

# **Liquid Laws: Extractivism and Unstable Authority**

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## **Abstract**

This thesis concerns the co-constitution of extractivism and claims to authority, particularly in contexts where the legal narrative hides the ways that extractivism is facilitated. I examine how law implicitly structures extractivism, as well as how states use extractivism to generate authority. I look at this relationship in the context of international legal debates over the Antarctic Treaty, and a history of extractive interventions by the settler colonial state towards the Murray-Darling River Basin in south-eastern Australia. The way I read claims to authority engages both the violence and instability of these claims. The specific ways in which the relationship between extractivism and authority is enacted in these contexts depends in part on the spatial construction of water and ice. The co-constitution of extractivism and authority in these examples is also revealed both through imperial imaginaries that have material effects, and material practices that build a colonial legal imaginary.

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## Introduction

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The questions of this thesis concern the co-constitution of extractivism and claims to authority. In it, I examine the relationship between legal ordering and extractivism in contexts where the relevant legal narrative hides or denies that extractivism is being facilitated. I examine how law implicitly structures extractivism, as well as how states use extractivism to generate authority. The first concern of the thesis is how forms of law structure and facilitate extractivism in sites where extraction is posited as contained, rather than explicitly authorized. The specific forms of law that I examine are international law and the law of a settler colonial state, and the sites are Antarctica and a river system in south-eastern Australia, the Murray-Darling Basin. Mining is banned in Antarctica, a ban that has material impact in preventing extraction on the Antarctic continent.<sup>1</sup> This is of course significant, as warming Antarctic ice already exposes and contributes to substantial global climate change without extractive disruption.<sup>2</sup> Yet what can at times be assumed is that the Antarctic Treaty System is, in a more essentialized way, an anti-extractive legal instrument.<sup>3</sup> Returning to a point of contest over the Treaty System, a set of debates at the General Assembly in late 1984,<sup>4</sup> I argue that while the Treaty System eventuates in a mining ban over Antarctic territory,<sup>5</sup> it contributes to global extractivism beyond Antarctica through reinforcing imperial geographies and temporalities that international law produces. I read the Treaty System in this way through examining debates over mining and the distribution of authority over the continent. I suggest that these debates expose the global structuring work that international law generally, and the Antarctic Treaty System specifically, enact, in a way that would be less visible by focusing on the doctrinal change of the mining ban that came into effect after these debates. This is because what was at stake in these debates, beyond mining regulation, was the contested (il)legitimacy of the doctrine of discovery and distinct (redistributive or

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<sup>1</sup> See Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, 30 ILM 1461 (entered into force 14 January 1998), cited in Kees Bastmeijer, "Introduction: The Madrid Protocol 1998–2018. The need to address 'the Success Syndrome'" (2018) 8:2 *The Polar Journal* 230 at 230.

<sup>2</sup> See Jonathan Watts, 'Antarctic temperature rises above 20C for first time on record,' *The Guardian* (14 February 2020) online: <<https://www.theguardian.com/world/2020/feb/13/antarctic-temperature-rises-above-20c-first-time-record>>.

<sup>3</sup> See for example praise for the Treaty System in the introductory comments to Gillian D Triggs & Anna Riddell, *Antarctica: legal and environmental challenges for the future* (London: British Institute of International and Comparative Law, 2007).

<sup>4</sup> See UNGA, 39<sup>th</sup> Sess. UN Doc A/39/583, Study requested under General Assembly resolution 38/77. Part II, Volume I-III, (29 October – 9 November 1984), New York.

<sup>5</sup> See Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 1.

imperial) spatial imaginaries invoked by the principle of the common heritage of mankind. The narrative of linear progress was contested through debates over the legitimacy of the doctrine of discovery as a way to claim sovereignty, which multiple states use as the basis for the authority to govern Antarctica.<sup>6</sup> Spatial imaginaries were also contested through the discourse of the common heritage of mankind. States who formed part of the Non-Aligned Movement, in these debates, emphasized the redistributive potential of the imaginary of a common heritage of mankind.<sup>7</sup> Certain signatory states to the Treaty System sought to appropriate the discourse to reinforce an imperial geographic imaginary that, I argue, continues to contribute to forms of global extractivism through reinforcing an imperial legality. Focusing on the Treaty System's localized effects cannot fully appreciate the work it does to contribute to reinforcing international law as a mechanism that locates the power to decide, extract and profit in the global North.

The Murray-Darling Basin river system exhibits signs of centuries of extractivism including dry riverbeds, salinity, algae, burning marshes and dying fish.<sup>8</sup> In response, much of the more recent discourse of the Australian state centres on reducing extraction, or rendering it sustainable.<sup>9</sup> Looking at a longer history of colonial extractive interventions towards this river system, I argue that the techniques of metering and dividing water that are currently implemented to reduce extraction are largely continuous with the techniques that positioned the river system as an extractive site to begin with, due to their commodification and exchange of water.

My second concern in the thesis is how states use these forms of law and their relationship to extractivism to generate, stabilize or project authority. In the Murray-Darling, the forms of extractive intervention mirror dynamics of settler colonial claims to authority in both their violence and instability.<sup>10</sup> Reasserting control over the river system does more than position it

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<sup>6</sup> See for example submissions of Australia (views of states, submission 3) in UNGA, *supra* note 4.

<sup>7</sup> See for example submissions of Pakistan, (view of states, submission 33) in UNGA, *supra* note 4.

<sup>8</sup> See Jessie Davies, "It's very grim": Macquarie Marshes wetland on fire and massive flush the only way to save it, *ABC News* (28 October 2019), online: <<https://www.abc.net.au/news/2019-10-28/macquarie-marshes-on-fire-90pc-reed-bed-raised/11645914>>; Anne Davies, 'Hundreds of thousands of native fish dead in second Murray-Darling incident,' *The Guardian* (7 January 2019), online: <<https://www.theguardian.com/australia-news/2019/jan/07/hundreds-of-thousands-of-native-fish-dead-in-second-murray-darling-incident>>; Margaret Simons, "Cry Me a River: The Tragedy of the Murray-Darling Basin," *Quarterly Essay* 77 (March 2020).

<sup>9</sup> See for example discourses of a sustainable diversion limit discussed in Simons, *supra* note 8 at 4; 6-7.

<sup>10</sup> See on these dynamics in forms of state law, Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992); and see for settler colonial contexts specifically Shiri Pasternak & Dayna Nadine Scott, "Introduction: Getting Back the Land" (2020) 119:2 *South Atlantic Quarterly* 205.

as an extractive site, it attempts to stabilize an assertion that the law of the colonial state is the proper, or only, law governing the river system.<sup>11</sup> In the Antarctic debates, imperial ‘world-making practices’<sup>12</sup> are contested and reiterated by different state actors in a way that I suggest is entangled with, rather than distinct from, the state actors’ claims to authority beyond Antarctica. Specific signatory states rely on imperial geographies that locate authority and the profits of extractivism in the North in a more fundamental way than merely a form of claiming legitimacy over Antarctic governance. Similarly, they rely on a linear temporality that authorizes discovery as a way to claim territory to legitimize not only their claims to Antarctica, but also, often, their existence as nation-states.<sup>13</sup>

The primary way that I investigate the co-constitutive link between extractivism and authority is through examining how material practices of law and legal imaginaries are each mobilized to claim authority and legitimize or enact extractivism.<sup>14</sup> I focus on how states, primarily, construct spaces as available for extraction in order to attempt to legitimize their authority over and beyond that space; how authority over contested space is claimed and reclaimed in relation to extractivism. I primarily focus on state claims to authority in settler colonial or imperial structures because of their specific relation to extractivism, and because of the form of my legal training. My focus on both the instability and violence of imperial and settler colonial claims to legal authority and totality, and their relationship to extractivism, is due to both my position as a white Australian settler scholar as well as my legal training in the Anglo-Australian common law, which is inextricably linked to dispossession, settler colonialism and British Empire.<sup>15</sup> I do not focus on state discourse in order to equate the state form with law itself. There are multiple legal actors, forms of law and legal orders that compete and overlap with the state claims I examine.<sup>16</sup> I also read state

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<sup>11</sup> See on the impossible assertion of a unitary, totalizing law asserted through material practices, Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon; Routledge, 2016).

<sup>12</sup> See on world-making practices Matthew Craven, Sundhya Pahuja & Gerry Simpson, “Reading and Unreading a Historiography of Hiatus” in Matthew Craven, Sundhya Pahuja & Gerry Simpson, eds, *International Law and the Cold War* (Cambridge: Cambridge University Press, 2019) 1 at 23.

<sup>13</sup> The doctrine of discovery relies on more than a linear temporality of course, including the violence of racialized discourses of civilization and *terra nullius*. See Antony Anghie, *Imperialism, sovereignty, and the making of international law* (Cambridge: Cambridge University Press, 2007). See also Ntina Tzouvala, “Civilisation” in Jean d’Aspremont & Sahib Singh, *Concepts for international law: contributions to disciplinary thought* (Cheltenham; Northampton: Edward Elgar Publishing, 2019) 83.

<sup>14</sup> Indeed the impact of imperial imaginaries on reproducing material extraction is one crucial reason why I pay attention to these imaginaries.

<sup>15</sup> See for example on the common law’s relationship to Empire, Olivia Barr, “Walking with empire” (2013) 38 *Australian Feminist Law Journal* 59.

<sup>16</sup> Significantly for the Murray-Darling region, First Nations’ law.

discourse as not determinative of a total legality, and resistance projects as articulations of legal orders outside the epistemic frameworks of state law.<sup>17</sup> I am focusing on state discourse to unravel it to some extent, but there is also significant resistance at work that has its own specific juridicity, and cannot be obscured if we are to take the liquidity or instability of legal ordering seriously.<sup>18</sup> Resistance is central to the stories that I tell here, and significantly influences state claims, discourse and practices of extractivism.<sup>19</sup> I speak less about resistance in this thesis so as to not claim to know, in any complete sense, about the demands of particular forms of resistance. In the last chapter I briefly look at the resistive possibilities inherent in unstable and incomplete claims to lawful authority, in order to point to a significant multiplicity of challenges to the extractivism-authority relationship and its legal ordering. In doing so, it is important to also acknowledge the significant resistance to explicit forms of violent extractivism, even as this thesis primarily examines the implicit authorization of extractivism.<sup>20</sup> I take the state as an actor in order to somewhat unravel its claims to singularity, and not to accept the terms it sets out or conflate multiple parts of state operations.<sup>21</sup> I also do not focus on state discourse to deny the influence of the corporation or capital – corporations are not present in all the stories told in this thesis, but overall play a significant role in legitimizing as well as competing with state authority in spaces denoted as available for extraction.<sup>22</sup> Indeed, it is not possible to fully understand the settler state's extractivism without an account of its relationship with capital.<sup>23</sup> If I use an example of a single state, I primarily look at the Australian state, having lived nearly all my life on lands that it claims. Although I also wrote this thesis in lands claimed by the Canadian state, and my work is animated by the rich discussion and practices of resisting extractivism and settler colonialism that I encountered there also.<sup>24</sup>

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<sup>17</sup> See generally Kathleen Birrell, *Indigeneity: before and beyond the law* (Abingdon: Routledge, 2016).

<sup>18</sup> *Ibid*, particularly Chapter 3 on both the juridicity of law outside the state, and on the unstable dynamic of state law.

<sup>19</sup> See Shiri Pasternak, *Grounded authority: the Algonquins of Barriere Lake against the state* (Minneapolis: University of Minnesota Press, 2017).

<sup>20</sup> See as examples *Ibid*; and contributions to the special issue introduced by Pasternak and Scott, *supra* note 10.

<sup>21</sup> See generally on the problems of doing so, due to complex interactions between international and local space production and a 'shifting global order,' Luis Eslava, *Local space, global life: the everyday operation of international law and development* (Cambridge: Cambridge University Press, 2015) at 8. See also Luis Eslava, & Sundhya Pahuja. "The State and International Law: A Reading from the Global South" (2020) 11:1 *Humanity* 118.

<sup>22</sup> See Sundhya Pahuja, "Public Debt, the Peace of Utrecht, and the Rivalry between Company and State" in Alfred Soons, ed, *The 1713 Peace of Utrecht and Its Enduring Effects* (Netherlands: Brill, 2016) 156.

<sup>23</sup> See Dayna Nadine Scott, 'Extraction Contracting: The Struggle for Control of Indigenous Lands' (2020) 119:2 *South Atlantic Quarterly* 269.

<sup>24</sup> See for example all contributions to Pasternak and Scott, *supra* note 10. See also Zoe Todd, "Refracting the State Through Human-Fish Relations: Fishing, Indigenous Legal Orders and Colonialism in North/Western Canada" (2018) 7:1 *Decolonization: Indigeneity, Education & Society* 60.

Extractivism is a particular form of resource extraction that is involved with capital accumulation and dispossessive social processes, which Dayna Scott characterizes as a relation, ‘a particular *way* of relating to nature.’<sup>25</sup> Extractivism is enacted in a variety of ways, including through violent means, and legitimated through various techniques including discourses of development and the mobility and legal status of the corporate form.<sup>26</sup> In the context of global extractivism, I came to the concerns of this thesis through an interest in whether discourses on restraining extraction sufficiently depart from the sustaining dynamics of extractivism and its relationship with authority. I came to understand that while an extractivist positioning of resources takes them as separate from land, extractivism in these examples is inherently connected to the contested authority over territory.<sup>27</sup> The question I take up here is what structuring work does international law, or the law of a settler colonial state, do to facilitate extractivism, and in particular, when extractive projects are not in full view? The assumptions that I started with included the co-constitution of international law and the law of a settler state,<sup>28</sup> the highly connected relationship between the settler state and corporate authority,<sup>29</sup> and how technologies of investment or development projects enabling extractivism were as much about authority and maintaining a deeply unequal global order as about the extractive project in question.<sup>30</sup> The question that I came to was how can we understand the effects produced, and technologies utilized, by legal discourse that purports to limit extraction in relation to global extractivism? If doctrinal changes or policy measures to reduce extraction do not confront the sustaining dynamic of the co-constitution between extractivism and (certain imperial and colonialist) forms of authority, then would they perpetuate this relationship, with devastating consequences?

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<sup>25</sup> See Dayna Nadine Scott, “Extractivism” in Mariana Valverde, Kamari Clarke, Eve Darian-Smith & Prabha Kotiswaran, eds, *Handbook of Law and Society* (Abingdon: Routledge, forthcoming 2021). Emphasis original.

<sup>26</sup> See Sundhya Pahuja, “Corporations, Universalism and the Domestication of Race in International Law” in Duncan Bell, ed, *Empire, Race and Global Justice* (Cambridge: Cambridge University Press, 2019) 74.

<sup>27</sup> Although this may be very different in distinct colonial forms, this thesis primarily focuses on the multiple forms of authority with connections to settler colonial territoriality. See Scott, *supra* note 23; Scott, *supra* note 25.

<sup>28</sup> Including the simultaneous reproduction of a settler state’s imperial and colonial positions. See Antony Anghie, “Race, self-determination and Australian empire” (2018) 19:2 *Melbourne Journal of International Law* 423; Cait Storr, “‘Imperium in Imperio’: Sub-Imperialism and the Formation of Australia as a Subject of International Law” (2018) 19:1 *Melbourne Journal of International Law* 335.

<sup>29</sup> Pahuja *supra* note 26; Scott, *supra* note 23.

<sup>30</sup> See Sundhya Pahuja, *Decolonising international law: development, economic growth, and the politics of universality* (Cambridge: Cambridge University Press, 2011); Anghie, *supra* note 13.

In this thesis, therefore, I primarily pay attention to the margins of extractive discourse, the ways of ordering that are maintained when the explicit narrative is about conserving and regulating mining resources, or saving water and regulating irrigation.<sup>31</sup> I look at sites where considerations of extractivism are generally framed in terms of limiting or prohibiting extraction, but where returning to a specific historic moment can help to draw out the ways that extractivism is at the same time still authorized through techniques of governing or regulating extractivism that also authorize its continuance. In the Antarctic context, the maintenance of forms of authority that rely on imperial geographies and reinforce global extractivism perpetuates global ordering that seeks to enable the global North to continue profiting from Southern resources. Revisiting a specific set of debates at the United Nations over the Antarctic Treaty, which were a moment in which the distribution of authority and the use of resources were contested, allows us to see the ways in which imperial geographies may continue to be legitimized despite a mining ban over the Antarctic continent. In the Murray Darling, the discourse of saving, reducing or redirecting extraction is incomplete and jarring when the interventions maintain an extractive positioning of water as exchangeable. Examining techniques of moving water is also a way to trace the placing of colonial law (intended to be) at the centre of controlling these rivers.<sup>32</sup> Although these two instances are distinct in important ways from more explicitly violent forms of extractivism,<sup>33</sup> I argue that they are not entirely separate from such violence. There is, I suggest, an underlying substrate in particular forms of legal ordering that legitimizes and reproduces extractivism, even, or in some cases especially, where extractivism is ostensibly contained, regulated or prohibited. In this way, my account of techniques of extractivism involves not only (but no less significantly so) violent theft, development, labour exploitation or investment.<sup>34</sup> Techniques of extractivism are also embedded in international or the colonial state law's world-making dimensions,<sup>35</sup> which I will argue rely on linear temporality, imperial geographies, and techniques of commodification including division and exchange in ways that are fundamentally extractive. What is also at stake in these techniques is a co-constitutive effect, techniques that authorize and structure extractivism, but also generate (contingent and unstable) claims to authority by doing so. In this way the thesis is also about what authority

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<sup>31</sup> As is the case in the two examples I examine.

<sup>32</sup> See Barr, *supra* note 11.

<sup>33</sup> See Tendayi Achiume, *Global Extractivism and Racial Inequality: Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, UN Doc A/HRC/41/54 (14 May 2019), Human Rights Council, 41<sup>st</sup> session, 24 June – 12 July 2019, Agenda Item 9.

<sup>34</sup> See *Ibid*; see also on the justifications of the development project and investment Pahuja, *supra* note 30.

<sup>35</sup> Craven, Pahuja & Simpson, *supra* note 12 at 23.

state or international law generates through extractivism. This dual inquiry opens a broader conception of extractivism as well as a broader consideration of possibilities for resistance that challenge law's more marginal ordering, beyond doctrinal changes.

In the two substantive chapters, I look at specific techniques of extractivism utilized by state actors. In the chapter on Antarctica I focus on how the techniques of space-making and linear temporalities contribute to framing the authority-extractivism relationship. In the chapter on the Murray-Darling Basin waters I focus on the technique of movement – literally, interventions to move and divert water, as well as changing projections of how exactly the water is framed as extractible and governed by state law.<sup>36</sup> In this way, movement as a technology is not a descriptive phrase but reveals an insidious practice that builds a pervasive, if unstable, colonial legality.<sup>37</sup> In each chapter I look at the forms of authority generated through these techniques. The techniques are, for Antarctica, a linear temporality which appears in debates on the doctrine of discovery, and an imperial geography contested through debates on the discourse of the common heritage of mankind. In the Murray-Darling, the techniques are a commodification through division and exchange. The forms of authority generated through these techniques are, for Antarctica, legitimizing sovereignty through discovery, and legitimizing a global ordering that privileges Northern decision-making and profit.<sup>38</sup> In the Murray-Darling, the forms of authority are the settler state's authority, which unravels and is continually reasserted.<sup>39</sup>

Because I want to examine the relationship to authority, including territorial authority, generated and enacted by extractivism, it is significant that the spaces I examine occur are constructed as not completely solid land.<sup>40</sup> The colonial legal imaginary and its relationship to land, authority and territory is specific.<sup>41</sup> Antarctica is viewed as a space of remote ice,<sup>42</sup> a

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<sup>36</sup> See on movement as a technique Barr, *supra* note 11.

<sup>37</sup> *Ibid.*

<sup>38</sup> On the continuous impact of the doctrine of discovery in international legal ordering see Anghie, *supra* note 13.

<sup>39</sup> See on this negotiation and reassertion Pasternak and Scott, *supra* note 10.

<sup>40</sup> See on the construction of Antarctic ice as 'not-quite-land' Barr, *supra* note 11 at 197.

<sup>41</sup> See Brenna Bhandar, *Colonial lives of property: law, land, and racial regimes of ownership* (Durham: Duke University Press, 2018); Renisa Mawani, *Across oceans of law: the Komagata Maru and jurisdiction in the time of empire* (Durham: Duke University Press, 2018); Cait Storr, 'Denaturalising the Concept of Territory in International Law,' in Julia Dehm & Usha Natarajan, eds, *Locating Nature: Making and Unmaking International Law* (Cambridge: Cambridge University Press, forthcoming), via Academia: [https://www.academia.edu/42663319/Denaturalising\\_the\\_Concept\\_of\\_Territory\\_in\\_International\\_Law](https://www.academia.edu/42663319/Denaturalising_the_Concept_of_Territory_in_International_Law).

<sup>42</sup> Barr, *supra* note 11 at 197.

form of ‘outside’ space.<sup>43</sup> The rivers of the Murray-Darling are viewed as a moveable, liquid resource.<sup>44</sup> These constructions mean that the way these sites are mobilized by state actors to contribute to the authority-extractivism relationship is specific. Much has been written about how claiming space, territory or land with legal techniques (and the violence this entails) is incomplete and unstable; overlapping narratives must be constantly retold and reformed in the face of resistance to these claims.<sup>45</sup> Spaces constructed as ‘otherwise’ to land or territory,<sup>46</sup> such as outer space or the deep seabed, have been shown to be involved in constructions of contested authority.<sup>47</sup> I am interested in this thesis in how this may also be the case with rivers and ice for the sites that I examine here. For Antarctica, the construction of the continent as a confined space, icy and remote, would hide the deep spatial connections that I read in this thesis to other sites of extractivism that signatory states benefit from. For the Murray-Darling, the exchange of water is utilized to ‘transform’ land, as is inherent to colonial projects; the posited moveability of water makes a specific way of extracting it visible, as well as specific way that this extractivism is related to claiming territory.<sup>48</sup> It is for these two reasons that I speak about laws as liquid, both for the instability and constant reassertion of claims to authority, as well as for the way they are related to claiming land as territory or resources in colonial epistemologies.<sup>49</sup> The spatial construction of these sites as remote or liquid is one specific way to see, although there are others, how even though

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<sup>43</sup> See on spaces constructed as ‘outside’ generally Matthew Craven, “‘Other Spaces’: Constructing the Legal Architecture of a Cold War Commons and the Scientific-Technical Imaginary of Outer Space” (2019) 30:2 *European Journal of International Law* 546.

<sup>44</sup> See the state intrusions and exchange detailed in Simons, *supra* note 8; and Sue Jackson & Lesley Head, ‘Australia’s mass fish kills as a crisis of modern water: Understanding hydrosocial change in the Murray-Darling Basin’ (2020) 109 *Geoforum* 44.

<sup>45</sup> See through the register of film Ruth Buchanan & Rebecca Johnson, “The Unforgiven Sources of International Law: Nation-building, Violence and Gender in the West(ern)” in Doris Buss & Ambreena Manji, eds, *International Law: Modern Feminist Perspectives* (Oxford: Hart Publishing, 2005) 131; see generally Fitzpatrick, *supra* note 10.

<sup>46</sup> Although these are of course not the same concept. See Storr, *supra* note 41.

<sup>47</sup> See Craven, *supra* note 43; Surabhi Ranganathan, “Ocean Floor Grab: International Law and the Making of an Extractive Imaginary” (2019) 30:2 *European Journal of International Law* 573. See also Cait Storr “‘Space is the Only Way to Go’: The Evolution of the Extractivist Imaginary of International Law” in Sundhya Pahuja & Shane Chalmers, eds, *Handbook of International Law and the Humanities* (Abingdon: Routledge, forthcoming 2020), via Academia: [https://www.academia.edu/42663349/Space\\_is\\_the\\_Only\\_Way\\_to\\_Go\\_The\\_Evolution\\_of\\_the\\_Extractivist\\_Imaginary\\_of\\_International\\_Law](https://www.academia.edu/42663349/Space_is_the_Only_Way_to_Go_The_Evolution_of_the_Extractivist_Imaginary_of_International_Law).

<sup>48</sup> See Aileen Moreton-Robinson, *The White possessive: property, power, and indigenous sovereignty*, (Minneapolis: University of Minnesota Press, 2015); Irene Watson, *Aboriginal peoples, colonialism and international law: Raw law* (Abingdon: Routledge, 2015); see also Anghie, *supra* note 13; Adrian Smith, “Toward a Critique of Political Economy of ‘Sociolegality’ in Settler Capitalist Canada” in Mark P. Thomas et al, eds, *Change and Continuity: Canadian Political Economy in the New Millennium* (Montreal: McGill Queen’s University Press, 2019) 167; Tzouvala, *supra* note 13.

<sup>49</sup> See on the colonial constructions of land and water Renisa Mawani, “Law, Settler Colonialism, and the Forgotten Space of Maritime Worlds” (2016) 12:1 *Annual Review of Law and Social Science* 107; Bhandar, *supra* note 41.

resources are constructed as removable commodities and disconnected from the land, extractive processes are, in these examples, deeply connected to ‘struggles for control’ over land and territory, as Scott has shown.<sup>50</sup>

There are two primary analytics for how I read authority, narrative and jurisdiction.<sup>51</sup> Part of my inquiry is how material practices of extractivism and imaginaries that reinforce extractivism work together. This arose from my reading of the debates over resource extraction in Antarctica, where a later doctrinal change to prohibit material practices of extraction in Antarctic territory seemed highly entangled with a legal and spatial imaginary that would implicate the Antarctic Treaty system in legitimizing global practices of material extraction elsewhere. In turn, it developed through reading histories of dividing and exchanging commodified water in the Murray-Darling region, where material practices of extraction contribute to a colonial imaginary of ownership over waters and territory.<sup>52</sup> I do not seek to set up a binary between the registers of the imaginary and the material. I also do not seek to set up a blurred relationship between the two, they are different in significant ways. In outlining what I take an imaginary to mean, Sheila Jasanoff’s explanation of socio-technical imaginaries is helpful.<sup>53</sup> I do not adopt a strict definition of a socio-technical imaginary, yet Jasanoff’s description exposes elements of the kind of influence I read the proponents of these imaginaries as trying to wield. I take definitions of materiality from both Shaunnagh Dorsett and Shaun McVeigh’s work on jurisdiction that reads techniques of material practices as building claims to lawful authority,<sup>54</sup> and from Adrian Smith’s explanation of ‘material legality,’<sup>55</sup> and its ‘socio-spatial practices,’ and focus on relationality.<sup>56</sup> Using these two frames together assists, for my purposes here, to trouble in different ways seemingly settled sites where state actors frame extractivism as being regulated rather than perpetuated. Examining the imperial imaginaries of the Antarctic debates exposes how the Treaty System reinforces forms of global ordering that have forceful material consequences. Examining the material techniques of extraction in the Murray-

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<sup>50</sup> Scott, *supra* note 23 at 269.

<sup>51</sup> On jurisdiction see Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012).

<sup>52</sup> On the histories of division of water see Simons, *supra* note 8; on building colonial legal imaginary through material practices see Barr, *supra* note 11.

<sup>53</sup> See Sheila Jasanoff, “Future Imperfect: Science, Technology, and the Imaginations of Modernity” in Sheila Jasanoff & Sang-Hyun Kim, eds, *Dreamscapes of modernity: sociotechnical imaginaries and the fabrication of power* (Chicago: The University of Chicago Press, 2015) 1 at 4.

<sup>54</sup> Dorsett and McVeigh, *supra* note 51.

<sup>55</sup> Smith, *supra* note 48.

<sup>56</sup> *Ibid.*

Darling Basin region exposes how such practices are mobilized to build a colonial legal imaginary where the law of the settler state is posited as authoritative and all-encompassing.<sup>57</sup> In this way, these two frames assist to see how legal ordering both produces and is produced by extractivism.

