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Extranational Taxation: Canada and UNCLOS Article 82

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PRÉCIS

L'auteur examine l'imposition du « revenu extranational » (le revenu qui provient de l'extérieur des frontières géographiques de la souveraineté nationale d'un pays) sous l'angle de l'expérience du Canada de l'article 82 de la Convention des Nations Unies sur le droit de la mer.

ABSTRACT

The author considers the taxation of "extranational income" (income that arises outside the geographical borders of any country's national sovereignty) through the lens of Canada's experience with article 82 of the United Nations Convention on the Law of the Sea.

KEYWORDS: INTERNATIONAL TAXATION ■ MARITIME LAW ■ SOVEREIGNTY ■ SPACE ■ NEXUS ■ MINERAL RESOURCES

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INTRODUCTION

This paper considers the taxation of "extranational income" (that is, income that arises outside the geographical borders of any country's national sovereignty) through the lens of Canada's experience with article 82 of the United Nations Convention on the Law of the Sea (UNCLOS).[1] Extranational income presents a

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1 United Nations Convention on the Law of the Sea, concluded at Montego Bay, Jamaica, on December 10, 1982, entered into force in 1994, 1833 UNTS 396. The large majority of the

unique international tax law challenge that is not adequately addressed by existing tax rules and has gone largely unanalyzed. In this paper, I explore how such income should be taxed, and I entertain the possibility that an extranational taxing regime is justified by the international law principles applicable in geographic areas beyond national jurisdiction (colloquially referred to as the "common heritage of mankind" [CHOM]).

Arguably, the only existing fiscal mechanism to manifest this concept is the scheme under UNCLOS article 82, which deals with the equitable sharing of the value of non-living resources mined from certain areas of the seabed. Although no country has yet triggered the regime's obligations under the convention, it appears that Canada will be the first country to do so in the near future because of its commercial exploitation in an area covered by article 82. This paper uses Canada's nascent experience to evaluate the article 82 regime as an illustrative example of extranational taxation.

Below, I identify the problems with taxing extranational income under the current rules. In the section following, I discuss the geographical delimitation between areas under national sovereignty and the global commons, and the application of the CHOM principle to the latter. Next, I describe the UNCLOS article 82 regime and its application to Canada. The final sections discuss the characterization of the article 82 regime, normatively and theoretically, as an extranational tax.

CURRENT TAXATION OF EXTRANATIONAL INCOME

The century-old international income tax infrastructure rests upon two fundamental assumptions: that taxing jurisdiction is an indivisible component of national sovereignty, and that the geographical location of economic activity (along with the taxpayer's residence) is the essential determinant of which competing national sovereign shall exercise its rightful taxing authority over a particular item of income. Technological advancement and globalization, along with the sophisticated tax planning that such developments allow, have focused attention on this infrastructure's increasing obsolescence; one may observe that both of the assumptions mentioned above are under question by academics and policy makers alike. Michael Graetz, discussing US domestic tax law, illustrates the problem with the now-familiar concept of "stateless income":[2]

> [The] fundamental rules . . . were put in place during the formative period—1918 through 1928—for international income taxation, a time when the world economy was very different. Recent years have witnessed, for example, the rise of e-commerce, the expanded use of financial derivatives, . . . the increased mobility of capital, a rise in

world's nations have ratified the treaty, including all of the major economies, with the notable exception of the United States.

2 Stateless income, as the originator of the term explains, "can be understood as the movement of taxable income within a multinational group from high-tax to low-tax source countries

> the use of tax-haven[s] . . . and more sophisticated cross-border legal and financial arbitrage, all of which have helped render archaic (or easily manipulated) the long-standing core concepts used worldwide to implement international income tax arrangements and policies. International income tax law is now composed of legal concepts and constructs that no longer reflect the economic realities of international business, if they ever did.[3]

The international tax community has been explicitly grappling with this problem of stateless income for the last decade or so, culminating in the Organisation for Economic Co-operation and Development's (OECD's) base erosion and profit shifting (BEPS) project. Stateless income is the product of tax planning, and it arises from the interaction of different countries' domestic and treaty-based tax rules. As such, it is a synthetic creature of the law and is of concern to the international fiscal community, for good reason. BEPS and other responses to such transnational tax problems inevitably and incrementally chip away at one or both of the bedrock assumptions mentioned above.

Although stateless income has rightly set the agenda for re-examining foundational assumptions of tax policy, there has been little analysis of extranational income, which in some way provides a purer analytical lens through which to view the changing valence of the concepts of tax jurisdiction and source. Extranational income (de facto stateless income) does not pose the same fiscal threat as de jure stateless income, but technological progress and globalization are making the issue increasingly relevant in economic terms. And although extranational income and stateless income are different, there is more than linguistic similarity between the two phenomena: they similarly drive tax transnationalism by highlighting the increasingly problematic nature of the interaction between (1) traditional notions of independent national taxing jurisdictions and (2) source rules that rely on physically locating economic activity.[4] Stateless income (which is something of a misnomer)

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without shifting the location of externally-supplied capital or activities involving third parties." Edward D. Kleinbard, "Stateless Income" (2011) 11:9 *Florida Tax Review* 699-773, at 702 (emphasis omitted). Kleinbard's article is credited with coining the term "stateless income" to describe the general tax malfeasance perpetrated by multinational enterprises. The income is "stateless" because it is derived "from business activities in a country other than the domicile of the group's ultimate parent company, but which is subject to tax only in a jurisdiction that is not the location of the customers or the factors of production through which the income was derived, and is not the domicile of the group's parent company." Supra, at 701. This type of income is sometimes called "nowhere income." See, for example, John A. Swain and Walter Hellerstein, "State Jurisdiction to Tax 'Nowhere' Activity" (2013) 33:2 *Virginia Tax Review* 209-68 (regarding the source of income for US state tax purposes).

3 Michael J. Graetz, "The David R. Tillinghast Lecture Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies" (2001) 54:3 *Tax Law Review* 261-336, at 315-16.

4 Professor John Prebble notes that "all countries place geographical limits on the income that they tax. . . . Countries are defined primarily by reference to geography, a discipline that deals with physical phenomena. Certainly, countries are so defined for tax purposes. Income, on the

demonstrates the problem that income can be sourced in *any* country; extranational income demonstrates the problem that income can be sourced in *no* country. They are both transnational issues that require transnational solutions.

Extranational spaces are not tax law voids; a hodgepodge of substantive international tax rules apply to extranational income. These various rules (found in domestic tax law and tax treaties) include (1) rules of general applicability, such as those regarding worldwide taxation, the source of business profits and location of permanent establishments,[5] the source of services income, the source of royalties,[6] and the treatment of "other" income;[7] (2) industry-specific rules, such as the international transport rules found in article 8 of the OECD model, and rules relating to income from communications and natural resources; and (3) even some rules specifically addressing extranational income, such as the "space and ocean activity" source rules under US Internal Revenue Code (IRC) section 863(d).[8]

The rules in the second and third categories take some account of the special nature of extranational income, and both the article 8 rule and the US space and ocean activity rules default to residence taxation (for lack of a better alternative).[9] However, given the nature of extranationally sourced income (and the types of taxpayers

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other hand, is not a physical phenomenon . . . [it] is an abstract concept . . . . And yet source rules, a crucial aspect of the juridical concept of income, are based on this contradiction . . . [I]ncome can no more have a physical source than can, say, patriotism or capitalism." John Prebble, "Ectopia, Tax Law and International Taxation" [1997] *British Tax Review* 383-403, 385-86. See also Phillip Genschel, "Globalization and the Transformation of the Tax State" (2005) 13:S1 *European Review* 53-71, at 60 (https://doi.org/10.1017/S1062798705000190), proposing that the notion of "a 'natural nexus' between tax base and a particular territory has always been a fiction." Kleinbard decries the fact that one implication of the phenomenon of stateless income is the "dissolution of any coherence to the concept of geographic source." Kleinbard, supra note 2, at 701. Nevertheless, the main focus of BEPS is to tax cross-border income "where economic activity is conducted, and value is created." See, for example, Miranda Stewart, "Transnational Tax Law: Fiction or Reality, Future or Now?" Working Paper prepared for NYU Tax Policy and Public Finance Colloquium, March 29, 2016, at 29.

