

Recalcitrant Materialities of a Liminal Ocean: Deconstructing the ‘Arctic *Nomos*’

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Abstract

Published in 1950, Carl Schmitt's *Nomos of the Earth* has been one of the most influential contributions in legal theory, illustrating *inter alia* the territorial conceptualization of the Eurocentric global legal order. While the Earth's *nomos* has been largely hinged on the constructed ontology of a land-sea dichotomy and the appropriation and division of space through the establishment of sovereignty upon it, this article contends that the particular geomorphology of the Arctic seascape, the multiscale dynamics of Arctic politics, and the rapid pace of change in the region render the Arctic spatial order rather intricate and may challenge the existing territorial application of state sovereignty. After critically deconstructing the process of territorialization of the Arctic Ocean, the article delves into three conceptual challenges – one ontological, one epistemological, and one technological respectively - pertinent to the juridical imaginary of the ‘Arctic *nomos*’ engraved by sovereignty, and seeks to expose the limits of the existing regime in place.

Keywords

Sovereignty - Carl Schmitt - Arctic *nomos* - territorialization - Arctic Ocean - sea ice - Indigenous spatial thinking

1 Introduction

Just like any other region in the world, the spatial order of the Arctic has been legally organized on the basis of state sovereignty. Albeit the first sovereign claims in the Arctic mainland can arguably be traced back to the age of discovery, assertions of sovereignty over the Arctic Ocean space were increasingly receiving attention only during the Cold War, at a time when the Arctic was highly militarized.¹ Since the 1990s though, a new era of collaboration began in the circumpolar North, with the two superpowers, the USSR and the USA, negotiating maritime boundaries in the Bering Strait, Bering Sea, and the Chukchi Sea and the rest of the Arctic states following their footsteps.² Through a peaceful collaborative approach, all territorial disputes in the Arctic, with the insignificant exception of the tiny nondescript islet Hans Island, have been

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¹ Michael Byers, *International Law and the Arctic* (Cambridge: Cambridge University Press, 2013), 1.

² Byers, *International Law and the Arctic*, 1-2.

successfully resolved, while, under the UN Convention on the Law of the Sea (UNCLOS),³ most overlapping maritime sovereign claims have also been settled.⁴ Ratified by all Arctic littoral States but the US, the Law of the Sea Convention has managed to crystalize most boundaries between the maritime zones of adjacent coastal states in an exceptionally successful way.⁵ Under this apparatus, and disregarding the mainstream media narratives depicting the Arctic as a region characterized by political instability, constant confrontation and a lack of security, the reality has shown that relations among sovereign states are rather solid and stable.⁶

With the Arctic warming three times faster than the global average rate due to ‘climate change’, this proverbial phenomenon driven by the ice-albedo feedback, geopolitical studies warn that the traditional application of the concept of state sovereignty in the circumpolar North seems to be forcefully challenged by various factors.⁷ In what follows, I will argue that, in addition to the rapid pace of change in the region, the unique materiality of the Arctic seascape, along with a multiplicity of actors involved in Arctic affairs (to mention a few: sovereign states, multilateral organizations, extractive industries, non-Arctic stakeholders, Indigenous peoples) tend to expose existing legal realities and complicate the traditional manifestations of sovereignty and projection of sovereign rights over the sea. Motivated by such perspectives, this study aims to shed light on certain layers of the territorial application of sovereignty over the Arctic Ocean, and, through a legal geographic approach, to critically deconstruct aspects of the region’s spatial order. By employing Carl Schmitt’s legal-spatial notion of ‘*nomos*’, the article first highlights the gradients of sovereignty’s territorial projection seawards. Subsequently, it presents three conceptual realizations - one ontological, one epistemological, and one technological, respectively - that complicate the spatial architecture of the Arctic Ocean engraved by sovereignty.

2 Deconstructing the Earth’s *nomos*

The relationship of human societies with seascapes is embedded in distinct histories and materialities of coastal communities that predate for centuries the existing Westphalian conceptualization of ‘state sovereignty’. At least since modernity though, the sovereign paradigm has been nurtured as the dominant approach that informs the existing legal relationship of states to the surrounding environment.⁸ When looking at the normative relationship between human institutions and the marine space throughout legal modernity, a useful point of departure is the important work of the German jurist Carl Schmitt. Although Schmitt’s personal political views

³ Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 U.N.T.S. 3 (UNCLOS).

⁴ Clive Schofield and Andreas Østhagen, “A Divided Arctic: Maritime Boundary Agreements and Disputes in the Arctic Ocean,” in *Handbook on Geopolitics and Security in the Arctic*, ed. Joachim Weber (Berlin: Springer, 2020), 171-191.

⁵ Existing disputes remain over a wedge-shaped slice on the international boundary in the Beaufort Sea, between the Canadian territory of Yukon and the American state of Alaska, as well as over the legal status of the Northwest Passage. For a comprehensive discussion on all remaining Arctic disputes see Weber, *Handbook on Geopolitics and Security in the Arctic*.

⁶ This statement is premised on data collected and analyzed prior to the War in Ukraine. It is possible that, in the aftermath of the war, some statements may no longer reflect the most likely scenarios of international relations in the Arctic and may have to be adjusted in response to new realities.

⁷ Weber, *Handbook on Geopolitics and Security in the Arctic*.

⁸ For a detailed discussion on the development of state sovereignty from the Westphalian system to modernity, see Benno Teschke, “Theorizing the Westphalian System of States: International Relations from Absolutism to Capitalism,” *European Journal of International Relations* 8, no. 1 (2002): 5-48, <https://doi.org/10.1177/1354066102008001001>.

are highly problematic,⁹ his contribution to legal and political geography (and philosophy in general) has been remarkable. To trace the origins of the world's legal-spatial order, Schmitt pointed out that “*Man is a terrestrial being, an earthling. He lives, moves and walks on the firmly-grounded Earth*”.¹⁰ Antithetical to the land which is considered as the ‘privileged space’ of human societies, his thesis theorized the oceans as a vacant space, an ‘asocial area’ without character.¹¹ As he discussed in his famous *Nomos of the Earth*, “*on the open sea, there were no limits, no boundaries, no consecrated sites, no sacred orientations, no law, and no property*”.¹² Hence, with land being conceptualized as the only social and humanized space, the territorialization of the sea could only be grounded on a rationale borrowed from a land-based mentality. As further observed by Schmitt:

Every ontonomous and ontological judgment about the sea derives from the land ... The sea has no character, in the original sense of the word, which originates from the Greek charassein, meaning to engrave, to scratch, to imprint... The sea is free... On the waves there is nothing but waves.¹³