## Sites

As I have already noted, the two examples that I look at are debates over resource extraction in Antarctic that occurred in late 1984, and paying attention to the historical context of more recent struggles over waters of the Murray-Darling. To contextualize the Antarctic debates, it is necessary to speak a little about the regulation of extraction in the Cold War context. Certain Cold War practices of relating to scientific inquiry and the natural environment are relevant to the trajectory of resource discussions in Antarctica. For instance, Aaron Wu traces particular forms of Cold War thought including the proliferation of ‘similar views about humanity’s destiny to control and manage its natural environment,’<sup>58</sup> and ‘the putative neutrality of nature.’<sup>59</sup> His account focuses on commonality in the context of rivalry between Cold War powers, which is not to assume that bipolarity is a complete characterization of the period. Matthew Craven, Sundhya Pahuja and Gerry Simpson write about the period as plural in terms of spaces, times and perspectives.<sup>60</sup> Wu’s characterization of these specific commonalities between Cold War powers in positing mastery over nature is relevant to considering the geopolitical landscape that signatory states inhabited and enacted when debating the Antarctic Treaty. Emily Crawford similarly traces particular forms of Cold War thought that expose ways of relating to the natural environment as a form of mobilizing resources. She examines the development of the Environmental Modification (or ENMOD) Treaty, enacted, as she highlights, ‘to ban environmental modifications a method of warfare.’<sup>61</sup> The sentiment of nature as a strategic resource is also a relevant contextual factor for reading the debates over governing Antarctica. Whilst the debates in a certain way show Cold War powers and other signatory states as both defending the Antarctic Treaty system, faced with re-distributive challenges by states from the Non-Aligned Movement, it is also

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<sup>57</sup> See Barr, *supra* note 11.

<sup>58</sup> Aaron Wu, ‘Bridging Ideologies: Julian Huxley, *Détente*, and the Emergence of International Environmental Law’ in Craven, Pahuja & Simpson, *supra* note 12 at 189.

<sup>59</sup> *Ibid* at 190.

<sup>60</sup> See Craven, Pahuja & Simpson, *supra* note 12 at 4-6, 6-12, and the chapter generally.

<sup>61</sup> Emily Crawford, ‘Accounting for the ENMOD Convention: Cold War Influences on the Origins and Development of the 1976 Convention on Environmental Modification Techniques’ Law’ in Craven, Pahuja & Simpson, *supra* note 12 at 81.

true that I do not examine in equal depth all signatory states to the Antarctic Treaty. This is partly because of the way my account links claims to authority over Antarctica with other claims to authority that a state actor makes. Trained as I am in Anglo-Australian common law, I attend first to legal projections related to British imperialism and related forms of settler colonialism.<sup>62</sup> Yet there are a number of untold stories of signatory states, participating states and contesting states (as well as all those actors, technologies and projects not confineable to the state form).<sup>63</sup> Additionally, by focusing on these actors as a way to attend to my legal training, I do not seek to de-emphasize the multiple legalities of Non-Aligned state actors or to collapse these in a homogenized ‘other’ position, but to take seriously contests at play.<sup>64</sup> The way resources are linked to authority, spatial imaginaries to material practices and impacts, and the way that this plays out through a discussion over resources where authority is implicated and contested is why I chose these debates specifically.<sup>65</sup> I take up the assertions of states whose law is linked to British Empire partly to attend to the interplay between the national and international, as the national context of my second example is Australia.<sup>66</sup> Partially also, then the domestic context provided by the Murray-Darling history (although they are not strictly contemporaneous) is a helpful backdrop to assertions made internationally. Certainly my account is not a complete account of either of these histories, even of the totality of the debates or narratives themselves. Reading the two sites together helps expose the continuation and interaction of specific extractive dynamics and techniques.

To contextualize interventions in the Murray-Darling, a necessary backdrop is the centrality of settler colonial extractive projects to claims of authority made by Australia, as First Nations scholars such as Irene Watson and Aileen Moreton-Robinson have shown.<sup>67</sup> Watson shows extractive projects including fracking and mining in Australia are intrinsically related

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<sup>62</sup> See for example on these links Barr, *supra* note 15.

<sup>63</sup> At the time, other signatory states included apartheid South Africa, Chile under Augusto Pinochet and Argentina, where a transition from the leadership of Jorge Videla had recently occurred. See UNGA, *supra* note 4 for participating states.

<sup>64</sup> See on the multiplicity of contests in the international sphere Charlotte Peevers, *The politics of justifying force: the Suez Crisis, the Iraq War, and international law* (Oxford: Oxford University Press, 2013).

<sup>65</sup> As opposed to later ones where the environmental protocol was implemented but the potential rupture in the structure of authority was not as explicitly contested. See Alessandro Antonello, *The greening of Antarctica: assembling an international environment* (Oxford: Oxford University Press, 2019) at 6-7.

<sup>66</sup> See for example on these links Barr, *supra* note 15.

<sup>67</sup> See generally Watson, *supra* note 48; Moreton-Robinson, *supra* note 48.

to state claims that state law is valid to the exclusion of First Nations' law.<sup>68</sup> A historical reading of interventions in the Murray-Darling can help bring into focus the different ways racialized possession, as Moreton-Robinson highlights, is claimed by moving and attempting to control river flows.<sup>69</sup> The names of these waterways, used by settler governments, are of course partial and colonially entangled. I maintain them for the purposes of tracing state interventions, but there are other names by which these rivers are known.<sup>70</sup>

I must also attend to environmental concerns, as Antarctica is now a site of significant glacial melting.<sup>71</sup> Also in the acknowledgement that catastrophic climatic effects are experienced disproportionality in the global South, I certainly do not dismiss the importance of mining and nuclear waste disposal bans restraining corporate intrusions.<sup>72</sup> I pay attention to the relations and cartography that are maintained whilst the ban is implemented, which I argue is not separable from extractivism that continues and increases elsewhere.<sup>73</sup> There has also been relatively recent rain near the Murray-Darling Basin, but the temporary easing of signals such as burning marshes or dry riverbeds should not be taken to mean that structure of extractive interventions or their legal relationships and ordering have fundamentally changed.<sup>74</sup>

This is not a history of global or colonial extractivism.<sup>75</sup> Both of these examples are about what happens to authority and its relationship to extractivism when it is claimed that extraction is not occurring or is reduced: in one instance, a (long-term but not permanent) mining ban, and another a discourse of saving and returning water to rivers it has long been taken from. The sites were chosen both for their relation to a discourse of restraining extraction, and for being spatially constructed as not entirely the solid land of the settler

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<sup>68</sup> Irene Watson, "Aboriginal relationships to the natural world: colonial 'protection' of human rights and the environment" (2018) 9:2 *Journal of Human Rights and the Environment* 119 at 123; 136-137; and the article generally.

<sup>69</sup> See Moreton-Robinson, *supra* note 48.

<sup>70</sup> See on contested naming generally Watson, *supra* note 48 at 70.

<sup>71</sup> See Jonathan Watts, *supra* note 2.

<sup>72</sup> See on these maldistributions, Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27 *Leiden Journal of International Law* 573 at 580.

<sup>73</sup> See on this escalation Scott, *supra* note 25 at 1.

<sup>74</sup> See Graham Readfearn, "Waters of Murray-Darling rivers join for first time in two years," *The Guardian* (13 April 2020), online: <<https://www.theguardian.com/australia-news/2020/apr/13/waters-of-murray-darling-rivers-join-for-first-time-in-two-years>>.

<sup>75</sup> Many have been told and remain to be told. See as examples Achiume, *supra* note 33; Katerina Martina Teaiwa, *Consuming Ocean Island: Stories of People and Phosphate from Banaba* (Bloomington, IN: Indiana University Press, 2014).

state's imaginary of static territorial authority.<sup>76</sup> Antarctica provides an example of the complex spatiality of the authority-extractivism relationship, and the Murray-Darling how the idea of a resource can be isolated, on the verge of disappearing or being used up, but still be mobilized as a way to maintain territorial authority.<sup>77</sup> These examples help to expose the ways in which, despite resources being posited as separable, extractivism is deeply connected to contests over land.<sup>78</sup>

## Position

Locating myself, to the materials as well as within bodies of work, requires discussing ways which I might arrive at being able to speak with this material, positioned and trained as I am in the forms of law and their epistemologies that I seek to unsettle. Anghie outlines methodological challenges with investigating stories of imperialism and colonialism,<sup>79</sup> including the need to locate 'concepts and lenses' that are 'adequate for this purpose.'<sup>80</sup> The frames that I adopt, examining narrative and jurisdiction, seek to destabilize the singularity and totality of claims to law and authority by state actors in international and national contexts.<sup>81</sup> Anghie concludes that the purpose of his account of Australia as Empire is that 'the unique character of Australia's relationship with imperialism can only be understood if different and yet connected forms of imperialism ... are considered together as opposed to separately.'<sup>82</sup> Kathleen Birrell also discusses possibilities of disembeddedness, complicity, or the reproduction of a discursive dynamic that silences the other and recreates a position of power to speak from.<sup>83</sup> On this point, she notes Gayatri Chakravorty Spivak's observation that 'the coloniser himself is constructed in relation to the colony.'<sup>84</sup> Yet Birrell traces a tentative path for a settler scholar embarking on a conversation about systems of state law that they benefit from. She proposes a continuous approach,<sup>85</sup> and one that foregrounds

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<sup>76</sup> On the stasis of the projected authority of a settler state in the case of the Anglo-Australian common law, see Barr, *supra* note 15.

<sup>77</sup> Scott points to the stark incompatibility between 'extractive logics' and other forms of understanding or relationship. See Scott, *supra* note 25 at 2.

<sup>78</sup> See Scott, *supra* note 23.

<sup>79</sup> Anghie argues that currently the methodological questions are heightened 'especially when the task of telling those histories from the perspective of the colonised is still largely incomplete.' Anghie, *supra* note 28 at 424.

<sup>80</sup> *Ibid* at 424.

<sup>81</sup> This is by reading them as partial, contested or incomplete. See for example on jurisdiction Pahuja, *supra* note 22 at 158; and on narrative generally see Fitzpatrick, *supra* note 10.

<sup>82</sup> Anghie, *supra* note 28 at 459.

<sup>83</sup> Birrell, *supra* note 17 at 49-50.

<sup>84</sup> Gayatri Chakravorty Spivak cited in Birrell, *supra* note 17 at 50.

<sup>85</sup> Birrell, *supra* note 17 at 49.

relationality, a ‘more open-ended view of discourse and communication,’<sup>86</sup> where it is possible to attempt to translate ‘between one hermeneutic moment and another,’<sup>87</sup> without seeking to “‘know,”’<sup>88</sup> if ‘knowledge implies domination.’<sup>89</sup> Following these insights, framing the project as an inquiry into law’s role in facilitating extractivism, I seek to engage both the instability and violence of imperial and colonial legal projections, and certainly not to produce knowledge about a site in a way that reproduces a centre-periphery dynamic about where knowledge is produced. I here attempt to locate myself in a similar manner to Birrell, who I read as seeking not only a position, but to direct her work towards creating a space with potential for plurality and attentiveness to existing resistive possibilities.<sup>90</sup>

This thesis attends to how international or state law are implicated in the sustaining dynamics of extractivism, and relatedly racial capitalism and the violence and instability of specific claims to authority.<sup>91</sup> I investigate these questions through looking at a set of debates on the Antarctic Treaty and at the Murray-Darling river system, specifically through the frames of the imaginary and the material and the analytics of jurisdiction and narrative, to which I now turn.

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<sup>86</sup> Jay Maggio, cited in Birrell, *supra* note 17 at 50.

<sup>87</sup> *Ibid*, drawing from the work of Walter Benjamin. Internal citation omitted.

<sup>88</sup> Jay Maggio, cited in Birrell, *supra* note 17 at 51.

<sup>89</sup> Birrell, *supra* note 17 at 51.

<sup>90</sup> *Ibid* at 51-53.

<sup>91</sup> See Achiume, *supra* note 33; Fitzpatrick, *supra* note 10.

## Chapter 1 – Extractivism: Locations and Methods

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This chapter sets out how I locate myself within multiple bodies of literature that understand extractivism as deeply linked to racial capitalism, imperialism and settler colonialism.

Understanding both the violent and unstable nature of claims to authority, and their relationship to extractivism, I engage the work of jurisdiction in order to expose contested practices of asserting legal authority,<sup>92</sup> as well as work on legal narratives. The work that narrative does for me in this thesis is to understand the connection between how a story of law becomes authoritative, which is contested in a different way to practices of jurisdiction. If this thesis concerns the relationship between authority and extractivism, both what authority is claimed from extractivism as well asserted through it, then this chapter develops an account of each of those parts of the relationship, which will be drawn out further in the two substantive chapters. The methods that I use to do so are an attention to histories, and engaging technologies: specifically, the work of techniques of space-making that rely on imperial imaginaries and a linear, homogenous temporality, and techniques of control and asserting ownership through movement, commodification and division.

### Part 1: Locations

There are many ways to understand the relationship between extractivism and claims to authority. This section outlines the ways that I locate my work within this relationship, where extractivism is deeply linked to coloniality, racialization and capital.

#### *Extractivism*

Resource extraction can be done on many scales and in many ways. Extractivism, in contrast, necessarily involves particular social processes linked to capitalism, state and corporate power, and certain forms of dispossession, to varying degrees.<sup>93</sup> Dayna Scott defines extractivism as

‘not an activity, but a relation.... a mode of accumulation in which a high pace and scale of ‘taking’ generates benefits for distant capital without generating benefits for local people. It is a way of relating to lands and waters that is non-reciprocal and oriented to

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<sup>92</sup> Dorsett and McVeigh, *supra* note 45.

<sup>93</sup> See Scott, *supra* note 25.

the short-term. Extractivism refers to a particular logic endemic to and intensifying under contemporary global capitalism, but also with a very long history.’<sup>94</sup>

Facundo Martín writes about extractivism as ‘an expression of political dominance.’<sup>95</sup> He highlights its ‘relational, omnipresent and temporal’ dimensions,<sup>96</sup> arguing that the nature of extractivism (and its uneven distributive effects) is complex and widespread. He engages work that points to extractive accumulation, degradation and ‘financialisation,’<sup>97</sup> compelling citing Maristella Svampa’s definition of a ‘political-economic-narrative consensus.’<sup>98</sup> He goes on to argue, however, that the dynamics of extractivism cannot be adequately accounted for without conceptualizing extractivism spatially, as produced by a certain global geopolitics rather than an analysis bounded by the nation-state.<sup>99</sup> Extractivism is not a static practice through time, and there is also rich work on the changing dynamics of neo-extractivism.<sup>100</sup> I maintain the use of the term extractivism to signal forms of historical continuity, without denying the changes in extractive practices.<sup>101</sup>

If Scott uses the ‘underlying political economy’ and the relations engendered by it as the primary analytic to account for extractivism,<sup>102</sup> writing that ‘the dynamics of extraction are shaped by the reality that the ‘taking’ by necessity must happen in the specific places where the resources are found,’<sup>103</sup> and Martín its spatiality and productive dimensions (all of which are relevant for my purposes), Macarena Gómez-Barris invokes an ‘extractive view’ that necessarily precedes extractive projects.<sup>104</sup> She argues that, ‘before the colonial project could prosper, it had to render territories and peoples extractible and it did so through a matrix of symbolic, physical, and representational violence.’<sup>105</sup> This violence involved social ordering as well as claims to territory and resources, and Gómez-Barris describes coloniality and

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<sup>94</sup> Scott, *supra* note 25 at 1-2.

<sup>95</sup> Facundo Martín, “Reimagining Extractivism: Insights from Spatial Theory” in Bettina Engels & Kristina Dietz, eds, *Contested Extractivism, Society and the State: Struggles over Mining and Land* (London: Palgrave Macmillan UK, 2017) 21 at 29.

<sup>96</sup> *Ibid* at 35.

<sup>97</sup> *Ibid* at 24.

<sup>98</sup> *Ibid* at 24, describing the work of Maristella Svampa. Internal citation omitted.

<sup>99</sup> *Ibid* at 29.

<sup>100</sup> See for example Maristella Svampa, “Commodities Consensus: Neoextractivism and Enclosure of the Commons in Latin America” (2015) 114:1 *The South Atlantic Quarterly* 65.

<sup>101</sup> See Scott, *supra* note 25.

<sup>102</sup> *Ibid* at 1.

<sup>103</sup> *Ibid* at 1.

<sup>104</sup> Macarena Gómez-Barris, *The Extractive Zone: Social Ecologies and Decolonial Perspectives* (Durham, United States: Duke University Press, 2017) at 5.

<sup>105</sup> *Ibid*.

capital as inseparable in constituting extractivism.<sup>106</sup> She calls attention to erasure and techniques of rendering invisible inherent in the extractive view, particularly with links to false proclamations of *terra nullius*.<sup>107</sup> Scott also points to ‘fierce resistance’ to extractivism, which ‘exposes deep rifts’ between ‘principles of deep relationality’ and ‘extractive logics.’<sup>108</sup> Gómez-Barris’ primary concern is artistic resistance projects that enable contestation of extractivism. In attending to those points of rupture, she notes, ‘like any system of domination, extractive capitalism is not totalizing in its destructive effects.’<sup>109</sup> Yet it is also necessary here to account for the overwhelming violence of extractivism, highlighted in the recent report by Tendayi Achiume, *Global Extractivism and Racial Equality*.<sup>110</sup> Achiume reports on the violence of global forms of extractivism, practices of colonial dispossession, slavery, racialized exploitation of labour,<sup>111</sup> and continuing patterns of power distribution.<sup>112</sup> She writes about the transnationality of extractivism, ‘not only did colonial extractivism plunder colonial territories and racially stratify labour globally, but it also forced territories of extraction into political and economic subordination to colonial nations.’<sup>113</sup> Achiume also calls attention to the centrality of both the corporate form and international law in structuring extractive processes.<sup>114</sup> Following these insights, it is not possible for my purposes to think about extractivism in the absence of racial capitalism, imperialism or settler colonialism, or the overlapping authorities of corporations and states.<sup>115</sup> I engage work on these concerns as they relate to extractivism here.

Anghie has also traced links between extractivism and imperialism and notably reports that an agreement over the administration of Nauru as a League of Nations Mandate territory included provision for all states involved not to intervene in any aspect of phosphate

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<sup>106</sup> *Ibid* at 4-5. See also Achiume, *supra* note 33 at 6-7 on the Berlin Conference and the centrality of colonization, extraction and race.

<sup>107</sup> Gómez-Barris, *supra* note 104 at 6.

<sup>108</sup> Scott, *supra* note 25 at 2.

<sup>109</sup> *Ibid* at 4. I will talk more about resistive possibilities in the concluding chapter. Gómez-Barris continues, ‘therefore, the extractive view sees territories as commodities, rendering land as for the taking, while also devalorizing the hidden worlds that form the nexus of human and nonhuman multiplicity. This viewpoint, similar to the colonial gaze, facilitates the reorganization of territories, populations, and plant and animal life into extractable data and natural resources for material and immaterial accumulation.’ *Ibid*.

<sup>110</sup> Achiume, *supra* note 33.

<sup>111</sup> *Ibid* at 6-7.

<sup>112</sup> *Ibid* at 6.

<sup>113</sup> *Ibid* at 8.

<sup>114</sup> *Ibid* at 6-10.

<sup>115</sup> Although I am not able to give a full account here (of which there are many) which each deserves.

mining.<sup>116</sup> Anghie exposes the significance of phosphate extraction to Australian imperialism towards Nauru and for the Australian state's development of characteristics of an imperial as well as a settler colonial nation, partly through reliance on international law.<sup>117</sup> As he demonstrates, discourses of racism were further mobilized to enable extractivism.<sup>118</sup> Cait Storr also examines racialization and the simultaneous reproduction of imperial extraction and settler colonialism (in the case of Australia), showing racialized 'supremacist anxieties'<sup>119</sup> influenced both domestic and international assertions of authority.<sup>120</sup> Pahuja draws from Frantz Fanon's work to write about racialization in relation to economic distribution, yet the same could be said for relations of extractivism. Pahuja highlights, 'for Fanon, the question of economic inequality can be separated neither from history in general, and the history of colonialism in particular, nor from the question of race.'<sup>121</sup> Pahuja points to the co-constitution of these, because 'race was – and remains – an operative (historical) category in the constitution of the 'human.'<sup>122</sup> Pahuja, writing about distinctions between Fanon and Thomas Pogge's accounts of international economic distribution, both calls attention to the way race constitutes the development project, and also how it is made invisible as an analytic, 'as a concern of the national sphere,'<sup>123</sup> which produces a positioning of race as 'no longer understood to be a global practice of ordering.'<sup>124</sup> Christopher Gevers, in examining the imaginaries of Pan-African literature and projects to 'radically re-imagine, and then re-write 'the global,'<sup>125</sup> draws from Pahuja's work to show how the nation-state creates forms restricting the legibility for discussing race and the international. Yet, he says, 'race was a, if not the, constitutive feature of the global order.'<sup>126</sup>

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<sup>116</sup> Austl, *Nauru Island Agreement Act (No 8) (Commonwealth)*, 1919, Art 13, cited in Anghie, *supra* note 28 at 431.

<sup>117</sup> Anghie, *supra* note 28 at 423.

<sup>118</sup> See Anghie's citation of racist attitudes documented by Maslyn Williams and Barrie Macdonald, that the people of Nauru 'could never be changed for the better by education, *much less by a sudden excess of prosperity*.' Cited in *Ibid* at 433. Emphasis added. Internal citation omitted.

<sup>119</sup> Storr, *supra* note 28 at 353.

<sup>120</sup> *Ibid* at 335 and generally.

<sup>121</sup> Pahuja, *supra* note 26 at 75.

<sup>122</sup> *Ibid*. On defining race as an analytic, Achiume also notes social construction of race and its structuring effects. Although constructed as a false biological account, 'it is centrally about the social, political and economic meaning of being categorized as black, white, brown or any other racial designation.' Achiume, *supra* note 33 at 4.

<sup>123</sup> Pahuja, *supra* note 26 at 76.

<sup>124</sup> *Ibid*.

<sup>125</sup> Christopher Gevers, 'To Seek with Beauty to Set the World Right: Cold War International Law and the Radical 'Imaginative Geography' of Pan-Africanism' in Craven, Pahuja & Simpson, *supra* note 12 at 492.

<sup>126</sup> *Ibid* at 508.

Shiri Pasternak, in an examination of Canadian settler colonial extractivist techniques for a special issue entitled *Getting Back the Land*, writes about the co-production of racial capitalism and settler colonialism.<sup>127</sup> She uses Ruth Wilson Gilmore's explanation of racial capitalism: 'a technology for reducing collective life to the relations that sustain neoliberal democratic capitalism.'<sup>128</sup> Moreton-Robinson also explains this co-constitution in relation to colonial Australia, that 'Cook's idea of possession was informed by the logic of capital.'<sup>129</sup> The racialized violence of settler colonial state law or claims to authority and extractivism are operative in an continuous way.<sup>130</sup> Moreton-Robinson writes of reasserting claims to white possession in a settler colony 'it takes a great deal of work...';<sup>131</sup> and settler states, she highlights, 'are extremely busy reaffirming and reproducing this possessiveness through a process of perpetual Indigenous dispossession.'<sup>132</sup> Yet the authority claimed in settler colonial extractivism is necessarily embedded in theft and ongoing territorial dispossession, it cannot be explained merely as a disembedded or dematerialized projection. Pasternak writes, drawing on Jodi Byrd's seminal work, that 'settler colonialism is not just a form of racialized violence, but a form of domination that is itself constituted by the materiality of land theft and genocide.'<sup>133</sup> Brenna Bhandar also draws on Byrd's work, highlighting that 'the conflation of racialization and colonization works to erase the central function played by territoriality in colonization and contemporary modes of dispossession.'<sup>134</sup> In doing so she also draws from Stuart Hall's work to argue that the 'uneven, nonlinear, and sometimes contradictory effects' of these cannot be guaranteed, at least not in any particular form.<sup>135</sup> She writes that 'the continual renewal of racial regimes of ownership is not an inevitability, as political imaginaries that exceed the confines of this juridical formation demonstrate.'<sup>136</sup>

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<sup>127</sup> Shiri Pasternak, 'Assimilation and Partition: How Settler Colonialism and Racial Capitalism Co-Produce the Borders of Indigenous Economies' (2020)19:2 *South Atlantic Quarterly* 301 at 301-302, and generally. She locates 'theories of racial capitalism grounded in the black radical tradition. Racial capitalism is a theory of the inseparability of race and capitalism that was developed by black intellectuals in South Africa.' *Ibid* at 303. Internal citation omitted.

<sup>128</sup> Wilson Gilmore cited in *Ibid* at 308.

<sup>129</sup> Moreton-Robinson, *supra* note 48 at 117.

<sup>130</sup> Pasternak, *supra* note 127 at 303. Pasternak writes, drawing from Jodi Melamed's work, 'this is true for the origins of the state, founded in colonization and slavery, but also in the ongoing reproduction of this violence through political-economic governance today.' *Ibid* at 303.

<sup>131</sup> Moreton-Robinson, *supra* note 48 at xi.

<sup>132</sup> *Ibid*.

<sup>133</sup> Pasternak, *supra* note 127 at 307. Internal citation omitted.

<sup>134</sup> Bhandar, *supra* note 41 at 25.

<sup>135</sup> *Ibid* at 11. She explains, 'in part this is because of the sheer heterogeneity contained within articulations of race and property ownership, occasioned by the resistance, refusal, negotiation, or recognition and acceptance of colonial relations of ownership by First Nations and other racialized subjects in settler colonial contexts.' *Ibid* at 13.

<sup>136</sup> *Ibid*.

Attending to the what Byrd calls the ‘territoriality of conquest,’<sup>137</sup> the way stolen land is necessarily central to forms of racial capitalism and extractivism in a settler colony, does not necessarily require adopting the concept of territory as it is defined by international law. Storr has exposed that the international legal concept of territory is deeply shaped by colonial epistemologies.<sup>138</sup> She usefully describes the notion of territory in international law as ‘fundamentally Eurocentric, a specific articulation of ‘the rightful relationship between community, authority and place,’ relying on abstractions that erase both land and relationality with it.<sup>139</sup> Martín also highlights how the concept of territory operates more broadly through the mobility of capital,<sup>140</sup> and cautions against a rigid notion, or conflation, between the state and territoriality.<sup>141</sup> Yet it is still a particular form of violent deterritorialization that settler colonial states necessarily assert through claiming legitimate sovereignty.

While I primarily focus on state claims, their authority and relationship to extractivism cannot be completely legible without also acknowledging corporate influence in constructions of these claims. Pahuja’s explanation of a history of competing claims to authority between the company and the state helps to understand the overlapping forms of influence claimed by corporate and state actors in relation to extractivism.<sup>142</sup> Pahuja describes both a rivalry and significant complicity between companies and states,<sup>143</sup> arguing that ‘historically, the financial capital market and the state were mutually constitutive.’<sup>144</sup> Elena Blanco and Anna Grear also discuss the material basis of connections between capital, extraction and Empire, and the centrality of the corporate form to consolidating state power.<sup>145</sup> They show how the transnational corporation as a formation enabled ‘early mercantile capitalism,’ and they trace its particular influence and protection from this

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<sup>137</sup> Byrd cited in Pasternak, *supra* note 127 at 307.

<sup>138</sup> See Storr, *supra* note 41.

<sup>139</sup> *Ibid* at 1. She notes that this denaturalizing is not to romanticize other ways of relating to land and waters, stating ‘it is rather a call to recognise the international legal concept of territory for what it is: recent, acculturated, colonial and, in its objectification of earth, complicit in contemporary environmental crisis.’ *Ibid* at 17.

<sup>140</sup> Martín, *supra* note 95 at 40; 25.

<sup>141</sup> *Ibid* at 30.

<sup>142</sup> See Pahuja, *supra* note 22 at 158.

<sup>143</sup> *Ibid* at 164.

<sup>144</sup> *Ibid* at 168. She explains, ‘the Crown ... ‘was, of course, the guarantor of their [companies] protected status’’. Robert Brenner cited in *Ibid* at 164. Internal citation omitted.

<sup>145</sup> Elena Blanco & Anna Grear, ‘Personhood, jurisdiction and injustice: law, colonialities and the global order’ (2019) 10:1 *Journal of Human Rights and the Environment* 86. They write that ‘America’s gold and silver enabled the expansion of the Spanish Empire’ and the ‘transatlantic trade in commodities brought a new affluence to the Netherlands and England through banking, finance and shipping.’ *Ibid* at 91.

point.<sup>146</sup> Overlapping corporate extractive activity also facilitates the state's simultaneous reproduction of its imperial and colonial positions through extractive projects.<sup>147</sup> As Katerina Teaiwa has identified regarding colonialism and the drive for phosphate consumption in Banaba, 'the colonial administration, businesses, and missionaries were a labyrinth of intersecting political and economic interests and agendas.'<sup>148</sup> These elements of extractivism: coloniality in distinct forms, racialization, overlapping corporate and state power also frame how claims to authority precede and arise from it.