5 See, for example, *Deputy Commissioner of Income Tax v. PanAm Sat International Systems Inc.* (2006), 9 SOT 100 (Delhi ITAT), regarding whether telecommunications satellites in orbit above a country's territory can constitute a permanent establishment of their owners.

6 See Kleinbard, "Stateless Income," supra note 2.

7 For example, Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (Paris: OECD, November 2017), article 21 (https://doi.org/10.1787/mtc_cond-2017-en) (herein referred to as "the OECD model").

8 Internal Revenue Code of 1986, as amended, section 863(d). Treas. reg. section 1.863-8, entitled "Source of income derived from space and ocean activity under section 863(d)." A space and ocean activity includes activities conducted in space, in Antarctica, and on or in water outside the jurisdiction of the United States or any other country. For US tax law purposes, the source of income from a space or ocean activity is generally determined by the residence of the person deriving such income.

9 OECD model, supra note 7, article 21, relating to "other income" also defaults to residence taxation.

likely to earn it), the suitability of residence (or "place of effective management" [POEM]) taxation is belied by a consideration of shipping income, which is the primary type of extranational income to explicitly warrant special consideration.[10]

Article 8 of the OECD model, dealing with income from international transport activities, has a distributive rule that may be traced back to the 1920s and the early days of the League of Nations, and, as such, it is the original and only exception to the set of general distributive rules that are based on the difficulty of locating and apportioning income from an activity. The feature of the activity of international transport that warrants exceptional treatment (and exclusive tax jurisdiction) was said to be the difficulty of allocating profits to the multiple jurisdictions that are inherently involved in international transport. The 1925 Resolution of the Technical Experts of the League of Nations advised that shipping income should be taxed otherwise than under the business profits rules, "in view of the very particular nature of [shipping] activities and the difficulty of apportioning the profits, particularly in the case of companies operating in a number of countries."[11]

Until recently, the default solution offered by the OECD model was to attribute exclusive taxing rights to the state of the place of effective management; however, in light of the fact that most recent treaties (including all treaties of Australia, the United States, and Canada) grant taxing rights to the residence country, the OECD recently changed its model to reflect the reality of residence taxation.[12]

Either way, the electivity of such exclusive taxing rules has become a tool for evasion.[13] Shipping companies (increasingly taxed only on the basis of residence)

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10 See Richard Vann, "Current Trends in Balancing Residence and Source Taxation," in *Current Trends in Balancing Residence and Source Taxation in BRICS and the Emergence of International Tax Coordination* (Amsterdam: IBFD, 2015), 367-92, at 378: "The non-taxation of international shipping income came about through a combination of the nature of the activity and two international tax rules which made sense ex ante but did not prove robust in preventing avoidance ex post. In one sense shipping income is sourceless or perhaps more accurately is mainly sourced on the high seas and so in the context of the world effectively operating an exemption system for relief of double taxation at the corporate level in relation to non-domestic business income it is not surprising that there is no source or residence tax."

11 League of Nations, Double Taxation and Tax Evasion: Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations, League of Nations document no. F.212 (Geneva: League of Nations, February 7, 1925), resolution 1, at paragraph C(2)(a). See, generally, Guglielmo Maisto, "The History of Article 8 of the OECD Model Treaty on Taxation of Shipping and Air Transport" in Kees van Raad, ed., *Comparative Taxation—Essays in Honour of Klaus Vogel* (London, UK: Kluwer Law International, 2002), 83-110.

12 See Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital: Condensed Version 2014* (Paris: OECD, July 2014), commentary on article 8, at paragraph 1(2): "Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State."

13 See Vann, supra note 10, at 378: "[U]nfortunately the residence/PoEM tests for corporations have little substance compared to the PE-type tests in establishing where actual operations occur so that it was easy to establish residence/PoEM of a shipping company wherever desired."

have moved to tax havens,[14] and developed countries have had to lure them back by essentially replacing income tax with (minimal) tonnage taxes.[15]

With respect to non-residents, furthermore, the "difficulty of allocation" rationale is not entirely satisfying, in that the problems of allocating international transport income are quantitatively rather than qualitatively different from the problems of allocating income from many other activities (and that is why, perhaps, we have BEPS). The OECD model and commentary in other areas do not deviate from concurrent taxation default rules that are based on difficulties in allocating income.[16]

14 See, for example, Yoshifumi Tanaka, *The International Law of the Sea*, 2d ed. (Cambridge, UK: Cambridge University Press, 2015), at 152-57; Vann, supra note 10, at 378: "Shipping havens (where little or none of the actual shipping operations was based) quickly developed which have turned out to be countries generally without tax treaty networks."

15 See Vann, supra note 10, at 379: "In recent years virtually, every major developed country has given up on trying to tax shipping income. Most have now introduced tonnage taxes or some equivalent which mean that no or trivial residence tax is levied on the income of a resident shipper from international operations." Canada does not have a tonnage tax (and instead imposes regular income tax on shipping and aircraft operations), but, like many other countries, it has for a long time exempted the shipping (and aircraft) income of a non-resident who is from a country that provides reciprocal relief to Canadian residents. See paragraph 81(1)(c) of the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended; John J. Lennard, "Canada," in Guglielmo Maisto, ed., *Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties* (Amsterdam: IBFD, 2017), 291-321, at 294-96.

16 Interestingly, a comment to this effect with regard to activities in space has been removed from the OECD commentary. The 2008 update to the OECD commentary removed the following comment on article 7, paragraph 1(4): "There have been, since the 1950s, rapid developments of activities in space: the launching of rockets and spaceships, the permanent presence of many satellites in space with human crews spending longer and longer periods on board, industrial activities being carried out in space, etc. Since all this could give rise to new situations as regards the implementation of double taxation conventions, would it be desirable to insert in the Model Convention special provisions covering these new situations? Firstly, no country envisages extending its tax sovereignty to activities exercised in space or treating these as activities exercised on its territory. Consequently, space could not be considered as the source of income or profits and hence activities carried out or to be carried out there would not run any new risks of double taxation. Secondly, if there are double taxation problems, the Model Convention, by giving a ruling on the taxing rights of the State of residence and the State of source of the income, should be sufficient to settle them. The same applies with respect to individuals working on board space stations: it is not necessary to derogate from double taxation conventions, since Articles 15 and 19, as appropriate, are sufficient to determine which Contracting State has the right to tax remuneration and Article 4 should make it possible to determine the residence of the persons concerned, it being understood that any difficulties or doubts can be settled in accordance with the mutual agreement procedure." It is not clear whether this comment was removed because it was considered self-evident or because the OECD no longer had confidence in its veracity or usefulness. However, the question that it posed is likely to become germane, since the final frontier of human exploration could soon become the next frontier in international tax policy. (The comment above was originally added on 23 July 1992 and edited on 31 March 1994 to remove a reference in the first sentence to "the prospect in the very near future" of industrial activities being carried out in space.)

What is relevant is the reason for the difficulty of allocating international transportation income: such income is derived from activity conducted largely outside the territory of any country. In this sense, the taxation of international transport income is a useful object lesson in the treatment of extranational income generally.[17] If residence taxation is ineffectual and there is no source country, then what? UNCLOS article 82 and CHOM are instructive.

To the extent that the geographic location of income matters as a basis for allocating international taxing rights (and, despite its shortcomings, there is not an obviously better basis in many cases), the salient feature of extranational income is that it arises in spaces (or with respect to materials) that are subject to the CHOM principle.[18] Whereas it is readily acceptable, according to a number of theories, that income identifiably sourced in spaces subject to national jurisdiction is subject to tax by that jurisdiction, the CHOM concept provides an analogous basis for taxing jurisdiction—that is, the basis of international agreements to manage the exploitation of extranational spaces in ways that benefit all of humankind.

