property-based exploitation of space natural resources, led several governments to adopt domestic space laws introducing private property for areas of outer space.[35] Similarly, private companies have often participated in multi-stakeholder initiatives, such as in the European Space Resources Innovation Centre[36] and in processes of knowledge production. The Hague International Space Resources Governance Working Group,[37] for example, produced a

26 J Mende, 'Business Authority in Global Governance: Beyond Public and Private', May 2020, SP IV 2020–103 Discussion Paper – Berlin Social Science Centre 14.

27 *ibid*, 15.

28 See generally, A Abrahamian, 'How the Asteroid-Mining Bubble Burst – A Short History of the Space Industry's failed (for now) Gold Rush', 26 June 2019, MIT Technology Review, https://www.technologyreview.com/2019/06/26/134510/asteroid-mining-bubble-burst-history/ (last visited 29 July 2023).

29 Luxembourg Law on the Exploration and Use of Celestial Bodies, *supra note* 4.

30 'Japan: Space Resources Act Enacted', Library of Congress, https://www.loc.gov/item/global-legal-monitor/2021-09-15/japan-space-resources-act-enacted/ (last visited 13 March 2024).

31 See the relevant declarations by M Al Ahbabi in K Warner, 'UAE looks to regulate asteroid mining as it aims to lure private space sector', 26 November 2019, The National News https://www.thenationalnews.com/uae/science/uae-looks-to-regulate-asteroid-mining-as-it-aims-to-lure-private-space-sector-1.943028 (last visited 5 May 2024), where he emphasizes that '[s]imilar to the principle of the law of the sea in international waters where no state can claim sovereignty over the sea but commercial fishing operations can own and sell what they obtain … If you don't own the fish then why go to the sea?'.

32 *ibid*.

33 *ibid*.

34 NASA, *NASA's Lunar Exploration Program Overview* (NASA: September 2020) at 29.

35 NASA, *supra note* 34, at 28–29. See also The Government of the Grand Duchy of Luxembourg, 'SpaceResources.lu: the Luxembourg Government becomes a key shareholder of Planetary Resources, Inc., the U.S.-based asteroid mining company', press release, 3 November 2016.

36 European Space Resources Innovation Centre, 'Commercial Partnerships', https://www.esric.lu/partnerships (last visited 29 July 2023).

37 The Hague International Space Resources Governance Working Group, https://www.universiteitleiden.nl/en/law/institute-of-public-law/institute-of-air-space-law/the-hague-space-resources-governance-working-group (last visited 29 July 2023).

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series of building blocks towards an exclusive and property-based exploitation of space natural resources.[38] The Group was composed of forty members, including developing and developed States and, among others, five private space mining companies.[39] Such building blocks, the construction of which expresses the property-oriented objectives of several space actors,[40] were later considered by the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space as expressing an emerging global space policy.[41]

Therefore, the participation of private space companies in such initiatives has a significant impact on global policy-making and on the governance mechanisms of space activities. Both in the event of public-private cooperation and in the event of private actor participation in decision-making schemes, such as in the International Space Resources Governance Working Group, a chain of local governance centres is created, first on a vertical and then on a horizontal level. That is, the power of private space actors functions as a centre of pressure on State or non-State structures that have the power to influence space governance and is ultimately reflected in regulatory mechanisms, thus institutionalizing and expressing its authority. At another level, the State itself (in this case acting as an entity expressing the interests of private space actors) acts as a pressure centre on the overarching community of States, which, as demonstrated in the case of space natural resources exploration, tend to follow by adopting similar regulatory mechanisms. As such, through the creation of local governance centres, political agendas (which have been influenced by the authority of private (space) actors) spread across borders and, ultimately, make part of the modern forms of global space governance.