### *Authority*

I use two conceptual frames to consider the claims to authority in this thesis: jurisdiction and narrative. Both registers help to examine the particularities of claims to authority, their inability to be totalizing, and the violence they entail. By examining these as elements of authority I am not intending to advance a definition of authority. Rather, I invoke them as partial and overlapping insights into what authority is claimed from extractivism as well asserted through it.

### *Jurisdiction*

Shaunnagh Dorsett and Shaun McVeigh's influential work on jurisdiction suggests that we can see jurisdiction as both the 'ordering of authority' and beyond such an ordering.<sup>149</sup> They show that jurisdiction 'declares the existence of law and the authority to speak in the name of the law [...] it gives ... a way of authorising law.'<sup>150</sup> They explain that jurisdiction has multiple elements, 'material representations' of authority such as mapping, technical practices of 'craft[ing]' law, and 'as practices, the idioms of jurisdiction concern the means of creating and ordering law.'<sup>151</sup> A number of scholars take up Dorsett and McVeigh's work of jurisdiction. Olivia Barr describes the notion of jurisdiction as 'a mode of authorisation, both ideationally and institutionally,'<sup>152</sup> related to 'technical and material practices.'<sup>153</sup> She also writes about jurisdiction's potential to 'ope[n] a domain of thought...concerned with how to

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<sup>146</sup> *Ibid* at 91.

<sup>147</sup> On this simultaneous reproduction see Storr, *supra* note 28, Anghie, *supra* note 28.

<sup>148</sup> Teaiwa, *supra* note 75 at 19.

<sup>149</sup> Dorsett and McVeigh, *supra* note 51, cited in Barr, *supra* note 15 at 62.

<sup>150</sup> Dorsett and McVeigh, *supra* note 51 at 4-5.

<sup>151</sup> *Ibid* at 5.

<sup>152</sup> Barr, *supra* note 11 at 80.

<sup>153</sup> Barr, *supra* note 15 at 59.

live with law and how to create and engage lawful relations.’’<sup>154</sup> It can, as Barr shows, provide a way to think ‘beneath the rhetoric and representations of sovereignty and territory that tend to dominate the ways in which we understand the place of law.’<sup>155</sup> Pasternak has also expressed that jurisdiction is a crucial way that authority is organized in settler colonies,<sup>156</sup> she writes ‘jurisdictional encounters produce colonial space.’<sup>157</sup> Pasternak argues that ‘state authority is produced and reproduced by drawing this line of difference around its shifting spheres of influence.’<sup>158</sup> She explains how, ‘settler-state logic is not a hegemonic logic “out there” but a specific and active construction of authority through the limit-making practices of jurisdiction.’<sup>159</sup> Pasternak invokes Mariana Valverde’s insight that ‘state claims to jurisdiction seek to naturalize its spatial differentiation,’<sup>160</sup> when in fact imperial intrusions into territory ‘composed a fabric that was full of holes.’<sup>161</sup> Pahuja, writing about jurisdiction and its potential as an analytical frame, argues that ‘an emphasis on legal form and practices of authorization in the name of law,’ can expose competing claims to authority, decentring state claims to totality.<sup>162</sup> She offers an approach to thinking about legal authorization as ‘practices of authorization which are not fixed, final or settled, but ongoing, and always encountering other - often rival – practices.’<sup>163</sup> For my purposes, the analytic frame of jurisdiction assists to expose the specific practices of authority claimed through extractive projects, as well as treating these oppressive claims as non-totalizing, and interacting with resistance from competing exercises of jurisdiction, legal and political practices. The method of analysing technologies, or specific practices of generating authority that I argue emerge from looking at the sites through the lens of extractivism, is closely linked to reading authority through jurisdiction.

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<sup>154</sup> *Ibid* at 62. In another chapter she describes ‘‘jurisdictional thinking’ as giving ‘legal form to life and life to law.’’ Dorsett and McVeigh, *supra* note 45, cited in Barr, *supra* note 11 at 81.

<sup>155</sup> Barr, *supra* note 15 at 59.

<sup>156</sup> Pasternak, *supra* note 127 at 303.

<sup>157</sup> Shiri Pasternak, ‘Jurisdiction and settler colonialism: where do laws meet?’ (2014) 29:2 Canadian Journal of Law and Society 145 at 146.

<sup>158</sup> Pasternak, *supra* note 19 at 71.

<sup>159</sup> *Ibid* at 72.

<sup>160</sup> Valverde cited in Pasternak, *supra* note 157 at 153.

<sup>161</sup> Pasternak, *supra* note 157 at 148.

<sup>162</sup> Pahuja, *supra* note 22 at 169.

<sup>163</sup> *Ibid* at 171.

## *Narrative*

‘The monster’s discourse is premised upon absolutes, inevitability, and the lack of any alternative to his proclaimed future order and authority.’<sup>164</sup>

If the work of jurisdiction exposes contested practices of asserting legal authority, the work that narrative does for me in this thesis is to understand the connection between how a story of law becomes authoritative, which is contested in a different way. The approach of reading narrative also helps to expose law’s productive role. Ruth Buchanan engages international law not as a regime but ‘an array of contexts, techniques and projects deeply entangled with practices of ‘world-making.’’<sup>165</sup> She continues, on understanding the nature of this embedded partiality, ‘law is neither wholly distinct from, nor wholly determinative of, these complex processes.’<sup>166</sup> Craven, Pahuja and Simpson also highlight the productive role of narrative in law, writing that international law functions in a way that should be considered as,

‘not merely ‘legitimizing’ policies and practices or providing a vehicle for collaborative endeavours, but authoring and organising global life, shaping identities, manufacturing interests, stabilising borders, controlling access to resources, privileging and distributing authority.’<sup>167</sup>

There are a number of lenses that I take up to look at the work of legal narratives, including discourse and performance, archiving and myth. Although distinct, I engage each with the purpose of examining how a legal narrative becomes authoritative. Discourse and performance help to both examine exertions and justifications of authority, as well as to read the productive dimensions of legal narratives as contested. Archiving helps to expose the simultaneous facilitation and obfuscation that occurs in some narratives. Myth helps to expose the key contradictions, violence and instability of specific claims to legal authority.<sup>168</sup> These each are discussed with the aim of generating an engagement with the rich work on the instability of legal narration, and its violence. I do not seek to produce an account of any specific element, or of legal narration more broadly, but engage this work to better

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<sup>164</sup> Adil Hasan Khan, “Tragedy’s Law(s): Receiving the Mythology of Modern Law Today,” (2017) 43:2 Australian Feminist Law Journal 273 at 274. Hasan Khan is speaking of Slavoj Žižek’s translation of Antonio Gramsci’s text on the interregnum. Internal citation omitted.

<sup>165</sup> Ruth Buchanan, “End Times in the Antipodes: Propaganda and Critique in *On the Beach*” in Craven, Pahuja & Simpson, *supra* note 12 at 560-1. Internal citation omitted.

<sup>166</sup> *Ibid* at 561.

<sup>167</sup> Craven, Pahuja & Simpson, *supra* note 35 at 23.

<sup>168</sup> This is not to say all authors have the same inquiry, but I read their work as contributing to the question of narrative as it concerns me here. See generally on power of storytelling in legal authority Buchanan and Johnson, *supra* note 45.

understand the links between not only the authority claimed by extractive projects, but also that sought to be generated through them and their enactment and legitimization. Alongside technologies, I use this work to generate a reading of the implications of claims to authority through extractivism, and their potential unravelling. I engage each of these forms of narrative as a way to better understand aspects of the central inquiry of this section, how narrative generates authority.

### Discourse and performance

Discourse and performance, for my purposes here, help to embed actors in discussions of narrative as well as to expose narratives as contested, performed or utilized to gain authority. Charlotte Peevers examines public discourse as a way to interrogate the tactics used by the British and United States governments in justifying intervention and the use of force.<sup>169</sup> She argues that the purpose of this exercise is to reveal the inherent contestation and potential for indeterminacy in legal justification, against a narrative of certainty.<sup>170</sup> Peevers identifies the potential for ‘thick descriptions’ and understandings to reveal useful points of departure in public discourse, including a precise tracking of political economy, narrative role, and how it produces ‘a particular set of meanings and lessons from history as imagistic, as imagined, as always ready to change with each moment of rupture.’<sup>171</sup> Peevers also invokes the notion of juridical theatre as a way to re-read or counter-read narratives of legal authority.<sup>172</sup> Reading crises over control of the Suez Canal as plural, she takes ‘on the making of the crisis as a kind of theatrical event,’<sup>173</sup> asserting the ‘juridical significance of dramatic crisis,’<sup>174</sup> situated with ‘distinct Cold War scripts,’<sup>175</sup> while resisting the notion that a singular resolution would be possible or desirable.<sup>176</sup> The plurality of the crises she attributes to different meaning-making projects, indeed a ‘crisis of meeting’<sup>177</sup> and its attendant multiple effects ‘the choreography of

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<sup>169</sup> Peevers, *supra* note 64 at 1.

<sup>170</sup> *Ibid* at 249-250.

<sup>171</sup> *Ibid* at 198-199. See also on thick descriptions Luis Eslava, “Dense Struggle: On Ghosts, Law and the Global Order” in Andreas Philippopoulos-Mihalopoulos, ed, *Routledge handbook of law and theory* (Abingdon: Routledge, 2019) 15.

<sup>172</sup> Charlotte Peevers, “International Law, Cold War Juridical Theatre and the Making of the Suez Crisis” in Craven, Pahuja & Simpson, *supra* note 12. In a chapter for the same collection, Hasan Khan also notes the importance of staging or ‘the register of the dramatic.’ See Adil Hasan Khan, “The ‘Bihar Famine’ and the Authorisation of the Green Revolution in India: Developmental Futures and Disaster Imaginaries” in Craven, Pahuja & Simpson, *supra* note 12 at 418.

<sup>173</sup> Peevers, *supra* note 172 at 467.

<sup>174</sup> *Ibid*.

<sup>175</sup> *Ibid*.

<sup>176</sup> *Ibid* at 488.

<sup>177</sup> *Ibid* at 467.

the crisis simultaneously threatened to radically destabilise the existing legal order and to entrench a repetition of particular forms of legal authorship and sovereign authority.<sup>178</sup> Indeed a dramatic reading is inherently connected to the juridicity of competing assertions.<sup>179</sup> As Peevers states, ‘not one step removed from legal performance and authorship but intrinsically intertwined with them.’<sup>180</sup> In this way, its scripts also are both specific and ongoing, shifting and recurring, which is a useful approach to interrogating the legal narratives that I take up in this thesis. Following this, discourse and performance are useful analytical frames to approach the multiplicity of legal narration, and the work done to seek to authorize or stabilize one.

### Archiving

Archiving is a concept that I engage with, through particular authors, to describe a specific dual quality in certain legal narratives: that hiding a form of violence through narrative can also authorize it.<sup>181</sup> It is helpful for the analysis in this thesis as the forms of ordering extractivism that I argue are authorized through claims to lawful authority are not explicitly presented as supporting extractivism. For these reasons, the concept of archiving is productive in exposing law’s relationship to particular forms of violence and the way that this is authorized through narrative.<sup>182</sup> Stewart Motha defines archiving as the way that legal fictions simultaneously facilitate and deny or hide sovereign violence.<sup>183</sup> He writes that, in his work, the “archive” is understood as both the origin and function of law.<sup>184</sup> Renisa Mawani has also written on how law expands its authority through the archive, which is used to hide law’s original and continuing violence.<sup>185</sup> She calls this law’s ‘double logic of violence,’<sup>186</sup> which she defines as a ‘reciprocal and reinforcing movement ... the preservation and destruction by which law generates the veracity of its own legality.’<sup>187</sup> For instance, I will

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<sup>178</sup> *Ibid*

<sup>179</sup> On the juridicity of narratives and artistic texts see also Birrell, *supra* note 17 at 35, citing Jacques Derrida.

<sup>180</sup> Peevers, *supra* note 156 at 490. Peevers explains, ‘the dramatisation of political events as crisis would be repeated again and again.’ *Ibid*.

<sup>181</sup> See Stewart J Motha, *Archiving sovereignty: law, history, violence* (Ann Arbor: University of Michigan Press, 2018).

<sup>182</sup> *Ibid*.

<sup>183</sup> *Ibid* at 6-7, 20-21 and generally.

<sup>184</sup> *Ibid* at 2.

<sup>185</sup> Renisa Mawani, “Law’s Archive” (2012) 8 Annual Review of Law and Social Science 337.

<sup>186</sup> *Ibid* at 341.

<sup>187</sup> *Ibid*. Both Motha and Mawani draw from Derrida’s *Archive Fever*. Mawani explains, ‘the archive’s juridical status is clearly expressed in its etymology. *Arkhe* ‘names at once the *commencement* and the *commandment*.’ Derrida cited in *Ibid* at 340. Although Mawani differs to Fitzpatrick, whose argument I later adopt, on the groundlessness of legal authority. She says, ‘viewed as such, law can no longer be conceived as a groundless ground or a “vacuity of origin,” ... law is the archive.’ *Ibid* at 351. Motha also states, ‘at the heart of Derrida’s

later argue that extractivism is utilized in this way to both found claims to authority to govern Antarctica, and forms of global extractivism are implicitly justified and reproduced through the maintenance of the structures of authority. Indeed, Motha shows how narratives of authority reinscribe themselves and their violence into the future, explaining

‘Authority needs a story—an act of literature. Violence has a grip on the future, an archival future that needs to be reimagined and reinscribed. The narratives of origin are marked, re-marked, or sometimes (paradoxically) inscribed for the first time in the process of being “recounted.” How does the law recognize and disavow sovereign violence, and yet preserve forms of sovereignty founded on that violence?’<sup>188</sup>

Following Mawani, the archive is also a useful concept to understand the necessary instability of legal narration, how any claim to totality is undermined by what is sought to be repressed and obscured.<sup>189</sup> Mawani uses Birrell’s work to show that law and the archive are ‘a place of haunting.’<sup>190</sup> She says, ‘read through the archival turn, law as archive is an unequal and incomplete regime of power/knowledge... It operates simultaneously as a potentially oppressive modality of governance and a site of creative opening.’<sup>191</sup> This will later become important for me in considering the resistive possibilities inherent in the liquidity, or instability of claims to authority that co-exists alongside the violence of these claims. Mawani writes that instability persists despite ways that ‘law’s archive maintains a juridico-political status that is both material and imaginary.’<sup>192</sup> This instability or opening is also a key methodological tool, which means that the tracing of imperial and colonial strategies is not presented as totalizing or eschewing resistance. It is this idea of law as archive that allows legal narratives to be examined for how they construct the fiction of original, proper, or singular authority. These constructions are prevalent in the examples that I discuss in this thesis.

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examination of the archive was a concern with understanding the compulsion to excavate the past.’ Motha, *supra* note 181 at 7. Motha draws particular attention to the presence of archiving manoeuvres amongst us, stating ‘like Benjamin I contend that this is not archaic in the sense of “what-has-been,” but an archaism that is present in the here and now.’ Motha, *supra* note 181 at 20. Internal citations omitted.

<sup>188</sup> Motha, *supra* note 181 at 20.

<sup>189</sup> Mawani, *supra* note 185 at 351-352.

<sup>190</sup> *Ibid* at 352.

<sup>191</sup> *Ibid* at 356.

<sup>192</sup> *Ibid* at 351. She also states later that part of the double logic of violence, ‘that underwrites law as archive is not solely grammatological or epistemological but also ontological and material.’ *Ibid* at 357.

## Mythology

Mythology is another analytical frame that I use to unpack the relationship between the instability and violence in claims to law and authority, particularly in a universalized imperial international law or the law of a settler colonial state. States use both of these forms of law to, impossibly, claim a singular and totalizing legal position. In using the work of mythology, I draw from Peter Fitzpatrick's seminal work, *The Mythology of Modern Law*. Fitzpatrick's principal argument is that 'law as a unified entity can only be reconciled with its contradictory existences if we see it as myth.'<sup>193</sup> Many scholars have taken up Fitzpatrick's insights and also engage the mythological qualities of modern law. For instance, Shane Chalmers explains Fitzpatrick's insight that mythological reconciliation of contradictions within modern law (including what I refer to here as state law or colonial law) is needed to project coherence, 'despite being intrinsically plural, the law remains 'distinct, unified and internally coherent.'<sup>194</sup> Adil Hasan Khan also engages Fitzpatrick's work, writing that 'to make this disparate discourse cohere ... 'deific attributes' would be required.'<sup>195</sup> Yet as Chalmers also highlights, 'law as myth' that showed the constitutive relation between racialised imperialism and Occidental modern law,<sup>196</sup> that 'this particular mythology is essentially racist, having been forged in the experience of European colonialism.'<sup>197</sup> Hasan Khan's analysis of the uncertainty and violence of law's myths proposes that what is required in these times is 'an account that is attentive to and orientates us towards ... other (international) laws.'<sup>198</sup> He argues that 'in a world in which the '(white) mythic conscience' of the 'moderns' is slowly unravelling,'<sup>199</sup> where 'mythological consciousness has been partially torn, such that the older mythology no longer orders the world but still lingers on as a remnant that could potentially be appropriated by newer mythologies, now jostling to take its place.'<sup>200</sup> The work of mythology as an analytic is crucial to exposing the dual quality of

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<sup>193</sup> Fitzpatrick, *supra* note 10 at 1.

<sup>194</sup> Fitzpatrick cited in Shane Chalmers, 'Negative Mythology' (2020) 31 *Law & Critique* 59 at 63.

<sup>195</sup> Hasan Khan, *supra* note 164 at 282.

<sup>196</sup> Chalmers, *supra* note 194 at 60. Hasan Khan also writes that, 'this mythology of progress was never without the move of othering.' Hasan Khan, *supra* note 164 at 285.

<sup>197</sup> Chalmers, *supra* note 194 at 63. Chalmers continues 'not only did Occidental modern law obtain its identity in the encounters between the peoples of the Old and the New worlds, but it also became 'a prime justification and instrument of imperialism', ... to begin with, modern law is set against a certain otherness, or 'certain "others" who concentrate the qualities it opposes.' *Ibid*.

<sup>198</sup> Hasan Khan, *supra* note 164 at 294.

<sup>199</sup> *Ibid* at 293.

<sup>200</sup> *Ibid* at 275. Speaking of the work the form of tragedy does, Hasan Khan states that 'stag[ing] tragedies of modern international law' can be a way to 'receiv[e], and re wor[k], broken-down mythology.' *Ibid* at 273.

violence and instability in the legal discourse asserted over the sites I look at, as well as to read it as a partial account amongst multiple legal narratives.

The work of legal narratives, including discourse and performance, archiving and myth, each enable a particular way to examine the instability of the state's legal narration, and its violence. These distinct frames are drawn together by a concern with how a particular legal narrative becomes authoritative, and what the implications of this claim to authority are. Part of the way that I analyse these links is through close attention to narratives and the forms of authority asserted through them. These frames are a useful set of locations because they assist to understand and expose the links between, not only the authority claimed by extractive projects, but also that sought to be generated through them.

## **Part 2: Methods**

There are two ways that I have primarily thought about method. One is through an attention to history, partly because as Pahuja notes, discussing international law ahistorically commits an account to a problematic teleology of progress.<sup>201</sup> It is also the case that the Antarctic debates occur within a particular time that is necessarily linked to various conceptions of history – the Cold War. Decontextualizing or disembedding these debates would work to obscure the ways in which they can be understood today. I engage history as a method briefly, so as to be able to do this contextualising work, although my account is not a history as such. The second, and one that I spend more time with, is attending to technologies as practices of authority-making. This helps to examine the specific violence, instability and points of rupture and resistance of the authority-extractivism relationships as I have read them in these two sites. It will also help to draw out in the concluding chapter the implications for these moves toward claiming authority. Through a close reading of the discourse on restraining extraction for each site, I draw from these two methods in distinct ways. In the chapter on Antarctica I investigate the technologies enacted through the international legal framework and its effects in relation to the sustaining dynamics of global extractivism.<sup>202</sup> In the chapter on the Murray-Darling I investigate the historical context and continuities between previous extractive interventions and current discourse of sustainable diversion.

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<sup>201</sup> See Pahuja, *supra* note 22.

<sup>202</sup> On a careful examination of effects as method see Mariana Valverde, 'Introduction' in *Law's Dream of a Common Knowledge* (Princeton, NJ: Princeton University Press, 2003).

### *Histories, and telling them*

Pahuja argues that any account that engages international law ‘requires an appreciation of its history,’<sup>203</sup> specifically a ‘critical or unofficial history which is attentive to power.’<sup>204</sup> She shows how accounts that take the historical formation of the law for granted are problematic for how they present law, ‘understood implicitly as having been formed or ‘fixed’ at some point *outside* the time or place of the history being told.’<sup>205</sup> Craven, Pahuja and Simpson outline a strategy of ‘unreading’ conventional historiography.<sup>206</sup> Craven also engages the possibility of work that pays close attention to distinctive world-making practices and does not reproduce narratives of universalization through narrating a teleological path.<sup>207</sup>

Similarly, I have not chosen to present a linear history, although each of these stories of extractivism has long historical roots. The form of the Murray-Darling story takes a more continuous approach. Yet, particularly for speaking about Antarctica, I draw from Rose Parfitt’s historiographical proposal of a ‘‘modular’ approach.’<sup>208</sup> Aspects of her work, she explains, are conceived ‘not as links in a single chain, but instead as separate but related historical ‘items’ placed within a theoretical ‘frame.’’<sup>209</sup> This is a helpful methodological point to follow as it outlines how a particular moment, for my purposes a set of debates, can be part of a non-linear historiographical inquiry. Parfitt relates each item by and within her theoretical frame. I have related the debates to techniques of space-making and temporalities that are necessarily connected to other times and locations. I use these relationships to argue that the forms of global extractivism I suggest are authorized through the debates I examine cannot be temporally or spatially confined to that particular year or to the Antarctic continent. In adopting this approach, however, Parfitt cautions that thick descriptions that focus on

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<sup>203</sup> Pahuja, *supra* note 22 at 169.

<sup>204</sup> *Ibid* at 170.

<sup>205</sup> Sundhya Pahuja “Book Review: Law’s History and History’s Laws” *Il mestiere di storico* 2 (2013), available at SSRN <<https://ssrn.com/abstract=3100626>> at 1. Xavier, Bhatia, Natarajan and Reynolds also describe an element of the praxis of attending to history in the context of TWAIL scholarship, to ‘unpack and deconstruct colonial legacies of international law.’ Xavier et al, “Placing TWAIL Scholarship and Praxis: Introduction to the Special Issue of the Windsor Yearbook of Access to Justice” (2016) 33:3 *Windsor Yearbook of Access to Justice* v at v.

<sup>206</sup> They are ‘concerned with unravelling, picking apart, and troubling.’ See Craven, Pahuja & Simpson, *supra* note 12 at 4.

<sup>207</sup> See Matthew Craven, “Theorising the Turn to History in International Law” in Anne Orford & Florian Hoffman, eds, *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016) 21.

<sup>208</sup> Rose Parfitt, *The process of international legal reproduction: inequality, historiography, resistance*, (Cambridge, United Kingdom: Cambridge University Press, 2019) at 15.

<sup>209</sup> *Ibid*.

complexity and contextualisation don't lose political charge.<sup>210</sup> I focus on a particular moment and its relationship to imperial legal imaginaries and practices in order to draw out the political consequences of the debates and the system of authority being debated in order to not accept the ways in which this might be hidden in the accounts of certain signatory state actors. In thinking with a modular approach that does not disengage with structural violence, I also draw from Susan Marks and Andrew Lang's proposal of a Benjaminian reading of historiography. Particular methodological elements from Marks and Lang's analysis include Walter Benjamin's exposition of historical 'similarity and contact' and 'the 'flash' that was his way of expressing historical comprehension.'<sup>211</sup> They explain his notion of the flash, a 'memory' of the past as a way of being in contact with or understanding it.<sup>212</sup> The idea of the 'flash,' for my purposes, also helps to understand the way a historic moment can continue to speak today. Because my account of extractivism is related to legal structures concerning Antarctica and focuses on a specific set of debates, the idea of a modular history, or the moment of a flash is helpful in understanding what can be drawn from a historic moment as well as or instead of looking at a sequence. For my purposes, attention to historical moments, whether continuous or modular, helps to see the ways extractivism is ordered by state or international law, even if current discourse does not explicitly engage extractive projects.

### ***Technologies***

Technologies as a methodological tool enables tracing the specific operation of legal regimes.<sup>213</sup> Valverde notes in work drawing from Michel Foucault that 'plural powers necessarily deploy plural knowledges – [so] we will be motivated to study the workings of particular knowledge moves.'<sup>214</sup> In this thesis, attending to particular techniques help to expose both extractive ordering, and the generation of authority as they are visible in a specific instance. Dorsett and McVeigh explain the relationship between examining technologies and forms of jurisdiction as looking at 'how the technologies of jurisdiction are

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<sup>210</sup> See Rose Parfitt, "The Spectre of Sources" (2014) 25:1 *European Journal of International Law* 297 at 304, drawing from Christopher Tomlins' work. Internal citation omitted.

<sup>211</sup> Andrew Lang & Susan Marks 'Even the dead will not be safe: international law and the struggle over tradition' in Wouter Werner, Marieke de Hoon & Alexis Galán, eds, *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge: Cambridge University Press) 321 at 323.

<sup>212</sup> *Ibid.*

<sup>213</sup> See on the merits of tracing the operation of specific legal regimes Bhandar, *supra* note 41.

<sup>214</sup> Mariana Valverde, 'Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory' (2009) 18:2 *Social & Legal Studies* 139 at 143. Anghie makes a similar point, by grounding history in specific techniques 'a study ... might provide a detailed sense, in a very distinct and concrete way, of Australia's Empire in its actual operations.' Anghie, *supra* note 28 at 455.

engaged in the creation and arrangement of lawful relations, and with how the technologies of jurisdiction give us the form of law.’<sup>215</sup> They usefully define technology as an inquiry in the following way

‘Technology derives from the Greek *technê*, meaning craft, art or strategy. In a classical sense, *technê* described a power or capacity to produce things whose eventual existence was contingent upon the exercise of that power; things whose existence was ‘caused’ by the craftsman. *Technê* (craft), as opposed to *epistêmê* (knowledge), connotes practical knowledge or practices ordered towards the production of something.’<sup>216</sup>

This definition is helpful for my purposes for highlighting a number of relevant elements, particularly the strategy, the productive dimension of a technology, and its relation to power. The technologies that I examine here are space-making, imaginaries, temporality and movement.

### *Space-making*

‘Settler colonialism and extractive capitalism reorganized space and time.’<sup>217</sup>

A spatial analysis is central to my thesis because the way that extractivism is authorized in the set of debates concerning Antarctic authority cannot be grasped without a dispersed and interconnected conception of space, rather than one that is confined to the Antarctic continent. In Chapter 3, space also becomes an important tool of analysis. In that case it helps, not to make the argument that extractivism is authorized, which I argue occurs through the material practices of movement, division and commodification, but rather to expose the consequences of how these extractive practices generate a colonial legality. In this way, the extractivism directed towards the Murray-Darling river system is relevant beyond this region in considering techniques of the settler colonial state of Australia to project a singular, totalizing form of legal authority. In the last chapter, spatialized legal ordering becomes a relevant analytic to read the implications of multiple resistive possibilities and challenges to the forms of legal ordering that authorize extractivism and how authority is spatially distributed.<sup>218</sup>

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<sup>215</sup> Dorsett and McVeigh, *supra* note 51 at 54.

<sup>216</sup> *Ibid* at 55. Although they note ‘There is, however, no strict dividing line between the two.’ *Ibid*.

<sup>217</sup> Gómez-Barris, *supra* note 104 at 6.

<sup>218</sup> See Sarah Keenan, *Subversive property: law and the production of spaces of belonging* (Abingdon: Routledge, 2015).