NATIONAL SPACE, EXTRANATIONAL SPACE, AND THE COMMON HERITAGE OF HUMANKIND

In order to determine which income is *not* sourced within anyone's taxing jurisdiction, it is first necessary to geographically delimit the territorial scope of national taxing sovereignty (a matter of international law, each country's domestic law, and tax treaty law).[19] While a country's jurisdiction is often defined self-referentially for tax purposes,[20] international law provides nuanced detail regarding this territorial scope.

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17 Professor Vann notes the similarity between shipping income and stateless income in this regard as well: "[I]ncome from intellectual property has some similarities with shipping income in that in one sense it is either sourced everywhere or nowhere." See Vann, supra note 10, at 379.

18 The concept is not limited to tangible material and physical space; for example, the United Nations Declaration on the Rights of Indigenous Peoples affirms "that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind." See United Nations, General Assembly, "United Nations Declaration on the Rights of Indigenous Peoples," resolution 61/295, September 13, 2007.

19 A straightforward description of national borders and territories (on land, at sea, and in the air) is more interesting than it appears, because a wide range of legal issues are implicated by the endeavour. Before the 2015 legislation that simplified and harmonized the definition of "Australia" for tax purposes, the geographical meaning of "Australia" was found under 13 different Commonwealth acts. Treasury Legislation Amendment (Repeal Day) Act 2015; Income Tax Assessment Act 1997, subdivision 960-T.

20 For example: "The term 'United States' when used in a geographical sense includes only the States and the District of Columbia." See IRC section 7701(a)(9).

Large portions of the earth's oceans are subject to national jurisdiction under international law.[21] UNCLOS provides for full national sovereignty over territorial waters,[22] and limited sovereignty over a country's "continental shelf" and "Exclusive Economic Zone" (EEZ) for purposes relating to environmental activity and the exploration and exploitation of natural resources.[23] In layman's terms, the continental shelf is the part of the ocean floor that comprises part of the continental land mass.[24] The EEZ comprises the seabed and waters extending 200 nautical miles out from the country's coast.[25]

Thus, article 3(1)(b) of the Australia-Canada tax treaty provides that

> (b) the term "Canada" used in a geographical sense, means the territory of Canada, including any area beyond the territorial waters of Canada which is an area where Canada may, in accordance with its national legislation and international law, exercise rights with respect to the seabed and subsoil and their natural resources.[26]

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21 Australian tax law defines "Australia" to include enumerated external territories and statutory offshore areas, and it specifically includes the country's continental shelf and EEZ, as authorized by UNCLOS. Income Tax Assessment Act 1997, section 960-505. Section 255 of Canada's Income Tax Act defines "Canada" to include (and to have always included), for the purposes of the Act, "(a) the sea bed and subsoil of the submarine areas adjacent to the coasts of Canada in respect of which the Government of Canada or of a province grants a right, licence or privilege to explore for, drill for or take any minerals, petroleum, natural gas or any related hydrocarbons; and (b) the seas and airspace above the submarine areas referred to in paragraph 255(a) in respect of any activities carried on in connection with the exploration for or exploitation of the minerals, petroleum, natural gas or hydrocarbons referred to in that paragraph."

22 Up to 12 nautical miles out from the coastline. UNCLOS, articles 2 and 3. It is not unheard of for states (particularly non-ratifying ones) to make claims to territorial waters well in excess of the UNCLOS limit, although US domestic legislation adopts the 12-nautical-mile limit. Article 33 confers additional sovereignty over a "contiguous zone" (not more than 24 nautical miles out from the territorial baseline) for the purpose of preventing "infringement of . . . customs, fiscal, immigration or sanitary laws." See UNCLOS article 33(1)(a).

23 See UNCLOS, articles 55-56 and 76-77.

24 A coastal country's continental shelf "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." See UNCLOS, article 76(1). Generally, the point on the coast from which the 200 nautical miles are measured is the "low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." See UNCLOS, article 5.

25 UNCLOS, article 57. The economic significance of the world's EEZs is underappreciated; the economic value, to large coastal countries such as Australia and Canada, of their marine sectors is in the tens if not hundreds of billions of dollars. Global EEZs have extended states' geographical jurisdiction to over 20 percent of the world's oceans (and almost all of the world's fisheries). Canada's EEZ covers 5.6 million km^2 of ocean.

26 Convention Between Canada and Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income done at Canberra on May 21, 1980, article 3(1)(b).

"Australia" is defined in article 3(1)(c) to exclude all external territories except Norfolk Island, Christmas Island, Cocos (Keeling) Island, Ashmore and Cartier Islands, Heard Island and McDonald Islands, and the Coral Sea Islands and includes

> any area adjacent to the territorial limits of Australia (including the Territories specified in this subparagraph) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploration for or the exploitation of any of the natural resources of the seabed and subsoil of the continental shelf.[27]

The extent to which a country's continental shelf might extend beyond the 200 nautical miles of its EEZ (that is, the distinction between where the global commons begin and national boundaries end) has always been contentious under international law and was a matter of great importance leading up to and during the UNCLOS negotiations. In 1958, three different international treaties dealing with the law of the sea were drafted in Geneva in an effort to standardize international seafaring norms.[28] Subsequent efforts in the 1970s and 1980s to improve and update the treaties' incomplete coverage[29] culminated in negotiations that ultimately produced UNCLOS, which seeks to establish nations' rights and responsibilities with respect to their use of and jurisdiction over the world's oceans.[30] The International Seabed Authority was established as an autonomous organization under UNCLOS (and under the 1994 agreement relating to its implementation) to manage, organize, and control, on behalf of humankind as a whole, activities (particularly the exploitation of mineral resources) in "the Area": the seabed and ocean floor and the subsoil thereof beyond the territorial limits of national jurisdiction.[31]

However, a sticking point during the conferences that led to UNCLOS was the fact that many countries—including, prominently, Canada—maintained that their continental shelf (and thus national sovereignty) naturally extended beyond the arbitrary 200 nautical mile limit (the extended area being the so-called extended

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27 Ibid., article 3(1)(a). Both countries' claims to airspace are questionable in light of the provisions of UNCLOS, but discussion of the matter is beyond the scope of this paper.

28 United Nations, Convention on the High Seas done at Geneva on April 29, 1958, entered into force on September 30, 1962, 450 UNTS 82; United Nations, Convention on the Continental Shelf done at Geneva on April 29, 1958, entered into force on June 10, 1964, 499 UNTS 311; United Nations, Convention on the Territorial Sea and Contiguous Zone done at Geneva on April 29, 1958, entered into force on September 10, 1964, 516 UNTS 205.

29 For example, the Convention on the Territorial Sea and Contiguous Zone did not define the maximum size of a state's territorial sea claims. See, generally, John Astley III and Michael N. Schmidt, "The Law of the Sea and Naval Operations" (1997) 42 *Air Force Law Review* 119-55.

30 As discussed above, the definitional provisions of the widely accepted treaty provide the template for most of the maritime jurisdictional claims reflected in the major economies' domestic laws and international agreements, including tax treaties.

31 UNCLOS, article 1, part XI. The seabed covers about 70 percent of the earth's surface, making the Area the largest terrestrial commons space.

continental shelf [ECS]). There are tens of millions of square kilometres of seabed that potentially fall within this category.

UNCLOS provides a compromise: there is a mechanism by which such areas may be recognized as subject to (limited) national sovereignty, but countries must share a percentage of the value of the exploited resources from such areas to be redistributed equitably to disadvantaged countries. As is more fully discussed in the next section of this paper, there is disagreement as to whether the resulting UNCLOS provisions dealing with ECS areas reflect a compromise with regard to sovereignty or simply enshrine the international law status quo.

The backdrop to this ongoing controversy is the patchwork treaty-based international legal regime that applies to extranational spaces. As a useful shorthand, it is often said that such spaces (and, more specifically, their resources) are subject to the international law concept of CHOM. As a term of art, however, CHOM is used in only two significant international instruments (UNCLOS and the Moon treaty), and its application has been explicitly rejected in other treaties (in large part because the term does not have an agreed-upon definition).