2.2 CLAIMING GLOBAL INTEREST IN THE USE AND EXPLORATION OF OUTER SPACE: THE POLITICIZATION AND LEGITIMATION OF PRIVATE AUTHORITY

A large part of the scholarship on authority-creation identifies a link between the process of authority legitimation and claims to global interest.[42] The protection of human rights as a public good, for example, is often linked with claims to global interest justifying the authority – and, therefore, the action – of private companies.[43] Similarly, schemes, such as corporate social responsibility, and environmental protection schemes, presented as action for the global interest, often enable and legitimize authority by presenting it to the public as a necessary act for the common good.[44]

In a similar way, the legitimation of authority of private space companies and of several governments – or, the legitimation of authority of private space companies that is expressed through several governments – seeking to objectify parts of outer space for the purpose of commercialization, projects the global interest as a justification. Specifically, the ensemble of domestic legislation that introduced a property-based legal framework for the exploration of space natural resources emphasizes the need to legitimize the ownership of space natural resources by private actors on account of the fact that such legitimation would allow for exponential global economic growth, the postponement of terrestrial resource depletion and

38 *Building Blocks for the Development of an International Framework on Space Resource Activities*, The Hague International Space Resources Governance Working Group, November 2019.

39 The Hague International Space Resources Governance Working Group, *supra note* 37, 'Members' section.

40 *Building Blocks for the Development of an International Framework on Space Resource Activities*, *supra note* 38, provisions 7–8.

41 UN Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, *The Hague Space Resources Working Group*, 57th sess, item 15 of the provisional agenda, General exchange of views on potential legal models for activities in exploration, exploitation and utilization of space resources, 12 April 2018, A/AC.105/C.2/2018/CRP.18.

42 J Steffek, 'The output legitimacy of international organizations and the global public interest' (2015) 7(2) International Theory 263–293; M Zürn et al., 'International Authority and its Politicization' (2012) 4(1) International Theory 69–106.

43 J Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2013).

44 One such example is the International Civil Aviation Organization's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), in the context of which aviation emissions are governed by a mechanism based on which air services operators can purchase carbon credits in order to fly, therefore promoting the interests of the air service providers with the higher purchasing power by, at the same time, claiming global reduction of carbon emissions in aviation, thus suggesting a global interest claim. For the scheme see, CORSIA, online: ICAO, https://www.icao.int/environmental-protection/CORSIA/Pages/default.aspx (last visited 29 July 2023). See also J Rowe, 'Corporate Social Responsibility as Business Strategy' in R Lipschutz & J Rowe (eds.), *Globalization, Governmentality and Global Politics: Regulation for the Rest of Us?* (Routledge, 2005), 122–160.

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the fulfilment of the interests of all States,[45] all of which can be thought of as claims to a global interest.

In that way, the narrative used for the promotion of domestic and international space laws enabling property rights in outer space, or, in other words, enabling the objectification of outer space, looks for justification in the global interest wording of international space law,[46] disregarding, however, its founding rationales. That is, this narrative sees the property-based exploitation of outer space as enabling the 'interests of all countries', as per Article I of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty), omitting, however, to observe the critical role of the non-appropriable nature of outer space in maintaining global access to it.

One more such example is the Preamble to the Artemis Accords that links 'space exploration' to 'commerce' and presents the combination of both terms as contributing to 'global benefits'.[47] More explicitly, Section 10 of the Accords provides that 'the Signatories note that the utilization of space resources can benefit humankind by providing critical support for safe and sustainable operations'.[48] However, the US *Executive Order 13914*,[49] based on which the Artemis Accords were drafted, emphasized the importance of incentivizing private investment through the establishment of a regulatory regime providing certainty and allowing property rights over parts of outer space. [50] Similarly, the Artemis Accords describe the establishment of territorial zones, the so-called 'safety zones, as in the interest of "sustainable space exploration"'.[51] In other words, the Artemis Accords use 'sustainable space exploration'[52] as a global interest justifying the authority of exclusive use over lunar and celestial land. Even though the Artemis Accords provide that such zones would be compatible with 'free access to all areas of celestial bodies',[53] they do not specify in what way the prohibition of occupation of outer space parts,[54] as provided in Article II of the Outer Space Treaty, is compatible with this provision.

Accordingly, the authority of private space actors becomes legitimized – and, as such, *politicized* – through a process that promotes the global interest and common good as grounds for justification for the objectification and commodification of what is otherwise perceived to be a *global commons* beyond any type of territorial claim.[55]

This process of legitimation, however, does not take place with the mere promotion of global interest by private companies. It also involves the use of the institutional structures of States, which play a crucial role in reflecting the process of legitimation of authority at the level of global governance. The interrelationship and interdependence between the private and public spheres is crucial in understanding how this process functions.