Defining space as an analytic, Martín writes that beyond a ‘geophysical referent,’ space is also social.<sup>219</sup> He explains that his engagement with critical space theory produces a plural concept of space, neither as a ‘container’ or solely a result of construction.<sup>220</sup> Barr invokes a definition of space as the

‘outcome of a series of highly problematic temporary settlements that divide and connect things up into different kinds of collectives which are slowly provided with the means which render them durable and sustainable.’<sup>221</sup>

Martín also argues that focusing on contests over authority is helpful for seeing how spaces of extractivism are created, ‘the complex and embedded spatiality of social and political practices that have built these multiple extractivist spaces.’<sup>222</sup> Martín particularly speaks of constructions of ‘heterotopic’ or ‘other’ spaces, which I take as a productive way of examining the particular epistemic construction of extraction from waters and ice.<sup>223</sup> Sarah Keenan writes of the benefits of using space as a concept in legal work, ‘factors that are otherwise overlooked come into view.’<sup>224</sup> For instance, Pasternak highlights how interrogating the spatiality of legal assertions can reveal how ‘dominant spatial representations of jurisdiction ... have obscured its highly political work.’<sup>225</sup> She writes, ‘though the space of state territory is projected as an undifferentiated, absolute, and bounded space, it is in fact nothing of the sort.’<sup>226</sup> In doing so, spatiality and legality do not necessarily need to be considered as a binary, but rather as overlapping forms of ordering. Barr describes David Delaney’s identification of a false binary between law and space, ‘arising from the dichotomies encoded in the formulation of the field itself as law as ‘legality’ and geography as spatiality,’<sup>227</sup> and Craven, Pahuja and Simpson also refer to the interrelatedness as ‘juridical spatiality.’<sup>228</sup> This is relevant for drawing a co-constitutive connection between practices of jurisdiction or legal narratives that work to claim authority over space, as we will see occurring in distinct ways in both substantive chapters.

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<sup>219</sup> Martín, *supra* note 95 at 27.

<sup>220</sup> *Ibid* at 23.

<sup>221</sup> Nigel Thrift, cited in Barr, *supra* note, 11 at 92.

<sup>222</sup> Martín, *supra* note 95 at 29

<sup>223</sup> Martín, *supra* note 95 at 33-34. He draws from Foucault’s work on heterotopias and ‘other spaces’ which Craven (*supra* note 38) also uses – both have influenced my thinking here.

<sup>224</sup> Keenan, *supra* note 218 at 5.

<sup>225</sup> Pasternak, *supra* note 19 at 21.

<sup>226</sup> Pasternak, *supra* note 157 at 154.

<sup>227</sup> Barr, *supra* note 11 at 91.

<sup>228</sup> Craven, Pahuja & Simpson, *supra* note 12 at 13 discussing Scott Newton’s chapter in the collection.

Equally, space requires time to render it legible.<sup>229</sup> Keenan and Barr both draw from Doreen Massey's formulation of space, Barr writing that 'space is not timeless, but is in fact time-full,'<sup>230</sup> and Keenan showing that conceiving of space as 'not fixed in time'<sup>231</sup> helps to disrupt 'the Western philosophical privileging of time over space.'<sup>232</sup> The interaction between technologies of space-making and temporality is visible in the ways signatory states to the Antarctic Treaty construct an imperial legality that locates the power to decide, extract and profit in the global North. Gómez-Barris also writes on how extractivism 'demarcates [both] the temporalities and spatial catastrophe of the planetary through a universalizing idiom and viewpoint that hides the political geographies embedded within the conversion of complex life.'<sup>233</sup> This becomes important because although I analyse technologies of space-making and temporalities separately in the chapter on the Antarctic debates, the technologies work together and it helps to also hold them in mind as both contributing to constructions of a global extractivism that is visible in an international context of imperial ordering.

Techniques of space-making, including disciplinary knowledge forms, that scholars examine to reveal specific elements of legal construction are enacted in multiple ways. Here I briefly consider the work of the knowledges of geography and geology, which are both prevalent discourses in justifying extractivism in the examples of this thesis. In discussions of extraction in Antarctica, an imperial geography is constructed to maintain existing international economic ordering and reinforce the North profiting from extraction. In the Murray-Darling example, a rendering of the river as non-living resource works to make commodifying it more legible.

The language of geography is often utilized to naturalize developmentalist interventions, as Timothy Mitchell's work shows.<sup>234</sup> Mapping work is a key technology of colonialisms, and Gómez-Barris also speaks of mapping projects using surveillance technologies to produce knowledges that contribute to extractive projects.<sup>235</sup> Gevers also describes what he terms 'imaginative geography,' a concept he links writing with imagining (and reimagining) global

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<sup>229</sup> Barr, *supra* note 15 at 93.

<sup>230</sup> *Ibid.*

<sup>231</sup> Keenan, *supra* note 218 at 11.

<sup>232</sup> *Ibid* at 48.

<sup>233</sup> Gómez-Barris, *supra* note 104 at 4.

<sup>234</sup> See Timothy Mitchell, *Rule of experts: Egypt, techno-politics, modernity* (Berkeley: University of California Press, 2002), particularly Chapter 7 at 169-195.

<sup>235</sup> Gómez-Barris, *supra* note 104 at 7.

ordering.<sup>236</sup> Speaking of Pan-Africanism and literary interventions, he writes about the project's 'imaginative counter-geography' or 'radical 'imaginative geography.''<sup>237</sup> He defines imaginative geography as 'the (political) geography of 'openly imaginative' texts'<sup>238</sup> and 'the imaginative nature of (political) geography.'<sup>239</sup> Writing about a W. E. B. Du Bois essay from 1921 and its interruption to 'the forms, temporality and orientation of geography,' he argues that the essay 'disturb[s] the innocence of geography and politicize[s] the writing of global space.'<sup>240</sup> Gevers argues that attending to imaginative geography also exposes the discipline of geography as also constructed by imaginaries and discourse, albeit with strong material effects.<sup>241</sup> He characterizes the way of seeing produced by geographic knowledge as, 'the central conceit remains that 'geography does not argue; it just is.''<sup>242</sup> In the way that naturalizing discourses of geography can be put to work in claiming authority, it is useful to consider geographical proclamations as partially as space-making technology, and partially an imaginary – a complex system of representation. This is in part due in part to the role of geographical knowledge and imaginaries instituting imperial violence through international law.<sup>243</sup>

Taking geology as a forms of constructed knowledge production involved with extraction, Kathryn Yusoff explains her work as intended 'to undermine the *givenness* of geology as an innocent or natural description of the world.'<sup>244</sup> She says geology helps solidify the operation of property and commodification, 'property as an acquisition (as resource, land, extractive quality of energy or mineral),'<sup>245</sup> and cites a number of strategies where the discipline works to 'enact territorial extraction (through survey, classification, codification, and

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<sup>236</sup> Gevers, *supra* note 125 at 492.

<sup>237</sup> *Ibid* at 493-4. He here refers to a 'radical alternative' to the state as the basis of geopolitical formation, writing 'international law continues to imagine states as having 'the same kind of permanence and solidity ... that one would normally associate with geological formations in the physical world.''*Ibid* at 505.

<sup>238</sup> *Ibid* at 494. Internal citations omitted.

<sup>239</sup> *Ibid*. Internal citations omitted.

<sup>240</sup> *Ibid* at 499. Significantly for Gevers' account in acknowledging the importance of the interventions is the temporal precedence of Du Bois' essay.

<sup>241</sup> *Ibid* at 494. This creation of the 'truth' of the state form as the basis of international through Cold War time and international law, 'circulated and sedimented by both,' was a specific vision with its 'roots firmly in Europe, and Empire.' *Ibid* at 495.

<sup>242</sup> Nicholas Spykman, cited in Gevers, *supra* note 125 at 506. Gevers continues, the "'struggle over geography', then, is also a struggle against its naturalisation; a struggle to hold attention to the 'sense in which all geographies are imaginative . . . at once abstractions and cultural constructions.'" *Ibid* at 506.

<sup>243</sup> *Ibid* at 492-493.

<sup>244</sup> Kathryn Yusoff, "'Geology, Race, and Matter' in A Billion Black Anthropocenes or None" *Manifold @uminnpress*, online: <https://manifold.umn.edu/read/6b94c453-792a-4a6e-8aea-5a2c8c8155bd/section/6243cd2f-68f4-40dc-97a1-a5c84460c09b#ch01>. Emphasis original.

<sup>245</sup> *Ibid*.

annexation).<sup>246</sup> In the Murray-Darling example here, rendering the river as a non-living resource works to make commodifying it more legible. Yusoff elaborates on the implications of this rendering, ‘geology is a relation of power and continues to constitute racialized relations of power,’ she argues, that ‘in its material manifestation in mining, petrochemical sites and corridors, and their toxic legacies – all over a world that resolutely cuts exposure along color lines.’<sup>247</sup> Engaging space-making techniques beyond these particular disciplinary knowledge forms, Charles Mills highlights the volume of work on a ‘white spatial imaginary,’<sup>248</sup> and Pasternak draws on work by ‘black radical tradition focused on socio-spatial constructions of racial difference.’<sup>249</sup> The state’s spatial construction of legality over the Murray-Darling is in this way inseparable from an analysis of racialized claims to authority, ownership and possession.<sup>250</sup>

The way that these space-making technologies will be used throughout this thesis is for their relationship to extractivism, how particular global geographies and discourses of geology sustain and naturalize where extraction occurs and who benefits. This is the way that I read the imperial geography imagined by signatory states debating the Antarctic Treaty as contributing to legitimizing Northern extraction from the global South, as well as rendering the rivers of the Murray-Darling as non-living resources and therefore more easily commodifiable.

### *Imaginaries*

It might seem counter-intuitive to read an imaginary as a form of technology, rather than related to narrative or knowledge forms. Yet it is a helpful way to read space-making techniques and the ordering implicit in them.<sup>251</sup> Another way of speaking about the imperial geography relied upon by signatory states in the Antarctic debates as an imperial spatial imaginary. As I referred to earlier, in outlining what I take an imaginary to mean, Jasanoff’s explanation of socio-technical imaginaries as ‘collectively held, institutionally stabilized, and

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<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> Charles Mills, ‘White Time: The Chronic Injustice of Ideal Theory’ (2014) 11:1 Du Bois Review 27 at 27; 29, citing George Lipsitz.

<sup>249</sup> Pasternak, *supra* note 19 at 305. She explains, ‘in Canada, there has also been a long *spatial* history of colonial policy, law, and practices that have structured the enrichment and class advantage of white settlers.’ *Ibid* at 306. Mawani also examines the spatial dimension of racialized legal ordering, using the register of oceans. She writes how, ‘if race has a geography... oceans point to its expansive and alternative histories by emphasizing the polyvocality, mobility, and mutability of racial orders.’ Mawani, *supra* note 49 at 25.

<sup>250</sup> See Moreton-Robinson, *supra* note 48.

<sup>251</sup> See for instance Gevers, *supra* note 125.

publicly performed visions of desirable futures'<sup>252</sup> is helpful, even though I read the imaginaries performed in extractive projects as derived from and producing ordering beyond socio-technicality.

In relation to imaginaries that reinforce extractivism, Surabhi Ranganathan and Craven's descriptions of imaginaries embedded in the law of the sea and the law of outer space, respectively, are productive. Ranganathan shows how legal imaginaries 'reified' and constituted an 'an extractive imaginary of the ocean floor.'<sup>253</sup> She demonstrates how this extractive imaginary of the seabed relied on (and continues to rely on) positing it as disconnected from social and legal relations and jurisdiction.<sup>254</sup> Ranganathan examines how colonial fears over decolonization and Cold War tensions contributed to a world-view of the sea where 'exploration,' extraction and imperialism were re-inscribed.<sup>255</sup> She writes, 'the law turns the seabed over to the extractive interests of states and corporations.'<sup>256</sup> Craven traces the development of legal frameworks for outer space in the context of Cold War rivalry and contest. He explains, using Foucault's 'image of the mirror,' how imaginaries can function by 'bringing into being, through its conceptual and institutional architecture, a space that is at once imaginary (futural, anticipatory, mythopoetic) and real.'<sup>257</sup> Craven also usefully links the imaginaries of extractivism and accumulation to imperial projects,<sup>258</sup> which is key to understanding the legal narratives that this thesis explores. The work of deeply inscribed extractive imaginaries, particularly the notion of 'conceptual and institutional architecture'<sup>259</sup> and the creation of space helps read the delineation of authority and authorization of extraction by signatory states in the imaginaries created by legal discourse mobilized in debating the Antarctic Treaty System.

Jasanoff describes an imaginary's potential effect as 'neither cause nor effect in a conventional sense but rather a continually rearticulated awareness of order in social life.'<sup>260</sup>

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<sup>252</sup> Jasanoff, *supra* note 53 at 4.

<sup>253</sup> Ranganathan, *supra* note 47 at 576.

<sup>254</sup> *Ibid* at 576-7.

<sup>255</sup> Ranganathan, *supra* note 47 at 574-575. Ranganathan further notes how 'in the long 1960s – years in which decolonization-linked anxieties about overpopulation, resource erosion and environmental degeneration on land met a growing intimacy with the sea, as 'a territory that could be scouted, explored, mapped, colonised and connected to the land and its economies.' *Ibid* at 574.

<sup>256</sup> Ranganathan, *supra* note 47 at 596.

<sup>257</sup> Craven, *supra* note 43 at 571. Internal citation omitted.

<sup>258</sup> *Ibid*.

<sup>259</sup> *Ibid*.

<sup>260</sup> Jasanoff, *supra* note 53 at 26.

And referring to Donna Haraway's analysis of the Natural Science Museum she highlights how, 'the dioramas she interprets are first and foremost "meaning machines." Like all machines they freeze social relations, reinforcing an impression of predestination that analysts should seek to dissolve.'<sup>261</sup> Buchanan's work on Jacques Rancière's description of the politics of aesthetics is also instructive. She writes that this work can contribute understanding 'the distribution of the sensible... the see-able and the sayable.'<sup>262</sup> This distribution operates on multiple levels, including through 'a delimitation of spaces and times, of the visible and the invisible.'<sup>263</sup> The frame of the imaginary and its meanings and distributions is a useful way to read the spatial ordering of authority that signatory states imagine and perform through debating the Antarctic Treaty.

### *Temporalities*

Techniques of constructing a homogenous, linear temporality that I will argue seek to reinforce discovery as a legitimate mode of claiming authority are visible in the Antarctic debates. This reinforcement stabilizes both imperial extraction and authority. Mawani explains how 'law not only responds to external temporalities; it also absorbs and obscures them. It expands and compresses time by emphasizing, erasing, and recasting historical events.'<sup>264</sup> Bhandar also shows how 'temporalities of colonialism... are multiple and uneven.'<sup>265</sup> She positions these in opposition to imperial/colonial discourses of linear time, 'with the non-European world placed either at some earlier stage of development or outside history altogether.'<sup>266</sup> Mawani also writes about how British 'imperial temporalities' were asserted to the exclusion of 'the histories and chronologies of many diverse and heterogeneous communities' in India during times of formal Empire.<sup>267</sup> She uses Partha Chatterjee's critique of 'empty homogeneous time that has been repeatedly evoked by critics of empire ... is not an inhabited or lived time but one that is thought and projected.'<sup>268</sup> Buchanan and Pahuja also engage Chatterjee's work, writing (of the development project and constituting forms of the nation-state as 'modern' or of a supposedly different time) that 'nation-states are therefore perceived not to co-exist equally in their heterogeneity in the

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<sup>261</sup> *Ibid* at 19.

<sup>262</sup> Buchanan, *supra* note 165 at 566.

<sup>263</sup> Rancière cited in *Ibid*.

<sup>264</sup> Renisa Mawani, "The Times of Law" (2015) 40:1 Law & Social Inquiry 253 at 261.

<sup>265</sup> Bhandar, *supra* note 41 at 23.

<sup>266</sup> *Ibid*.

<sup>267</sup> Dipesh Chakrabarty cited in Mawani, *supra* note 41 at 28.

<sup>268</sup> *Ibid* at 29.

same time-space, but rather are conceptually captured and arranged in a hierarchical progression from past to present to future.<sup>269</sup> Keenan's focus is on a distinct legal regime, property (and possibilities for subversive property), yet her analysis of its dominant tendencies are relevant, it 'tends to be (re)productive of the status quo, to produce linear time and help the world retain its shape.'<sup>270</sup> Mills also shows how racialized imaginaries of time and temporality are just as operative as racialized space.<sup>271</sup> Racial regimes, Mills argues, not only govern access to space and time, but structure society,<sup>272</sup> in ways that he describes as a 'chronological cartography of Whiteness,' influenced by Western notions of theology and temporality.<sup>273</sup> The abstractions and attempted universality of this temporality is then, Mills argues, 'timelessness and racelessness,'<sup>274</sup> 'so that the immanent realization of the abstract norm (raceless humanity, which is White humanity) is already waiting to be unfolded.'<sup>275</sup> The implications of this ordering, he states, are that 'the general transdisciplinary pattern of modernity ... is reinforced and exacerbated here by the discipline's pretensions to timelessness and abstract truth.'<sup>276</sup>

This homogeneity and linearity that produce racialized claims to possession and authority are also visible in and produced by international law's narratives. Richard Joyce shows how liberal international law depends on a problematic idea of 'its messianic promise,' constructing justifications for stasis or unfulfillment.<sup>277</sup> Joyce's argument is based in a consideration about 'how messianic ideas of redemption and fulfilment (either in this world or the next) can structure and constrain thought about international law,'<sup>278</sup> both in relation to temporality and history.<sup>279</sup> Joyce writes about how certain phenomena (in his case the Cold

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<sup>269</sup> Chatterjee cited in Ruth Buchanan and Sundhya Pahuja, 'Law, Nation and (Imagined) International Communities' (2004) 8 *Law Text Culture* 137 at 159.

<sup>270</sup> Keenan, *supra* note 218 at 14.

<sup>271</sup> Mills, *supra* note 248 at 27. See also Charles Mills, "The Chronopolitics of Racial Time," (2020) 29:2 *Time & Society* 297.

<sup>272</sup> *Ibid* at 28-29.

<sup>273</sup> *Ibid* at 30. He continues, 'both macro- and meso-periodizations reveal the traces of the White scalpel, as the postcolonial critique has long since shown.' *Ibid*.

<sup>274</sup> *Ibid* at 32.

<sup>275</sup> *Ibid*.

<sup>276</sup> *Ibid*.

<sup>277</sup> Richard Joyce, 'International law and the Cold War: Reflections on the Concept of History' in Craven, Pahuja & Simpson, *supra* note 12 at 45.

<sup>278</sup> *Ibid* at 28.

<sup>279</sup> He also points to an 'eschatology' of an 'endless repetition of same-times' in his analysis of Carl Schmitt's fascist account of international law. The endless repetition refers to Schmitt's account, and he refuses both Carl Schmitt's conception of history as well as a liberal teleology. *Ibid* at 28. As Craven, Pahuja and Simpson explain in relation to Joyce's description of these different constructions of time working on law 'each of these accounts... has attendant effects, either by operating as an apology for the power of the guarantors of concrete

War) can be posited as placing ‘time itself under pressure in one direction or another,’ simultaneously an ‘accelerator of time,’ and ‘a force of restraint.’<sup>280</sup> To work against these conceptualizations, and to emphasise potentiality, Joyce engages Benjamin’s notion of ‘a more fragmented sense’<sup>281</sup> of time, emphatically opposed to teleology of progression ‘through a homogeneous, empty time.’<sup>282</sup> This time is a ‘now-time,’<sup>283</sup> any messianic presence is engaged not in teleology but disruption, ‘small gateways’ or ‘splinters.’<sup>284</sup> These ideas of temporality are also related to a way to engage histories, but for my purposes I will argue that they can show how technologies of linear time-making can work to authorize forms of authority that reinforce extractivism by reinforcing racialized and distributive binaries inherent to legitimizing the doctrine of discovery prevalent in the specific debates over Antarctica that I look at in this thesis.

### *Movement*

Movement, particularly as a technology of jurisdiction drawn from Barr’s work, is how I analyse the ways that current state interventions towards the Murray-Darling river system are continuous with early colonial extractive division of the waters. It is also an important way to highlight how material practices of building a colonial claim to lawful authority are both generated and unstable. Barr writes about the Anglo-Australian common law, alternatively referred to here as the colonial state’s law, projects and imaginary of being static, complete and total, obscuring its movement and instability. In this way, Barr describes the common law imaginary as encompassing ‘all available legal spaces,’<sup>285</sup> in a way that is ‘non-textured, evenly distributed.’<sup>286</sup> Barr argues that the projection of colonial law as totalizing both suggests exclusive legal authority as well as the lack of space for movement.<sup>287</sup> She elaborates on this imaginary, it is based on a view of space as abstract, ‘where space is fixed, apolitical and pre-given.’<sup>288</sup> Barr explains that although colonial legal imaginaries construct the common law as unique and totalizing, ‘coherent, fixed and singular space somehow filled

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orders, or by denying/deferring responsibility for the present state of affairs.’ Craven, Pahuja & Simpson, *supra* note 12 at 9.

<sup>280</sup> Joyce, *supra* note 277 at 27.

<sup>281</sup> *Ibid* at 46.

<sup>282</sup> Benjamin cited in *Ibid* at 46.

<sup>283</sup> Benjamin cited in *Ibid* at 47. Internal citations omitted.

<sup>284</sup> *Ibid*.

<sup>285</sup> Barr, *supra* note 15 at 61.

<sup>286</sup> *Ibid*.

<sup>287</sup> Barr, *supra* note 11 at 87.

<sup>288</sup> Barr, *supra* note 15 at 61.

with a single form of law;<sup>289</sup> ‘common law is not quite as everywhere as it might seem to be.’<sup>290</sup> She warns against colonial obscuring of movement (of the common law), as they movements ‘tend to collapse into sovereignty, territory and territorial sovereignty in a certain imagining of legal place.’<sup>291</sup> ‘Everywhere’ as a projection is of course a form of colonial erasure of First Nations’ laws, and, as Barr describes, ‘a counter-image of multiple forms of laws in an abstract ‘single’ space provides a more textured, erratic and inconsistent spatial landscaping of the space.’<sup>292</sup> She points to the fact that if space is already full, common law is seen as unmoving, which obscures the extent that movement that is central to imperial techniques.<sup>293</sup> Indeed Barr argues that in fact movement is ‘how common law comes to be, or at least how common law seems to come to be, in place.’<sup>294</sup> Attending to movement also assists in exposing certain instabilities in claims to authority, ‘in contrast to the highly suggestive images of sovereign territory representing a fixed, immovable and somehow complete place of law in both space and time, there is some sort of limitation to common law's movements.’<sup>295</sup> As I will argue, movement can expose claims to authority and extractivism when the movement (in the example, of river water entitlements) is framed in terms of sustainability rather than extraction. This is because the techniques of moving, dividing and exchanging water are largely continuous with techniques that initially positioned the rivers of the Murray-Darling as an extractive site. Additionally, drawing from Barr’s insights about creation of law through movement can expose attempts to place the law of the colonial state at the centre of controlling the rivers.

Attending to the particular techniques of claims to authority, here space-making, imaginaries, temporality and movement help to illuminate the kinds of ways extractive authority may be claimed in the examples I turn to now. These ways of engaging method help to show how a historical moment can be brought to bear on discourses of progress against extractivism to show how extractivism may be indeed continuing through the forms of authority claimed. Examining specific technologies as a method helps to show how this authority is enacted in each case.<sup>296</sup> Through the method of technologies I seek to engage the work of jurisdiction, to

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<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid* at 62.

<sup>292</sup> *Ibid* at 61.

<sup>293</sup> *Ibid* at 62.

<sup>294</sup> *Ibid* at 59.

<sup>295</sup> *Ibid* at 68.

<sup>296</sup> Both methods are also linked to ways of reading detailed in the section on locating myself in the literature.

see space-making and authorizing temporality and movement as material practices of claiming authority to decide the law.<sup>297</sup> The imaginary as a technology of jurisdiction, in my account, helps to reveal the productive dimensions of a legal narrative and how it claims authority. I also use the method of history partially to examine changes or continuities in jurisdictional practice and narratives, and to better appreciate both the violence and instability of these particular forms of legal production and ordering.

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<sup>297</sup> See Barr, *supra* note 11; Barr, *supra* note 15. Some of how these are visible is through the work of the ‘idiom,’ see Dorsett and McVeigh, *supra* note 51 at 5.

### Introduction

My analysis in this chapter focuses on a specific set of debates at the United Nations that occurred during the late Cold War. I investigate the technologies enacted through these debates and ask how they affect the sustaining dynamics of global extractivism. In these debates, state actors contest both the Antarctic Treaty system and the way it distributes authority over the continent, as well as access to resources in Antarctic territory. I will suggest that returning to this point of contest, and particularly paying attention to how signatory states defended the Treaty framework, allows a deeper consideration of what forms of authority and extraction these signatory state actors sought to remake and maintain.<sup>299</sup> Specifically, I will argue that the relationship between forms of extractivism and authority is revealed through paying attention to the way that the doctrine of discovery is defended as the legitimate basis of sovereignty over Antarctica and consequent authority to govern the territory. Additionally, the dynamics of this relationship are visible in the way signatory states sought to both appropriate and dismiss the discourse of the common heritage of mankind, as it was mobilized in these debates by certain state actors who formed part of the Non-Aligned Movement. Attending to the links between the forms of authority and extractivism at stake here can better reveal whether a localized mining ban is sufficient contestation of what I argue is signatory states' attempt to reconstruct imperial geographies, and the consequent materially extractive impacts beyond Antarctica that this authorizes. The way that I organize the chapter sets out to show this through examining interactions between analytics of the imaginary and the material, notably how global imperial imaginaries reperformed in these debates contribute to material practices of extraction beyond Antarctic territory. In my reading of these particular debates, narratives of discovery and the discourse of the common heritage of mankind are related to temporal and space-making practices implemented by signatory state actors. I read this from particular state submissions that preceded the General Assembly discussions. Firstly, I give context to the debates themselves, that occurred towards the end of 1984. Secondly, I examine the role that narratives of discovery play in legitimizing a linear temporality and reject any disruption to the distribution

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<sup>298</sup> Significant work that I draw from in this chapter highlights the way spatial and temporal imaginaries and practices work together. Yet for a specific and detailed concept of spacetime see David Harvey, 'Spacetime and the World,' in *Cosmopolitanism and the Geographies of Freedom* (New York: Columbia University Press, 2009) 133.

<sup>299</sup> See on returning to forms of contest, Pahuja, *supra* note 22.

of authority over Antarctica. Thirdly, I examine ways that contestations over the discourse of the common heritage of mankind are utilized by the signatory state actors that I pay particular attention to reproduce imperial divisions of space that also work to authorize extractivism beyond the Antarctic continent. I then also read these techniques for how they are entangled, rather than distinct from, these state actors' claims to authority beyond Antarctica.

## The debates

Towards the end of 1984 the United Nations General Assembly returned to debating 'the question of Antarctica.'<sup>300</sup> Prompted by proposals in 1983 from a number of states in the global South to obtain more transparent information about the Antarctica continent and contest the Treaty system which governed it,<sup>301</sup> states made written submissions prior to the 1984 meetings.<sup>302</sup> The debates in 1984 ran for multiple sessions of the General Assembly's First Committee.<sup>303</sup> The debates focused on the distribution of authority over Antarctica by the Treaty system,<sup>304</sup> including regarding resource use, and the basis of the claims to sovereignty by discovery that the Treaty system implicitly preserves.<sup>305</sup> Administration of the Treaty System occurs through Consultative Meetings.<sup>306</sup> States can be added to the Treaty system by acceding to it either as a Consultative Party, which enables participation in decision-making, or with non-Consultative Party status.<sup>307</sup> Consultative Party status can be obtained by a state that proves sufficient connection to the Antarctic continent, usually through scientific operations.<sup>308</sup> The Antarctic Treaty itself was signed in 1959 in

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<sup>300</sup> See UNGA, *supra* note 4, for the state submissions prepared for these discussions.

<sup>301</sup> See resolution adopted at the 38<sup>th</sup> Session of the General Assembly. UNGA, 1983, 38<sup>th</sup> Sess, 97<sup>th</sup> Plen Mtg (15 December 1983) UN Doc A/RES/38/77.

<sup>302</sup> See UNGA, *supra* note 4.

<sup>303</sup> See views of states in *Ibid.*, in discussion by the First Committee between 28 and 30 November 1984 after referral from the 39<sup>th</sup> session of the General Assembly on 21 September 1984 (discussions were also held in the 1983 meetings of the General Assembly's First Committee, prior to the adoption of the resolution 38/77, *supra* note 300). See UNGA, 1984, 39<sup>th</sup> Sess, Agenda Item 66, Report of the First Committee, UN Doc A/39/756. See also verbatim records of the 1984 First Committee Meetings: UNGA, 1984, 39<sup>th</sup> Sess, 1<sup>st</sup> Cttee 54<sup>th</sup> Mtg (28 November 1984, New York), UN Doc A/C.1/39/PV.50; UNGA, 1984, 39<sup>th</sup> Sess, 1<sup>st</sup> Cttee 54<sup>th</sup> Mtg (30 November 1984, New York), UN Doc A/C.1/39/PV.54; UNGA, 1984, 39<sup>th</sup> Sess, 1<sup>st</sup> Cttee 55<sup>th</sup> Mtg (30 November 1984, New York), UN Doc A/C.1/39/PV.55. See for a record of the Plenary Meeting in September UNGA, 1984, 39<sup>th</sup> Sess, 7<sup>th</sup> Plen Mtg (25 September 1984, New York), UN Doc A/39/PV.7. See also for a description of the 1983 and 1984 debates Stephan Eilers, 'Antarctica Adjourned - The U.N. Deliberations on Antarctica' (1985) 19:4 International Lawyer 1309.