For Schmitt, the foundation of the Earth's *nomos*, the first global order, would henceforth rest on this constant oscillation between the spatial order of ‘firm and solid land’ and that of ‘free and untamed sea’, while the sea only acquired a spatial dimension when became ‘tamed’ by the use of technology.¹⁴ Schmitt used the concept of *nomos* - commonly translated from the Greek as ‘law’ - to encapsulate a spatial understanding of the rule of law, roughly conceptualized as pattern of operations that seek to establish authority within a delineated territory. The projection of sovereign power seawards, thus, pre-necessitates the conceptualization of the sea as ‘territory’ (similarly to land) and its enclosure within a delimited area by using technological means, wherein the sovereign entity could exercise power in the sense that it succeeds independence from external unconsented intervention (or interference) and determines the monopoly of violence and jurisdiction.¹⁵ We could therefore argue that the idea of ‘territory’ is not a state of ‘existence’ but can be seen as a ‘semiotic practice’ originated from the land that gives existential meaning to space and makes it amenable to sovereign power, appropriation, and legal treatment. Yet, to mark space, practice territory and determine sovereignty upon it, drawing lines (what Deleuze and Guattari call “striation”)¹⁶ has always been necessary and was historically achieved through the

⁹ The German jurist Carl Schmitt was a passionate defender of Hitler's regime and active member of the Nazi party until 1936. Schmitt's most important theoretical insights on the foundations of international law were included in *The Nomos of the Earth*, written in the early 1940's but only published in the 1950's, given that Schmitt was detained at the end of the war; for a comprehensive discussion on Schmitt's contested background, as well contribution to legal and political philosophy, see “Carl Schmitt,” Stanford Encyclopedia of Philosophy, accessed March 24, 2022, <https://plato.stanford.edu/entries/schmitt/>.

¹⁰ Carl Schmitt, *Land and Sea: A World-Historical Meditation* (San Francisco: Counter Currents, 1954), 3.

¹¹ Philip E. Steinberg and Kimberley Petters, “Wet Ontologies, Fluid Spaces: Giving Depth to Volume through Oceanic Thinking,” *Environment and Planning D: Society and Space* 33, no. 2 (2015): 247-48, <https://doi.org/10.1068/d14148p>.

¹² Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press Publishing, 2016), 43.

¹³ Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 45.

¹⁴ Schmitt argued that the British were the first nation that extended the global order to the sea through the employment of technological means; Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 178.

¹⁵ Henry Jones, “Lines in the ocean: thinking with the sea about territory and international law,” *London Review of International Law* 4, no.2 (2016): 307-08, <https://doi.org/10.1093/lril/lrw012>.

¹⁶ The concept of ‘striation’ is particularly discussed in the book Gilles Deleuze and Felix Guattari, *A Thousand Plateaus* (Minneapolis: University of Minnesota Press, 1987).

development of cartography.¹⁷ Throughout modernity, mapping served as a means that demonstrated how European actors thought about political space, organization, and authority, and was a necessary precondition for the conceptualization and creation of sovereign states.¹⁸ Therefore, the Earth's spatial imaginary unfolds a multilayered nexus: the exercise of sovereignty requires the acknowledgment of territory, and territory in turn requires the existence of space (initially land and much later sea), while for the assertion and exercise of sovereignty within this territory the delimitation of lines and boundaries (striation) is needed. As pointed much later by Deleuze and Guattari, drawing such lines has been one of the “*fundamental tasks of the state*”.¹⁹ The same territorial understanding is still pertinent to the contemporary global legal order and has been echoed in international legal instruments as early as 1933, recognizing ‘territoriality’ as the quintessence of any state’s very existence.²⁰

Disregarding the preexisting efforts to enclose the marine space, dating back to the ancient Thalassocracies or the Roman idea of *Mare Nostrum*,²¹ it could be arguably asserted that international law acquired a spatial dimension that extended to the oceans only after the end of the 15th century.²² Since the international legal engagement with maritime spaces did not take place before the European colonial expansion during the age of discovery, under this territorial understanding of space, states had initially sovereignty only over land.²³ Drawing, thus, sovereignty and ‘lines’ seawards in a way similar to the land was an instrumental means for the gradual territorialization of the oceans by acknowledging the existence of sovereignty over previously uncharted areas known as *Terra Incognita* or *Terra Nullius*;²⁴ similarly, the coastal waters adjacent to them were treated as *Mare Nullius* and were subject to the colonizing state’s expansion of *dominium* and, thus, sovereignty. Against the backdrop of a territorial conceptualization of space, the ‘re-discovered’ world was seen as amenable to the acquisition of title through occupation, since ‘space’ in the preexisting premodern societies of the ‘new’ world was not organized by a sovereign authority, property institutions, and delineated boundaries in a Western sense, and thus, was considered to be ‘vacant’.²⁵ This dialectic between an imagined vacant space and the processes of drawing sovereignty on it is deeply anchored in the foundations of the international legal order.

¹⁷ For a deeper engagement with sovereignty in relation to cartography see Karin Mickelson, “The Maps of International Law: Perceptions of Nature in the Classification of Territory,” *Leiden Journal of International Law* 27 (2014): 621-639, doi:10.1017/S0922156514000235.

¹⁸ Jordan Branch, “Mapping the Sovereign State: Technology, Authority, and Systemic Change,” *International Organization* 65, no. 1 (2011): 1–36; Christopher R Rossi, *Remoteness Reconsidered: The Atacama Desert and International Law* (University of Michigan Press, 2021).

¹⁹ Deleuze and Guattari, *A Thousand Plateaus*, 385.

²⁰ The 1933 Montevideo Convention on the Rights and Duties of States affirmed that for a legal entity to be recognised as a ‘state’ according to international law, there must be, *inter alia*, a defined territory. The Montevideo Convention consolidated the theory of statehood and, although referring to the American States, it has been considered customary international law; see Convention on the Rights and Duties of States (adopted December 26, 1933) 165 L.N.T.S. 19 (Montevideo Convention) Article 1(b) (emphasis added)

²¹ See Clark G Reynolds, *Command of the sea: The history and strategy of maritime empires* (New York: William Morrow and Company, 1974) book II.

²² Legal historians usually refer to the 1494 Treaty of Tordesillas between Spain (Kingdoms of Castile and Aragon) and Portugal as the first effort to territorialize the oceans on the basis of maritime boundaries. The Treaty partitioned the world’s oceans in two zones and established sovereign power upon them; see Frances Gardiner Davenport, ‘Treaty of Tordesillas, June 7, 1494’ in ed. Gardiner Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, 4 vols. (Washington, DC: Carnegie Institution, 1917), 1:86–100.

²³ Schmitt observed that the systematization towards an equilibrium between land and sea in legal territorial thinking began only after 1713 with the Treaty of Utrecht directly concerned the spatial foundation of the *jus publicum Europaeum*; see Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* 180.

²⁴ Mickelson, “The Maps of International Law: Perceptions of Nature in the Classification of Territory.”

²⁵ Glen Coulthard, *Red Skin, White Masks Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 100.