2.3 RECOGNIZING PUBLIC AUTHORITY IN PRIVATE SPACE ACTION

'Concentrated stakeholder control of the networked communications infrastructure,'[56] writes Cohen, 'can produce and perhaps is beginning to produce an inversion of law- and policymaking

45 Saletta and Orrman-Rossiter, *supra note* 11; Dallas et al. *supra note* 11; Saletta, *supra note* 11.

46 See for example the wording used in the Outer Space Treaty Preamble: '*Recognizing* the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,' '*Believing* that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development,' and Art. I: 'The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries …'.

47 Artemis Accords, *supra note* 5, Preamble: '*Recognizing* the global benefits of space exploration and commerce.'

48 Artemis Accords, *supra note* 5, s. 10, para. 2.

49 *US Executive Order 13914*, *supra note* 19.

50 *ibid*.

51 Artemis Accords, *supra note* 5, s. 11, para. 11.

52 *ibid*.

53 *ibid*.

54 Outer Space Treaty, *supra note* 9, Art. II: 'Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.'

55 *ibid*. See also R Jakhu, 'Legal Issues Relating to the Global Public Interest in Outer Space' (2006) 32 Journal of Space Law 31–110.

56 Cohen, *supra note* 1, 237.

authority, through which some stakeholders become policy hubs in their own right'.[57] She continues by noting that:

> Theories of international relations that deny the possibility of private sovereignty are ill-equipped to respond to that possibility. Reconceptualizing the arena for transnational governance in a way that expressly accounts for both network-and-standard-based governance and the network-making power of dominant platforms has become an increasingly important project.[58]

Indeed, a large part of the scholarship on international relations is increasingly considering the emergence of private companies as governance actors and as makers of normative transnational standards that tend to replace the rules-based international order. As this article has so far demonstrated, a similar approach appears to have emerged in the modern governance of outer space. However, in the case of space governance, one can simultaneously observe that private actors do not act, or impose standards, independently of the State. Both the domestic unilateral regulatory initiatives towards a property-based global space governance and similar efforts through soft law, such as the initiative of the Artemis Accords, tend to involve the State, in the first case as a domestic regulator and, in the second case, as a negotiator at the international level. In this scenario, on the one hand, the promoted interests and policies originate in and express the interests of the action of private space actors, while, on the other hand, the legitimation and expression of such interests and policies at the global level are routed through the vehicle of the State.

Therefore, the divide between the elements of private and public is a narrow divide, revealing that, even through the production of power and authority that leads to the formation of new private actor-centred space policies within the private sphere, the ultimate communication of such policies at the global level takes place within the public sphere, that is, through the State. Similarly, several international relations theories consider private authority as part of the public authority, observing that any action of private actors that act within the rules of a certain jurisdiction will always be structurally linked to the mechanisms of the State, regardless of whether the link is direct or indirect. Typically, any private activity – in all fields of private action – requires authorization, approval, or licensing by a centralized State entity,[59] thus introducing a public element into the action of private actors.

The relationship between the public and private elements is especially important in identifying the trends in modern global space governance. It is crucial to ponder whether the property-centred objectives of private space actors can be simultaneously considered as those of the State on the basis of the structural links and relationships of authority between private actors and the State.

This is especially important in considering the specificities of international space law and the governance mechanisms that it entails. This article earlier presented the traditional space governance as being State-centric in character. One of the main reasons for this is the obligation of States to authorize and continuously supervise the activities of their private space actors and remain ultimately responsible for them.[60] As a result, private space activities are explicitly linked to the public element due to the procedural structure of international space law. Furthermore, international space law requires that all space activities, be they public or private, must be licensed by the responsible public authorities, imposing, therefore, one more requirement that subjects private space activities to public approval.[61]

Therefore, in exploring the interdependence between public and private in the field of space governance, a relationship of mutual authority-making processes emerges. On the one hand, a relationship of norm- and policy-making superiority is formed, where private actors utilize State mechanisms to express such norms and policies. On the other hand, a relationship of structural

57 *ibid*.

58 *ibid*.

59 J Contreras, 'From Private Ordering to Public Law: The Legal Framework Governing Standards-Essential Patents' (2017) 30 Harv J L & Tech 211–231; A Shleifer, 'Understanding Regulation' (2005) 11(4) European Financial Management 439–451.

60 Outer Space Treaty, *supra note* 9, Art. VI.

61 *ibid*.

and procedural superiority is observed between public and private, where public mechanisms absorb the private element. However, this structural superiority ultimately serves as a tool of legitimation and institutionalization of private authority, thus politicizing private agendas and moving them into the public sphere.

