Extranational Taxation: Canada and UNCLOS Article 82

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I. Introduction

This paper 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 ("UNCLOS").[1] Extranational income presents a unique international tax law challenge that is not adequately addressed by existing tax rules and that has gone largely unanalysed. This paper explores how such income should be taxed and entertains the possibility that an extranational taxing regime is theoretically 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 extant fiscal mechanism to manifest this concept is the scheme under UNCLOS Article 82 dealing with the equitable sharing of the value of non-living resources mined from certain areas of the seabed. While no country has yet triggered its obligations under the convention, it appears that Canada will be the first country to do so in the near future due to commercial exploitation in an area covered by Article 82. As such, this paper uses Canada's nascent experience to evaluate the Article 82 regime as an illustrative example of extranational taxation.

Section II identifies the problems with taxing extranational income under current rules. Section III discusses the geographical delimitation between areas under national sovereignty and the global commons, and the application of CHoM to the latter. Section IV describes the UNCLOS Article 82 regime and its application to Canada. Section V discusses whether we should think of the Article 82 regime as a tax, and whether it is normatively justified as such. Section VI concludes that Article 82 represents an effective compromise relating to commons governance and is justified by the decoupling of taxing jurisdiction from national sovereignty and the trend towards transnational approaches to international tax law problems.

[1] 1833 U.N.T.S. 396, entered into force in 1994. The large majority of the world's nations have ratified the treaty, including all of the major economies, with the notable exception of the United States.

II. Current Taxation of Extranational Income

The 100-year-old international income tax infrastructure is based upon two fundamental assumptions: that taxing jurisdiction is an indivisible component of national sovereignty, and that (along with the taxpayer's residence) the geographical location of economic activity 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 such developments allow, have focused attention on this infrastructure's increasing obsolescence – one can observe that both of the above assumptions are under question by the academy and policymakers alike. Professor Michael Graetz (discussing United States domestic tax law) illustratively describes 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 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 longstanding 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 OECD's Base Erosion and Profits Shifting ("BEPS") project. Stateless income is the product of tax planning and arises from the interaction of different countries' domestic and treaty-based tax rules. As such, it is a synthetic creature of the law and 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.

While stateless income has rightly set the agenda for re-examining foundational tax policy assumptions, there has been little analysis of extranational income, which is in some ways a

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[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 without shifting the location of externally-supplied capital or activities involving third parties." Edward D. Kleinbard, 'Stateless Income' (2011) 11 *Florida Tax Review* 699, 702. The article is credited with coining the titular term as a description of 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 neither the source of the factors of production through which the income was derived, nor the domicile of the group's parent company." Ibid at 701. This type of income is sometimes called "nowhere" income. See, e.g., John A. Swain and Walter Hellerstein, 'State Jurisdiction to Tax 'Nowhere' Activity' (2013) 33 *Virginia Tax Review* 209 (regarding the source of income for U.S. state tax purposes).

[3] Michael Graetz, 'Taxing International Income – Inadequate Principles, Outdated Concepts, and Unsatisfactory Policy' (2001) 54 *Tax Law Review* 261, 315-316.

more pure 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 that of *de jure* stateless income, but technological progress and globalization are making the issue increasingly relevant in economic terms. And while the phenomena are different, there is more than linguistic similarity between extranational income and stateless income: they similarly drive tax transnationalism by highlighting that the interaction between traditional notions of independent national taxing jurisdictions and source rules that rely on physically locating economic activity is increasingly problematic.[4] System set up to determine which country taxes income located in one of their two jurisdictions. Stateless income (somewhat of a misnomer) 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.

These extranational spaces are not tax law voids; there is a hodgepodge of substantive international tax rules that apply to extranational income. These various rules (found in domestic tax law and tax treaties) include 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] 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 even some rules specifically addressing extranational income, such as the "space or ocean activity" source rules under United States Internal Revenue Code Section 863(d).[8]

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[4] Professor John Prebble notes that "[A]ll 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 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, 385. See also Philip Genschel, 'Globalization and the Transformation of the Tax State' (2005) 13 *European Review* 53, 60 ("fiction" that the physical location of taxable events can always be identified). 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, above n 2, 702. Nevertheless, the main focus of BEPS is to tax cross-border income "where economic activity is conducted and value is created." See, e.g., Miranda Stewart, 'Transnational Tax Law: Fiction or Reality, Future or Now?' (2016) Working Paper, NYU Colloquium on Tax Policy and Public Finance, at 29.