3 Conceptualizing a *nomos* for the Arctic

The same spatial understanding has also been relevant to the Arctic region, although the territorialization of the Arctic Ocean succeeded the territorialization of most seas of the planet. Given that for many centuries the vast remoteness and severe climatic conditions of the North did not render the Arctic waters much attractive to permanent operations for resource exploitation,²⁶ the first assertions of sovereignty over the Arctic marine space occurred in the early 20th century.²⁷ While Canadian claims over a part of the Arctic Ocean were indirectly laid already in 1878,²⁸ it was the Canadian Senator Pascal Poirier, in a 1907 speech, who first publicly propounded the territorialization of a vast segment of the Arctic Ocean by the state of Canada.²⁹ Poirier suggested the division of the Arctic Ocean space into sectors, on the basis of the ‘sector theory’.³⁰ Partially motivated by Poirier’s suggestions, Canada officially claimed the sector between 60° and 141° W in 1925.³¹ This assertion fueled the Soviet Union to similarly assert, on the basis of a sectoral division, sovereignty over the ocean space north of its territory.³² In a 1926 Decree, the USSR acknowledged that all lands and islands, both discovered and undiscovered belong to the ‘state owning this sector’ (denoting the USSR).³³ Although the will to partition the ocean space into boundaries among adjacent states was relevant to most coastal nations at the time, these sectoral claims did not meet any universal acceptance.³⁴

After several decades of instability, overlapping maritime claims and a number of bilateral treaties among the five Arctic littoral states,³⁵ the will to ‘striate’ the Arctic Ocean was

²⁶ Indeed, fishing and hunting in search of goods such as ivory and fur was already taking place in the Arctic from the 16th century on the basis of freedom of navigation and exploitation; for early exploitation activities in the Arctic Ocean, see Donat Pharand, “Freedom of the Seas in the Arctic Ocean.” *The University of Toronto Law Journal* 19, no. 2 (1969): 210-233.

²⁷ It was probably the abundance of living resources in the vast circumpolar area that did not earlier lead the Arctic littoral states to seek exclusive jurisdiction over parts of the Arctic Ocean.

²⁸ As recorded by Donat Pharand, the first sovereign claims, by indirectly using the sector theory, seem to have been made on May 3, 1878, when the House of Commons and Senate of Canada, due to the uncertainty of the extent of the territory transferred to Canada by Great Britain in 1870, adopted a joint address to the British Parliament asking for “the transfer of all Arctic lands and islands lying between the 141st meridian of longitude and the series of straits between Ellesmere Island and Greenland”; Donat Pharand, *Canada's Arctic waters in International Law* (Cambridge: Cambridge University Press, 1988), 4

²⁹ Wojciech Janicki, “Why Do They Need the Arctic? the First Partition of the Sea”, *ARCTIC* 65, no. 1 (2012): 87-88, <https://doi.org/10.14430/arctic4168>; Ivan L. Head, “Canadian Claims to Territorial Sovereignty in the Arctic Regions,” *McGill Law Journal* 9, no. 3 (1963): 200-03.

³⁰ Head defines sector theory as “the practice of claiming sovereignty over a sector of the earth's surface, as measured by meridians of longitude”; Head, “Canadian Claims to Territorial Sovereignty in the Arctic Regions,” 202.

³¹ Janicki, “Why Do They Need the Arctic? the First Partition of the Sea,” 88.

³² Head, “Canadian Claims to Territorial Sovereignty in the Arctic Regions,” 202.

³³ As directly quoted by Timtchenko, the Soviet Union’s claim extended up to “All lands and islands, both discovered and which may be discovered in the future, which do not comprise at the time of publication of the present decree the territory of any foreign state recognized by the Government of the USSR, located in the northern Arctic Ocean, north of the shores of the Union of Soviet Socialist Republics up to the North Pole between the meridian 32°04'35 "E. long, from Greenwich, running along the eastern side of Vaida Bay through the triangular marker on Cape Kekurskii, and the meridian 168°49'30"W. long, from Greenwich, bisecting the strait separating the Ratmanov and Kruze”; see Leonid Timtchenko, “The Russian Arctic Sectoral Concept: Past and Present,” *Arctic Institute of North America* 50, no. 1 (March 1997): 29-30, <https://www.jstor.org/stable/40512039>. For the original claim see Sóbrame Zakonov, *On the proclamation of lands and islands located in the northern Arctic Ocean as territory of the USSR* (Moscow: Dokumenty Vneshnei Politiki, 1926), 228.

³⁴ Janicki, “Why Do They Need the Arctic? the First Partition of the Sea,” 87-89. Interestingly, similar claims on the bases of sectorial territorialization partitioned by meridians of longitude lie the foundations of the Arctic’s frozen geographic opposite and are still well reserved within the Antarctic Treaty System (ATS).

³⁵ In 1973, Canada and Denmark agreed to divide the ocean floor between Canada and Greenland using a median or “equidistance” line; Denmark and Canada Agreement relating to the delimitation of the continental shelf between Greenland and Canada, no. 13550 (signed in Ottawa on 17 December 1973).

eventually crystalized within the maritime zoning established by UNCLOS, according to which different ways of drawing sovereignty or sovereign rights on the oceanic space are provided, yet this time on the basis of adjacency from the land and not of a sectoral division. Antithetical to its preamble which states that “*the problems of ocean space are closely interrelated and need to be considered as a whole*,”³⁶ UNCLOS consolidated the partitioning of the oceanic space into delineated zones, determining a different approach to each regulated zone dependent on the level of asserted sovereignty and jurisdiction, with the notion of sovereignty itself being used as the main institution (technology)³⁷ for achieving this partitioning and drawing lines upon the seas. Eventually, the expansion of this territorial logic towards the sea was reified in UNCLOS III through the projection of sovereignty over territorial seas to 12 (nm) for coastal nations,³⁸ the extension of sovereign power over resources up to 200 (nm),³⁹ and the exclusion of the deep seabed and the high seas (marine areas beyond 200 nm) from any sovereign claims, remaining a global commons.⁴⁰ Finally, in relation to the oceanic subsurface, UNCLOS may grant coastal states additional sovereign rights over extended continental shelves (up to 350 nautical miles from the baseline) provided that certain geological and bathymetric criteria are met.⁴¹ With UNCLOS being the dominant means for the delimitation of maritime boundaries and resolution of territorial disputes among the Arctic coastal states, the same rationale of projecting sovereignty seawards has been unanimously applied throughout the circumpolar North, even by the US which, although not a member of the Convention, considers the key provisions of UNCLOS as customary law.⁴² As a result, depending on how one will define the Arctic region, it can be safely asserted that about 80 percent of the Arctic Ocean (containing the vast majority of fish stocks and mineral resources) is nowadays territorialized or falls under some form of state sovereignty and jurisdiction.

The will to further striate the Arctic Ocean and enclose adjacent areas under sovereign jurisdictions has been further expressed over the last two decades. Whereas, until the end of the previous century, the Geographic North Pole and a big part of the Arctic Ocean were generally considered to be a ‘global commons’, the Arctic littoral states, legitimated by UNCLOS, have recently submitted applications for additional sovereign claims to an extended continental shelf. While the US is the only Arctic state with no voice in the claims process on the basis of UNCLOS,

The USA and the Soviet Union signed a boundary treaty for the Bering Sea, Bering Strait and Chukchi Sea in 1990; Agreement between the United States of America and the Union of Soviet Socialist Republics on the maritime boundary, (1 June 1990);

In 2010, Norway and Russia resolved a 40-year boundary dispute in the Barents Sea; Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, (Murmansk, OS – 15 September 2010, EIF - 07 July 2011).