The importance of this observation lies at the heart of the discourse concerning both global space governance and the future development of international space law. That is to say, considering that privately produced policies and standards are ultimately reproduced and expressed internationally through State mechanisms, they could eventually have the potential of changing not only the normativity of modern global space governance, but also the *stricto sensu* international legal regime. A sustainable legal and policy framework providing a place for all actors involved and balancing their interests thus appears to be necessary.

3. PLURALISM OF SPACE ACTORS, PLURALISM OF NORMS: DECONFLICTING MODERN SPACE LAW AND GOVERNANCE

The ideology of international space law is built on the anticolonial idea of inclusivity, pursuant to which exclusive rights over the natural and social environments of outer space are prohibited.[62] Introduced during the 1950s and 1960s, this idea of inclusivity seemed to include all States, while keeping the action of decentralized space actors, such as private space entities, under the control of States.[63] However, as this article argues, the development of international space law and global space governance over the years demonstrated the emergence of non-State actors as active participants in the normative development of space law and governance. Accordingly, the lack of regulatory and governance structures accommodating these new space actors has led private space actors to form and politicize their own informal norm-making avenues, leading to phenomena that alter the traditional ideological dynamic of international space law and governance by transforming it from State- to actor-centred.

The current legal order and governance of the use and exploration of space are thus characterized by two parallel, yet conflicting, ideologies: the anticolonial ideology of international space law's foundations, where an inclusive State-centric structure is constructed, and the ideology of modern space law's pluralistic normativity, where informal norms are constructed by decentralized centres of governance. Neither of the two, however, appears to have the capacity to regulate modern space activities in a sustainable manner.

3.1 TOWARDS AN AESTHETIC OF SPACELESSNESS FOR SPACE ACTIVITIES

Aesthetics as a means to understand law is not only a way of approaching the law; it could also be thought of as a methodology towards imagining the law's ideals and the law's ideal way of application. In other words, understanding the aesthetics of law is understanding the culture that is embedded in it and how law facilitates its expression in the world. 'Aesthetic imaginings,' writes Shaw,[64] 'are evidenced to underpin and sustain "law's symbolic processes and doctrines, institutions and ideas; that is, a realm of limitless fantasy, of free flowing nomological desire, fixed around, and fixated upon controlling images that condense its central juridical concepts"'.[65]

Imagining, therefore, the aesthetics of international space law is imagining the ideals that it reflects. This article argues that the ideals expressed through international space law, in particular through the Outer Space Treaty, are those of a legal order that is detached from the fixity of land and from the bordered thinking of property-based rules and rights of exclusivity over parts of outer space. Accordingly, the aesthetics of space law leads to imagining international space law's order as one of an inclusive use and exploration of outer space, detached from the element of fixed territorialities, and reflecting the interests of all actors, yet without privileging some of them.

62 *ibid*. See also *Interim Report by the Chairman*, A/AC.105/C.2/L/16 (1966); *Legal Sub-Committee Report 5th Session*, A/AC/105/35 (1965); *Committee of the Peaceful Uses of Outer Space Report – 7th Session*, report, A/6042 (1964).

63 *ibid*. See also: Outer Space Treaty, *supra note* 9, Art. VI.

64 J Shaw, 'Aesthetics of Law and Literary License: An Anatomy of the Legal Imagination' (2017) 38 Liverpool Law Rev 83–104 at 83.

65 *ibid*.

The idea of pluralism could fulfil such an aesthetic. The emergence of new actors in the realm of space activities and, consequently, the emergence of new powers and authorities that have the capacity to eventually change the existing law – for example, by interpreting international space law through a practice opposed to its ideals, or via the creation of new customary norms – also have the potential to transform its aesthetics. As such, powers and authorities appear to form new centres of governance, and so the inclusive aesthetics of international space law must adjust, rather than change, in order to accommodate them. That is, while recent space laws and policies seek to favour new space entrants, the traditional aesthetics of space law tend to favour the concept of inclusion rather than that of exclusion, entailing, in fact, a deeply pluralistic character.