<sup>304</sup> Much has been written on the Antarctic Treaty System and constructions of authority beyond extractivism, see for example Shirley V Scott, 'Ingenious and innocuous? Article IV of the Antarctic Treaty as imperialism' (2011) 1:1 The Polar Journal 51. See also Antonello, *supra* note 65.

<sup>305</sup> See discussions in UNGA, *supra* note 4.

<sup>306</sup> See Donald Rothwell & Alan Hemmings, *International Polar Law*, online ed, (Cheltenham: Edward Elgar Publishing, 2018) at 3.2.

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*

Washington by Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, the United States, the United Kingdom, the Soviet Union and South Africa.<sup>309</sup> One principal effect of the Treaty is to place claims of sovereignty over Antarctic territory in abeyance.<sup>310</sup> Claims of sovereignty to Antarctic had been made by the United Kingdom, Australia, New Zealand, Norway, Chile, Argentina and France from the early 20<sup>th</sup> Century onwards on the stated grounds of exploration and discovery.<sup>311</sup> The United States and the Soviet Union did not actively claim sovereignty at the time the Treaty came into effect, but did not recognize existing claims and continue to reserve the right to make them.<sup>312</sup> Another primary effect of the Treaty is to ban military and nuclear activity, including nuclear waste disposal,<sup>313</sup> and the Treaty has since also been amended with additional conservation protocols for marine life.<sup>314</sup> Following the centrality of mineral resources to the 1984 debates,<sup>315</sup> an additional protocol was drafted to regulate Antarctic mining in the late 1980s.<sup>316</sup> It never came into effect, however, and was replaced by the Protocol on Environmental Protection, signed in Madrid in 1991, which bans mining.<sup>317</sup>

Reading the submissions, I found that the question of control over Antarctic resources was central to discussions of distribution of authority over the continent. The question of resources was raised partially in response to the proposed drafting of a mineral regulation convention by signatory states.<sup>318</sup> In this proposal, when signatory states discussed the future use of regulatory regimes of mineral resources, they were careful to preserve guaranteed access for signatory states should mining become feasible in Antarctica. For instance, the United States' representatives state its interest in the 'non-discriminatory access' to all

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<sup>309</sup> *Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961). See also Antonello, *supra* note 65 at 8.

<sup>310</sup> *Antarctic Treaty*, *supra* note 309 at Art IV.

<sup>311</sup> Antonello, *supra* note 65 at 8-9.

<sup>312</sup> *Ibid* at 9.

<sup>313</sup> *Antarctic Treaty*, *supra* note 309, at Art 1 and V.

<sup>314</sup> See Antonello, *supra* note 65 at 4-7.

<sup>315</sup> See UNGA, *supra* note 4. See also for a discussion of the debates preceding 1984, Gillian Triggs, "A Minerals Regime for Antarctica: Compromise or Conflict?" (1984) 35 Australian Mining and Petroleum Law Association Yearbook 525.

<sup>316</sup> Antonello, *supra* note 65 at 78-81.

<sup>317</sup> Except if the Treaty itself were renegotiated, for instance on its potential expiry or review in 2048. See Rothwell & Hemmings, *supra* note 306 at 5. See also Klaus Dodds, "In 30 years the Antarctic Treaty becomes modifiable, and the fate of a continent could hang in the balance", *The Conversation* (July 12, 2018) online: <<http://theconversation.com/in-30-years-the-antarctic-treaty-becomes-modifiable-and-the-fate-of-a-continent-could-hang-in-the-balance-98654>>.

<sup>318</sup> Antonello, *supra* note 65 at 78-81.

potential mining sites.<sup>319</sup> The debates, particularly on the question of resources, received significant media attention at the time. The Convention to regulate resources and mining, as drafted by representative for New Zealand Christopher Beeby, was described by one publication as environmentally insufficient, ‘Beeby’s Slick Solution.’<sup>320</sup> Some parts of the international legal literature took a more adjudicative tone: describing the debates as politicized, turning to international legal doctrine to assess the merits of claims regarding the common heritage of mankind, and further appealing to international law’s potential as a stronger enforcement mechanism to protect the Antarctic environment.<sup>321</sup> The debates also help to expose links between the question of resources and a contest over the way authority is distributed in the Antarctic Treaty System. Specifically, if the Treaty produces peace, science and environmental protection or whether it reinforces colonialism and preserves access to resources for a few states.<sup>322</sup> What I want to do in this chapter is revisit these debates to re-examine this moment and investigate the role of international law in constructing forms of extractivism that might persist despite the formal mining ban. There were previously other challenges to the Antarctic Treaty System,<sup>323</sup> but I have chosen this set of debates as one potential site of rupture and contest that challenged international ordering of authority and access to resources and profit.

The description of the debates as a contest does not imply a binary form. There were a range of positions taken, and while I argue that signatory states aim to reconstruct an imperial geography that enables resource extraction by the global North including in global South territories, this distinction does not impute a sharp binary or an absolute claim about each state involved.<sup>324</sup> A number of Latin American states supported maintaining the Treaty System, and India and Brazil had recently acceded as Consultative Parties.<sup>325</sup> The discourse used by those states supporting the Treaty is also divergent, from more minimalist discourse

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<sup>319</sup> Submission of the United States of America (views of states, submission 50) in UNGA, *supra* note 4 at 128, para 94 (c)(viii).

<sup>320</sup> “Antarctic Minerals Regime: Beeby’s Slick Solution” *ECO* 23:1 (July 1983) at 1, cited in Gillian Triggs, “The Antarctic Treaty Regime: A Workable Compromise or a Purgatory of Ambiguity,” (1985) 17:2 *Case Western Reserve Journal of International Law* 195 at 213.

<sup>321</sup> See for example Triggs & Riddell, *supra* note 3.

<sup>322</sup> See discussions in UNGA, *supra* note 4.

<sup>323</sup> See Adrian Howkins, “Defending polar empire: opposition to India’s proposal to raise the ‘Antarctic Question’ at the United Nations in 1956” (2008) 44:1 *Polar Record* 35.

<sup>324</sup> See on fluid categorizations Luis Eslava, “TWAAIL,” (2 April 2019), online: *Critical Legal Thinking* <<https://criticallegalthinking.com/2019/04/02/twail-coordinates/>>.

<sup>325</sup> See for a list of signatory and acceding states as of 1990, the appendix of Donald Rothwell, “The Antarctic Treaty System: resource development, environmental protection or disintegration?” (1990) 43:3 *Arctic* 284 at 290.

about the Treaty being likely to be the most feasible option, in part due to the late Cold War context,<sup>326</sup> to open invocations of colonial discovery by, amongst other states, Australia and the United Kingdom.<sup>327</sup> Discourses of peace in the context of Cold War tensions, as well as of scientific endeavour are invoked by the United States.<sup>328</sup> Without requiring the construction of a binary, there is nevertheless a strong view advanced by a number of states from the Non-Aligned Movement that contests the colonial doctrines of discovery that sovereignty claims are founded on and that the Treaty preserves by not addressing.<sup>329</sup>

Some international legal literature has largely accepted the Treaty as a success of the discipline, including as an anti-extractive success.<sup>330</sup> Yet attending to space-making and temporal technologies provides a critique into the imaginary, narratives and practices associated with the Antarctica Treaty and how states use these techniques and claims to bolster or legitimize their authority both nationally and internationally.<sup>331</sup> What I suggest can be found in these debates is not merely a discussion about constructing Antarctica as a material source to draw hydrocarbons from, which is the account that focusing on the doctrinal changes to mineral regulation might expose. Rather I will argue that the construction of the continent as a material source to draw upon goes far beyond mineral resources. As Scott points to, it is the ‘non-reciprocal’ relation of extractivism that is more distinctive.<sup>332</sup> The continent is turned to, repeatedly, by states who are party to the Treaty System as a source: of scientific information, security, and even future fresh water. Reading these debates, I found that the way in which the Treaty was defended constructs Antarctica as

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<sup>326</sup> See for instance the submissions of Canada (views of states, submission 9) in UNGA, *supra* note 4 at 15.

<sup>327</sup> See submissions of Australia (views of states, submission 3) in UNGA, *supra* note 4; submissions of the United Kingdom (views of states, submission 49) in UNGA, *supra* note 4. Although as we will see a number of additional states also utilized the discourse of discovery.

<sup>328</sup> See submissions of the United States (views of states, submission 50) in UNGA, *supra* note 4.

<sup>329</sup> The discussion was principally proposed and led by Malaysia, Antigua and Barbuda. See discussions in UNGA, *supra* note 4.

<sup>330</sup> See for instance Triggs & Riddell, *supra* note 3. See also Tim Stephens, ‘The Antarctic Treaty System and the Anthropocene’ (2018) 8:1 *The Polar Journal* 29. But see on the contested concept of the ‘Anthropocene,’ Donna Haraway ‘Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin’ (2015) 6 *Environmental Humanities* 159; Jeremy Baskin, ‘Paradigm Dressed as Epoch: the Ideology of the Anthropocene’ (2015) 24 *Environmental Values* 9; Kathleen Birrell and Julia Dehm, ‘International Law & the Humanities in the ‘Anthropocene’’ in Sundhya Pahuja & Shane Chalmers, eds, *Handbook of International Law and the Humanities* (Routledge, forthcoming 2020), via Academia, [https://www.academia.edu/43130967/International\\_Law\\_and\\_the\\_Humanities\\_in\\_the\\_Anthropocene](https://www.academia.edu/43130967/International_Law_and_the_Humanities_in_the_Anthropocene).

<sup>331</sup> See Adrian Howkins, ‘Appropriating Space: Antarctic Imperialism and the Mentality of Settler Colonialism’ in Tracey Banivanua-Mar & Penelope Edmonds, eds, *Making settler colonial space: perspectives on race, place and identity* (Houndmills, Hampshire: Palgrave Macmillan, 2010) 29 at 31.

<sup>332</sup> Scott, *supra* note 25.

a source to draw from, both materially and as a legal imaginary, well beyond a strict focus on mining regulation.

While extractivism typically involves violent taking of resources such as oil and gas, Martín shows how there is nothing necessarily natural about the kind of resources generally associated with extractive projects. He states “‘natural resources’ such as minerals are produced and reproduced through a political process. In other words, they become ‘resources’ through political relations, operations and space production.”<sup>333</sup> The Australian state, for instance, adopts a wide definition of resources, beyond minerals and hydrocarbon resources to include ‘marine living resources (krill, fin fish, seals, whales and other marine life); ice; wilderness; wildlife/unique assemblage of species; scenery; biological or genetic diversity; and special and unusual research opportunities.’<sup>334</sup> It posits these as resources, ‘such a listing of natural resources tends to shade into values of the region that, while not specifically “stocks that can be drawn upon”, are of significance to man.’<sup>335</sup> The central insight to draw from this definition is the quality of the characterization, how Antarctic space is posited and mobilized as a resource.

Relatedly, and more relevantly in terms of its operation, I found that the Treaty being ferociously defended by some signatory states also exposed the contest over colonial imaginaries of space, temporality and the distribution of authority. To suggest this construction, I read these debates with a particular emphasis on how certain signatory states defending the Treaty characterized Antarctica and their relationship to the continent. I also argue that the identification of Antarctica as a source, or resource, has close, co-constitutive, relationships to authority and extractivism, or extractive consequences and relationships. Examining where this extractivism is located in a temporal and spatial sense, I argue that it cannot be contained to a separate and discrete analysis of Antarctic territory. Spatially, the construction of Antarctica in these debates relies on and legitimizes extractivism in other locations, which some signatory states assume access to through constructions of imperial geography. As I will argue, temporally, Antarctica is constructed as a guarded space that provides future resources to signatory states. Past extractivism, such as the sealing trade, is both used as evidence of discovery and effective occupation in order to found sovereignty

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<sup>333</sup> Martín, *supra* note 95 at 31.

<sup>334</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4, at 54, para 147.

<sup>335</sup> *Ibid* at 54, para 148.

claims. This linear temporality authorizes discovery as a form of current lawful authority. The implications of these spatial and temporal techniques reveal a complicated set of narratives and practices of extractivism and authority that undergird the Treaty System.<sup>336</sup>

### **Authorizing temporalities**

In this section I examine the role that narratives of discovery play in legitimizing a linear temporality to reject disruption to the distribution of authority over Antarctica. It is important to note that the linearity of the temporality is not the point as such, rather that the linearity works to authorize authority founded on ‘discovery’ and possession and project an idea that those foundations are both legitimate and no longer relevant.<sup>337</sup> This contradiction relies on both the linearity of the form of time constructed by signatory states in these debates, as well as a notion of ‘progress’ that would reformulate possession with a basis in extraction as sovereignty with a basis in discovery.<sup>338</sup> This contradiction exposes a close co-constitution between extractivism and claims to authority over Antarctica.

### ***Narratives of discovery***

A number of signatory states describe discovery as the basis of their current interests in Antarctic territory, including the authority to participate in the Treaty. These claims to sovereignty and rightful ownership and authority are crucial to both understanding the contests over the doctrine of discovery and how it relates to the contest over designating Antarctica as the common heritage of mankind in these debates. For example, Australia states that its ‘claim to sovereignty over the Australian Antarctic Territory (AAT) is based on acts of discovery and exploration by British and Australian navigators and explorers going back to the time of Captain Cook, and subsequent continuous occupation, administration and control.’<sup>339</sup> The state asserts that this claim to sovereignty is grounded in ‘proclamations of title on behalf of the British Crown;’<sup>340</sup> when ‘in 1929 the British Government decided, in consultation with the Australian and New Zealand Governments, that it would transfer to each of them the areas of Antarctica closest to their respective territories.’<sup>341</sup> The United

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<sup>336</sup> To reiterate, it is certainly not the case that I take issue with provisions that ban nuclear waste disposal, military activity or mining. I focus on what else these narratives authorize.

<sup>337</sup> See on progress narratives in international law Pahuja, *supra* note 204 at 3; Joyce, *supra* note 277.

<sup>338</sup> *Ibid*; see also Anghie, *supra* note 13; Tzouvala, *supra* note 13.

<sup>339</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4 at 39-40, para 71.

<sup>340</sup> *Ibid* at 40, para 72.

<sup>341</sup> *Ibid* at 40, para 73.

Kingdom proclaims to be ‘the first State to become involved in Antarctica with the voyage of Captain Cook in 1772-1775,’<sup>342</sup> additionally claiming to be ‘the first to undertake the regulation of Antarctic activity by means of the application of territorial sovereign rights,’<sup>343</sup> and Argentina also claims that ‘Antarctic history began when Christopher Columbus landed in America and the Spanish tried to find the south-west passage.’<sup>344</sup> Although the United States and Russia do not maintain a current territorial claim, in these debates the former Soviet Union also claimed to be the first state to discover the territory,<sup>345</sup> and the United States claims that that their explorations were more significant in their scientific capacity. Representatives to the United States assert that ‘New England sailors were prominent in the first big wave of exploration of Antarctica, when seal hunters flocked to Antarctic waters in the 1820s. Little is known of their no doubt extensive reconnaissance of the Antarctic Peninsula area, since the sealers guarded their cruise logs and landfalls as proprietary secrets.’<sup>346</sup> Submissions maintain both that

‘the first official United States expedition to explore Antarctica was led by Lieutenant Charles Wilkes in 1838-1842. While searching for the south magnetic pole, Wilkes sailed 1,500 miles along the coast of east Antarctica that now bears his name, thus proving for the first time that a continent-size land mass existed in the south polar region,’<sup>347</sup>

and that ‘Americans did not participate in the “heroic age” of European exploration.’<sup>348</sup>

However, submissions claim technological superiority, writing that

‘the United States pioneered the “technological age” of Antarctic exploration. Using airplanes, radios and tracked vehicles, the Byrd expeditions of 1928-1929 and 1933-1935 discovered and surveyed vast areas of Antarctica, reported instantaneously by radio to an excited public and staked claim to large areas on behalf of the United States.’<sup>349</sup>

Signatory states’ claims of discovery were contested in these debates, and Pakistan’s submissions dispute this basis for sovereignty, stating that ‘the colonial premise on which these claims were based has been rejected.’<sup>350</sup> The submissions of the Philippines also call for

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<sup>342</sup> Submission of the United Kingdom (views of states, submission 49) in UNGA, *supra* note 4 at 97, para 3.

<sup>343</sup> *Ibid.*

<sup>344</sup> Submission of Argentina (views of states, submission 2) in UNGA, *supra* note 4 at 6, para 6.

<sup>345</sup> Submission of the Union of Soviet Socialist Republics (views of states, submission 48) in UNGA, *supra* note 4 at 82, para 6.

<sup>346</sup> Submission of the United States of America (views of states, submission 50) in UNGA, *supra* note 4 at 100, para 1.

<sup>347</sup> *Ibid* at 100, para 2.

<sup>348</sup> *Ibid* at 100, para 3.

<sup>349</sup> *Ibid.*

<sup>350</sup> The submission of Pakistan (view of states, submission 33) in UNGA, *supra* note 4 at 32, para 1.

a new agreement over the continent ‘which will not recognize territorial claims that are substantiated by mere historical episodes.’<sup>351</sup> This particular submission notes a Consultative Party meeting on 23 September 1983 in Canberra, Australia, describing an aim of the meeting as ‘to oppose attempts by third world countries to place Antarctica within United Nations supervision.’<sup>352</sup>

Signatory states’ narratives of discovery both rely upon and legitimize a linear temporality. The narrative tendency of international law as a teleology of progression has been well documented.<sup>353</sup> The relevance for my purposes of linking discovery with temporality is partially how discovery is cast as legitimate claim to sovereignty, which defends *terra nullius* as a concept. Indeed, Howkins describes how claims to Antarctica have been utilized by states to project superiority ‘helping, they believed, to legitimise their rule both at home and abroad.’<sup>354</sup> Although discovery has been long invoked as an international legal claim,<sup>355</sup> the authorising function that it performs here is hybrid. It legitimizes discovery as a foundation for claims of sovereignty and authority to govern Antarctica, and also other territory where signatory states use the same claims. For instance, many territories that signatory states claim as legitimately theirs are contested, such as settler colonies, although not confined to settler colonial forms.<sup>356</sup> As I will argue later in this chapter, the narrative or claim of discovery as a legitimate form of sovereignty is also used to negate discussions of redistributing authority through the concept of the common heritage of mankind.

### ***Temporality as technology***

Relating linear temporalities to extractivism as well as the forms of authority that narratives of discovery exposed, I read signatory states invoking a linear temporality in both the direction of the past and the future. This aspect of the question revealed that, in these debates, the Antarctic continent is viewed by the signatory state actors that I focus on as a source of future resources. The futurity of access to living and non-living resources plays an important part in viewing multiple elements of Antarctic land as extractible. Australian representatives

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<sup>351</sup> The submission of Philippines (view of states, submission 35) in UNGA, *supra* note 4 at 39, para 3.

<sup>352</sup> *Ibid* at 39, para 4. Capitalization original.

<sup>353</sup> See Pahuja, *supra* note 205, Joyce, *supra* note 277.

<sup>354</sup> Howkins, *supra* note 331 at 31. See also on Cold War tensions and overlapping Soviet and United States claims to territory at the South Pole Howkins, *supra* note 323 at 37.

<sup>355</sup> See Anghie, *supra* note 13.

<sup>356</sup> Such as Australia, the United States, New Zealand; and South Africa, Chile and Argentina. See UNGA, *supra* note 4, for participating states and their claims to Antarctica.

state their ‘commercial exploitation’ has been postponed due to the state’s ‘substantial interest in ensuring that any exploitation of these resources by others is regulated ... [to] not threaten either the balance of the ecosystem or the maintenance of the resources for future utilization.’<sup>357</sup> Glacial ice is also identified as a resource, of water or for energy creation, to be maintained for future use.<sup>358</sup> Representatives of the Australian state describe a proposal in these terms, ‘in the future, Antarctic icebergs may be towed to suitable northern sites (for example, southern Australia) as a source of freshwater or to serve as a heat sink for energy generation.’<sup>359</sup> Additionally, the state posits this as a widespread technical solution, stating that ‘as the demand for freshwater and new energy sources increases, it is likely that Antarctic iceberg utilization will be seriously considered by a number of countries.’<sup>360</sup>

Past incarnations of extractive industry in Antarctica, such as during times of fur trade, are also used by some signatory states as a basis for sovereignty claims. When invoking discourses of exploration and discovery, extractivism is described as industrious, and leading to occupation. Australian submissions state that ‘Cook... did discover several of the sub-Antarctic islands in the south Atlantic Ocean, and his reports of the teeming seal colonies soon led to the establishment of the British southern sealing industry.’<sup>361</sup> While Antonello notes that the seal trade in Antarctic Islands in the early 1800s was a ‘catastrophic over-exploitation,’<sup>362</sup> the function of a linear temporality works to both legitimize and erase this point, partially in order to maintain future claims to Antarctic resources. Motha’s work on archiving as a narrative technology of simultaneously authorising and hiding is productive in reading the relationship between this temporality and reasserting the legitimacy of the distribution of authority in Antarctica.<sup>363</sup> He writes that this narrative work can inaugurate new forms of law and authority.<sup>364</sup> A linear form of progress narrative working to authorize the doctrine of discovery is notably reinforced by a number of signatory states who claim territories of settler colonies.<sup>365</sup>

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<sup>357</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4 at 79, para 266.

<sup>358</sup> Australian representatives state that ‘the Antarctic ice-sheet contains as much as 89 per cent of the fresh water on Earth.’ Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4 at 63, para 198.

<sup>359</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4 at 63, para 199.

<sup>360</sup> *Ibid* at 64, para 200.

<sup>361</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4 at 28, para 6.

<sup>362</sup> Antonello, *supra* note 65 at 51.

<sup>363</sup> See Motha, *supra* note 181.

<sup>364</sup> *Ibid* at 20, and the Introduction generally.

<sup>365</sup> Including Australia, New Zealand and the United States. See again UNGA, *supra* note 4.

The temporality relied upon is also homogenous, drawing a line from discovery to sovereignty is necessarily linked to racialized discourses of civilization.<sup>366</sup> As Mills states, particular projections of abstract time work to reinforce a singular and racialized notion of truth and authority.<sup>367</sup> And Joyce has shown narratives of progress through homogenous time to be deeply linked to authorization through international law.<sup>368</sup> Linear temporality functions then, in my reading, as a technology of authorization; one that that authorizes extractivism and its own claim to authority at the same time. The temporality that seeks to legitimize narratives of discovery operates to reinforce signatory states' authority over Antarctica, but this narrative also maintains international imperial ordering through reinforcing a narrative of progress through homogenous time. This works to justify authority founded on 'discovery' and possession and project an idea that those foundations are both legitimate and no longer relevant.<sup>369</sup> This contradiction relies on both the linearity of the form of time constructed by signatory states in these debates, as well as a notion of 'progress' that reconstrues possession with a basis in extraction as sovereignty with a basis in discovery. In doing so, it reinforces extractivism by locating the power to decide and profit in the North, including by working to reinforce imperial spatial imaginaries.

### **Space-making as jurisdiction<sup>370</sup>**

In this section I examine the way that contestations over the discourse of the common heritage of mankind are utilized by the signatory state actors that I pay particular attention to reproduce imperial divisions of space that also work to authorize extractivism beyond the Antarctic continent.

#### ***Discourses of the common heritage of mankind***

State actors contesting the Antarctic Treaty's distribution of authority frequently invoked the discourse of the common heritage of mankind. The concept of the common heritage of mankind has been attributed to Maltese Ambassador Arvid Pardo who, in a 1967 speech to the General Assembly, proposed a new regime to prevent powerful states from monopolizing

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<sup>366</sup> See Anghie, *supra* note 13.

<sup>367</sup> Mills, *supra* note 248.

<sup>368</sup> Joyce, *supra* note 277, 39-46.

<sup>369</sup> See Joyce, *supra* note 277. The claim of *terra nullius* is more violent in contexts beyond Antarctica of invasion and colonization.

<sup>370</sup> Many scholars have examined this dimensions of jurisdiction's work. See Barr, *supra* note 15 and 11; Pasternak, *supra* note 157.

deep sea resources.<sup>371</sup> In the Antarctic debates, the discourse was invoked to promote internationalizing Antarctic authority, as well as to counter colonialist extraction by redistributing Antarctic resources and mobilizing them as a source of economic reordering. For example, the submissions of Ghana noted an aim of the debates was ‘bringing Antarctica eventually into a more open and accessible régime which would make it part of the common heritage of mankind and not, as at present, the exclusive preserve of a limited number of countries.’<sup>372</sup> Challenges to the Treaty framework invoke the concept to be redistributive explicitly in terms of resources, for instance Pakistan’s submissions state that ‘every State should have a fair share of the living and mineral resources of Antarctica.’<sup>373</sup> State actors also identify the concept as a basis to advocate for access and distribution of scientific knowledge drawn from Antarctica.<sup>374</sup>

The common heritage of mankind is itself a contested discourse with a complicated relationship with extractivism. Scholars have examined the multiple meanings that the discourse of the common heritage of mankind was given, particularly in the development of international law of the sea and space.<sup>375</sup> For my purposes, the sea and outer space are both useful comparisons because of their constructions as remote, and as related through reference to discourse of the common heritage of mankind. Karin Mickelson, writing to explore multiple aspects of the principle in relation to its potential to slow environmental degradation, notes certain mobilizations of the concept by the New International Economic Order that had a ‘desire to emphasize the distributional aspects’ of the common heritage of mankind.<sup>376</sup>

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<sup>371</sup> See Ranganathan, *supra* note 47 at 577; 582-3, 589; Karin Mickelson, “Common Heritage of Mankind as a Limit to Exploitation of the Global Commons” (2019) 30:2 *European Journal of International Law* 635 at 637; 640.

<sup>372</sup> The submission of Ghana (view of states, submission 18) in UNGA, *supra* note 4 at 83, para 1.

<sup>373</sup> The submission of Pakistan (view of states, submission 33) in UNGA, *supra* note 4 at 33, para 5(e).

<sup>374</sup> Pakistan’s submissions argue that ‘there should be freedom of scientific research and investigation in Antarctica and the results of these activities should be used for the benefit of all.’ *Ibid* at 33, para 5(c). See also for a reflection of this debate in the international legal literature, support for the concept at Yale Note, “Thaw in International Law--Rights in Antarctica under the Law of Common Spaces” (1978) 87:4 *Yale Law Journal* 804, and a denial of the applicability of the concept at Roland Rich, ‘A Minerals Regime for Antarctica’ (1982) 31:4 *International and Comparative Law Quarterly* 709.

<sup>375</sup> See Isabel Feichtner & Surabhi Ranganathan, “International Law and Economic Exploitation in the Global Commons: Introduction” (2019) 30:2 *European Journal of International Law* 541, and all the articles in this symposium. Feichtner and Ranganathan state in their introduction, ‘in search of alternative political economies – less exploitative, less ecologically destructive – scholars and activists have turned to the commons and to commoning in recent years... Yet current initiatives that seek to harness the economic potential ... as a solution to conflict and environmental destruction stand in stark contrast with visions of a commons economy built on solidarity.’ *Ibid* at 541.

<sup>376</sup> Mickelson, *supra* note 371 at 641. Mickelson also notes that the World Social Forum’s 2009 ‘Reclaim the Commons Manifesto.’ *Ibid* at 660.