The *sui generis* Svalbard Treaty of 1920 has granted sovereignty to Norway and provided the right to resource exploitation at the archipelago to each signatory state; Svalbard Treaty, “Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British Overseas Dominions and Sweden Concerning Spitsbergen Signed in Paris 9th February 1920.” (Longyearbyen: The Governor of Svalbard, 1920).

³⁶ UNCLOS, preamble (emphasis added).

³⁷ See, below, section 3.3 *Assessing sovereignty as a ‘technology’*.

³⁸ UNCLOS, Articles 2 and 3.

³⁹ UNCLOS, Article 57.

⁴⁰ International law acknowledges five global commons, namely the High Seas, the deep-sea bed in areas beyond national jurisdiction (the ‘Area’), the Atmosphere, the Antarctica and the Outer Space; For an in-depth discussion on the conceptualization of ocean commons in legal thinking, see Vito De Lucia, “Oceans Commons, Law of the Sea and Rights for the Sea” *Canadian Journal of Law & Jurisprudence* 32, no.1 (2019): 45-57, <https://doi.org/10.1017/cjlj.2019.2>.

⁴¹ UNCLOS, Article 76.

⁴² Richard Lugar, “The Law of the Sea Convention: The Case for Senate Action” presented in ‘Conference on the Law of the Sea, Brookings Institution: Washington, D.C., May 4, 2004, accessed March 24, 2022, www.unclosdebate.org/evidence/1312/us-has-already-been-abiding-provisions-unclos-last-two-decades.

Russia, Norway and Denmark have respectively submitted reports to the United Nations Commission on the Limits of the Continental Shelf (CLCS), claiming sovereign rights on the seabed beyond their 200 nm EEZs, mainly driven by the prospect of a future seasonally ice-free Arctic Ocean.⁴³ Under the existing state practice, it is highly possible that the Arctic Ocean will be further striated and territorially appropriated in the imminent future. However, while states continue to expand their maritime claims on the basis of sovereignty or sovereign rights, it is important to critically interrogate the existing system's continuous tendency towards striation and enclosure. It is both the geomorphological properties of the region and the change the region experiences occurring in a quick and lively tempo that may expose sovereignty's territorial application on the Arctic Ocean and, thus, need to be considered when thinking about the Arctic juridical imaginary. The following three sections are delving into three examples respectively and seek to demonstrate that the spatial conceptualization of the Arctic *nomos* may be confronted with an array of barriers.

3.1 *Sovereign encounters with the cryosphere*

Schmitt's *nomos*, which is etymologically drawn from the ancient Greek root *nemein* (νέμειν) that literally means 'to divide', 'to classify', inherently had a spatial dimension, denoting the fundamental process of territorializing and apportioning space, as well as the establishment of authority for the people within it, in accordance with each historical epoch's needs.⁴⁴ This territorial imaginary of the Earth's primary order was thus grounded on the antagonistic struggle between two irreconcilable worlds, this of 'firm and humane' land and that of 'free and asocial sea', with the sovereign authority willing to expand *dominium* over both of them.⁴⁵

Given that sovereignty was an institution born, developed and practiced in much southerner latitudes, and historically long before being expanded to the high north, it was natural that the preliminary conceptualization of an 'Arctic *nomos*' would also be derived from a Eurocentric legal rationale, and would, thus, be premised on the ontological dichotomy of space oscillating between 'firm land' and 'free sea'. According to this understanding, which is still embedded in contemporary international law instruments, sovereignty in the Arctic region tends to project from land seawards through the striation of maritime zones. Yet, in the polar latitudes this spatial conceptualization of law premised on the water-land dichotomy is confronted with another geomorphological peculiarity omnipresent in the poles (at least until recently), this of 'sea ice'. The Arctic sea ice may vary in form and type and is dynamically changing, while its extent, thickness and distribution shift significantly across years and seasons⁴⁶ and remain highly uncertain.⁴⁷ The sea ice has always been of crucial significance for the conservation of the Arctic ecosystems and contributes to the subsistence of a myriad of beings.⁴⁸ Many pinnipeds rest and

⁴³ Scott R. Stephenson, "Confronting Borders in the Arctic," *Journal of Borderlands Studies* 33, no. 2 (2018): 183-184.

⁴⁴ Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 78.

⁴⁵ Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. See, in particular, 'Chapter 2 - Justification of the Land-Appropriation of a New World: Francisco de Vitoria'.

⁴⁶ For a sample-based analysis of the changing state of Arctic sea ice from season to season, see Julienne Stroeve and Dirk Notz, "Changing state of Arctic sea ice across all seasons," *Environ. Res. Lett.* 13, no. 1 (2018), <https://doi.org/10.1088/1748-9326/aade56>.

⁴⁷ "Some Arctic Sea ice is thinning twice as fast as previously thought" *New Scientist*, accessed March 24, 2022, <https://www.newscientist.com/article/2279764-some-arctic-sea-ice-is-thinning-twice-as-fast-as-previously-thought/>.

⁴⁸ For a discussion on the importance of sea ice for earth's climate as well as beings, see, among other contributions, Gerhard S Dieckmann and Hartmut H Hellmer, "The Importance of Sea Ice: An Overview," in *Sea Ice: An Introduction to its Physics, Chemistry, Biology and Geology*, eds. David N Thomas and Gerhard S Dieckmann (Hoboken: Wiley-Blackwell, 2003), 1-21.

give birth on sea ice, while human and non-human predators use the Arctic ice edge for hunting, moving or harvesting.⁴⁹ On the algae grown on the Arctic ice edge zooplankton feed, which, in turn, constitute food for fish, sea birds and marine mammals.⁵⁰

Since 1979, when the first satellite measurements began, it has been observed that the Arctic sea ice has declined in all months, especially in summer, and tends to recede northwards.⁵¹ Vast parts of the Arctic Ocean, previously known to be frozen, are nowadays opening for navigation and resource development activities.⁵² Arctic winter sea ice loss is most pronounced in the Barents Sea compared to any other area in the Arctic, and the Barents region is projected to become an ice-free section of the Arctic Ocean in the decades to come. In the critical conjuncture of undisputable climate change, the material condition of the Arctic ice seems to be more unstable than ever before, and its ever-increasing fluidity challenges the affirmed solid borders drawn by sovereignty.⁵³ This uncertain materiality of the Arctic environment exposes sovereignty's inherent tendency for stability and permanence.⁵⁴ Sovereign states may wrongly legally conceptualize the sea ice as something relatively stable and plan conservation measures and resource exploitation on the basis of adjacency from the Arctic ice edge, notwithstanding the fact that it is dynamic in both space and time and may change form inconsistently.⁵⁵

Drawing rigid lines upon dynamic landscapes disregarding their fluid properties is not only a quality pertinent to the Arctic, and certainly not limited to the oceans. Natural environmental changes or extreme weather phenomena may shift baselines and territorial borders towards new locations elsewhere in the world.⁵⁶ It is the recalcitrant materiality of the Arctic Ocean though that tends to constantly shift from a solid to a liquid natural state that makes the Arctic *nomos* unique. Steinberg and Peters have previously argued that the intrinsic properties and phenomenological condition of the Arctic ice provide a new leaning in the traditional conceptualization of space due to its unique capacity to transform.⁵⁷ There is thus an ontological barrier attached to the constructed *nomos* of the Arctic ocean. It is the lack of realization of the obscure state of flux of the sea ice, one that complicates the conventional way of exercising sovereignty or sovereign rights in polar areas, but undoubtedly shapes all human and, not least, non-human activities in relation to them. Striating a 'frozen ocean' as a 'liquid sea' may strongly disregard the eidonomy and inherent liminality of the Arctic seascape and its dynamic patterns of

⁴⁹ Dieckmann and Hellmer, "The Importance of Sea Ice: An Overview."