Indeed, the study of pluralism has been central in the postcolonial context, where multiple identities – and, therefore, multiple sources of authority – coexisted and sought to translate their own power into law. The history of international space law showed that international space law's postcolonial moment occurred at its inception, when international space law – through the ideal of spacelessness[66] that it introduced – appeared as an effort to decolonize international law. The idea of pluralism, however, has also been studied in the context of colonialism, where the 'preexisting law … was itself often pluralistic, having undergone diverse influences of war, settlement, trade and religion'.[67] Therefore, the archetypical concept of pluralism appears to be linked to the idea of influencing and altering existing laws and customs, which, ultimately, lose their initial identity and reflect their colonial history. Paradoxically, as opposed to this conceptualization of pluralism, legal pluralism in the modern formation of law – and of international law – is linked to positive connotations.[68] Thought of as the amalgamation of the powers and authorities that emerge from the multiplicity of modern actors and their translation into a multiplicity of normativities, applying pluralism into the law-making process can ultimately lead to a multi-normative – and therefore inclusive – law.[69]

In this way, the pluralistic aesthetics of international space law, combined with space law's vision to deterritorialize the way in which international law is applied to the use and exploration of outer space, necessitates a legal and governance mechanism facilitating and accommodating new entrants into new space activities, in particular considering the use and exploration of space natural resources. Consequently, such a regime should be able to simultaneously accommodate new entrants – and the subsequently created authorities – in space activities, without, however, such inclusion territorializing either the physical environment of outer space, or its social one.

Leaving uncontrolled the current development of space law, especially regarding the use and exploration of space natural resources, that normally takes place either through domestic law-making structures[70] or at the level of soft law and the political sphere,[71] would be to accept the change in the aesthetics of space law not only as far as the inclusivity in the substantive provisions of the law is concerned but also in the processes of its formation. Therefore, further incorporating the pluralistic aesthetics of space law in the modern governance and regulation of outer space would be to foresee a truly pluralistic legal regime welcoming new actors while, at the same time, maintaining the place of older ones, welcoming the differences between all actors, their normativities, and ultimately harmoniously accommodating their respective authorities. The Agreement Governing the Activities of States on the Moon and Other Celestial

66 The term 'spacelessness' is used here in reference to the legal nature of outer space as beyond any kind of spatial formations, be they through sovereignty, property or any other type of occupation as per the relevant provision of Article II of the Outer Space Treaty.

67 M Davies, 'Legal Pluralism' in P Cane & H Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 805 at 811–817.

68 See generally S Merry, 'Legal Pluralism' (1988) 22(5) Law & Society Review 869–896; E Melissaris, *Ubiquitous Law – Legal Theory and the Space for Legal Pluralism* (Routledge, 2016); W Adams, *Popular Culture – Narrative as Law* (Routledge, 2017).

69 M-M Kleinhans & R Macdonald, 'What is a Critical Legal Pluralism?' (1997) 12(2) CJLS/RCDS 26 at 26; G Swenson, 'Legal Pluralism in Theory and Practice' (2018) 20 International Studies Review 438–462; K von Benda-Beckmann & B Turner, 'Legal Pluralism, Social Theory, and the State' (2018) 50(3) Journal of Legal Pluralism and Unofficial Law 255–274; N Roughan & A Halpin (eds.), *In Pursuit of Pluralistic Jurisprudence* (Cambridge University Press, 2017); B Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (1993) 20(2) Journal of Law and Society 263–323; and E Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' (2004) 13(1) Social and Legal Studies 57–79.

70 For example: US Commercial Space Launch Competitiveness Act, *supra note* 4, para 51302; Luxembourg Law on the Exploration and Use of Celestial Bodies, *supra note* 4.

71 For example: Artemis Accords, *supra note* 5.

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Bodies (Moon Agreement),[72] a truly pluralistic international legal instrument, could be used as guidance towards this objective through, for example, the development of a new binding international legal instrument, such as a new space treaty.

3.2 THE MOON AGREEMENT AS A DECONFLICTING FOUNDATION FOR RESTRUCTURING THE GOVERNANCE OF SPACE ACTORS AND SPACE ACTOR-NETWORKS

This article has so far noted that the status of the governance of outer space reveals that all space actors – considered as power and authority-generating actors – function in a relational way. That is, the action of private space actors shapes to a significant extent the action of public space actors and, in a similar way, the action of public space actors enables that of the private ones. Ultimately, this plurality of actors and actor-networks appear to be guided by the potential of space technology – and the subsequent potential for economic well-being – and to finally form their normative relationship with outer space.[73]

As this normative relationship is currently characterized by a territory- and property-led objective or, to put it simply, by a space-making objective, that is, in contrast with the spacelessness and anticolonial vision of international space law, the need for a mechanism to deconflict the relationship between the modern actor-based normativity and the rules-based regime of space activities appears critical.