Ranganathan discusses the development of the law of the sea, specifically how conflict over oceanic resources was expressed through discourses of the common heritage of mankind, with varying interpretations between a ‘weak institution...guided by commercial principles,’<sup>377</sup> and a ‘strong international authority, in whose decision making they [nation-states from the global South who were invoking the concept] could effectively participate.’<sup>378</sup> Craven also examines how a discourse of the commons could take on a more exclusionary tenor in his analysis of Cold War powers’ contests over the legal developments to regulate or aim to prohibit conflict and extraction in space. He writes that this particular formulation of commonness attempted to avoid constructing outer space as a site of accumulation or war, yet it reinforced both ‘rationalities’ through this formulation.<sup>379</sup>

The discourse was also utilized in competing ways in debates over Antarctica, exposing that one element of what was at stake in debating authority and resource exploitation was maintaining or reordering colonial imaginaries. Defences of the Treaty attempt to both incorporate and control the use of the discourse (silencing its redistributive dimensions), as well as reject its application. Simultaneously certain signatory state actors assert that the common heritage of mankind is inappropriate in the Antarctic because of sovereignty claims preserved by the Treaty.<sup>380</sup> In arguing against its adoption, Australian submissions assert that sovereignty claims mean applying the concept of common heritage to Antarctic territory is implausible, stating in an earlier Forum that ‘unlike outer space and unlike the deep seabed, where attempts are being made to apply new arrangements and concepts, Antarctica has been the subject of exploration settlement and claims to sovereignty by a number of countries over many years.’<sup>381</sup> Representatives further assert that ‘for Australia and six other countries that maintain national territorial claims and ... national settlements, Antarctica is not beyond national jurisdiction.’<sup>382</sup> Also in these earlier forums, Argentinean representatives further maintain that the idea of common heritage is inappropriate because ‘there is no legal vacuum.

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<sup>377</sup> Surabhi Ranganathan, “Manganese Nodules” in Jessie Hohmann & Daniel Joyce, eds., *International Law’s Objects* (Oxford: Oxford University Press, 2018) 272 at 278.

<sup>378</sup> *Ibid.*

<sup>379</sup> Craven, *supra* note 43 at 547, and generally.

<sup>380</sup> See submission of Australia (views of states, submission 3) in UNGA, *supra* note 4 at 90, para 305; submissions of Argentina (views of states, submission 2) in UNGA, *supra* note 4 at 25, para 108(d).

<sup>381</sup> UNGA, 38<sup>th</sup> Sess, 3<sup>rd</sup> Plen Mtg, 23 September 1983, New York, UN DOC A/38/PV.3 at 22, para 209.

<sup>382</sup> Mr. Woolcott, representative for Australia, in UNGA, 1983, 38<sup>th</sup> Sess, 1<sup>st</sup> Cttee 45<sup>th</sup> Mtg (30 November 1983, New York), UN Doc A/C.1/38/PV.45 at 16.

Nor is Antarctica a *res nullius*, on the contrary, there are various territorial claims to it.<sup>383</sup>

This discourse also had antecedents, as a member of the United States Ocean Mining Administration is described as ‘speaking in a personal capacity in 1977 at a press briefing seminar,’<sup>384</sup> stated:

‘Antarctica is not a no-man's-land... For a very long time, this continent has been a sphere of political activity. Nations have, through forethought and initiative, developed substantial vested interests in Antarctica's future. The political difference between the deep seabed and Antarctica and between the moon and Antarctica is stated quite simply - territorial sovereignty, and a sovereignty claim, be it valid, or dubious under international law, is nonetheless the grist of the international law mill.’<sup>385</sup>

Whilst these state actors mobilize sovereignty claims to reject the emerging discourse, they also appropriate the concept's language to intervene in its definition and reinforce familiar colonial concepts that locate humanity in the North. Australian submissions further locate the ability to define the common heritage of mankind within the Treaty framework as it stands, stating that ‘Consultative Parties, in dealing with the question of mineral resources in Antarctica, should not prejudice the interests of all mankind in Antarctica.’<sup>386</sup> Additionally, it states that the Treaty ‘establishes Antarctica as a region of unparalleled international co-operation in the interests of all mankind.’<sup>387</sup> In this way, these same actors also take the position that the principles of the Treaty should be used in the interests of mankind,<sup>388</sup> locating the ability to decide for mankind with themselves. Representatives for Sri Lanka stated that ‘claims to serve the interest of all mankind necessitate further study of this matter within the international community.’<sup>389</sup> And as the submissions of Malaysia state, ‘the interest of mankind can only be defined and managed by mankind itself... and not by any country or group of countries.... The coincidence of the interest of mankind and the interest of

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<sup>383</sup> Mr. Beauge, representative for Argentina, in UNGA, 1983, 38<sup>th</sup> Sess, 1<sup>st</sup> Cttee 46<sup>th</sup> Mtg (30 November 1983, New York), UN Doc A/C.1/38/PV.46 at 4.

<sup>384</sup> UNGA, 39<sup>th</sup> Sess. UN Doc A/39/583, Study requested under General Assembly resolution 38/77. Part I, (31 October 1984), New York at 65, para 282.

<sup>385</sup> Mr. Leigh Ratiner, representative of the United States, cited in *Ibid*.

<sup>386</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4, 81 at para 277 (d). Further submissions expose an imagined link between territorial claims and physical presence in Antarctica and the capacity to engage a more objective argument. The submissions state, ‘for the study to be objective, it must take into account the particular national perspectives of countries such as Australia.... on the basis of its long experience.’ Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4 at 26, para 1(b).

<sup>387</sup> *Ibid* at 85, para 290(b).

<sup>388</sup> I maintain the language of mankind as it is the way the common heritage principle is described in the debates.

<sup>389</sup> Mr. Dhanapala, representative for Sri Lanka, in UNGA, *supra* note 303 (UN Doc A/C.1/39/PV.50) at 42.

the Consultative Parties is not inevitable or pre-ordained.<sup>390</sup> Representatives further stated that

‘the assertion that the Treaty parties, in their current negotiations on a minerals regime, act as trustees for mankind and will look after the interests of mankind does not carry sufficient conviction ... trustees cannot be self-appointed, and they should not have a material interest in the trust property.’<sup>391</sup>

Peevers’ work on juridical theatre is a helpful way to read the contest over distinct productions of legal authority.<sup>392</sup> As Peevers writes, performances of juridical theatre are plural, sometimes entailing a ‘crisis of meeting,’ for instance the signatory states’ manoeuvres to both limit and appropriate the discourse.<sup>393</sup> In this way I do not read the contest through this device to trace or argue that a particular vision became triumphant. I am instead interested in tracing the narrative work, what Peevers calls scripts, that enables a closer examination of the kinds of space and authority signatory states sought to eschew and reproduce. Examining these narratives and performances helps, I suggest, to show how certain signatory states sought to reaffirm imperial geographies, space and jurisdiction through locating ‘common’ decision-making regarding ‘common’ resources squarely within their authority. This does not require framing an idealized version of what the impacts of the application of the common heritage of mankind would have been regarding extraction, but it helps us see how negating redistribution works to reinforce distinctions of Northern access and control of extractive processes. This reading assists in shifting the focus onto the multiple productive dimensions of contests of authority and extractivism in Antarctica. The fact that the doctrinal changes to the Treaty system’s distribution of authority have been limited does not mean that the contest of meaning at this point in time has been definitively settled. Indeed, such an understanding might point to ongoing contestation, linked through the ideas of imperial geographies and the authority sought from space-making projects.

### *Imperial space*

The spatial construction of Antarctica by signatory states can be read critically to reveal attempts to reinforce and legitimize their authority over and beyond the continent. What is

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<sup>390</sup> The submission of Malaysia (view of states, submission 27) in UNGA, *supra* note 4 at 110, para 6(2).

<sup>391</sup> Mr. Zain, representative for Malaysia, in UNGA, *supra* note 303 (UN Doc A/C.1/39/PV.50) at 12.

<sup>392</sup> See Peevers, *supra* note 172 at 487.

<sup>393</sup> *Ibid* at 467.

revealed when we think with a spatial approach to extractivist constructions of Antarctica, I suggest, is a contest over imperial geographies and space-making that are entangled with global patterns of extractivism as much as debating resource use in Antarctica. The specific ways that I use a spatial lens is to engage the constitutive qualities of debates over the common heritage of mankind. I argue that signatory states attempt to reassert a form of imperial geography that reinforces global forms of authority to extract.

Barr has outlined how Antarctica as a southern continent has historically often been constructed as a ‘counterbalance to the weight of the North.’<sup>394</sup> She describes Antarctica as ‘an ambiguous place that is not-quite-land and not-quite-sea. Not quite either, its land is covered by ice that moves and its seas freeze and expand and contract.’<sup>395</sup> The idea of a buffer or counterbalance is also expressed in through examining these debates. The operativeness of this counterbalance works to preserve space or climactic stability in the context of extractivism elsewhere. For instance, Australian representatives state that ‘resources may also include areas, species, biological communities or systems that are considered important to maintain, protect or conserve in as unaltered a state as possible to provide points of reference or natural buffers against activities undertaken elsewhere.’<sup>396</sup> Craven highlights how a similar idea of a ‘spatial fix’<sup>397</sup> influenced developing a legal framework for outer space. The notion of a ‘spatial fix,’ developed by David Harvey, describes imperialist responses to the ‘overaccumulation of capital,’<sup>398</sup> or ‘capitalism’s insatiable drive to resolve its inner crisis tendencies by geographical expansion and geographical restructuring.’<sup>399</sup> Storr explains that

‘for Harvey, geographic expansion is an inevitable response to capital overaccumulation, and functions as a ‘fix’ in two senses: first, as a solution to the irreconcilable co-existence of surplus capital and labour; and second, as a mode of fixing or producing space, so that capital can move freely within and across it.’<sup>400</sup>

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<sup>394</sup> Barr, *supra* note 11 at 166. The current operation of this counterbalance imaginary, of course, favours signatory states.

<sup>395</sup> *Ibid* at 197.

<sup>396</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4 at 54, para 146. Emphasis added.

<sup>397</sup> Craven, *supra* note 43 at 572.

<sup>398</sup> David Harvey “Globalization and the ‘Spatial Fix’,” (2001) 2 *Geographische Revue* 24 at 26.

<sup>399</sup> *Ibid* at 24.

<sup>400</sup> Storr, *supra* note 47 at 13.

Spatial constructions of Antarctica can be understood then as expansionist as well as a form of offset. Signatory states describe both a drive for resources as well as protection from extraction, yet either way the space-making that they seek to maintain legitimizes global forms of Northern authority and extractivism. Although Craven is interrogating a spatially distinct site and during an earlier phase of the Cold War to the point at which these debates occurred, the rationalities that he tracks in the development of the legal framework are instructive. He shows that ‘a common theme is that impending resource depletion on earth will soon bring such resources within commercial and technological reach, and that outer space will therefore provide a spatial fix’ for a system of global capitalism that might otherwise run into the ground.’<sup>401</sup> The spatial fix is a helpful analytic, because it relies on a homogenized vision of a single globe with extractive activity viewed or tallied in a single and total way. This notion is related to the way the common heritage of mankind concept’s redistributive dimension of commonality is appropriated by signatory states to position themselves as the location of common humanity. Yet here, the way resources are positioned as ‘commonly’ accessible within a single view works to position them in the control of signatory states. Thinking about Antarctica in this way allows us to see that the imaginary of its production and location as a source is not spatially confined to the Antarctic continent. I suggest this account because the discussion of the technical capacity to engage in extractive projects in Antarctica reference the accessibility of extractive projects elsewhere, in other locations to which signatory states also assume access.

In a similar way, Mitchell has also shown how the use of geographical descriptions naturalizes developmentalist interventions in Egypt. He explains, ‘what appears as nature is already shaped by forms of power, technology, expertise, and privilege.’<sup>402</sup> He describes the way interventions, ‘solutions,’ are produced by naturalizing a particular view that suits the intervention, ‘new technologies to overcome their natural limits... Yet the apparent naturalness of the imagery is misleading.’<sup>403</sup> For my purposes, the naturalness that I read as being asserted is that signatory states have authority to decide on the extraction of resources existing in anywhere in the globe, with this authority being framed as where it makes most geographical sense, but leaving questions of whose territory it is and who will profit comfortably out of view. For instance, submissions to the General Assembly state that ‘if

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<sup>401</sup> Craven, *supra* note 43 at 571-2. Cait Storr also writes on the idea of spatial fix, see Storr, *supra* note 47 at 13.

<sup>402</sup> Mitchell, *supra* note 234 at 170.

<sup>403</sup> *Ibid.*

sufficient incentive existed, exploitation of any Antarctic oil field could occur by sometime after the turn of the century. At present, the technology exists to allow prospecting in most, if not all, interesting offshore areas, and exploration in some limited areas.<sup>404</sup> Yet the submissions continue to invoke both technical reasons and access to other resources as reasons to postpone extracting Antarctic resources. Submissions state,

‘the remote and hostile environment, the difficulties and expense of extraction, the costs of necessary environment protection and transport, and the *availability of lower cost alternative sources* suggest that exploitation of Antarctic minerals is unlikely to be technically feasible or economically rational until the next century, if ever.’<sup>405</sup>

Representatives additionally argue that ‘it has been suggested that manganese nodules, a source of copper, nickel, manganese and cobalt, may have economic potential, though these are *most likely to be exploited first in tropical waters* where they are richer and geographically more accessible.’<sup>406</sup> I suggest that the geographical discussion of technical difficulties that would prevent Antarctic extraction both denote it as a site worth protecting, and legitimize access to ‘easily’ accessible resources elsewhere as well as legitimizing technology and ease of access as a way of ensuring authority over resources.<sup>407</sup> Denoting resources as ‘likely’ to be extracted or ‘accessible’ for extraction, as signatory states do, assumes both access to and control over these resources. In this formulation, rightful authority and ownership is located in the global North, reinforcing colonial binaries prevalent in the authority claimed through both international law and extractivism. Although corporate access for mining, drilling, fracking or similar extractive projects did not eventuate in Antarctic territory, the background to the legal framework denoting ‘accessible’ resources elsewhere reinforces signatory states’ and corporate access to these. As we will see in the next chapter, this question is not separable from questions of the settler state, authority and law.<sup>408</sup> Gevers’ work on the productive dimension of imaginative geographies is a useful way to understand signatory states’ narration of a singular global space where extraction can be authorized and balanced without changing the structures of authority. The narrative of

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<sup>404</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4, 57 at para 158.

<sup>405</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4, 81 at para 275. Emphasis added.

<sup>406</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4, 55 at para 151. Emphasis added.

<sup>407</sup> Although spaces of the global South are obviously far beyond a demarcation of ‘tropical waters,’ this point is primarily about the assumed access and imperial distribution of authority over global space beyond Antarctica, which these constructions of Antarctic authority attempt to maintain.

<sup>408</sup> See Scott, *supra* note 23; Barr, *supra* note 15.

signatory states here works to produce a similar imaginary of space, a form of imperial geography that reinforces imperial distributions of authority, harm and profit. This reading of imaginaries produced through signatory states' discourse attends to the construction of a form of global extractivism that cannot be fully legible if these debates are considered only in relation to the discrete site of Antarctica.

Much of my reading here also relies on how Craven explains Louis Althusser's strategy of a symptomatic reading, 'not simply looking at a text for the purposes of determining what it seeks to make clear or manifest but, rather, attending also to its constitutive silences ... to reveal what must be silently repressed, or kept out of sight in order for that which is visible to have meaning.'<sup>409</sup> Engaging this, the binaries implicit in creating imperial geographies through space-making claims are also visible in the way Antarctica's environmental protection is later discussed in these debates. Australian submissions describe Antarctica as wilderness and state that 'wilderness has value to many people simply because they know it is there.'<sup>410</sup> The language of wilderness further naturalizes a binary between certain lands to be protected, and lands where protection or restraint on extractive projects is not contemplated – those lands where resources are flagged as prevalent or accessible. For instance, as previous interventions by signatory state actors suggest, signatory states posit scientific and climactic knowledge as a resource, even open space and wilderness is at times also imagined as a source to draw from. The notion of a spatial fix here should be read in conjunction with activities of some signatory states such as Australia that have heavily extractive economies, relying both on internal contested territory and the resources of other states by influential mining companies.<sup>411</sup> For instance, Watson and other scholars have shown the widespread theft of land as part of the colonial project and continuing extractivism including fracking and, less conventionally considered extractive but with similar relationship to land, disposal of nuclear waste.<sup>412</sup> In this way I suggest that is not possible to fully understand the implications for claims to authority and distribution of harm and benefit from extractivism that are enacted in these debates solely by examining them as only impacting Antarctic territory.

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<sup>409</sup> Craven, *supra* note 43 at 556.

<sup>410</sup> Submission of Australia (views of states, submission 3) in UNGA, *supra* note 4 at 64, para 206.

<sup>411</sup> See Teaiwa, *supra* note 75; Anghie, *supra* note 28; Storr, *supra* note 28.

<sup>412</sup> See Watson, *supra* note 48, Moreton-Robinson, *supra* note 48.

To read in this way I also draw from Jasanoff's work that shows the creation of space through imaginaries can have a dispersed spatial effect, such as to 'acquire governing force across much wider domains, both physical and temporal,'<sup>413</sup> including how 'one can trace in policy discourse the creation of new geopolitical boundaries.'<sup>414</sup> These techniques and processes are also visible in demarcating areas of legitimate state authority, and the spatial demarcation of claims to authority over Antarctica may not be so easily separable from claims to authority in other contested spaces. Jasanoff explains how binaries can operate in this dispersed spatial way, 'it takes power, as Foucault and other historians of the human sciences have long seen, to create demarcations and simplifications in a world of hybridity.'<sup>415</sup> Craven also finds in relation to his examination of outer space that the 'outward projection of a set of rationalities'<sup>416</sup> allowed state actors to, and this is particularly important for considering the forms of extractivism authorized, 'imagine the globe and situate themselves at its centre, seeing themselves in, and through, *where they were not*.'<sup>417</sup> The imperial vision of space-making that signatory states project in relation to extractivism then is inseparable from, or works in a co-constitutive way with, a project of asserting settled authority where, in fact, signatory states' claims to authority are highly contested.

The work of jurisdiction as a technical or material practice that seeks to order authority helps to interrogate the ways in which reasserting an imperial geography or concept of global space can link extractivism and authority.<sup>418</sup> Pasternak's work on jurisdiction points to how presenting a spatially unified claim to authority hides and 'seek[s] to naturalize its spatial differentiation.'<sup>419</sup> In this way reassertions of imperial geographies can be read not only as legitimating extractivist interventions but as using imperial constructions of space to reinforce an imperial ordering of authority. Anghie, Pahuja and others have shown that the work of binaries, such as those I argue are implicit in the imperial geographies invoked by signatory states, are entangled with racialized discourses of civilization that were and remain central to international legal ordering.<sup>420</sup> Yet Pahuja's work also shows how attending to

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<sup>413</sup> Jasanoff, *supra* note 53 at 22.

<sup>414</sup> *Ibid* at 26.

<sup>415</sup> *Ibid* at 16.

<sup>416</sup> Craven, *supra* note 43 at 571.

<sup>417</sup> *Ibid*. Emphasis added.

<sup>418</sup> See Barr, *supra* note 11.

<sup>419</sup> Pasternak, *supra* note 157 at 153, drawing from Mariana Valverde's work.

<sup>420</sup> See Anghie, *supra* note 13; Pahuja, *supra* note 30. See also on the concept of 'civilization' in international law, Tzouvala, *supra* note 13. Howkins has argued that imperialism towards Antarctica exemplifies a settler colonial mentality or imaginary because space itself (space without permanent inhabitants) is able to be

these claims as jurisdictional practices can also denaturalize a claim to total authority, because contest and plurality become more visible.<sup>421</sup> The violence of constant reassertions also then comes into view as signatory state actors actively work to maintain imperial space and time and defend related forms of extractivism and authority.

Reading space-making technologies and imperial geographies as practices of authority with material effect, and if, as I suggest, the Antarctic Treaty framework can be read as tied up with these, a mining ban is a doctrinal change that does not necessarily undo all of the work of authorizing extractivism that these debates point to. In fact, partially its effect is to reinforce signatory states' claims to have authority to extract beyond Antarctica. A spatial lens further helps to see linkages between the temporal technologies also at work here. Without a focus on the spatial dimension of the forms of extractivism seeking to be authorized in these debates, and its dispersal well beyond Antarctic territory, it would be easier to read doctrinal changes that occur throughout time as relegating all forms of extractivism tied to Antarctica, and authorized in these debates, to the past. Instead, I suggest that an account that highlights the contested authority and world-making practices within the Antarctic Treaty exposes deep links to a project of maintaining divisions of authority, imperial geography and control where extractivism is legitimized in the Northern taking of Southern resources. Combining ideas of spatializing authority and extractive imaginaries helps to see the ways that signatory states utilize and draw from Antarctica and how it is not easy to clearly delineate this from extractive projects and assertions of authority elsewhere. The analytic of extractivism then becomes entangled with other processes posited as spatially or temporally distinct.

## Conclusion

In this chapter, I read state submissions to the General Assembly's 1984 consideration of Antarctic authority and resources, being attentive to how signatory states defending the Treaty characterized Antarctica and their relationship to the continent. Accounts of extraction in Antarctica predominantly focus on doctrinal changes that ban mining and nuclear activity.

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appropriated. See Howkins, *supra* note 331. Yet I read the assertions of authority in Howkins' account to only be fully legible if the way that Anghie has exposed colonial encounters as central to the creation of international law is also first taken into account. See Anghie, *supra* note 13.

<sup>421</sup> See Pahuja, *supra* note 22.

To be clear, the importance of these is certainly significant.<sup>422</sup> Yet considering the debates in a different register, I suggested, reveals that Antarctica is constructed not only as a material source to draw from (which may be abated by legislative bans), but also as an imaginary, a source to draw from of a different kind. Changing the direction of our attention shows not only how Antarctica receives and exposes the impacts of global extractive activity and the fossil fuel economy, but also that the legal imaginaries of Antarctica contribute to the global production of extractive activity. Specifically, imperial space-making practices seek to maintain and inaugurate a configuration of the world where humanity is located in the global North and decisions on world resources can be made by Northern states, who assume access to any location where resources are located. Discourses of geography work to naturalize the access to resources outside Antarctic waters as easier to access than those lodged under Antarctic ice sheets. These decisions, cast as purely technical, help to naturalize forms of imperial geography and authority that suggest that the lack of material extraction from Antarctic ice does not necessarily mean the forms of authority engendered by the Antarctic Treaty are entirely separate from the material impacts of extractivism elsewhere. In this way, I suggest that the debates can also be read to show the deep relationship between legal imaginaries and material practices of law. A linear temporality further reinforces narratives of progress and legitimizes the doctrine of discovery, which also relies on a homogenized conception of space and governance. Constructions of homogenized space and linear temporality here work together to reassert imperial ordering that is deeply entangled with global extractivism. In this way, the international ordering visible in signatory states discourse can also be read as reinforcing imperialism and claims to authority beyond Antarctic territory. Holding this in mind, although conservation protocols are now in place that prevent mineral and other material extraction from Antarctica, the global imperial imaginary within the Treaty System preserves extractivism beyond Antarctic territory. In this way, I also argue for a particular conception of extractivism,<sup>423</sup> that paying attention to localized material impacts of extractivism is essential, but there are other spatialized processes that also require contestation. This conception of extractivism as spatially complex and at least partially dispersed and entangled will become important when considering resistive possibilities to

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<sup>422</sup> See particularly recent news, Damian Carrington, “First active leak of sea-bed methane discovered in Antarctica”, *The Guardian* (21 July 2020), online: <<https://www.theguardian.com/environment/2020/jul/22/first-active-leak-of-sea-bed-methane-discovered-in-antarctica>>.

<sup>423</sup> See Martín, *supra* note 95.

legal ordering that challenge the relationship between authority and extractivism exposed in this chapter.

## Chapter 3 – Movement, exchange and the rivers of the Murray-Darling

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### Introduction

In the last chapter I argued that focusing on doctrinal changes did not sufficiently counter the extractivism authorized through a specific set of debates concerning authority over Antarctica. This is because what was really at stake in those debates was a contest over a temporality that authorized discovery as a legitimate mode of authority, and over imperial geographies and space-making that reinforced Northern authority and extractive projects. In this chapter I look at how regulation positioned as reducing extraction from the Murray-Darling river system in south-eastern Australia, including the ‘sustainable diversion limit,’<sup>424</sup> reinforces extractive interventions towards the rivers. This is visible through examining technologies of movement and exchange and how they have been utilized extractively to strengthen state authority, as well as through histories of claims to divide the waters for colonial projects. State control over the river system simultaneously unravels and is reasserted, and state constructions of this river system produce claims to authority and possession. This partly relies on overlapping forms of authority between state and corporate actors in the river basin. I suggest that the impact of extractive projections towards these waters is an attempt to transform existing legal relationships as a way of exerting authority over land as much as for profit or a ‘productive’ outcome. I first look at stories of unravelling and reasserting extractive control over the river basin, and then turn to how examining material practices of movement as a technique of extraction and jurisdiction can help expose the continuities in the extraction and the authority it generates. Looking at discourses of sustainable diversion, in response to visible signs of extractivism, I argue that paying attention to material practices is a useful way to examine the interaction between extractivism and authority here. Partly the specific ways in which the waters are used to assert territorial authority depends on the extractive site’s construction as liquid. In conjunction with the previous chapter, the ways that the co-constitution of extractivism and authority can be understood in these two examples is both through imperial imaginaries that have material effects, such as productions of imperial space and time that reinforce extractivism, and material practices that build a colonial legal imaginary, such as practices of division and exchange that assert the state’s lawful authority. In the last chapter, one particular reason to pay attention to the imperial space-making and temporal techniques of constructing a global

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<sup>424</sup> On the Murray Darling Basin Authority and the sustainable diversion limit see Simons, *supra* note 8 at 6.

extractive imaginary was the material effects of this imaginary in sites where extraction was authorized whilst extraction was prohibited in Antarctica. Here, we can see that one way to track the construction of a colonial imaginary of legal authority in Australia is through material practices of extracting water from the Murray-Darling. It is not that colonial imaginaries of transforming land do not also affect the forms of material practices, certainly this is also the case. But I suggest that through the practices themselves the colonial legality and its imaginaries are performed, stabilized and recreated. In this way, the last chapter showed how maintaining legal ordering authorized extractivism through a positioning of common humanity in the North, and legitimizing discovery – in one sense, law that builds extractivism. Here, material practices of extraction and allocation can also be shown to build claims to authority and forms of law.

### Unravelling and reasserting control

‘The word “rival” ... [was] used in Roman law to mean those who shared the water of a *rivus*, or irrigation channel.’<sup>425</sup>

The waters that form the area described as the Murray-Darling River Basin in south eastern Australia stretch 77 000 kilometres.<sup>426</sup> 77 000 kilometres, that is, of water, or where water used to be; the area covered by the Basin is over a million square kilometres,<sup>427</sup> comprising 23 river valleys and over 30 000 wetlands.<sup>428</sup> Substantial amounts of water are drawn from the Basin, to drink, but also for the high concentration of agricultural industry in the area, which includes significant food production and large-scale cotton farms.<sup>429</sup> In 2012 a federal management plan, the Murray Darling Basin Agreement, came into effect.<sup>430</sup> Its purpose is described as ‘to promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of water and other natural resources.’<sup>431</sup>

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<sup>425</sup> Simons, *supra* note 8 at 11. Rivalry is not of course the only way to relate to water, this rather points to the widespread politicization of water as a resource.

<sup>426</sup> Austl, South Australia, Murray-Darling Basin Royal Commission, *Report* by Commissioner Bret Walker SC (Adelaide, 2019) at 79. Although the Murray-Darling Basin is of course only one of many names for these waters.

<sup>427</sup> *Ibid* at 79.

<sup>428</sup> *Ibid*.

<sup>429</sup> *Ibid*.

<sup>430</sup> Under Austl, *Water Act 2007 (Cth)*. See Victoria, Department of Environment, Land, Water and Planning ‘Murray Darling Basin Plan’ (2020) online at: <https://www.water.vic.gov.au/murray-darling-basin/mdbp>.

<sup>431</sup> Murray-Darling Basin Royal Commission, *supra* note 426 at 5.