⁵⁰ "The ice edge – a vulnerable place with lots of life" Barentswatch, accessed March 24, 2022, <https://www.barentswatch.no/en/articles/Iskanten/>.

⁵¹ For the Arctic sea ice extent see "Arctic Sea Ice Extent" National Snow & Ice Data Center, accessed March 24, 2022, <https://nsidc.org/arcticseaicenews/charctic-interactive-sea-ice-graph/>.

⁵² In fact, the fable of a Northwest and Northeast Passage, that could link, through the pole, the Atlantic and Pacific oceans, and thus Europe with East Asia, has always enticed the Arctic politics.

⁵³ Ingrid H. Onarheim and Marius Årthun, "Toward an Ice-free Barents Sea," *Geophysical Research Letters* 44, no. 16 (2017).

⁵⁴ Not rarely referred to in legal documents as 'permanent sovereignty'.

⁵⁵ See, in particular, Philip E. Steinberg, Berit Kristoffersen, and Kristen L. Shake, "Edges and Flows: Exploring Legal Materialities and Biophysical Politics of Sea Ice," in *Blue Legalities*, ed. Iru Braverman and Elisabeth R. Johnson (Durham: Duke University Press, 2020), 85-106.

⁵⁶ For instance, Harris observes that monsoon-related landslides may shift the territorial borders designed in the Himalayas as well as adjacent human activities; see Tina Harris, "Lag Four-Dimensional Bordering in the Himalayas" in *Voluminous States: Sovereignty, Materiality, and the Territorial Imagination*, ed. Franck Billé (Duke University Press 2020), 78-90.

⁵⁷ Steinberg and Petters, "Wet Ontologies, Fluid Spaces: Giving Depth to Volume through Oceanic Thinking."; see also Philip E. Steinberg and Berit Kristoffersen, "The Ice Edge Is Lost ... Nature Moved It': Mapping Ice as State Practice in the Canadian and Norwegian North," *Transactions of the Institute of British Geographers* 42, no. 4 (2017): 625-641.

change. As simply pointed elsewhere by Gerhardt et al. “today’s ice could be tomorrow’s water.”⁵⁸

In discussing the spatial architecture of the Arctic Ocean, international lawyers had already by the beginning of the 20th century been engaged in conversations about the legal status of the sea ice and how sovereignty for coastal states could be potentially drawn on it. In such debates, the material condition of the ice was much contested and, thus its spatial status was often imagined as ‘immobile ice’, ‘*territoire glaciaire*’, ‘permanent ice’, ‘*glaces éternelles*’, ‘polar ice cap’, ‘quasi-land’, ‘quasi-fixed mass’ and so on.⁵⁹ State practice treating the ice as ‘land’ has been observed throughout the previous century, most prominently with the establishment of scientific drift stations on detached icebergs, such as the U.S. Fletcher’s Ice Island (T-3) station during the Cold War.⁶⁰ Discussions on the particular morphology of the Arctic Ocean were finally incorporated during the third UN Conference on the Law of the Sea (UNCLOS III). The two Cold War superpowers, along with Canada who always had a keen interest in the region, provided in their private negotiations, prior to and during UNCLOS III, the driving force for the development of article 234 devoted to ice-covered areas.⁶¹ The article acknowledged the fussy climatic conditions of the poles and the existence of frozen waters, ensuring eventually additional sovereign jurisdictional authority for coastal states with respect to the environment in their Exclusive Economic Zones (EEZs). While the historical background of article 234 indicates the states’ gradually increasing geopolitical interest in the polar regions, the unique wording of article 234 reveals a degree of uncertainty embedded in the final legal text of the UNCLOS provision.⁶²

The process of striating a liminal ocean scape has long now been associated with the aporia of whether beneath ice exist land or water or valuable resources and has, accordingly, shaped the Arctic states’ territorial approach to the sea.⁶³ The instability of climate conditions and the delicate balance between frozen and liquid water entities that characterize the Arctic have always attracted outsiders to the region. From the Hudson Bay’s colonial endeavors in the Canadian Arctic and its *de facto* establishment of monopoly in North America to China’s current visions for a Polar Silk Road (*Bingshang Sichouzhilu*), the Arctic has always been approached by non-Arctic stakeholders who seek to attain a stake in circumpolar affairs.⁶⁴ The opening of new lanes in previously ice-covered areas and the increase of traffic in the region demonstrate the longing for sovereign power over the Arctic Ocean which continues to haunt the present-day Arctic politics. In response to such pressure, under the logic of territorial control, the Arctic littoral states continue to assert their will for additional striation and expansion of sovereign claims over the Arctic Ocean space. Perhaps the most provocative incentive of an Arctic State that fuelled

⁵⁸ Hannes Gerhardt et al., “Contested Sovereignty in a Changing Arctic,” *Annals of the Association of American Geographers* 100, no. 4 (2010): 994, <https://doi.org/10.1080/00045608.2010.500560>.

⁵⁹ Pharand has previously mapped the preliminary conceptualization of the sea-ice by the Arctic littoral states. See Pharand, “Freedom of the Seas in the Arctic Ocean,” 210-11.

⁶⁰ Johanne Bruun and Philip Steinberg, “Placing Territory on Ice: Militarisation, Measurement and Murder in the High Arctic,” in *Territory beyond Terra*, eds. Kimberley Peters, Philip Steinberg and Elaine Stratford (Lanham: Rowman & Littlefield, 2018), 147-167.

⁶¹ UNCLOS, Article 234.

⁶² Questions remain open both with regard to the scope of the 234 provision and its interpretation; for the historical development of Article 234, see Jan J. Solski, “The Genesis of Article 234 of the UNCLOS,” *Ocean Development & International Law* 52, no. 1 (2021): 1-19. For a discussion on interpretation issues, see Jan J. Solski, “The ‘Due Regard’ of Article 234 of UNCLOS: Lessons from Regulating Innocent Passage in the Territorial Sea,” *Ocean Development & International Law* (2021): 1-21.

⁶³ For instance, the first efforts of under-ice navigation and exploration operations increasingly took place from 1930s onwards; see Pharand, “Freedom of the Seas in the Arctic Ocean,” 222-223.