The role of this new governance mechanism would be to introduce the existing rules-based regime as a guarantee of a materially and socially anticolonial space governance, while also welcoming and accommodating new interests. That is, the role of this mechanism would be to translate the anticolonialism of international space law into a minimum standard of action and, in parallel, translate the relational normativity produced through these actor-based networks into modern actor-specific – or network-specific – standards.

Indeed, the normative shift towards a private actor-led global space governance demonstrates the need to adjust the specificities of the international space law regime to the needs of modern space governance. The lack of such adjustment could eventually render the existing international legal regime obsolete and transform the modern global space governance into an anarchic regime of governance, where 'anarchy' can be thought of as the lack of 'arches', that is, principles and rules.[74] In this case, modern space activities and technologies would prove the international space law regime to be either rigid and unwelcoming of the new, or unable to include such activities and technologies under its umbrella of governance and regulation.

Therefore, while maintaining the initial objectives of international space law is critical in preserving the anticolonial order that it introduced, a new mechanism – of both regulatory and governance nature – is imperative to welcome and promote present and future space innovation. As this article noted earlier, international space law was built based on a rationale that sought to avoid terrestrial colonial dynamics from reoccurring in the use and exploration of outer space; a rationale that is still compelling today.[75] As such, the "spaceless" use of outer space was expressed through Articles I and II of the Outer Space Treaty, introducing an inclusive use and exploration of outer space, within the context of which rights of exclusivity, such as property rights, would be redundant.

72 Agreement governing the Activities of States on the Moon and Other Celestial Bodies, 5 December 1979, 1363 UNTS 3.

73 See generally: B Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, 2012); Y Rydin & L Tate (eds.), *Actor Networks of Planning – Exploring the Influence of Actor Network Theory* (Routledge, 2017); A Blok et al (eds.), *The Routledge Companion to Actor-Network Theory* (Routledge, 2020); and I Williams (ed.), *Contemporary Applications of Actor Network Theory* (Palgrave Macmillan, 2020).

74 The term 'anarchy' is used here in its literal meaning (*a* + *arches* (*αρχές* = principles)) to refer to a potential order without arches, that is, without principles, without rules. For the definition and etymology of the term see: Μπαμπινιώτης, Ετυμολογικό Λεξικό της Νέας Ελληνικής Γλώσσας – Ιστορία των Λέξεων (Etymological Modern Greek Language Dictionary – History of the Words) (Κέντρο Λεξικολογίας, 2010) 129: 'χωρίς κανόνες και αρχές, αυθαίρετος' (without rules and principles, arbitrary).

75 Despite the authority of private actors that leads modern space governance and its expression through national juridical structures or international soft law schemes, the core principles and provisions of international space law do not appear to have been replaced or updated through the avenues of custom or *ex ante* legal interpretation.

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At the same time, this article emphasized the objective of international space law not only to prohibit a land-based colonial approach to the use and exploration of outer space but, more importantly, to regulate against a social coloniality and a social territorialisation of it, which is built through the authority that private space actors generate. That is, international space law, from its inception, imagined the socially constructed *invisible* territorialities of outer space and promoted a governance against them. Furthermore, the pluralism of actors – and, subsequently, of normativities that emerge because of the modern governance of the use and exploration of outer space – constitutes further evidence for the need to form a mechanism ensuring the reflection of this plurality of actors in it, together with the preservation of international space law's objectives, principles, and its overall anticolonial mission.

Both the private actor-centred domestic legal efforts to enable the exploitation of outer space – and, therefore, its territorialisation and objectification – and the soft law initiative of the Artemis Accords, should be thought of as warning indications that a new mechanism is required to address the specificities of modern space exploration, rather than as concrete efforts to change international space law.

As the narrative of international space law has shown, its creation followed a fact: the launch of Sputnik I and the realization of the world that the human reach to outer space was a reality.[76] This launch gave humanity sufficient time to conclude rules and agree on the form of the use and exploration of outer space a decade after the launch of Sputnik 1. The readiness, however, of the modern space industry and the high degree of private investment in space activities, could not afford to take such a reactive approach.