Striking images have brought attention to the Basin in recent years, including a mass of dead fish floating in the Basin's southern waters,<sup>432</sup> algae, salinity and the river flows failing to reach the sea.<sup>433</sup> Stories from the Basin are equally striking: towns running out of drinking water downstream, allegations of irrigators upstream stealing water with departmental complicity, and irrigators being granted licences to harvest recent rains before they reach towns downstream.<sup>434</sup> Following a mass of fish dying in late 2019, fish were reported to be electronically stunned and transported to a different water source as the Murray-Darling river system could not support them to continue to live.<sup>435</sup> At the same time, diesel pumps were set up in the waters of the Darling river to attempt to oxygenate it artificially, since the low oxygen levels in the water contributed to the mass death of fish that lived there.<sup>436</sup>

In a recent journalistic essay subtitled the 'Tragedy of the Murray Darling,' Margaret Simons describes current water use in the southern Basin as a 'plumbed landscape,'<sup>437</sup> that in the southern sections, 'water is ordered up and delivered by rivers, pipes and channels to its end use.'<sup>438</sup> Yet in the Northern Basin, Simons writes, 'the Authority estimates that up to 75 per cent of the water diverted is unmetered.'<sup>439</sup> The Australian Broadcasting Commission's program 'Pumped' shows footage of expansive private dams on cotton farms where meter pumps appeared to not be working despite water appearing to be drawn from the river on days of low flow.<sup>440</sup> The extractive interventions towards this river system have caused visible disruption to its health and life.

Describing interventions in the Basin, Simons states that 'the water flows, usually, but the information doesn't.'<sup>441</sup> Simons describes the inaccessibility and impenetrability of

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<sup>432</sup> See A Davies, *supra* note 8.

<sup>433</sup> The recent Royal Commission also documents the Murray Darling Basin Authority's, the federal governance body, negligence for ignoring climate change in future modelling. See Murray-Darling Basin Royal Commission, *supra* note 426 at 247.

<sup>434</sup> On drinking water and water theft see Simons, *supra* note 8 at 2-4; 46. On irrigation licences see Simons, *supra* note 5, and on irrigation licences after the rain see Simons, *supra* note 8 at 107-108.

<sup>435</sup> Simons, *supra* note 8 at 40.

<sup>436</sup> *Ibid.*

<sup>437</sup> *Ibid* at 5.

<sup>438</sup> *Ibid.*

<sup>439</sup> *Ibid* at 47. The 'Authority' is the Murray Darling Basin Authority.

<sup>440</sup> Four Corners, "Pumped" (24 July 2017) *Australian Broadcasting Commission*, online: <https://www.abc.net.au/4corners/pumped/8727826>. Although only in relation to a single farm, and the legal limit itself being a contested notion, the New South Wales Land and Environment Court found earlier this year that a cotton farm had taken water above the legal levels. See *Australia, Water NSW v Harris (No 3)*, [2020] NSWLEC 18, with explanatory commentary by the Environmental Defenders Office, an environmental legal organization at <https://www.edo.org.au/2020/04/03/analysis-irrigators-convicted-judgment/>.

<sup>441</sup> Simons, *supra* note 8 at 4.

information about interventions into the Basin as exacerbated by bureaucratic management and who she terms ‘water engineers,’ who, ‘since before federation, dominated irrigation – the white man’s dream of creating gardens in the desert.’<sup>442</sup> In this language of engineers, rain is described as an ‘event,’<sup>443</sup> regular parts of river flow, including evaporations or seepage into the ground are described as ‘lost,’<sup>444</sup> and if a river isn’t running, it isn’t ‘part of the “connected” system,’<sup>445</sup> or is described as a ‘significant ‘cease to flow’ event.’<sup>446</sup> The Murray Darling Basin Agreement implements a ‘sustainable diversion limit’ to purportedly reduce extraction, although without departing from an extractivist relation.<sup>447</sup> The sustainable diversion limit is required to be, but described as not being, based on what is described as an ‘environmentally sustainable level of take,’<sup>448</sup> a related mechanism for measuring and enabling specific amounts to be taken from ‘(a) the Basin water resources as a whole; and (b) the water resources, or particular parts of the water resources, of each water resource plan area.’<sup>449</sup> A recent Royal Commission highlights deficiencies in scientific material relied upon as well as an approach called the ‘triple bottom line,’ which enables consideration of economic and social objectives along with environmental ones in determining these limits.<sup>450</sup>

Yet as Simons highlights, the sustainable diversion limit is ‘dead language, but also confusing, even a lie, because the sustainable diversion limit is not sustainable, and may not be a limit.’<sup>451</sup> She describes how projects described as ‘efficiency schemes,’ may have meant that irrigation draining has been changed to such an extent that water naturally returning to the river through, for instance, dripping into the soil, has been lowered – potentially at quantities that equal all of the water reallocated from farming to the river.<sup>452</sup> Ironically, the prevalence of the language of nature, as Simons says, is often used to legitimize further interventions.<sup>453</sup> The notion of water engineering and its discursive construction of the river

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<sup>442</sup> *Ibid* at 6.

<sup>443</sup> *Ibid*.

<sup>444</sup> *Ibid*.

<sup>445</sup> *Ibid* at 27.

<sup>446</sup> Murray-Darling Basin Royal Commission, *supra* at note 426 315.

<sup>447</sup> On the sustainable diversion limit and its aims see Simons, *supra* note 8 at 6. On the relational element of extractivism see Scott, *supra* note 25.

<sup>448</sup> Murray-Darling Basin Royal Commission, *supra* note 426 at 187.

<sup>449</sup> Austl, *Water Act 2007 (Cth)*, s 22 cited in *Ibid* at 143 and explained at 142-3.

<sup>450</sup> Murray-Darling Basin Royal Commission, *supra* note 426 at 20; 188. See for an account that supports this approach Rachel Kelly, "Getting the Balance Right: Why the Murray Darling Basin Plan Can Implement the Triple Bottom Line Approach" (2011) 10:3 Canberra Law Review 178.

<sup>451</sup> Simons, *supra* note 8 at 27.

<sup>452</sup> *Ibid* at 83.

<sup>453</sup> *Ibid* at 8.

as a resource reveals the deeply colonial projects of claiming and transforming land behind extractive interventions in the Murray-Darling.

Simons also describes a departmental transition to ‘strategic’ water buy backs (water bought from farmers’ licences by the government to return to the river for environmental purposes), which meant a closed tender process.<sup>454</sup> Indeed, in 2017, the Australian Department of Agriculture was criticized for reportedly buying water at the value of \$80 million from a company with headquarters in the Cayman Islands with connections to a member of the party serving in government.<sup>455</sup> Simons describes complex systems of licencing with differing entitlements of ‘security’ to extract water, and access to high or low water flows as well as the ability to maintain an unused water entitlement for many years into the future.<sup>456</sup> Water licences used to be part of title to land, but law promoting trade has disconnected the water rights from the property where the water is held.<sup>457</sup> And the ownership of water is obscured, with no public register of where each licence is held.<sup>458</sup> Yet a report by the national weather bureau for the year 2016-17 recorded 80% of entitlements to basin water by ‘individual users (irrigation, industry and other uses), 2% for urban water use, and 18% for the environment.’<sup>459</sup> If the last paragraph began to reveal coloniality is linked to extractive interventions here, the way water is posited as a tradeable commodity also draws attention to relationships with systems of capital and exchange.

Although Simons has described the 2019 Royal Commission’s view that the Murray-Darling Basin Authority, the federal body that governs the system, ‘is dishonest, incompetent and acting outside the law,’<sup>460</sup> I am particularly interested in the ways that this extractivism is

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<sup>454</sup> *Ibid* at 34. See for more detail on the buyback scheme Katherine Owens, ‘Reimagining water buybacks in Australia: Non-governmental organisations, complementary initiatives and private capital’ (2016) 33 Environmental and Planning Law Journal 342.

<sup>455</sup> See Anne Davies, ‘Barnaby Joyce approved plan to chase \$80m water buyback, documents show,’ *The Guardian* (6 June 2019), online: <https://www.theguardian.com/australia-news/2019/jun/06/barnaby-joyce-approved-plan-to-chase-80m-water-buyback-documents-show>; Anne Davies, ‘Angus Taylor says he did not set up Caymans structure on \$80m water buyback’, *The Guardian* (2 May 2019), online: <https://www.theguardian.com/australia-news/2019/may/02/angus-taylor-says-he-did-not-set-up-caymans-structure-on-80m-water-buyback>.

<sup>456</sup> Simons, *supra* note 8 at 5.

<sup>457</sup> *Ibid* at 13-14. See for a further critique of this trading regime Janice Gray, ‘The legal framework for water trading in the Murray-Darling Basin: An overwhelming success?’ (2012) 29 Environmental and Planning Law Journal 328.

<sup>458</sup> Or, without having previous knowledge of the licence number itself. See *Ibid* at 23.

<sup>459</sup> The ‘National Water Account, published by the Bureau of Meteorology’ cited in Murray-Darling Basin Royal Commission, *supra* note 426 at 143.

<sup>460</sup> Simons, *supra* note 8 at 3.

coexisting, or produced by – inside, in a way – the law. To do this I look at how the multiple extractions from the waters of the Murray-Darling have been used to bolster contingent and unstable claims to state authority and possession through technologies of movement and exchange.

### **Technologies of movement, division and exchange**

Barr's examination of movement as a form of jurisdiction, particularly attending to Anglo-Australian common law, is helpful to disrupt the common law's, or colonial state law's, imaginary of stasis, certainty and completeness.<sup>461</sup> Her work on movement as jurisdictional technique focuses primarily on how the movement of people is implicated in moving laws of Empire.<sup>462</sup> I take up the analytic of movement with a slightly different focus, how colonial histories of extractive interventions towards the river show sustained moving, dividing, and exchange of the water. This becomes particularly relevant for examining recent initiatives such as the 'sustainable diversion limit,' which purport to limit extraction. Yet, techniques of moving and dividing water allowances seem more continuous than discontinuous with practices long associated with extractivism toward the river. Moreover, the techniques of metering at least partially locate rightful ownership of water (through licences and other mechanisms) with corporate irrigators, and entirely within the framework of the colonial state law. I also argue, drawing from Barr's work, that not only do techniques of metering and exchange sustain extractive practices, but also are a way to assert legal authority and control, with reassertions of control heightening as control unravels. In this way, for my purposes, movement as a technical practice of law is a helpful analytic because it exposes the implications of moving, exchanging, measuring and dividing the waters of the Murray-Darling, as attempting to assert complete legal control over the multiple contested First Nations territories that the basin spans. While techniques of movement and exchange help to disrupt the state's projection of stable, singular legal and territorial authority in this case,<sup>463</sup> the sustaining dynamics of relationships between authority and extractivism are not confined to these techniques.

One of the implications or visible instances of the techniques of movement used in extractive interventions towards this river system is to create dams and allowances and meter its flow,

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<sup>461</sup> Barr, *supra* note 11.

<sup>462</sup> *Ibid.*

<sup>463</sup> Barr, *supra* note 15.

to divert water into storage, to return water from licences to the river itself. Indeed historically, the technique moved water between jurisdictions, for instance partly as agreed on in a colonial pact that certain state bodies are entitled to certain amounts of water for their interests and use. Sandford Clark describes Victoria and New South Wales' agreement in 1886 to 'divide the waters between them.'<sup>464</sup> Colonies, and then federal states (New South Wales, Victoria, South Australia), constructed the river as parcels of productive water, constructing rights to divert and utilize the water for irrigation and navigation.<sup>465</sup> The recent report of the South Australian Royal Commission into the Murray-Darling Basin frames New South Wales' claims as 'territorial rights to the watercourses,' Victoria's claims as irrigators' rights, and South Australia's claim as 'concern to preserve flows for the purposes of navigation.'<sup>466</sup> Simons also describes the Murray-Darling as one of the 'most bitterly contested issues,' in debates about creating the Australian Constitution, which has resulted in power to regulate river water firmly outside the Commonwealth, with states alone.<sup>467</sup> The Commissioner highlights the multiple meanings of conservation and regulation toward the river,<sup>468</sup> revealing further exchange and movement of water. He distinguishes what he calls a 20<sup>th</sup> Century meaning of conservation as environmental protection and a '19<sup>th</sup> Century Anglophone use' as 'the storage of water from otherwise natural flows, in order to make it available later, as desired by (say) irrigators.'<sup>469</sup> Indeed he says these conservations efforts were intended to 'enable regions otherwise too arid to farm ... to bear more profitable crops, and denser settlement to take root.'<sup>470</sup> Indeed the early views of colonists are evidenced in certain descriptions of the tributary Murrumbidgee River as dry, 'useless for any purposes of

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<sup>464</sup> Sandford Clark, "The River Murray Question: Part II – Federation Agreement and Future Alternatives" (1971) 8:2 Melbourne University Law Review 215 at 216.

<sup>465</sup> States also used multiple royal commissions in the late 1800s and early 1900s to plan irrigation development and negotiate water extraction between them. See Sandford Clark, "The River Murray Question: Part I – Colonial Days" (1971) 8:2 Melbourne University Law Review 11 at 27.

<sup>466</sup> Murray-Darling Basin Royal Commission, *supra* note 427 at 81.

<sup>467</sup> Simons, *supra* note 8 at 12. Clark also asserts 'the genesis of the controversy over the River Murray ... lies in Imperial legislation separating the colonies of Victoria and New South Wales.' See Clark, *supra* note 464 at 12. Complicated web of disputes ensued, Clark says, over where rates would be paid, and who would have rights or securities to maximize profit. See *Ibid* at 13. Today, the Murray River is still used as the border. See also for an account of the continuing relation between the Constitution and the region via international law Donald R Rothwell, 'International law and the Murray-Darling Basin Plan' (2012) 29:4 Environmental and Planning Law Journal 268.

<sup>468</sup> One 'eager to tame and train the forces of nature.' Murray-Darling Basin Royal Commission, *supra* note 426 at 12.

<sup>469</sup> *Ibid*.

<sup>470</sup> *Ibid*.

colonization.<sup>471</sup> And First Nations have recently described the actions taken toward the area as constituting practices of a form of ‘aqua nullius.’<sup>472</sup>

Moving the Basin waters for production as a state resource both compiles the waters together and divides them into sections. The complex life of the river basin has been metered, divided, extracted, returned (from irrigation licences, where in the state legal imaginary ownership is rightfully located, at least partially). Yet the dead fish, algae and salinity, as evidence of state interventions, both show control and a lack of control. Movement itself connotes a tension between projections of control and the inability to control. The moving of the water, and the returning it back, signifies control but also exposes instability of the many corporate and state actors along the river and their claims to legal authority. Movement is also used to flush salt from the river so as to not affect farming salinity,<sup>473</sup> and to maintain irrigation; it shows the repetition of efforts at control, including how they change over time. Indeed, Sue Jackson and Lesley Head write about the way water has been moved to such an extent through heightening neoliberal positionings that it became known as ‘exchange water.’<sup>474</sup> They write how ‘scripting water as a transferable ‘unit’ represented a further step in the abstraction of modern water, this time through an act of spatial abstraction that made water fungible.’<sup>475</sup> They link this to projects of knowledge of the water and quantifying its flow that were central to conceptualising it as a resource for the settler colony.<sup>476</sup> Indeed, more recently, there has been pressure to increase the amount enabled under the sustainable diversion limit.<sup>477</sup> Legislation permits proposed adjustments, under five percent of the total water volume, in the instance of, as examples: ‘re-configuring suitable lakes or storage systems to reduce evaporation’<sup>478</sup> or ‘changing the methods of environmental watering in such a way that equivalent environmental outcomes can be achieved with a smaller quantity of water.’<sup>479</sup>

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<sup>471</sup> Horton James, *Six Months in South Australia* (Facsimile ed. 1968) at 14, cited in *Ibid* at 25.

<sup>472</sup> Lorena Allam, “Ending ‘aqua nullius’: calls for laws to protect Indigenous water rights”, *The Guardian* (29 June 2018), online: <<https://www.theguardian.com/australia-news/2018/jun/29/ending-aqua-nullius-calls-for-laws-to-protect-indigenous-water-rights>>.

<sup>473</sup> See Simons, *supra* note 8 at 102-104.

<sup>474</sup> Jackson & Head, *supra* note 44 at 51.

<sup>475</sup> *Ibid*. Internal references omitted.

<sup>476</sup> *Ibid*. Although they describe water governance as including settler colonialism, but with the participation of multiple other, including Indigenous ontologies of water relation, that ‘intersect with and exceed modern water.’ *Ibid* at 44.

<sup>477</sup> Murray-Darling Basin Royal Commission, *supra* note 426 at 28; for further detail on the mechanisms and its potential to be adjusted see *Ibid* from 291.

<sup>478</sup> Austl, *Water Act 2007 (Cth)*, s 7.03, cited in *Ibid* at 291.

<sup>479</sup> Austl, *Water Act 2007 (Cth)*, s 7.03, cited in Murray-Darling Basin Royal Commission, *supra* note 426 at 292.

Heather Downey and Tim Clune also describe governmentality and neoliberalism enacted through claims to water entitlement in the Murray-Darling.<sup>480</sup> Invoking governmentality and discourse analysis, the moveability, engagement and constitutive nature of discourse and social relationships,<sup>481</sup> they specifically look at ‘irrigators’ imagined or assumed sense of entitlement to water.<sup>482</sup> Revealingly, they argue that the former Minister for Agriculture ‘perpetuates mythologised notions that water in the MDB belongs to irrigators alone.’<sup>483</sup> His reported response to allegations of water theft was to frame a discussion on water entitlements “‘about them trying to take water off you,” which locates rightful ownership of the waters with irrigators and posits its rightful use as a resource.<sup>484</sup> The neoliberal governmentality of water marketization is a different form of division and exchange than the division between colonial states, with a different relation to the colonial state law. Yet they are not unrelated, and the remedy to extractivism is often posited as better regulation by the state.<sup>485</sup> Without saying that limiting extraction is insignificant, proposing more regulation by the state misses how the state’s authority is necessarily entangled with corporate authority and capital, as well as how this proposal entails an implicit assumption that the state’s law is the only proper law governing the Murray-Darling. Yet it is important to draw out, rather than obscure, the implications of the assertion of colonial law and how it works in close relationship with capital and corporate authority. Indeed, Scott shows how the Canadian settler state provides access to capital in an attempt to preserve its own position, ‘to delay the inevitable breakdown of the state’s jurisdictional authority on those lands, which will entail radical wealth redistribution from capital to Indigenous peoples.’<sup>486</sup> She draws from A. Claire Cutler’s work, highlighting that “‘the assumption of the apolitical nature of private/economic exchanges ignores the more generalized and public implications of these exchanges,’”<sup>487</sup> yet Scott argues that, fundamentally ‘this is a struggle for the control of lands and resources.’<sup>488</sup>

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<sup>480</sup> Heather Downey and Tim Clune, ‘How does the discourse surrounding the Murray Darling Basin manage the concept of entitlement to water?’ (2019) 40:1 Critical Social Policy 108.

<sup>481</sup> *Ibid* at 115.

<sup>482</sup> *Ibid* at 117.

<sup>483</sup> *Ibid*. ‘MDB’ as referred to is the Murray-Darling Basin.

<sup>484</sup> *Ibid* at 119. Internal citation omitted.

<sup>485</sup> See Environmental Defenders Office, *supra* note 439. See also Simons, *supra* note 8 and the Murray-Darling Basin Royal Commission, *supra* note 426.

<sup>486</sup> Scott, *supra* note 23 at 273.

<sup>487</sup> A. Claire Cutler, cited in *Ibid* at 291.

<sup>488</sup> *Ibid* at 289. This is not to deny that the idea of ownership of resource has not long been linked to sovereignty through international law, but rather points to how more mobile forms of capital and corporate authority also are related to control or influence over contested territory.

Further, rendering the river as a non-living resource further works to make commodifying it more legible.<sup>489</sup> Yusoff also argues that particular knowledges and technologies work to increase the legibility of extractive projects,<sup>490</sup> by ‘the collective functioning of geologic languages coded—inhuman, property, value, possession.’<sup>491</sup> For the waters of the Murray-Darling, the Commission traces the predominance of economic language in positioning the river as a resource in current government descriptions.<sup>492</sup> He describes ‘the very unhelpful slogan of a ‘triple bottom line,’ which posits the rivers as a resource to be extracted for economic and social gain, with metered ‘recovered’ water for stated environmental purposes.<sup>493</sup> However, the balancing of these objectives through legislation sounds reminiscent of the form of conservation mentioned above, maintaining the lowest possible level of environmental protection in order to keep the river functioning for future extractions.<sup>494</sup> Any ‘incommensurab[ility]’ between the health of the water and its construction as a productive resource is eliminated through this slogan,<sup>495</sup> and irrigation remains privileged.<sup>496</sup> Yusoff also explains the importance of describing geologic processes not as natural but to expose the work that this knowledge does ‘as a question about the asymmetric organization, the capitalization, the temporal conversions and contraction of... inhuman matter and force.’<sup>497</sup> The way legal and physical interventions relatedly participate in this organization can be seen through the persistence of regulation of the river through construction to manipulate its flow.<sup>498</sup> Yusoff encourages attending to ways in which the ‘ontological categorization of matter is used to do political work,’<sup>499</sup> and also shows the interrelated sociality of extractive processes, arguing that the construction of ‘the earth as dead matter,’<sup>500</sup> has strong implications for extractive relationships. Sharp expansion in extractivism are certainly visible, and the Commission describes dams, such as the curiously

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<sup>489</sup> See on ‘extractive logics’ Scott, *supra* note 25 at 2.

<sup>490</sup> Yusoff, *supra* note 244.

<sup>491</sup> *Ibid.*

<sup>492</sup> Murray-Darling Basin Royal Commission, *supra* note 426 at 18.

<sup>493</sup> *Ibid* at 20.

<sup>494</sup> *Ibid* at 18-22.

<sup>495</sup> *Ibid* at 20.

<sup>496</sup> *Ibid* at 28. Part of the way this occurs is through positioning the river and extracting from it in order to transform land.

<sup>497</sup> Kathryn Yusoff, “The Anthropocene and geographies of geopower” in Mat Coleman & John Agnew, eds, *Handbook on the Geographies of Power*, (Cheltenham: Elgar Edward Publishing, 2018) 203 at 206.

<sup>498</sup> The Commission describes how “‘regulation’ was an allied concept, equally apt to justify massive engineering. Dams, weirs, bank reformation, snag removal and canalization are the more obvious physical modes of ‘regulating’ the rivers.” Murray-Darling Basin Royal Commission, *supra* note 426 at 12.

<sup>499</sup> Yusoff, *supra* note 498 at 14.

<sup>500</sup> *Ibid* at 211.

named ‘Keepit Dam,’ contributions to cotton production; in just five years (1961-1969), the area for growing cotton expanded from 38 hectares to 20 000 hectares.<sup>501</sup> The interaction between disruptions described as natural, usually described as drought rather than the interaction of extraction and drought, can work to invisibilize the role of extractivism. For example, between 2001 and 2009 during a significant drought, the river flow dropped by 82%. Half of this reduction in flow, the Commission states, was a result of extraction.<sup>502</sup> The influence of coloniality and capital on extractive interventions in the Murray-Darling then also begins to reveal the centrality of law to these projects, including the use of this river system to assert control and authority of the settler state’s law.

Barr’s work highlights how law’s projections of completeness, or of being ‘everywhere,’ seeks to erase First Nations’ legal authority<sup>503</sup> and at the same time obscures how movement itself can be a colonial technique.<sup>504</sup> The rivers of course move of their own accord, and this movement coexists with the movements different actors utilize to fulfil their desired uses of the rivers.<sup>505</sup> Constructions of the Murray-Darling Basin river system produce claims by the Australia state to authority and possession.<sup>506</sup> Moreton-Robinson’s work on ‘possessive logics,’ is useful in drawing out the extent to which competing and fragile claims of authority and possession to the waters of the Murray-Darling Basin must be constantly reasserted.<sup>507</sup> She describes possessive logics as ‘a mode of rationalization... that is underpinned by an excessive desire to invest in reproducing and reaffirming the nation-state’s ownership, control, and domination.’<sup>508</sup> And the Murray River has long been a site of colonial interruption and contest. Contests between colonial states exposed a shared view of the river as a resource to fuel expansion and authority over land and waters. The Commission links the current extraction from the Basin to ‘vain searches [by colonists] for the putative great inland

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<sup>501</sup> Murray-Darling Basin Royal Commission, *supra* note 426 at 82. Although numbers are only one way to register these shifts.

<sup>502</sup> *Ibid* at 88.

<sup>503</sup> Barr, *supra* note 15 at 61.

<sup>504</sup> *Ibid* at 62. Early colonial movement and division here being distinct to more recent neoliberal forms of movement and exchange. Although as Adil Hasan Khan notes, periodizations can ‘commit the error of treating colonial modernity as a *period*, instead of a *project*.’ See Adil Hasan Khan, “Politics and Piety in India: Re-learning Traditions of Civility,” *TWAILR* (12 June 2020), online: <<https://twailr.com/politics-and-piety-in-india-re-learning-traditions-of-civility/>>.

<sup>505</sup> Yet as all forms of naming aren’t appropriative, all forms of movement aren’t appropriative.

<sup>506</sup> See Pasternak and Scott, *supra* note 10.

<sup>507</sup> See Moreton-Robinson, *supra* note 48 at xii. Also see generally on retelling of stories of possession Buchanan and Johnson, *supra* note 45.

<sup>508</sup> Moreton-Robinson, *supra* note 48 at xii.

sea.<sup>509</sup> The Commission's report describes extractivism historically and continually, locating 'irreversible alteration in the Basin water resources' in the 1800s.<sup>510</sup> Disputes and displays of ownership between colonial states serve to show an extractive positioning of water, being able to be divided, commodified and put to work.<sup>511</sup> Yet framing the contest as only between colonial states alone would obscure the dispute between colonial laws and First Nations' laws, jurisdiction and authority. Indeed Moreton-Robinson highlights the interrelation between invasion of lands and waters and the production of a colonial racialized social space. She describes how 'racism is ... inextricably tied to the theft and appropriation of Indigenous lands in the first world.'<sup>512</sup> Theft and extractivism are not the same process, although they are related in a settler colony. Exposing the relationships between coloniality and intrusion into or extraction from the river, the Commission report describes colonial attitudes to the water, constructed as valuable or difficult: 'used as a 'servant' or resisted as an 'enemy.'<sup>513</sup> The Commission also characterizes extractive interventions and practices as (I would say attempting to) 'ordain their own (relative) permanence.'<sup>514</sup> The specific movement and exchange of the waters of the Murray Darling, and related reassertions and unravelling of claims to authority and control, expose how extractive interventions towards these waters are also used to consolidate authority over contested land and territory. In this way, relating to the reassertions of settler colonial authority, elements of the Murray-Darling discourse and water are moved and disrupted, but also continuous in their adaptive and violent reassertion.<sup>515</sup>

This far I have suggested that techniques of movement, division and exchange are utilized by the state to assert lawful authority and control over the rivers of the Murray-Darling. There were certain continuities that I read between techniques of movement and division in historical agreements to allocate water between state governments and more recent discourse

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<sup>509</sup> Murray-Darling Basin Royal Commission, *supra* note 426 at 11. The Commission does not characterize the state's extraction as comprising an extractivist relationship, distinct from other forms of extraction. For this reason I maintain the use of the term extraction when describing the Commission's descriptions, although I characterize the relationship as extractivism. See Scott, *supra* note 25.

<sup>510</sup> Murray-Darling Basin Royal Commission, *supra* note 426 at 12.

<sup>511</sup> See Scott, *supra* note 25 at 2.

<sup>512</sup> Moreton-Robinson, *supra* note 48 at xiii.

<sup>513</sup> Murray-Darling Basin Royal Commission, *supra* note 426 at 13.

<sup>514</sup> *Ibid.*

<sup>515</sup> Jackson and Head trace the construction of the waters of the Murray-Darling historically as the regulatory imaginary moved from interests in, they argue, navigation, entitlement, exchange and saving, through to neoliberal market environmentalism. Jackson & Head, *supra* note 44 at 44. They further describe 'entitlement flows' as 'suggested commensurability or equivalence between waters,' and savings as 'water accounting' that 'creates a space through which evaporative 'savings' travel.' *Ibid* at 50-54.

that purports to regulate extraction by irrigators through similar state allocations, as well as a more mercantile approach to water exchange. I argued that as well as enabling continued extraction, the techniques of moving also show attempts to assert that the state's law is the proper law in control of the river system, even as visible signs of the river's ill-health suggest that control is unstable. The implications of paying attention to these techniques of movement as a jurisdictional practice has so far been to expose the state's claims to rightful authority. These are also relevant for examining the constitutive connection between extractivism and authority, which, in this thesis, includes the way that the material practices of movement build a colonial legal imaginary. For instance, in the previous chapter I argued imperial spatial and temporal imaginaries were not disconnected from authorizing material practices of extractivism beyond Antarctica: the legal ordering reproduced extractivism. I now look at how material practices of extraction themselves are used to build colonial law and an imaginary of authority that extends beyond the site of extraction.