Nonetheless, CHOM has also become a more generic catch-all term for the emergent set of principles that normatively and positively apply to extranational spaces and their resources (such as the idea that common spaces are not subject to national sovereignty and that resources located there are to be maintained and used for the benefit of all humankind).[32] This more generic sense of the term is used in this paper (except when noted otherwise), and it refers to the principles that have emerged through the various treaty negotiations and compromises that constitute the international body of law applicable to the geographic commons. As such, the term is useful in considering not only the governance of extranational spaces, but also the theoretical legitimacy of extranational taxation.

By way of illustrating the difference between the generic and technical usages of the term: CHOM has been called "one of the most extraordinary developments in

32 There are multiple variations of the term and its application, in both applicable treaties and the secondary literature. See, for example, Michael W. Lodge, "The Common Heritage of Mankind" (2012) 27:4 *The International Journal or Marine and Coastal Law* 733-42, at 734, in note 3, citing A. Kiss, *The Common Heritage of Mankind: Utopia or Reality*: "[T]he idea of a common interest of mankind can be identified in the development of international agreements across multiple sectors in the second half of the twentieth century, including human rights, cultural heritage, labour, public health, telecommunications, outer space, Antarctica and the environment"; Harminderpal Singh Rana, "The 'Common Heritage of Mankind' & the Final Frontier: A Revaluation of Values Constituting the International Legal Regime for Outer Space Activities" (1994) 26:1 *Rutgers Law Journal* 225-50; John E. Noyes, "The Common Heritage of Mankind: Past, Present, and Future" (2012) 40:1-3 *Denver Journal of International Law and Policy* 447-71, at 455. As used in UNCLOS, "CHOM" applies to the natural resources located in the seabed, not the territory itself. Christopher Joyner, review of *The Concept of the Common Heritage of Mankind in International Law*, by Kemal Baslar in (1999) 13:2 *Emory International Law Review* 615-28, at 620.

recent intellectual history,"[33] but it has also been rejected as creating an "international socialist cartel."[34] Indeed, the fact that the term lacks precise legal definition is one of its defining characteristics. At a general level, however, basic principles of CHOM can be observed. Areas and resources subject to the doctrine are (1) not subject to appropriation (sovereign or otherwise), (2) to be used for peaceful purposes, (3) to be conserved, and (4) subject to shared and inclusive management.[35] In additional, and most relevantly for this discussion, benefits derived from the exploitation of resources in a common heritage area are to be equitably shared. Of course, even these vague general principles are often compromised and are, at any rate, open to wildly divergent interpretations.[36]

In particular, the aspects of CHOM that are related to the equitable sharing of the spoils of extranational space are at the crux of the controversy and indeterminacy regarding the term. In its technical and strongest form, CHOM calls for the literal vesting of exclusive ownership rights over natural resources in all of humankind (that is, common ownership). The sharing aspects of CHOM, along with the mandate to share the knowledge and material benefits of the exploitation of such resources in a way that furthers distributive justice, are both novel and controversial in international law.[37]

A brief history of the development of the CHOM principles will highlight the emergent features of commons governance (sometimes explicitly under the label of "CHOM" and sometimes based on related concepts) that provide the theoretical justification for treaty-based fiscal measures such as the article 82 regime. The first modern set of treaties dealing with the global commons is the 1959 Antarctic treaty system (ATS), whose main agreement is the Antarctic treaty.[38] Negotiated at a time when a number of countries had already made sovereign claims over areas of the continent on which they had been active (mainly conducting scientific research), and at a time before the articulation of the CHOM concept, the Cold War-era treaty had arms control and demilitarization as its main concern. Because of a lack of

33 Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (The Hague: Martinus Nijhoff, 1998), at 7.

34 Emilio J. Sahurie, *The International Law of Antarctica* (Dordrecht: Martinus Nijhoff, 1992), at 389. Not all would agree that the two characterizations are mutually exclusive.

35 Jennifer Frakes, "The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?" (2003) 21:2 *Wisconsin International Law Journal* 409-34, at 411-13.

36 See section IV below.

37 Noyes, supra note 32, at 451.

38 United Nations, The Antarctic Treaty signed at Washington on December 1, 1959, entered into force in 1961, 402 UNTS 71. It was signed by Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, United Kingdom, United States, and the USSR. The treaty now has 53 signatories and applies to the area south of 60 degrees south latitude (with a carve-out for the high seas).

international consensus regarding Antarctic sovereignty claims, the Antarctic treaty is purposefully vague and non-committal on the matter,[39] but the preamble declares that the continent is a natural reserve devoted to science and that it is "in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes."[40] In order to keep the peace, the ATS permits no mineral exploitation whatsoever: "Any activity relating to mineral resources, other than scientific research, shall be prohibited."[41]

Although the Antarctic regime rejects specific features of the very full CHOM doctrine (especially relating to sovereignty), the prohibition against commercial exploitation and the concern with science and peace demonstrate an important recognition by international law of the collective interest in extranational space—an interest that carries over into outer space.[42]

International law recognizes that nations enjoy unfettered sovereignty over their "air space."[43] Beyond national air space,[44] a series of treaties applies to outer space and celestial bodies.[45] The main treaty identifying freedoms, obligations, and limitations in space—the widely accepted 1967 outer space treaty—declares that

39 Antarctica has the curious attribute of having the unsettled nature of its sovereignty codified in its governing document. Article IV(2) of the Antarctic treaty deals with claims to territorial sovereignty by taking a "snapshot" of the sovereignty claims of parties to the treaty at the time the treaty comes into force. It provides as follows: "No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force." Article IV(I) preserves for party-states previously asserted rights of or claims to territorial sovereignty ((1)(a)), the bases for any such assertions ((1)(b)), and the right to not recognize any other state's assertions of sovereignty. By its terms, the ATS is in place until 2048.

40 See Antarctic treaty, preamble. Australia claims the "Australian Antarctic Territory," but statutory definitions of "Australia" for tax purposes do not include the territory. See Income Tax Assessment Act 1997, section 960-505.

41 The Protocol on Environmental Protection to the Antarctic Treaty signed in Madrid on October 4, 1991, entered into force in 1998, 30 ILM 1455, article 7.

42 The ATS was developed more or less concurrently with the birth of the space industry; United Nations, General Assembly, "Question of the Peaceful Use of Outer Space," December 13, 1958, UNGA res. 1348 (XIII), was among the first official acknowledgments of the common interest of humankind in outer space.

43 Convention on International Civil Aviation signed at Chicago on December 7, 1944, 15 UNTS 295, article 1 (Sovereignty). With respect to the z-axis, there seems to be no law regarding how far down national jurisdiction extends. Presumably, all countries taper down, in country-shaped cones, to a single point in the centre of the earth.

44 Surprisingly, there is no general agreement on the precise delimitation between national airspace and non-sovereign outer space (but the general range is from approximately 60 kilometres to 100 kilometres up).

45 A few countries—for example, the United States and Luxembourg—are taking the lead on setting space policy through domestic legislation.

> [t]he exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.[46]

Further, the outer space treaty was made before the CHOM concept had been expressly articulated,[47] and although the "province of mankind" concept embodied in this treaty forbids appropriation and the application of national sovereignty,[48] and although it calls for space to be used peacefully,[49] the treaty falls short of explicitly calling for the equitable sharing of the benefits derived from space. Instead of calling for communal ownership and redistributive sharing, the outer space treaty manifests the sharing principle of CHOM by providing equal access to the extraterrestrial commons. This is the essential dilemma—the choice between equality of access and equal sharing—facing the management of the global commons.[50]

Coming on the heels of *Sputnik*, the outer space treaty, like the Antarctic treaty before it, was mainly concerned with peace rather than economic exploitation. Its objections to making explicit the sharing principle are related to the strong version of CHOM's prohibition against exploitation (as in Antarctica) and against the establishment of private rights relating to natural resources in space.

The 1979 Moon treaty,[51] on the other hand, explicitly applies the CHOM principles (including the principle of common ownership) to the moon, to other objects in our solar system, and to their resources.[52] Supporters of the Moon treaty were concerned that the outer space treaty did not adequately protect the common interest in space. This treaty provides that the exploration and use of nearby celestial

46 United Nations, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies signed at London, Moscow and Washington on January 27, 1967, entered into force October 10, 1967, 610 UNTS 205 (herein referred to as " the outer space treaty"), article 1. Note that the "province of all mankind" applies to activities in space, not space itself.