This article identifies the Moon Agreement as an instrument that could constitute a legal basis accommodating and sustainably reflecting all authorities involved as well as the normativity of new space actors and the principles of the existing international legal regime. Even though the Moon Agreement has been of ambiguous importance in space politics,[77] and despite the fact that there are only 17 States that are party to it,[78] the objectives and provisions of the Moon Agreement could be used for the generation of a global governance mechanism achieving the sustainability and normativity mentioned above.

Indeed, the Moon Agreement is the only UN Space Treaty that explicitly foresees and considers the exploitation of outer space as a resource as a possibility in the realm of future space activities[79] and it does so in a way that provides inclusivity and sustainability. The Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries could also be used as a relevant example as it considers the interests of both commercial space actors and the developing States; it is not specific, however, to space natural resources.[80] Similar to the Outer Space Treaty, the Moon Agreement is inspired by the anticolonial dynamic of international space law and it reflects this dynamic through the rights and limitations that are embedded in it.[81] The preparatory works to the Moon Agreement frame the purpose of its creation as inspired

76 Regulation, limitation and balanced reduction of all armed forces and all armaments; conclusion of an international convention (treaty) on the reduction of armaments and the prohibition of atomic, hydrogen and other weapons of mass destruction, UNGA, 12th Sess, 716th plenary meeting, Res 1148 (XII), A/RES/XII/1148, 14 November 1957.

77 Regarding the reasons that led to the failure of the Moon Agreement to attract more States parties, see further: F von der Dunk, 'Asteroid Mining: International and National Legal Aspects' (2017) 26(1) Michigan State Law Review 83–102; F Tronchetti, *The Exploitation of Natural Resources of the Moon and Other Celestial Bodies* (Brill, 2009) 9–84; M Listner, 'The Moon Treaty: failed international law or waiting in the shadows?' 24 October 2011, The Space Review, https://www.thespacereview.com/article/1954/1#:~:text=The%20United%20States%2C%20the%20Russian%20Federation%20(former%20Soviet%20Union),the%20standpoint%20of%20international%20law (last visited 13 March 2024).

78 17 States have ratified, and 4 States have signed the Moon Agreement as of 13 March 2024 (following the withdrawal of Saudi Arabia from the Agreement, which took effect in January 2024). UN Office for Outer Space Affairs, 'Status of International Agreements Relating to Activities in Outer Space as at 1 January 2023', 1 January 2024, https://www.unoosa.org/res/oosadoc/data/documents/2023/aac_105c_22023crp/aac_105c_22023crp_3_0_html/AC105_C2_2023_CRP03E.pdf (last visited 13 March 2024).

79 Moon Agreement, *supra note* 72, Preamble: '*Bearing in mind* the benefits which may be derived from the exploitation of the natural resources of the Moon and other celestial bodies', and Art. 11, para. 5.

80 Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, 13 December 1996, A/RES/51/122 (Space Benefits Declaration).

81 Moon Agreement, *supra note* 72, Preamble.

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by a double ideal: to promote and enable innovation in space activities and, at the same time, to preserve the anticolonial dynamic of international space law. As such, '*determined* to promote on the basis of equality the further development of cooperation among States in the exploration and use of the Moon and other celestial bodies',[82] the Moon Agreement aims to balance the demands of space innovation with those of an inclusive use and exploration of outer space.

As noted earlier, space exploration and the potential benefits that could derive therefrom, generate more than ever before new pressure and authority centres in space governance, transforming them into the modern norm-makers, while the traditional State-focused networks function as legitimation mechanisms for – mainly – private claims. Although the Moon Agreement could accommodate this shift, it should not be considered per se as an international contractual instrument that would enable a balanced and sustainable exploration and use of outer space and its resources, due to its limited acceptance by States. Historically, the reluctance of States to sign the Moon Agreement has been caused by the 'common heritage of mankind' legal characterization of celestial bodies and their natural resources.[83] Such States saw this provision as an obstacle to the commercial exploitation of outer space and space natural resources, as they were called upon to consider as *common* the resources that they sought to exploit on a private commercial or national level.[84]