⁶⁴ For a comprehensive assessment of non-Arctic stakeholders’ participation in Arctic affairs, see Marc Lanteigne, “Inside, Outside, Upside Down? Non-Arctic States in Emerging Arctic Security Discourse,” in *The Arctic and World Order*, eds. Kristina Spohr and Daniel S. Hamilton (Massachusetts: Brookings Institution Press, 2020), 379-404.

discussions on additional sovereign claims was Russia's 2007 planting of a titanium flag on the ocean floor of the North Pole.⁶⁵ Although rather symbolic and legally meaningless, should the planting of the Russian flag be read along with Russia's CLCS claim and ongoing investments in Arctic trade and militarization, it can generate an overall feeling of competition for additional sovereign rights and territorialization expressed upon an unstable spatial order, and lead to what Billé calls new 'cartographic anxieties.'⁶⁶ The ongoing practice by sovereign states of seeking to extend territorial jurisdiction over maritime spaces beyond existing boundaries established by international customary or treaty law is known as 'creeping jurisdiction' and is an ever-expanding phenomenon.⁶⁷ With the Arctic sea ice steadily shrinking and new geopolitical realities undergoing, such claims and creeping enclosures nowadays invite an array of Arctic Ocean re-territorialization efforts by both state and corporate actors.⁶⁸ Such creeping claims were also asserted during the recent negotiations of the Central Arctic Ocean Fisheries Agreement (CAOFA), however proved to be unsuccessful in the shaping of the final draft.⁶⁹

3.2 *Epistemological clashes with other ways of practicing Arctic space*

The unique morphology of the Arctic seascape is posing a second question to sovereignty's territorial application, one of epistemological nature. Designating sea borders and imposing sovereignty upon them as provided by international law may be incompatible with other systems of knowledge and ways of being in and practicing ocean space. About 10% of the total Arctic population consists of Indigenous peoples who have inhabited the circumpolar North since time immemorial.⁷⁰ Considering the Western and Eurocentric, or better 'terracentric' essence of the Arctic legal imaginary, epistemological conflicts with Indigenous communities and traditional knowledge systems may arise when it comes to the existing legal architecture of the Arctic sovereign states.

Arctic coastal Indigenous peoples, such as the Inuit, the Aleuts, and the Yamal Nenets, often acknowledge the integrity of their traditional territories, with no distinction between state boundaries, terrestrial areas, fast-ice zones, and marine environments and their distinct ontological conceptualization of space has been in practice long before the colonization of the North by the existing Arctic sovereign states.⁷¹ For many Arctic Indigenous communities, intact sea ice has always ensured the traditional hunting (e.g. seals and walrus) and harvesting grounds

⁶⁵ For a legal discussion on Russia's planting of flag in relation to its continental shelf claims, see Nele Matz-Lück, "Planting the Flag in Arctic Waters: Russia's Claim to the North Pole," *Göttingen Journal of International Law* 1, (2009): 235-255, doi:10.3249/1868-1581-1-2-matz-lueck.

⁶⁶ The compound 'cartographic anxieties' may refer to any uncertain challenges in territorial integrity of sovereign states with reverberations on cartography. Such 'anxiety' emerges "in the attempt to reconcile the abstract principle of territorial sovereignty with spaces that are materially resistant, such as water or rarefied atmospheres"; see Franck Billé, "Introduction to 'Cartographic Anxieties,'" *Cross-Currents* 1, no. 21 (2016): 1-18.

⁶⁷ Victor Alencar Mayer Feitosa Ventura, *Environmental Jurisdiction in the Law of the Sea: The Brazilian Blue Amazon* (Berlin: Springer, 2020), 141-188.

⁶⁸ The compound "ocean re-territorialization" is borrowed by Christopher R. Rossi, *Remoteness Reconsidered: The Atacama Desert and International Law* (University of Michigan Press, 2021), 39.

Current creeping jurisdiction issues in the Arctic Ocean mainly exist over snow crabs in the Loophole and around Svalbard.

⁶⁹ Erik J. Molenaar, "Multilateral Creeping Coastal State Jurisdiction and the BBNJ Negotiations," *The International Journal of Marine and Coastal Law* 36, no. 1 (2021): 5, 14.

⁷⁰ "Arctic Indigenous Peoples," Arctic Center, accessed March 24, 2022, www.arcticcentre.org/EN/arcticregion/Arctic-Indigenous-Peoples.

⁷¹ See Margherita Poto, Endalew Lijalem Enyew and Apostolos Tsiouvalas, "Beyond Borders and States: Modelling Ocean Connectivity According to Indigenous Cosmovisions," *Arctic Review on Law and Politics* 12, (2021): 210-212, <https://doi.org/10.23865/arctic.v12.3290>.

(e.g. seaweed), as well as the means for communication between communities.⁷² For instance, the Inuit communities of the Great Water Polynya, *Pikialasorsuaq*, conceive of the frozen sea as an entity that extends beyond state-enforced maritime boundaries and have long now been operating cross-border mobility among the Greenlandic and Canadian coasts of the Polynya on the basis of customary utilization of the sea ice and the surrounding waters.⁷³ Such conceptualizations of space complicate the idea of stability and fixed maritime boundaries that springs from the sovereignty-based framework of international law, and confront the way territory is understood in Western legal systems. The sea-ice-land continuum is integral to the Inuit worldview and determines their traditional territories and livelihoods.⁷⁴ As Okalik Egeesiak, the former Chair of the Inuit Circumpolar Council (ICC), put it in a UN Chronicle, “*the Arctic Ocean and the sea ice is our nuna*,” which means ‘land’, acknowledging the Inuit’s strong bonds to the marine ecosystems – much like nation-states conceptualize the ‘land’.⁷⁵ To paraphrase Schmitt’s introductory words of *Land and Sea*, many Arctic Indigenous communities are thus ‘ice-born’. They ‘live, move and walk on the firmly-grounded ice’.⁷⁶ The liminal properties of the Arctic Ocean are therefore not only oscillating between the ice’s frozen and liquid state of nature, but between two different epistemological states. By reducing the Arctic Ocean to merely ‘water’, legal-spatial thinking may not only deny the phenomenology of the recalcitrant seascape itself, capable to change from liquid to solid and vice-versa, but also omit to conceptualize the value of the ice for the region’s first people.

More recently, and though their own representative organizations, many Arctic Indigenous communities have demonstrated that the conventional sovereign narrative of law of the sea and the following demarcation of marine boundaries is contradicting traditional ways of conceiving ‘territory’. The 2009 Circumpolar Inuit Declaration of Inuit Sovereignty well provided for the complex morphology of the Arctic environment as well as the transboundary historical bounds of the Inuit across different areas of the circumpolar North, nowadays limited by sovereign borders.⁷⁷ As put by Shadian, this form of sovereignty rather denotes a “cultural form of sovereignty” in light of the Inuit people’s historical relationship with the Arctic environment.⁷⁸ Similarly, in 2009, the Inuit Tapiriit Kanatami, which serves as the domestic representative organization for the Inuit of Canada,⁷⁹ designed a new map for Canada’s Arctic region entitled ‘*Inuit Nunangat*’. The map encompassed all terrestrial, marine, and ice-covered areas, and demonstrated that the Inuit consider the land, water, and ice areas to be inter-connected and play an integral role in their exercise of “*culture and way of life*”.⁸⁰ The ‘*Inuit Nunangat*’ map replaced Canada’s provincial and territorial boundaries with terraqueous/frozen borders based on

⁷² Poto, Enyew and Tsiouvalas, “Beyond Borders and States: Modelling Ocean Connectivity According to Indigenous Cosmologies,” 10.