47 The term came into common usage as a legal concept after it was used by Malta's ambassador to the United Nations, Arvid Pardo, on November 1, 1967, in a famous speech about the governance of the international seabed. See also United Nations, General Assembly, "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction," December 17, 1970, UNGA Res 2749/24.

48 The outer space treaty, supra note 46, article II. But see Declaration of the First Meeting of the Equatorial Countries, December 3, 1976, ITU doc. no. WARC-BS 81-E (1977) (also known as the "Bogotá Declaration"), regarding the mutually recognized claims to sovereignty over the respective geostationary orbits of the signatory equatorial countries.

49 Outer space treaty, supra note 46, articles III and IV.

50 See, generally, Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, UK: Cambridge University Press, 1990).

51 United Nations, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, December 5, 1979, 1363 UNTS 3 (herein referred to as "the Moon treaty").

52 Moon treaty, ibid., articles 11(3) and 12.

bodies should be carried out "for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development."[53] The treaty describes a strong form of equitable sharing:

> An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.[54]

The Moon treaty's strong form of the CHOM principle relating to communal ownership and equitable sharing has proved too strong; only a handful of countries, and none of the major space-faring ones, have ratified the treaty. Thus, while a generalized form of CHOM applies to outer space, there is not yet an explicit expression of the sharing principle that offers an acceptable compromise between space-faring nations and other nations. This remains a challenge to space governance as we continue to commercialize space.

UNCLOS, particularly its provisions regarding the seabed in ECS areas, contains an interpretation of the CHOM sharing principle that provides a way forward for governance in extranational spaces—a compromise. The expression of the sharing principle in UNCLOS (embodied in article 82) balances redistributive concerns with equal access and exploitation. The regime is, naturally, a flawed and incomplete set of compromises, but it provides for a form of sharing that is apparently acceptable to developed and developing nations alike. Conceiving of the regime as a tax could help address the shortcomings of its compromise, as illustrated by Canada's experience with article 82.

UNCLOS, ARTICLE 82, AND CANADA

UNCLOS, the most fully realized agreement to deal with the global commons, was conceived in the shadow of the New International Economic Order (and the Moon treaty); the sharing of the benefits from the exploitation of resources from the world's seas was contentious, and agreement was elusive. The treaty, signed in 1982, creates a comprehensive regime for various maritime zones (including the high seas, the EEZs, continental shelfs, and ECS areas), and it embodies a foundational compromise.[55]

53 Moon treaty, ibid., article 4.

54 Moon treaty, ibid., article 11(7)(d). The Moon treaty was drafted in the midst of the United Nations' "New International Economic Order" initiative at the 1964 United Nations Conference on Trade and Development, reflecting the push from post-colonialist developing nations for the equitable distribution of resources. The United States objected to such efforts as "international socialism controlled by the third world." See Baslar, supra note 33, at 163. See also United Nations, General Assembly, "3201(S-VI)-Declaration on the Establishment of a New International Economic Order," May 1, 1974.

55 See infra note 62 and accompanying text.

UNCLOS applies various elements of the CHOM principles to the various zones that it creates. The high seas are "free" (particularly with regard to travel and the exploitation of living resources)[56] and are not subject to collective ownership. But the high seas are not subject to national sovereignty,[57] either, and are to be "reserved for peaceful purposes."[58]

On the other hand, UNCLOS subjects the international seabed beyond any country's continental shelf ("the Area") to a strong form of CHOM[59] and establishes the International Seabed Authority (ISA) as the administrator of the deep seabed on behalf of humankind.[60] Article 140(2) calls for the "equitable sharing of financial and other economic benefits derived from" the natural resources in the Area via the ISA.[61] But these provisions came into force only in 1994, after a supplementary agreement was concluded to modify some of the general financial principles (relating to exploitation of the international seabed) in favour of exploitation and private property rights.[62]

Nevertheless, ISA has a wide mandate to administer humankind's ownership of the resources in the Area and to partner with private industry to exploit the Area's natural resources and generate revenue therefrom. As part of this mandate, ISA is to collect payments under contracts with its industry partners "in connection with activities in the Area" according to a complex set of rules and options.[63]

ISA has allowed a number of companies to explore the Clarion-Clipperton Zone (in the Pacific Ocean between Mexico and Hawaii). However, as a practical matter, because deep seabed mining in the Area activating any financial obligation is not yet viable, ISA has not yet developed a framework for the execution of its fiscal responsibilities with regard to the Area. Though the financial obligations set out in UNCLOS are similar in form to royalties, ISA regards them as tax-like in nature. In

56 UNCLOS, supra note 1, article 87.

57 Ibid., article 89.

58 Ibid., article 88.

59 Ibid., article 136. See, generally, Robin Rolf Churchill and Alan Vaughan Lowe, 3d ed., *The Law of the Sea* (Manchester, UK: Manchester University Press, 1999), at 223; Philip A. Burr, "The International Seabed Authority" (2006) 29:2 *Suffolk Transnational Law Review* 271-88, at 274, note 21.

60 UNCLOS, supra note 1, article 137(2). See, generally, Lodge, "The Common Heritage of Mankind," supra note 32. The ISA is charged with licensing exploration and managing the exploitation of mineral resources in the international seabed.

61 See also UNCLOS, supra note 1, article 160(2).

62 United Nations, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of Sea of 10 December 1982, adopted on July 28, 1994, entered into force on July 28, 1996, 1836 UNTS 3. See also Lodge, "The Common Heritage of Mankind," supra note 32, at 739. The 1994 agreement is generally considered to have weakened the application of CHOM and the independence of the ISA, mainly in order to appease the United States, which nonetheless ended up not signing UNCLOS.

63 UNCLOS, supra note 1, article 171(b); UNCLOS, annex III, article 13.

its most recent discussion paper,[64] ISA (1) identifies traditional tax policy criteria as the principles guiding the development of a fiscal regime over the Area;[65] (2) uses corporate tax rates as a comparator;[66] and (3) identifies the issues of "double taxation,"[67] transfer pricing, and anti-avoidance.[68] When this funding regime becomes tangible rather than speculative, Part XI of UNCLOS will provide an intriguing case study of a global tax based on CHOM.[69]

Of more immediate concern is the article 82 fiscal regime applicable to ECS areas. Notoriously short on details, article 82 provides as follows:

> Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles.
>
> 1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.
> 2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent

64 International Seabed Authority, *Developing a Regulatory Framework for Mineral Exploitation in the Area: A Discussion Paper on the Development and Implementation of a Payment Mechanism in the Area for Consideration by Members of the Authority and All Stakeholders* (Kingston, Jamaica: ISA, 2015).

65 Ibid., at paragraph 12: "The financial parameters set by the Convention and the 1994 Agreement are relatively simple. Their practical development is much more complex. The principles of efficiency, fairness, simplicity, certainty, flexibility and enforceability as applied to the development of any fiscal regime are equally applicable to the development of the financial mechanism for the Area."

66 Ibid., at paragraph 20(h).

67 Ibid., at paragraph 56: "[T]oo lenient a financial model in the Area could shift profits toward a national taxing regime at the expense of the CHM"; see also supra, at paragraph 57: "[T]here is a question over the treatment of payments made to the Authority by contractors and how these will be treated under national tax systems for the purposes of assessing contractor tax liabilities. This is however a matter for sovereign States to address."

68 Ibid., at paragraph 64.

69 See Richard M. Bird, *Are Global Taxes Feasible?* Rotman School of Management Working Paper no. 3006175 (Toronto: University of Toronto, Rotman School of Management, July 2017), at 6-7 (papers.ssrn.com/sol3/papers.cfm?abstract_id=3006175): "Others have considered taxing resources recovered from what is often called the 'global commons'—that is, territory not within national boundaries such as Antarctica, outer space, and, most importantly to date, the oceans. UN (2012), for example, suggested that a Global Undersea Resource Royalty should be imposed on . . . undersea mineral resources extraction." Professor Bird defines a "global tax" as "a tax imposed not by any one nation but by a group of nations on a regional or . . . worldwide basis," supra, at 2.

thereafter. Production does not include resources used in connection with exploitation.