However, due to the fast pace with which space technology is evolving and considering the long-standing refusal of States to sign the Moon Agreement, the general principles and substance of the majority of the provisions of this Agreement could serve as guidance for the establishment of the new mechanism. The Moon Agreement appears to be key in constructing a new mechanism governing the modern governance of outer space seen as a resource, especially as far as the exploration of its resources is concerned and adjusting it to the specificities of modernity without neglecting the objectives of the past. The Moon Agreement reiterates the provisions of the Outer Space Treaty and, in that way, emphasizes the extension of the provisions and objectives of the Outer Space Treaty over the celestial bodies and their natural resources. As such, it confirms the anticolonial spirit of the Outer Space Treaty by providing that 'the [celestial bodies] shall be used by all States Parties exclusively for peaceful purposes',[85] and reaffirming the provisions of Articles I and II of the Outer Space Treaty.[86]

The Moon Agreement, in a way similar to the Outer Space Treaty, provides that celestial bodies can neither be appropriated, nor can sovereignty be established on them, by specifying that no part of the celestial bodies can become the property of States or any other natural or juridical person.[87] As such, it could inspire the creation of a governance structure deviating from legal institutions of exclusivity, such as that of property, and enabling the anticolonial spirit of international space law.

Most importantly, the Moon Agreement provides for the exploitation of celestial bodies as a possibility, thereby embracing innovation. Such a possibility, however, based on the Moon Agreement, should be accompanied by a new international regime, new mechanisms, and new procedures.[88] Such an international regime would promote the 'rational' management of the resources.[89] Rationality in the management of resources, however, may not necessarily lead to the exclusion of private space actors, but rather to their rational integration.

Furthermore, the Moon Agreement provides for the sharing of the benefits deriving from the exploitation of space resources in an equitable manner.[90] Such equitability in the distribution

82 *ibid*, Preamble.

83 *ibid*, Art. 11, para. 1.

84 S Rosenfield, 'The Moon Treaty: The United States should not become a Party' (1980) 74 Proceedings of the Annual Meeting, American Society of International Law; UNISPACE '82, Report and Hearing before the Subcommittee on Space Science and Applications of the Committee on Science and Technology, US House of Representatives, 97th Congress, 2nd sess, no 160, 14 July 1982 at 162–171, 513–516 and 629.

85 Moon Agreement, *supra note* 72, Art. 3, para. 1.

86 Outer Space Treaty, *supra note* 9, Arts. I and II.

87 Moon Agreement, *supra note* 72, Art. 11, paras. 2 and 3.

88 *ibid*, Art. 7, para. 5.

89 *ibid*.

90 Moon Agreement, *supra note* 72, Art. 11, para. 7(d).

of benefits must take into special consideration not only the interests of developing countries, but also the interests of those States that have contributed to the exploitation of the resources. As such, a regime drawing inspiration from the Moon Agreement would enable the creation of a fair regulatory mechanism. This is because it would mobilize the concept of equitability, where the large contribution and effort of private space companies would be taken into special consideration in the equitable distribution of space benefits.

In this way the rationales embedded in the Moon Agreement could be used as a negotiation basis to be adjusted to the newly developed authorities in space exploration and lead to a new mechanism balancing the interests of all modern space actors and enabling the modern exploration of outer space while simultaneously maintaining the traditional dynamics of space law.

4. CONCLUSIONS

Considering the fragmented and 'beyond formal structures' initiatives of private space actors, States, and networks of actors alike to promote a space-based approach to the exploration and use of outer space, the construction of an actor-inclusive and interest-conciliating space governance mechanism will be a challenge. Nevertheless, political and soft law initiatives, such as those of the Artemis Accords, could be seen as a vehicle towards the construction of such a mechanism, instead of being considered as one more addition to the fragmented and power-structured normative space governance. As history has shown, the only way to moderate such power in the modern space governance structures is to negotiate and influence the development of law and law-making structures by participating in them and by recognizing the interest of all (States, non-State actors, human and non-human actors, such as the natural environment of outer space) in constructing an inclusive governance for areas of global interest – both at a procedural and at a substantive level. Thus, should the number of actors involved as active makers in global space governance increase geographically and structurally, the power and authority of the currently low number of actors that tend to normatively shape the future of an area of interest for all the others will become weaker.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR AFFILIATIONS

Maria Manoli orcid.org/0009-0004-4455-1143
Lecturer in Space Law, School of Law, University of Aberdeen, UK

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