⁷³ Pikialasorsuaq Commission, *People of the Ice Bridge: The Future of the Pikialasorsuaq*, (Montreal: ICC A-9.

⁷⁴ Claudio Aporta, Stephanie C. Kane, and Aldo Chircop, “Shipping Corridors through the Inuit Homeland,” *Limn* 10, <https://limn.it/articles/shipping-corridors-through-the-inuit-homeland/>.

⁷⁵ “The Arctic Ocean and the Sea Ice Is Our Nuna,” United Nations Chronicle, accessed March 24, 2022, <https://www.un.org/en/chronicle/article/arctic-ocean-and-sea-ice-our-nuna>.

⁷⁶ See Schmitt, *Land and Sea: A World-Historical Meditation*, 3.

⁷⁷ Jessica M. Shadian, “Remaking Arctic Governance: The Construction of an Arctic Inuit Polity,” *Polar Record* 42, no. 3 (2006): 249 - 259.

⁷⁸ Shadian, “Remaking Arctic Governance: The Construction of an Arctic Inuit Polity,” 251.

⁷⁹ Inuit Tapiriit Kanatami is a non-profit organization in Canada that represents over 65,000 Inuit and “serves as a national voice protecting and advancing the rights and interests of Inuit in Canada”; “We Are The National Voice Of Canada’s 65,000 Inuit,” Inuit Tapiriit Kanatami, accessed March 24, 2022, <https://www.itk.ca/national-voice-for-communities-in-the-canadian-arctic/>.

⁸⁰ The term “*Inuit Nunangat*” was introduced in 2009 as a more inclusive and appropriate term to determine the Inuit territory, encompassing water, land, and ice; to access the map, see “Maps Of Inuit Nunangat (Inuit Regions Of Canada),” Inuit Tapiriit Kanatami, accessed March 24, 2022, www.itk.ca/maps-of-inuit-nunangat/.

traditional utilization of the area by the Inuit and, thus, brought into forth a metaphysics of holism that raises concerns about Canada's sovereignty and political jurisdiction within traditional areas, particularly over the contested North West Passage (NWP).⁸¹

Alongside external regulations that often restrict traditional ways of traversing and hunting across space, unpredictable weather conditions over the last few decades such as longer periods of ice-break up, thinner ice, or lack of pack ice during the summer season may further shrink the geographical area wherein traditional activities are carried out. In turn, such tendencies may affect community health and mental wellbeing, in areas such as the NWP, where new shipping lanes may flourish in ice-free waters, whereas traditional ice-dependent activities diminish.⁸² In a region like the Arctic, where Indigenous participation in policy making is probably better ensured than anywhere else in the globe, through the mechanism of Permanent Participation in the Arctic Council and other regional bodies, Indigenous voices most likely will continue to raise concerns and openly question the spatial application of law in their ancestral territories.⁸³ Should the Arctic states decided to fully operationalize Indigenous self-determination in accordance with International human rights law and, thus, acknowledge Indigenous communities' frozen or terraqueous materialities, then the legitimacy of state sovereignty's territorial application over coastal waters and frozen areas would seem obsolete and certainly inadequate to spatially organize the region's legal order.

3.3 Assessing sovereignty as a 'technology'

A third realization relevant to sovereignty's application in the Arctic is technological, since it pertains to the *tekhne* (from the Greek *τέχνη* - art, craft, the way) of sovereignty: its modality on the Arctic Ocean's marine space. In a Heideggerian sense 'technology' is "*a way of revealing*", a way of approaching the world and conceiving truth, rather than being in essence 'technical' or 'technological',⁸⁴ but it may also denote the 'arts' employed in response to this conceptualization.⁸⁵ Understanding the interplay between sovereignty and territory as a political technology determined by the extension of the first upon the latter, as suggested by Elden, necessitates a deeper engagement with the way territory is measured, designed and functions in different historical and geographical contexts.⁸⁶ In the context of a rapidly changing Arctic, the modality of sovereignty upon a delineated territory, determined by rigid lines, static borders, and moulded by national jurisdictions based on a Westphalian territorial sovereign logic may disregard the mobile qualities and fluid properties that the world's oceans engulf.⁸⁷ Ongoing

⁸¹ Nadine C. Fabbi, "Inuit Nunaat as an Emerging Region in Area Studies: Building an Arctic Studies Program South of the Tree Line," (PhD diss., The University of British Columbia, 2015), 68-70.

⁸² Saami Council and the German Arctic Office, *Arctic Indigenous Peoples* (Potsdam: Alfred Wegener Institute, 2021) 5; see also Donna D W Hauser et al., "Co-production of knowledge reveals loss of Indigenous hunting opportunities in the face of accelerating Arctic climate change," *Environ. Res. Lett.* 16 (2021): 1.

⁸³ There are six Arctic Indigenous organizations that hold Permanent Participant status in the Arctic Council namely, the Aleut International Association, the Arctic Athabaskan Council, the Gwich'in International Council, the Inuit Circumpolar Council, the Russian Association of Indigenous Peoples of the North, and the Saami Council. Although they do not enjoy the right to vote at the Council, they have been heavily involved in Arctic political dialogues.

⁸⁴ Martin Heidegger, *The question concerning technology* (New York: Harper & Row, 1977), 12.

⁸⁵ Stuart Elden, *The Birth of Territory* (University of Chicago Press, 2013), 16.

⁸⁶ Elden, *The Birth of Territory*, 322-330.

⁸⁷ Although not exclusively referred to the Arctic, just to consider a few among the contributions reviewed here, see Philip E. Steinberg, "Sovereignty, Territory, and the Mapping of Mobility: A View from the Outside," *Annals of the Association of American Geographers* 99, no. 3 (2009): 467-495; Kimberley Petters et al. (eds.), *Territory beyond Terra* (Rowman & Littlefield, 2018); Mara Ntona and Mika Schröder, "Regulating Oceanic Imaginaries: The Legal Construction of Space, Identities, Relations and Epistemological Hierarchies Within Marine Spatial Planning,"

environmental issues, such as the loss of Arctic glaciers and permafrost, the melting of the enormous Greenlandic ice sheet, and the rising sea level in the region have already complicated the territorial borders that sovereignty draws on the Arctic Ocean, proving the volatility of geographical features once thought to be inert and stable. Along with the transboundary nature of environmental effects in the Arctic,⁸⁸ there has been an increasing mobility of beings, such as fish that move northwards, vessels and voyaging objects, while ongoing coastal erosion and permafrost melting in northern latitudes have already led to the first Arctic climate refugees,⁸⁹ bringing new dimensions to the existing legal realities.