3. A developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource.
4. The payments or contributions shall be made through the [International Seabed] Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.[70]

The fiscal regime in article 82 is a unique extension of the CHOM doctrine;[71] it embodies a conception of CHOM's sharing principle that is a compromise, balancing developed countries' preference for access rights (and private exploitation) against developing countries' preference for common benefit, in the form of a "legal obligation designed to address inequity in a practical way."[72] Article 82 redistributes some of the value derived from ECS areas and "is widely regarded as having paved the way for agreement to a definition of the outer limits of the continental shelf that struck an acceptable balance between these competing interests."[73]

The application of article 82 is imminent,[74] and Canada looks to be the first country whose obligations will be triggered. Equinor Canada (formerly known as

70 UNCLOS, article 82.

71 Michael Lodge, "The International Seabed Authority and Article 82 of the United Nations Convention on the Law of the Sea" (2006) 21:3 *International Journal of Marine and Coastal Law* 323-33, at 332-33; Helmut Tuerk, *Reflections on the Contemporary Law of the Sea* (Leiden, Netherlands: Brill Nijhoff, 2012), at 40. Article 82 is the only provision of UNCLOS involving an incursion into spaces within national jurisdiction.

72 Michael W. Lodge, "The Deep Sea Bed," in Donald R. Rothwell, Alex G. Uedeelferink, Karen N. Scott, and Tim Stephens, eds., *Oxford Handbook of The Law of the Sea* (Oxford, UK: Oxford University Press, 2015), 226-53, at 251. See also Noyes, supra note 32, at 462.

73 Harrison, infra note 76, at 490. See also Wylie Spicer, "Canada, The Law of the Sea Treaty and International Payments: Where Will the Money Come From?" (2015) 8:31 *SPP Research Papers*, [University of Calgary School of Public Policy] 1-23, at 9 (www.policyschool.ca/wp-content/uploads/2016/03/final-law-sea-spicer.pdf): "UNCLOS balanced the CS [continental shelf] entitlements of coastal states to resource exploitation with the rights of other states to share in the resource benefits of what would otherwise have been the seabed and subsoil of the Area"; Aldo Chircop, "Equity on the Extended Continental Shelf? How an Obscure Provision in UNCLOS Provides New Challenges for Ocean Governance," in *Sustainable Oceans: Reconciling Economic Use and Protection* (Lübeck, Germany: Dräger Foundation, 2013), 36-38, at 37 (https://www.draeger-stiftung.de/fileadmin/user_upload/konferenzen_2013/oceans_report_2013.pdf).

74 Although "[a]rticle 82 has remained largely dormant because to date the anticipated conditions to bring it into effect have not materialized . . . the expectation of resource discoveries holding promise for commercial production on the OCS [outer continental shelf] is realistic." See International Seabed Authority, *Implementation of Article 82 of the United Nations Convention on the Law of the Sea: Report of an International Workshop Convened by the International Seabed*

Statoil Canada) and, potentially, other ventures are about to dig out billions of barrels of oil from Canada's extended continental shelf more than 300 nautical miles off the east coast of Newfoundland.[75] When this happens, Canada's experience with its article 82 obligations could be precedent setting.

Canada, like all of the states that are party to UNCLOS, has not enacted domestic legislation implementing article 82.[76] So an important and obvious question is: Who pays?[77] The state is, of course, the party obligated under UNCLOS, but should the costs actually be passed on to industry?

In keeping with its economy, which is driven by natural resources, Canada has always been one of the nations most sensitive about sovereignty over its ECS. During the debate at UNCLOS's decisive third negotiation conference, Canada was among the "margineers" claiming that the covered ECS areas had always been their sovereign territory (as opposed to nations that saw the recognition of coastal states' ECS claims as being recognized at the expense of the Area, CHOM, and other coastal states).[78]

According to this argument, if article 82 were the price paid for a grant of sovereign access to the extended continental shelf, then a stronger case exists for placing the pecuniary burden on those private entities that take advantage of the access granted; if, on the other hand, article 82 were just a constituent part of the larger UNCLOS agreement, the costs of which are part of the price paid for the overall benefits that UNCLOS would deliver to all of Canada, then the Canadian state should bear the costs. Canadian industry stridently advances the latter interpretation (and its fiscal ramifications).

Nonetheless, while Canada has yet to formalize policy in this regard, notices on maps relating to exploration licences published by the governmental body overseeing offshore petroleum resources contain disclaimers such as the following:

Authority in Collaboration with the China Institute for Marine Affairs in Beijing, the People's Republic of China, 26-30 November 2012, ISA Technical Study no. 12 (Kingston, Jamaica: ISA, 2013), at 41and 43 (https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/ts12-web.pdf).

75 Newfoundland's extended continental shelf is the world's broadest.

76 Rowland J. Harrison, "Article 82 of UNCLOS: The day of reckoning approaches" (2017) 10:6 *Journal of World Energy Law & Business* 488-504, at 490 (https://doi.org/10.1093/jwelb/jwx022).

77 See Spicer, supra note 73.

78 Harrison, supra note 76, at 491-97, in note 15, citing Donald R. Rothwell and Tim Stephens, *The International Law of the Sea*, 2d ed. (London: Hart, 2016). The argument is that article 82 is the "price" for allowing sovereignty over what would otherwise have been part of CHOM. It is unlikely, however, that Canada and other margineers would call article 82 a "compromise" because, from their perspective, the provisions *acknowledged* their long-recognized sovereignty over their ECS rather than granted it. The distinction matters for how the article 82 regime is characterized and, ultimately, for determining who should pay for a country's article 82 obligations (and how).

> All interest holders of production licenses containing areas beyond 200 nautical miles may be required, through legislation, regulation, licence terms and conditions, or otherwise, to make payments or contributions in order for Canada to satisfy obligations under Article 82 of the United Nations Convention on the Law of the Sea.[79]

Furthermore, there appears to be an assumption, among other countries that have considered the issue (such as the United States and Norway), that the costs will be passed on to industry (notably, with a credit against royalties or tax otherwise payable, as the case may be).[80]

It thus seems appropriate to think of the article 82 regime as a tax, amenable to the application of tax policy criteria. Such a characterization allows for the design, implementation, and evaluation of the article 82 regime in a way that addresses the concerns of both the state party and the industry that is affected by article 82. Furthermore, as the next section discusses, characterizing the article 82 regime as an extranational tax is also theoretically justified.

EXTRANATIONAL TAXATION?

It must be admitted that, on its face, the article 82 scheme does not meet the traditional definition of a "tax."[81] Bird has pointed out that, even if it is a tax, no global tax of the type being discussed has ever been imposed, and he offers a convincingly bleak assessment of the future possibility of truly global taxes.[82] However, in light

79 See the text on the bottom of the map in Canada-Newfoundland & Labrador Offshore Petroleum Board (C-NLOPB), "Southern Newfoundland Region: License Information" (www.cnlopb.ca/wp-content/uploads/maps/snr.pdf).

80 See Harrison, supra note 76, at 502-03; Spicer, supra note 73, at 16. Under section 5A of New Zealand's Continental Shelf Act 1964, 1964 No. 28, the minister setting the royalty rate under a licence to exploit the outer continental shelf must have regard to New Zealand's article 82 obligations.

81 Chircop referred to it as a "downstream fiscal burden." See Aldo Chircop and Bruce A. Marchand, "International Royalty and Continental Shelf Limits: Emerging Issues for the Canadian Offshore" (2003) 26:2 *Dalhousie Law Journal* 273-302, at 295. The payment is not technically a royalty either, although it is often referred to as such. Indeed, it seems that only those most fearful of it explicitly call it a tax. One of the main reasons the United States has not ratified UNCLOS is its fear of losing tax sovereignty. During congressional hearings on the convention, for example, William Middendorf called article 82 a "step in the direction of international taxing authority." See "The Testimony of the Honorable William J. Middendorf II on The United Nations Convention on the Law of the Sea Before the Senate Armed Services Committee April 8, 2004," at 7 (www.globalsecurity.org/military/library/congress/2004_hr/040408-middendorf.pdf). But just because you are paranoid, it does not mean they are not out to get you.