### **Material practices building a colonial legal imaginary**

Material distribution is a crucial element of claims to authority in settler colonies. Adrian Smith's explanation of a 'material legality'<sup>516</sup> is helpful to draw out the importance of what he terms, 'socio-spatial practices'<sup>517</sup> and the 'material processes, practices, relations, and conditions of settler colonial capitalism.'<sup>518</sup> It is important not to minimize materiality, he argues, as settler colonialism is 'a (trans)formative structural relationship of domination and authority expressed in national-territorial terms... it functions on an obfuscation of its necessarily violent means carried out to secure and enforce authority.'<sup>519</sup> His argument is based in writing about labour and the racialized impacts of agricultural extractivism, and he highlights, 'work, labour, and the capital relation matter to how we characterize settler colonialism.'<sup>520</sup> I use the concept of 'material legality' to examine different material practices as this thesis is not an account of labour in extractivism, or in the Murray-Darling region, yet certainly no to deny its fundamental operativity.<sup>521</sup> The way that I engage material legality here is based on Smith's insight that 'territoriality is not a thing but rather an actionable

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<sup>516</sup> Smith, *supra* note 48 at 167.

<sup>517</sup> *Ibid.*

<sup>518</sup> *Ibid* at 168.

<sup>519</sup> *Ibid* at 170.

<sup>520</sup> *Ibid* at 173.

<sup>521</sup> As well as the erasure of this operativity.

spatial and legal claim of authority set within the relations of private property.’<sup>522</sup> What is also visible through an analysis of material practices is the centrality of capital to colonial legal imaginaries.<sup>523</sup> I do not adopt a simplistic division between the state’s legal imaginary and corporate practices of extraction, there is significant co-constitution between them. The practices that build assertions of law in my reading are drawn both from Smith’s work on material legality and Barr’s work on material practices of movement as jurisdiction, where paying attention to practices of dividing the waters of the river system also reveal practices of colonial legality. Material practices of water division (even if they are enacted or visible through discourse and legislative agreement) themselves build a colonial legality that is spatially dispersed and temporally continuous. This is because extractive practices actively utilize the river system to, historically and continually, claim and attempt to transform lands in the Murray-Darling region. Additionally, extractive practices posit the water as a divisible resources between colonial states and irrigators, and corporate capital with which the state has overlapping webs of authority.<sup>524</sup> This utilization for transforming or claiming land is deeply linked to projecting the authority of the colonial state’s law, to the exclusion of all other legal systems. In a certain way then, material practices contribute to creating a legal imaginary.

Partially, the specific way that the material practices operate in this site depends on its liquidity. Barr argues that the common law imaginary is strongly linked to, ‘attaching to,’ land.<sup>525</sup> Spaces constructed as distinct to land, including waters, are involved in attempting to bolster extractivism and authority, including over land (to the extent that land and waters can be entirely separate categories).<sup>526</sup> And specific colonial imaginaries of land and territoriality have been central to claiming property and authority in settler colonies.<sup>527</sup> It is also the case that space constructed as ‘otherwise’, such as outer space, and I suggested Antarctic ice, is involved in a distinct but related way to these territorial claims of authority (and totality). This is partly due to how the idea of a ‘spatial fix’ perpetuates and obscures other extractive activity, or works as an extension and demonstration of control.<sup>528</sup> To further consolidate a

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<sup>522</sup> Smith, *supra* note 48 at 171. He links settler capitalist material legality to ‘transforming’ territory and to being ‘productive.’ *Ibid* at 174.

<sup>523</sup> Smith, *supra* note 48.

<sup>524</sup> See on this overlap, Pahuja, *supra* note 22.

<sup>525</sup> Barr, *supra* note 15 at 61.

<sup>526</sup> See Craven, *supra* note 43.

<sup>527</sup> Bhandar, *supra* note 36.

<sup>528</sup> Craven, *supra* note 43 at 571-2; Harvey, *supra* note 398, Storr, *supra* note 47.

reading of the relationship between possession and extractivism with positing the moveability of water, I also engage with Yusoff's description of power distribution and organizing space, particularly her argument that 'politics takes place in relation to an inhuman 'outside.''<sup>529</sup> Indeed, in this instance, a rendering of the river as non-living resource works to make commodifying it more legible. Partly, I suggested in the previous chapter, it is part of constructing the imperial spatiality and temporality of a global extractivism. Here, there is something spatially distinct about the construction of extractivism. The specific way that this river system has been posited as a colonial resource also depends in part on its liquidity; water is used in part to change the land and the profits drawn from it. Water is utilized to transform land, in a way typical of colonial projects,<sup>530</sup> but the imaginary it builds can be mobilized by the state to assert a broader control over territory beyond the Murray-Darling. Extracted water is used for the land around it, and it is also then mobilized to build and legitimize the colonial state's asserted lawful presence. Yet, liquidity and movement both reinforce and destabilize claims to territorial authority, as its dual signification also reveals how the state's claims to complete legal authority cannot be maintained in a totalizing way. In the next chapter I elaborate more on the specific nature of liquidity, and the implications for framing resource extraction and contested authority over land.

## Conclusion

Looking at discourses of sustainable diversion, in response to visible signs of ecological stress, I argued that paying attention to material practices reveals the interaction between extractivism and authority in this case. Through looking at instances of extractive interventions by the Australian state towards the Murray-Darling River Basin as a resource, I suggested that positing this river system as moveable, divisible and exchangeable does not depart from the sustaining dynamics of the interventions that positioned the rivers as an extractive site initially. This is because they are utilized to produce claims to authority and possession. I also suggested that techniques of movement are both utilized to place the state's law and exert control over the waters of these rivers, but also movement shows that control cannot be certain or complete. Partly the specific ways in which the waters are used to assert territorial authority depends on the extractive site's posited liquidity, which I turn to in the next chapter. In conjunction with the previous chapter then, the ways that the co-constitution

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<sup>529</sup> Yusoff, *supra* note 498 at 208.

<sup>530</sup> See Smith, *supra* note 48 at 174.

of extractivism and authority can be understood in these two examples is both through imperial imaginaries that create material effects, and material practices that are utilized in building a colonial legal imaginary. In the next chapter, I look at the implications of the techniques I examined in this chapter, and the chapter concerning Antarctica, for the relationship between extractive projects and how they have been used to generate and sustain (unstable) claims to authority.

## Chapter 4 – Unstable Authority

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This thesis concerns the margins of extractive authorization partly because extractivism is not explicitly justified in the sites that I look at. Yet it also concerns the margins of the territorial nature of authority because it concerns spaces constructed as ‘otherwise’ including rivers and ice (which is reliant on colonial epistemologies of what land is).<sup>531</sup> Both the significant material violence and the significantly violent imaginaries of extractivism are contested. While attending to technologies of space-making, temporality and movement help to make more visible both the continuity of extractive violence and its incompleteness – these practices and the epistemologies underlying them are themselves in flux. The impossibility and violence of projecting a singular law is an irresolvable problem in claims to authority or extraction that rely on legal coherence and universality.<sup>532</sup> The previous chapters have focused on how techniques of reinforcing global extractivism involve legal ordering that is prevalent even when extraction is not explicitly present, as well as how the same legal ordering and forms of extractivism are used to generate or project claims to authority. This brief chapter looks at the instability, or liquidity, of that authority and its implication for how extractive positioning of resources as separate from the land can obscure extractivism’s fundamental relationship to territorial authority.

This far I have argued that understanding extractivism requires consideration of racial capitalism, imperialism and settler colonialism. Understanding both the violent and unstable nature of claims to authority, and their relationship to extractivism, I have engaged the work of jurisdiction in order to expose contested practices of asserting legal authority. Reading both chapters together tends towards understanding law’s production of extractivism as spatially dispersed. While many explicitly violent instances of extractivism are legitimized and justified through legal ordering, specific forms of law also reinforce extractivism more implicitly. In the chapter on certain debates over Antarctica, a spatially confined mining ban that is to come co-exists with imperial spatial production that contributes to forms of global extractivism that naturalize Northern ownership and benefit from Southern resources. As space and time cannot be entirely separated as analytical frames,<sup>533</sup> the work of a homogenized, linear temporality or a narrative of progression also contributed to locating

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<sup>531</sup> See for instance Bhandar, *supra* note 41, Mawani, *supra* note 41.

<sup>532</sup> See Fitzpatrick, *supra* note 10; Buchanan and Johnson, *supra* note 45; Pahuja, *supra* note 30.

<sup>533</sup> See Barr, *supra* note 11 at 93; Keenan, *supra* note 218 at 11.

rightful legal authority (and consequent extractivist decision-making) in imperial configurations. Paying attention to the specificity of localized struggles is essential, and I certainly do not adopt a flat universalized view of global space,<sup>534</sup> but rather point to spatially dispersed forms of extractivism and authority being re-enacted through these debates. This would enable considering challenges to imperial legal ordering as possibilities for resisting this authorization alongside site-specific struggles. Similarly, in the Murray-Darling, techniques of dividing and exchanging as asserting lawful authority and control over the waters as a state resource not only works to reinforce extraction from the Basin river system. Additionally, these material practices are part of building a colonial legality, and the colonial state's legal imaginary of a singular law is asserted over space beyond the river system. Challenges to the colonial state's lawful authority expose the violence and impossibility of these claims to legal totality in a related way to challenges to the ongoing extraction from the rivers.

Because of the broader ordering involved in law's structuring of extractivism, resistive possibilities inherent in law's liquidity challenge legal ordering in a number of ways, through direct opposition to extractive projects, through challenging the imperial extractive ordering of legal narratives or through challenging the place of the colonial state's law or international law's ordering. I briefly describe two instances of such challenges here. As these artistic projects have multiple communicative functions, I do not describe them to produce an account of or about the projects themselves, but rather to read them as part of multiple legal assertions and orderings and point to them as forms of resistance beyond doctrinal change that work on either an imaginative or material level to challenge the spatialized imperialism/coloniality of the authority-extractivism relationship. One such project is a challenge to extractivism in the Murray-Darling waters in a recent exhibition by multiple artists titled 'River on the Brink.'<sup>535</sup> While this exhibition speaks to localized impacts of extractivism, it can also challenge more broadly the extractive ordering and material practices of constructing colonial law in the region.

Challenging global extractive positioning of territories in the global South, Colombian artist Carolina Caycedo's work is described by Gómez-Barris as disrupting the 'extractive view' of

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<sup>534</sup> See on the problems of such a universalized view Pahuja, *supra* note 29.

<sup>535</sup> See "River on the Brink: inside the Murray-Darling Basin", *SH Ervin Gallery*, online: <<https://www.shervgallery.com.au/event/river-on-the-brink/>>.

surveillance images taken for a hydroelectric project in the Magdalena River.<sup>536</sup> Gómez-Barris shows how ‘rather than reproduce the extractive view that sees like a satellite from above to enable the management and diversion of the river’s resources toward capitalist accumulation,’<sup>537</sup> Caycedo’s work ‘reverses the flow of capital and its amnesic evacuation of what was once there, placing the river back in the frame and outside of the digital colony.’<sup>538</sup> Gómez-Barris writes, ‘because of its sheer size and potential for destruction, mega dam development often casts doubt about the potential for local responses, yet ... visual and embodied resistance finds ways to fissure the dam walls, working to perforate the matrix of capitalist expansion.’<sup>539</sup> The implications of this, as Gómez-Barris highlights, are, ‘Caycedo produced a fish-eye epistemology that changes how we might relate to Yuma [the river] as a sentient being, rather than as an extractible commodity.’<sup>540</sup> This work, while spatially distinct from either site also participates in challenging a global extractive ordering, where an homogenized global space, similar to a satellite view, is reminiscent of the Antarctic signatory states positioning global resources as under their control.

If legal imaginaries and material practices of legality influenced each other in the imperial/colonial construction of an authority-extractivism relationship, resistance in both of these registers can impact this reproduction. To be able to make this analysis, the frames of the imaginary and the material have to be able to be read as impacting each other. For instance, exploring the imaginaries of narrative work and their links to materiality, Kojo Koram writes about Fanon’s intellectual resources for critical legal work. Koram writes, ‘Fanon’s work did not dismiss or deemphasize the way the material relations of production underwrote colonial ordering, but neither did he simply reduce racial subjectivization to a manifestation of structural economic relations.’<sup>541</sup> He shows how Fanon’s account exposes how the ‘anchoring of Euro-modernity in the subjugation of the colonized subject can be seen

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<sup>536</sup> Gómez-Barris, *supra* note 104, particularly Chapter 4 at 91-109.

<sup>537</sup> *Ibid* at 97.

<sup>538</sup> *Ibid*.

<sup>539</sup> *Ibid* at 93. Gómez-Barris highlights, ‘for Caycedo, then, extractivism cannot be separated from forms of violence and repression that are rendered invisible by current economic and political models. Attending to this colonial matrix, her work “explores the interrelations between social repression, and the planning and construction of water dams/reservoirs. Dams generally serve the primary purpose of retaining water by stopping the flow of a river. By analogy, we may think of repression as an instance of power that also interrupts the flow of social and community organization.”’ *Ibid* at 96. Internal citation omitted.

<sup>540</sup> *Ibid* at 103. She continues, ‘despite the fact that new extractivisms and megaprojects leave little room for the subtlety of riverbed knowledge, but what the fish eye sees is precisely the muck of the neoliberal and colonial condition.’ *Ibid* at 109.

<sup>541</sup> See Kojo Koram, “‘Satan Is Black’ – Frantz Fanon’s Juridico-Theology of Racialisation and Damnation,” (2017) Law, Culture and the Humanities, online: <https://doi.org/10.1177/1743872117738914> at 3.

to also facilitate the transition of the Euro-modern perspective into a self-acclaimed position of not only universality but also omnipotence.<sup>542</sup> Reading measures to sustainably divert the Murray-Darling and Antarctic mining debates in this context would reveal not merely legitimizing extractivism or practices that enable it elsewhere, but claims to legal supremacy. In Antarctica, contests to legitimize the doctrine of discovery, imperial control and racialized ordering through projections of space and time overlapped with legitimizing and continuing extractivist ordering that enables taking and intervention by the global North. As we saw in the Murray-Darling, the claim is to the legitimacy, place and authority of state law. In the face of resistance and contradictory incompleteness, state law's authority is constantly retold in a similar way to the reoccurring practices that attempt to reassert control over the river itself, visible through how law structures interventions. Resistive possibilities and violent reassertions co-exist, with significant material consequences.<sup>543</sup> For instance, Gevers' work on imaginative geography shows that the space-making techniques of imperialism and colonialism are themselves contested.<sup>544</sup> Indeed, Gómez-Barris argues, 'if we only track the purview of power's destruction and death force, we are forever analytically imprisoned to reproducing a totalizing viewpoint that ignores life that is unbridled and finds forms of resisting and living alternatively.'<sup>545</sup> Gómez-Barris also draws from Du Bois' 'form of multidirectional critique that both undoes and reworks unilinear historical narratives that erase its subjects,' as 'multivalent' and an 'episteme of double consciousness.'<sup>546</sup> Work on resistive possibilities through countering and thinking beyond provides insight into the multiple and shifting effects of the colonial legal order, both material and imaginative, as well as its limits. This point is not to deny that there is any importance to a mining ban or initiatives to reduce extraction, but not to negate the continuity of extractive authority that

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<sup>542</sup> *Ibid* at 4. He further explains, 'Vitoria's legal ordering of colonial violence should be remembered as being a product of political/juridico-theology as much as geopolitics.' *Ibid* at 14. He explains that Fanon's 'consistent use of theological descriptors to capture the condition of colonized existence,' shows 'how colonization was not merely a practice of land seizure, resource exploitation or political/juridical control, but was also the translation of the deific conceptions of absolute good and absolute evil onto different categorizations of humanity.' *Ibid* at 4; 8.

<sup>543</sup> Also see on counter-archiving as a concept Stewart Motha & Honni van Rijswijk, *Law, Memory, Violence: Uncovering the Counter-Archive* (Routledge, 2016).

<sup>544</sup> See Gevers, *supra* note 125.

<sup>545</sup> Gómez-Barris, *supra* note 104 at 3. She uses Walter Dignolo's work on delinking and decoloniality to argue this point. She calls her work in this regard foregrounding 'submerged perspectives.' *Ibid* at 1, 11. This is partly as it focuses on 'the creation of emergent alternatives.' *Ibid* at 4. Chapters include 'an archive for the future' and 'a fish-eye episteme' which is particularly aimed at disrupting 'commodification of water.' *Ibid* at 15.

<sup>546</sup> *Ibid* at 12. Further engaging Caycedo's work, she highlights how 'an inverted view offers us a different order of perception than the empirical sight lines that peer below, above, and through the extractive divide.' The effects of this work, she argues 'displaces the ocular centrality of human development and instead reveals a submerged, below-the-surface, blurry countervisuality.' *Ibid* at 15.

may also be enacted through these doctrinal changes, or to confine resistive possibilities to these.

In conceptualizing resistive possibilities, it is useful to have an account of the notion of liquidity in two respects, firstly as it helped to trace the specific ways extractivism is authorized through assertions over places not posited as solid land in colonial epistemologies, and now to assist with getting closer to a sense of the instability of these reassertions of authority. I speak about laws as liquid not only because the extractive projects I examine occur on surfaces not constructed completely as solid land; the colonial legal imaginary is distinct, although related to imaginaries of land. I suggest that it is also the case that these laws are liquid because the authority sought to be claimed is moveable, traceable, but not permanent, although reoccurring. I refer to liquid laws then, both for their movement and because they are reasserted, as well as for the way they are related to land in colonial epistemologies.<sup>547</sup> The spatial construction of Antarctica as remote, between water and land,<sup>548</sup> but confined or ‘fixed’<sup>549</sup> is distinct to the waters of the Murray-Darling as divisible and exchangeable. Yet, in contrast to a projection of static, singular territorial authority,<sup>550</sup> the examples here expose how the forms of authority tied up with extractivism in these cases are contested and unstable. The idea of liquidity, both as instability and as a particular spatial construction, is one way to see what can also be revealed by land-based struggles over resources, that positioning resources as separate, and removeable, from the land (attempts to) obscure the ways in which extractivism is fundamentally related to claims to territorial authority.<sup>551</sup>

There are many ways in which settler-colonial and international law facilitate extractivism and expansion whilst constantly justifying their grounds, albeit in unstable or uncontainable ways.<sup>552</sup> Much has been written about how claims to space, territory or land with legal techniques (and the violence this entails) is incomplete and unstable; overlapping narratives must be constantly retold and reformed in the face of resistance to these claims.<sup>553</sup> In these

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<sup>547</sup> See on the colonial constructions of land and water Mawani, *supra* note 41; Bhandar, *supra* note 41

<sup>548</sup> See Barr, *supra* note 11 at 197.

<sup>549</sup> As Storr reminds us, this fixing is intended to produce free movement of capital. Storr, *supra* note 47.

<sup>550</sup> Barr, *supra* note 15.

<sup>551</sup> See Scott, *supra* note 23; see also Pasternak, *supra* note 19. Even though control takes very different forms in colonial or settler colonial structures, although there is overlap between such structures. See Mawani, *supra* note 49. Colonial structures are not the only way to relate to land of course, or utilize resources, yet this is the case within the ‘non-reciprocal’ relationship of extractivism. See Scott, *supra* note 25 at 1.

<sup>552</sup> Mawani, *supra* note 185.

<sup>553</sup> See generally Fitzpatrick, *supra* note 10.

discussions of narrative I have referred to state or international law, although multiple legal orders are central to disruption, resistance and the instability of legal narration.<sup>554</sup> One way that I have suggested that these forms of law perform responses to groundlessness is by creating a knowledge base.<sup>555</sup> Narratives are used not only to re-establish corporate relationships and access to extractive practices, or to project authority over natural resources in the region, but also to further settler colonial projects and assert the stability of a legal position over contested space.<sup>556</sup> As Pasternak and Scott note, ‘Canada’s claim to exclusive territorial authority across all the lands and waters is a failed project.’<sup>557</sup> They continue, ‘but that fact has only succeeded in more complex legal and political subterfuge,’ detailing ‘tactics of the settler capitalist state, and on the exercises of Indigenous jurisdiction that counter them.’<sup>558</sup>

The other valence of liquidity connotes the movement of water, or the shifting of ice.<sup>559</sup> Mawani explains that there are ‘many sites of territoriality where struggles over colonial and imperial rule were waged,’<sup>560</sup> ‘despite the prevalence of modernist and imperialist land-based legal imaginaries, oceans featured prominently and even significantly as topographies of colonial and settler colonial legalities.’<sup>561</sup> Focusing on spaces that are ‘outside’ or ‘otherwise’ to land-based territory is partly to highlight the forms of authority being asserted over land as well. Signatory states, in the Antarctic debates, both authorize global extractivism through reinforcing the temporality of the doctrine of discovery and imperial space, as well as generating or stabilizing claims of authority that reinforce signatory states own positions with a global imperial order, or over claimed colonial territory, or both.<sup>562</sup> In the Murray-Darling, techniques of moving and exchanging the river not only perpetuate the river as an extractive site, but also continue to (seek to) place the law of the colonial state in control of the river and its surrounds.<sup>563</sup> In the Murray-Darling, controlling interventions visibly unravel as attempts to control the river produce stark algal blooms, dry riverbeds and dead fish.

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<sup>554</sup> See for example Birrell, *supra* note 17. See also Watson, *supra* note 48; Margaret Davies, *Law unlimited: materialism, pluralism, and legal theory* (Abingdon: Routledge, 2017). On artistic forms of resistance, and how these might also assist with conceptualizations of extractivism, see Gómez-Barris, *supra* note 104.

<sup>555</sup> Mawani, *supra* note 185.

<sup>556</sup> See Buchanan and Johnson, *supra* note 45.

<sup>557</sup> Pasternak and Scott, *supra* note 29 at 205. Although of course differing tactics and situations apply.

<sup>558</sup> *Ibid.*

<sup>559</sup> See Barr, *supra* note 11, on Antarctic ice being construed as ‘not-quite-land’ at 197.

<sup>560</sup> Mawani, *supra* note 49 at 125.

<sup>561</sup> *Ibid.*

<sup>562</sup> See Anghie, *supra* note 13.

<sup>563</sup> See Barr on the placing of law, *supra* note 11; 15.

Movement not only commodifies the river as a resource to reinforce extractivism, but to position the colonial state's law as the only legitimate authority over the river. The imperial space reinforced by Antarctic signatory states is contested in multiple ways. Imperial space-making and temporalities do not only enable extraction and profit, but also continue the imperial ordering of authority. If technologies and engaging history helped to show that law does more extractive ordering than is always stated, these forms also produce authority and are then also contested.<sup>564</sup> The work of narrative helps to show both the violence and impossibility at the heart of these claims to authority, and to see resistive possibilities.

The way imperial space-making and linear temporalities work together to reinforce global extractivism helps to reveal the spatial production of global extractivism, or extractivism in the projects of a nation-state. The spatial configurations have material effects, and material bases. The interaction of the imaginary and the material helps see the complicated ways that extractive ordering is reproduced and contested, including the temporal construction of a linear homogenous time where extraction is used as a basis for legitimate possession, and current extractions are posited as being regulated. These multiple registers are also visible in the work of resistive possibilities. Reading in this way does not erase the territoriality of extractivism and colonial claims to lawful authority; indeed territoriality is key to both, particularly in the specific ways the spatial construction of both relates to and obscures contested claims to territory. These claims rely both on transcendent claims to authority and material practices of jurisdiction or legality that have distinct but related ways of reinforcing extractivism.

This chapter examined the instability, or liquidity, of claims to authority in the context of extractivism. I have suggested that law structures extractivism implicitly as well as explicitly due to imperial space-time,<sup>565</sup> and technologies of division. Additionally and relatedly, extractivism generates authority by the same mechanisms and techniques. The enactment of this in the examples I have looked at involves the interlinked workings of legal imaginaries and material practices of law-making. Imaginaries and technologies of jurisdiction have material consequences that are spatially dispersed from the site in question, and material techniques generate law and contribute to imaginary: the co-constitution of both of these is a

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<sup>564</sup> See Gevers, *supra* note 125.

<sup>565</sup> See Harvey, *supra* note 298.

crucial element of the authority-extractivism relationship I have sketched out here. This relationship specifically works here in double context of imperial/colonial violence, and of spatial construction with specific relationship to territorial authority. Specifically, whilst resources are constructed as removeable commodities, paying close attention reveals the deep links between extractivism and claims to authority over certain territories.<sup>566</sup> There is particular violence in this, as well as strong possibilities for resistance inherent in law's liquidity because extractivism is both explicitly and implicitly tied to the ordering of authority more broadly. Consequently, then, a broad range of resistive possibilities can challenge its totality, not just doctrinal changes but any of the multiple challenges to these forms of legal ordering. The resistive possibilities inherent in law's liquidity draw out both the violence and impossibility of completeness or stasis in the authority-extractivism relationship, and multiple challenges to ordering of extractivism and authority in both material and imaginative registers expose more than contestation but multiple possibilities of re-ordering.

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<sup>566</sup> See Scott, *supra* note 23; see also Pasternak, *supra* note 19.

## Conclusion

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Examining the authority-extractivism relationship as co-constituted reveals that extractivism is both a claim to authority and used to generate forms of authority. These forms can be read through jurisdiction, technologies of space-making, temporality, movement; and through narrative forms. The literature shows extractivism to be deeply linked to racialized, colonial and capitalist forms of violence. Sites including water are used to shore up extraction also on land, and forms of settler or imperial authority produce unstable narratives. The methods I used in this thesis are an attention to history, in order to negate narratives of linear progress, and technologies to examine how extraction may be authorized in situations where there are less obvious claims to justify it. Specifically, the work of techniques of space-making relying on imperial imaginaries, constructing a linear, homogenous temporality, and techniques of control and asserting ownership through movement and division. Returning to a set of debates over the Antarctic Treaty System at the General Assembly in late 1984, I have suggested that Antarctica is also constructed as an imaginary and utilized to legitimize claims to sovereignty via discovery as well as to (attempt to) control emerging discourses about the common heritage of mankind and limit its potential. I also argued that focusing on the Treaty System's effects in a spatially confined way cannot fully appreciate how it reinforces international law as a mechanism that locates the power to decide, extract and profit in the global North. In this way, the imaginary of Antarctica is used to naturalize colonial binaries and concepts that work to legitimize extractivism by signatory Northern states in the global South, as well as their own authority in what is for some states the contested territory of a settler colony. I suggested that spatial and temporal registers allow the relationship between extractivism and authority to be read more clearly. Linear temporality works to legitimize discovery as a way to claim authority. Spatially, the construction of Antarctica as a continent of environmentalism relied on and legitimizes extractivism through contributing to imperial geographies. Imperial spatial imaginaries and linear, homogenized temporalities work together to reassert imperial ordering that is deeply entangled with global extractivism. In this way, the international ordering visible in signatory states discourse can also be read as reinforcing imperialism and claims to authority beyond Antarctic territory, internationally and within specific nation-states. Reading discourses of sustainable diversion measures to regulate extraction in the Murray-Darling river system, I argued that practices that position the rivers as moveable, divisible and exchangeable does not significantly shift the

commodification of the river as resource that remains a key part of extractivist interventions. I also suggested that techniques of movement are both utilized to place the state's law and exert control over the waters of these rivers, but also movement shows that this control cannot be certain or complete. Partly the specific ways in which the liquidity of the waters and remoteness of ice are used to assert territorial authority depends on the spatial construction of extractive site's and the positioning of resources as separable commodities, yet extractivism and claiming authority over land are inextricably linked.<sup>567</sup> Relatedly, my second concern in the thesis was how states used these forms of law and their relationship to extractivism to generate, stabilize or project authority. Examining the international ordering that is enacted even where extractivism is not explicitly present both allows a broader appreciation of the co-constitution between colonial authority and extraction, and a broader set of resistive possibilities that contest this ordering. The ways that the co-constitution of extractivism and authority can be understood in these two examples include both how legal ordering produces extractivism and how extractivism produces legal ordering. Because of the broader ordering involved in law's structuring of extractivism, resistive possibilities inherent in law's liquidity challenge legal ordering in a number of ways, through direct opposition to extractive projects, through challenging the imperial extractive ordering of legal narratives or through challenging the place of the colonial state's law. The resistive possibilities inherent in law's liquidity draw out both the violence and impossibility of completeness or stasis in the authority-extractivism relationship, and multiple challenges to ordering of extraction and authority in both material and imaginative registers show expose more than contestation or doctrinal change, but multiple possibilities of re-ordering.

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<sup>567</sup> See Scott, *supra* note 23.

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