Mobility in international law of the sea, although to an extent acknowledged,⁹⁰ remains strictly grounded upon conceptual borders that underpin different levels of state sovereignty and jurisdiction, ignoring a variety of moving human and non-human actors in the oceans, such as Indigenous communities, fish, marine mammals, technologies, icebergs, that may be moving on, under, or above the surface of the oceans and constantly challenging existing legal meanings. Bear and Elden, for example, have explored the fluidity of the water itself as well as of the fish, demonstrating that ‘fishery certification schemes’ are incapable to capture the mobility of the oceans and the fish they contain.⁹¹ Transboundary marine species have shown an increased risk of overexploitation, as management regimes and enforcement can vary among states and are limited within fixed sovereign territorial borders.⁹² In turn, the geopolitical layout of exclusive economic zones (EEZs) rarely reflects the natural boundaries of the biological resources they contain, leading to an increased risk of mismanagement.⁹³ It therefore conceives of their mobility only in territory-centred terms, determined by the different levels of state sovereignty, rendering non-humans objects of enclosure, exploitation and conservation, devaluating their fluid material properties. In addition to UNCLOS’ zoning apparatus, the territorial sovereign logic has been incorporated in external environmental protection schemes enforced upon a delineated territory of the Arctic Ocean, such as area-based-management tools⁹⁴ or marine spatial planning (MSP).⁹⁵

Maritime Studies 19, no. 3 (2020): 241-254; Jones, “Lines in the Ocean: Thinking with the Sea About Territory and International Law,” 307-343.

⁸⁸ The transboundary nature of environmental issues that the Arctic is confronted with was also affirmed in paragraph 9 of the Nuuk Declaration; see Nuuk Declaration (2011), The Seventh Ministerial Meeting of the Arctic Council (May 12, 2011, Nuuk, Greenland), para 9: “*We underline the importance of prior and timely notification and consultation regarding activities that may have significant adverse transboundary environmental effects.*”

⁸⁹ Remote Alaska villages, such as the predominantly Indigenous communities Kivalina, Newtok, Shaktoolik, and Shishmaref, face growing threats to infrastructure and safety due to the climate-driven coastal erosion and flooding; see Lawrence C. Hamilton, “Climigration? Population and Climate Change in Arctic Alaska,” *Population and Environment* 38, no. 2 (2016): 115–133.

⁹⁰ For example, the *Straddling Fish Stocks Agreement* was adopted to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks that may be subject to the different legal regimes that apply among different national jurisdictions; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Seas of 10 December 1982 Relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks, Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 6th Sess., U.N. Doc. A/CONF.164/37 (1995).

⁹¹ Christopher Bear and Sally Eden, “Making Space for Fish: The Regional, Network and Fluid Spaces of Fisheries Certification,” *Social & Cultural Geography* 9, no. 5 (2008): 487-504.

⁹² For instance, the transboundary salmon rivers of Northern Fennoscandia have been threatened by overexploitation; A case study of transboundary salmon regulation in Tana, North Norway, is discussed in Irene V. Dahl, “International Regulations and Guidelines on Transboundary Salmon Stocks: Case Study of the Tana River,” *Arctic Review on Law and Politics* 11, (2020): 157-188.

⁹³ Amanda M. Barkley et al., “Complex Transboundary Movements of Marine Megafauna in the Western Indian Ocean,” *Animal Conservation* 22, no. 5 (2019): 420.

⁹⁴ Indeed, the latter argument is debateable in MPA networks. See Elizabeth McLeod et al., “Designing marine protected area networks to address the impacts of climate change” *Front Ecol Environ* 7, no. 7 (2009): 362–370.

⁹⁵ See Kimberley Peters, “The Territories of Governance: Unpacking the Ontologies and Geophilosophies of Fixed to Flexible Ocean Management, and Beyond,” *Philosophical Transactions of the Royal Society B: Biological Sciences* 375, no. 1814 (2020): 20190458.

As new species arrive in Arctic waters and ice-dependent species move northwards or concentrate in shrinking sea ice areas, there is an ever-growing need for dynamic area-based measures that can manage species in rapidly changing conditions. The establishment of dynamic marine protected areas (MPAs) in the region could better reflect the turbulent nature of sea ice and accommodate dynamic biodiversity patterns largely dependent on the ice edge.⁹⁶ Conversely, environmental management in a delimited area of the oceanic space under UNCLOS' existing linear logic may perpetuate the same territorial understanding that sees the Arctic Ocean as 'inert' and 'static' and reduces the complex oceanic processes to simply lines on a map.⁹⁷

4 Conclusions: Reimagining the 'Arctic *Nomos*'

Despite continued warning by mainstream narratives, most scientific climate models predict that the Arctic Ocean would remain fully or partially ice-covered until the end of this century.⁹⁸ Whether the existing sovereign maritime boundaries deep-rooted in the Arctic reality will be resilient to the ongoing environmental and geopolitical changes that the region experiences is a question that remains to be addressed. The rapid pace of change and the ongoing geopolitical pressure have only come to exacerbate the fluid materiality of the Arctic seascape that has been there all the way along and inherently complexifies the territorial logic of sovereignty in the Arctic Ocean. The Arctic is no longer a matter of sovereign states - if it ever was - but a robust multiscale scene of both local and global actors, human and non-human, that move across fluid borders. While efforts by the Arctic littoral states to increase their existing sovereign power are undertaken, concurrently, the phenomenology of the Arctic environment and the rapid change in the region make striation more difficult and destabilise conventional understandings of sovereignty and geopolitics. With anthropogenic global warming underway, the state of flux of sea ice may become further violent and inhospitable to both human and non-human activities dependent upon it. Even conceptual dichotomies between land and sea seem to be more shifting than ever before, making imperative a new understanding of Arctic spatial planning in alignment with the Arctic Ocean's liminal status. With state sovereignty remaining the driving force of territorial thinking in the Arctic Ocean, a semantic reconceptualization of the 'Arctic *nomos*' seems to be necessary, embracing an ontology that decouples from the traditional supremacy of sovereign biases in legal-spatial thinking. Such an ontology could, in turn, signal the welcome of a different ocean materiality, one that accounts for the cryospheric gradients of the Arctic Ocean, reconciles with epistemologies that differ from the Western one, understands the mobility of multiple actors in space and time, and is overall less certain when drawing lines upon 'slushy waters'.

⁹⁶ Although MPAs are generally established as solid areas permanently enclosed, recent environmental governance discussions advocate for a shift towards more dynamic and adaptive management schemes that better reflect the ongoing challenges facing marine ecosystems. For a discussion on dynamic MPAs in light of climate change see Tim Cashion et al., "Shifting seas, shifting boundaries: Dynamic marine protected area designs for a changing climate" *PLoS ONE* 15, no. 11 (2020): 1-17, <https://doi.org/10.1371/journal.pone.0241771>.

⁹⁷ As elsewhere observed by Halsey, even conservation areas themselves can be seen as tools that the states use in order to have greater control of the territory abutting such areas; Mark Halsey, "Majesty and monstrosity: Deleuze and the defence of Nature," in *Law and ecology: new environmental foundations*, ed. Andreas Philippopoulos-Mihalopoulos (London: Routledge, 2011), 228.

⁹⁸ "Sea Ice," *Earth Observatory*, accessed March 24, 2022, <https://earthobservatory.nasa.gov/features/SeaIce>.

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