82 Bird, supra note 69, at 20: "[M]any proposed global taxes seem to assume that a supranational taxing authority can impose progressive taxes on (or even within) countries to fund activities that will, at least in the first instance, directly benefit people in other countries. Establishing such a supranational tax system on a world basis requires more from the world than the EU has managed to do in half a century." See supra, at 23. See supra note 96 and accompanying text.

of the evolving nature of tax sovereignty, the traditional definition of "tax" is due for a reconsideration.

Common-law jurisdictions that lack a comprehensive statutory definition of "tax" (such as Australia, Canada, and the United States) rely on case law, which, rather than arriving at a comprehensive definition, has been focused on characterizing the particular payment at issue by weighing the existence of enumerated positive and negative features.[83]

The Canadian Privy Council case *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd* is the typical starting point for the positive features: an exaction is a tax if it is compulsory, enforceable by law, imposed by a public authority, and for a public purpose.[84] Numerous cases have identified negative criteria: a tax is not arbitrary, is not a payment for property or services, and is not in the nature of a penalty.

But this list of relevant features was never intended to be exhaustive, and subsequent case law and scholarship show that it does not provide the most meaningful guidance on what is and is not a tax, and why. For jurisprudential and policy purposes, the criteria provide neither certainty nor clarity: most of them are neither necessary nor sufficient, and collectively they evince no apparent binding principle.[85] For example, depending on the facts, taxes do not need to be "compulsory,"[86] imposed by a governmental or public body,[87] or raised for a public purpose.[88]

Bowler-Smith and Ostik propose a more functional and purposive definition of "tax," one that obviates the need for considering procedural features (since they

83 See, for example, the discussion of restricting the legislative power to tax, in Miranda Stewart and Kristen Walker, "Australia—National Report" (2007) 15:2 *Michigan State International Law Review* 193-245; Max Bessell, Karen Burford, and Scott Henderson, "What Latham CJ Really Said About Taxation!" (1999) 11 *Corporate and Business Law Journal* 143-63.

84 *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd*, [1933] AC 168, at 176. In Australia (which is similar to Canada in this respect), the accepted "general statement of positive and negative attributes" sufficient to make an exaction of money a tax is that it is compulsory, for a public purpose, enforceable by law, and not for services rendered. *Air Caledonie International v. Commonwealth*, [1988] HCA 61, at paragraph 5. Presumably, the non-inclusion of negative criteria previously mentioned is not significant in light of the facts of the case.

85 Mark Bowler-Smith and Huigenia Ostik, "On the Meaning of 'Tax'" (2018) 33:3 *Australian Tax Forum* 601-19.

86 The term "compulsory" as Bowler-Smith and Ostik note, "connotes a wide range of control, including situations where there is an absence of a legal obligation to pay," ibid., at 613. See, for example, *Attorney-General (NSW) v. Homebush Flour Mills Ltd* (1937), 56 CLR 390 (HCAU).

87 It is not "essential to the concept of a tax that the exaction should be by a public authority." *Australian Tape Manufacturer's Association Ltd v. Commonwealth*, [1993] HCA 10, at 13.

88 *Air Caledonie International v. Commonwealth*, [1988] HCA 61, at 6: "[T]here is no reason in principle . . . why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes, which could not properly be described as public."

are not intrinsic to a payment's character as a tax but rather are matters related to sovereignty more generally and are appropriately dealt with by constitutional and administrative law) and whose terms encapsulate the negative indicia: "a compulsory transfer of value imposed primarily for a redistributive purpose."[89] This definition is useful because its focus on the unique purposes of taxation allows clarity, transparency, and coherence of tax policy. Like all formulations of the concept of tax, it includes a focus on the use for which the payment is to be put.

The explicit inclusion of a redistributive purpose is controversial, but it gets at the heart of the purpose of tax. Indeed, it is arguable that redistribution is "the main function of a government."[90] While redistribution via tax in the domestic setting is not a radical idea,[91] redistribution "has not proved to be a persuasive argument for global taxes"[92] because redistribution at the international level would require the ceding of national tax sovereignty to a supranational authority.[93] In order for a global tax to transcend resistance to redistribution and the concomitant ceding of tax sovereignty, there must be the "necessary political foundations for such ideas."[94]

Some of these political foundations are being laid by international treaties relating to the commons, as reflected by the tangibility of the article 82 regime. The acceptance of basic CHOM principles in the global commons indicates that redistribution is not only acceptable but also integral under certain circumstances (if manifested in an acceptable way); at the same time, the historical arc of tax sovereignty is bending toward globalism.

With regard to redistribution, it is common under international law, outside of the tax context.[95] And although taxation might not be the optimal way to undertake

89 Supra note 85, at 601.

90 Bowler-Smith and Ostik, supra note 85, at 617: "Therefore, if the state chooses to take money from one person and give to another," that's a proper public purpose. See, generally, supra.

91 Richard M. Bird and Eric M. Zolt, "Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries" (2005) 52:6 *UCLA Law Review* 1627-95.

92 Bird, supra note 69, at 24. See supra, at 29: "[G]lobal initiatives to redistribute funds in a major way from rich to poor countries, let alone to extend taxing authority to an international body to deal with global externalities, seem unlikely to succeed."

93 Since "countries have little appetite for giving up fiscal sovereignty or for explicitly redistributive fiscal arrangements, most global tax proposals had little or no prospect of success" (Bird, supra note 69, at 1) and, "[b]ecause the prospect of a meaningful fiscal union at the world level is even bleaker, explicitly redistributive global taxes are likely unachievable" (supra, at 32). See also Allison Christians, "Sovereignty, Taxation, and Social Contract" (2009) 18:1 *Minnesota Journal of International Law* 99-153, at 151: "We may not yet (or ever) be in a position to discuss whether countries have a duty to redistribute income or otherwise seek global distributive justice though globally-oriented tax policy choices."

94 Bird, supra note 69, at 30.

95 See, for example, Aileen E. Nowlan, "Stumbling Towards Distributive Justice" (2012) 12:1 *Chicago-Kent Journal of International and Comparative Law* 101-139, at 138: "The breadth of areas for which international law redistributes resources should put to rest the question of whether '[w]e should rarely observe treaties that redistribute wealth from one state to

redistribution, it does seem to be among the more politically feasible ways of doing it, as is shown by its common use in domestic tax systems and its usefulness as an acceptable compromise solution to the issue of sharing the benefits of CHOM.

With regard to tax globalism, the lack of a world government[96] and the "overwhelming weight of existing perceptions about the bounds of the state"[97] have meant "until recently, unequivocal resistance to multilateralism and a single world tax order."[98]

But the evolution of the international tax architecture suggests a gradual acceptance of global taxation mechanisms. Many have observed the historical trend, in international tax and global tax reform, away from a singular focus on national taxing jurisdiction and toward extranational tax administration and authority. This trend towards multilateralism, transnationalism, and convergent efforts to respond to perceived shortcomings in the international tax system is aptly demonstrated by the BEPS project. The substantive results of policy coordination might be questioned,[99] but the *process* of attempted policy coordination that animates the BEPS initiative, along with established and increasing administrative cooperation and multilateralism (especially with regard to information sharing), demonstrates a trend toward global action.[100] The OECD, as Christians has said, "is signalling a major conceptual shift away from the conventional view that equates sovereignty with complete state autonomy over tax matters,"[101] in recognition that the "sovereign autonomy over taxation is increasingly inconsistent with a global economic

another' " (quoting Eric A. Posner and Cass R. Sunstein, "Climate Change Justice" (2008) 96:5 *Georgetown Law Journal* 1565-1612, at 1575).

96 It is often said that a solution to international tax's conundrums is not possible short of having a world government. Philipp Genschel and Thomas Rixen, "Settling and Unsettling the Transnational Legal Order of International Taxation," in Terence C. Halliday and Gregory Shaffer, eds., *Transnational Legal Orders* (New York: Cambridge University Press, 2015), 154-83, at 157: "The only way to simultaneously mitigate international double taxation and tax competition is to pool tax sovereignty internationally."

97 Allison Christians, "Human Rights at the Borders of Tax Sovereignty," Working draft, 2017, at 2 (https://ssrn.com/abstract=2924925).

98 Ibid., at 11. See also Bird, supra note 69, at 33: "There is little political support for global income or wealth taxes, and no world government to implement them." Consider, for example, the coordination of international policy that the BEPS project is attempting, and consider information sharing (for example, FATCA, TIEAs, multilateral information-sharing agreements).

99 As Graeme Cooper notes, "The BEPS project would, it was said, establish 'a fundamentally new set of standards designed to establish international coherence in corporate income taxation.' . . . [M]any of the items in the Action Plan are better described as tinkering." Graeme S. Cooper, *Coordinating Inconsistent Choices—The Problem of Hybrids*, Legal Studies Research Paper no. 14/108 (Sydney: Sydney Law School, December 2014), at 1.

100 Bird, supra note 69, at 2: "The fact that many regional and international organizations exist and are financed shows that the reluctance of nation-states to reduce their fiscal sovereignty does not mean there is no scope for global action."

101 Christians, "Sovereignty, Taxation, and Social Contract," supra note 93, at 101.

reality."[102] Tax sovereignty is not inviolable, and international tax development is increasingly carried out transnationally (including through delegating the making of norms to international NGOs).

The phenomenon of stateless income gets credited with driving an emergent extranational element in the international tax regime, but the issue of extranational income analogously manifests the challenges that face the current international tax order. Like stateless income, extranational income is a transnational problem requiring a transnational approach. Although the challenge of stateless income is a practical one that has a bearing on the integrity of the international tax order, extranational income demonstrates the theoretical justification for a taxing regime beyond that of the state.

The nation-state's power to tax is generally a background assumption in tax scholarship,[103] but there is a growing scholarly literature that describes, with more nuance, "which relationships between a government and a potential taxpayer normatively justify taxation."[104] In a series of compelling papers analyzing the justifications for tax sovereignty, Christians lays out an account of a taxing sovereignty limited and defined by considerations beyond simply the sovereign's own authority: its obligation to respect the fundamental rights that lie at the heart of international law (such as human rights), and its rights and obligations via membership in the international community.[105]

In this paper, I have taken Christians's essential points out of their specific analytical context (that is, the context of theoretical restrictions on national tax sovereignty) and extended them to a discussion of justifications for an extranational tax regime in the global commons.[106] It is in the context of abstaining from harmful tax competition, for example, that Christians identifies the need for sovereign states to take account of their responsibility to the international community, but "[t]he implications of these ideas may reach far more broadly than their architects envisioned. In identifying sovereign duty in a specific context, the OECD is explaining the existence of, or perhaps even creating, a global tax community."[107]

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102 Ibid., at 99.

103 See, for example, Christians, "Human Rights at the Borders of Tax Sovereignty," supra note 97, at 5, and accompanying text; Brian J. Arnold, *Tax Discrimination Against Aliens, Non-Residents, and Foreign Activities: Canada, Australia, New Zealand, the United Kingdom, and the United States*, Canadian Tax Paper no. 90 (Toronto: Canadian Tax Foundation, 1991), at 7.

104 See, for example, Christians, "Human Rights at the Borders of Tax Sovereignty," supra note 97, at 1; Diane M. Ring, "What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State" (2008) 49:1 *Virginia Journal of International Law* 155-233.

105 Christians, "Human Rights at the Borders of Tax Sovereignty," supra note 97; and Christians, "Sovereignty, Taxation, and Social Contract," supra note 93.

106 Christians's analysis does not de-centre the nation-state; she notes, in fact, that the "OECD's approach to harmful tax competition may be interpreted as an implicit claim that states are the primary repositories of a responsibility to working toward creating a global economic order." See Christians, "Sovereignty, Taxation, and Social Contract," supra note 93, at 152.

107 Christians, "Sovereignty, Taxation, and Social Contract," supra note 93, at 148.

States already go to great lengths to voluntarily give up tax sovereignty in the service of being members of this community and of making the international tax system work. There is an "implicit social contract" regarding "global community tax standards" that demands adherence to universal principles and respect for fundamental rights (specifically, human rights) in taxation.[108]

The relationship between sovereign and subject must be limited and defined, "guided by some universal principles about what people owe and are owed as citizens of the world."[109] This relationship must be "an expression of the individual's consent to the jurisdiction," and it is (imperfectly) captured by concepts of "nexus," such as residence and source.[110] Christians develops a nexus model, in the context of national tax sovereignty and its interaction with fundamental rights, that is based on the "membership principle" in which one affirmatively declares one's membership in the community.[111] Even this conception of "nexus" admits of the importance of "place."

Indeed, it is a truism of all theories of nexus that "where stuff happens matters" —there is something special about place, especially extranational space. Various treaties formalize consensual membership in the international community subject to CHOM at the national level. Conducting activities in extranational spaces that are difficult to access, and the inherent otherness of the space, puts one on notice that they are subject to special rules.

A corollary, then, of the justifications for restrictions on national tax jurisdiction is that one can also make the case for the use of extranational taxation to fill the void. Thus, it is argued that in the context of extranational space such as the seabed, the collective rights embodied in the principles of CHOM are the rights that form the basis of the "social contract" applicable in extranational commons (as made explicit, in this case, by UNCLOS). In the same way that individual rights define national tax sovereignty, common rights define (and justify) extranational tax sovereignty.

CONCLUSION

The practical and political hurdles to true global taxation are, as Bird has detailed, huge and perhaps insurmountable.[112] But the general trend of international taxation, including recent efforts to combat harmful tax competition and stateless

108 Ibid., at 103 and 111. See also Christians, "Human Rights at the Borders of Tax Sovereignty," supra note 97, at 5: "[T]he sovereign state's decision to rely on taxation as the primary means of raising money should be viewed as an admission that its own power is self-evidently and intrinsically limited by the countervailing force of individual rights."

109 Christians, "Sovereignty, Taxation, and Social Contract," supra note 93, at 151.

110 Christians, "Human Rights at the Borders of Tax Sovereignty," supra note 97, at 19.

111 Ibid., at 15 and 26.

112 While any tax is by its very nature redistributive, it remains to be seen whether the article 82 regime will satisfy the other requirements for a viable global tax identified by Bird (transparency,

income, is toward transnational approaches to transnational issues. Furthermore, extranational taxation is normatively justified by the CHOM sharing principles and by expansive, purposive conceptions of "tax" and "tax sovereignty."

During the UNCLOS negotiations, fiscal measures like the one in article 82 proved to be an effective compromise between (1) developed countries, which want private enterprise to be able to access and exploit the commons, and (2) developing countries, which want to be able to share in the spoils from places and resources that, under international law, belong to all of humankind. This compromise manifestation of the CHOM sharing principle is an illustrative proto-tax, theoretically justified by theories of how tax sovereignty and rights interact and the special international law status of the extranational places to which CHOM applies.

Canada has long recognized the importance of extranational spaces.[113] As one commentator put it, almost 40 years ago, "The question remains, however, could international tax law one day have to deal with an international tax?"[114] Canada's experience with article 82 is about to answer that question.

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linkage to national administration, and being widely beneficial). Bird, supra note 69, at 27-29. Though the article 82 regime's application is imminent, it is rife with interpretive and practical uncertainties, including but not limited to the nature and calculation of payments, the administrative process, and the recipient countries. In the Canadian context specifically, there are federalism problems relating to federal-provincial maritime resources agreements. See Harrison, supra note 76, at 497.

113 Elizabeth Riddell-Dixon, "The Seven-Decade Quest to Maximize Canada's Continental Shelf" (2014) 69:3 *International Journal* 422-43.

114 A. Peter F. Cumyn, "Can Canada Levy Tax on the Continental Shelf?" (1981) 4:4 *Canada-United States Law Journal* 165-70, at 170.