[5] See, e.g., *Deputy Commissioner of Income Tax v PanAm Sat International Systems, Inc.*, ITAT Delhi Branch 'A', IT Appeal Nos. 1796 of 2001, 2041 of 2004, and C.O. No. 274 of 2004 (11 August 2006) (regarding whether or not telecommunications satellites in orbit above a country's territory can constitute a permanent establishment of their owners).

[6] See Kleinbard, 'Stateless Income', above n 2.

[7] E.g., Article 21 of the OECD Model.

[8] Treas. Reg. § 1.863-8 ("Source of income derived from space and ocean activity under section 863(d). A space and ocean activity includes activities conducted in space, Antarctica, and those on or in water outside of the jurisdiction of the United States or any other country. For United States 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").

The latter two categories take some account of the special nature of extranational income and both the Article 8 rule and the US space or ocean activity rules default to residence taxation (there not being a better alternative).[9] But given the nature of extranationally-sourced income (and the types of taxpayers likely to earn it), the suitability of residence (or "place of effective management" ("PoEM")) taxation is belied by a consideration of shipping income, the primary type of extranational income to explicitly warrant special consideration.[10]

Article 8 of the OECD Model Convention, dealing with income from international transport activities, has a distributive rule that traces its roots back to the early 1920s League of Nations days and, as such, is the original and only exception to the set of general distributive rules 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 inherently implicated by international transport. The 1925 Resolution of the Technical Experts of the League of Nations advised that shipping income should be taxed other 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 model convention 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 of those of Australia, the United States, and Canada) grant taxing rights to the residency 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 residence basis) have moved to tax

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[9] OECD Model Convention Article 21 relating to "other income" also defaults to residence taxation.

[10] "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." Richard Vann, 'Current Trends in Balancing Residence and Source Taxation' in International Bureau of Fiscal Documentation, *Current Trends in Balancing Residence and Source Taxation in BRICS and the Emergence of International Tax Coordination* (2015) 367, at 378.

[11] League of Nations, Technical Experts to the Economic and Financial Committee, "Double Taxation and Tax Evasion Report and Resolutions', submitted by the Technical Experts to the Financial Committee, Document F212, Resolution 1, para. C(2)(a) (Geneva, 1925). 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* (New York: Kluwer Law International, 2002) 83.

[12] "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." OECD Model, Art. 8(1). 2017 Update to the OECD Model Tax Convention, available at http://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf.

[13] "[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." Vann, above n 10, 378.

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 thus it is, perhaps, why we have BEPS). The OECD Model and Commentary in other areas decline to deviate from concurrent taxation default rules based on difficulties in allocating income.[16]

It is the reason for the difficulty of allocating international transportation income that is relevant: 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

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[14] See, e.g., Yoshifumi Tanaka, *The International Law of the Sea* (2015) pp. 152-157; Vann, above n 10, 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] "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." Vann, above n 10, 379. Canada does not have a tonnage tax (and instead imposes regular income tax on shipping and aircraft operations), but, like many other countries, has for a long time exempted shipping (and aircraft) income of a non-resident from a country that provides reciprocal relief to Canadian residents. Paragraph 81(1)(c) of the Income Tax Act; John Lennard, Canada chapter, in Guglielmo Maisto (ed), *Taxation of Shipping and Air Transport in Domestic Law, EU Law and Tax Treaties* (2017) IBFD, 291-322, at 294-296.

[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 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 it posed is likely to become germane as the final frontier of human exploration could soon become the next frontier in international tax policy. (The above paragraph 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.)

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 the geographic location of income matters (and despite its shortcomings, there is not an obviously better basis for allocating international taxing rights in many cases), the salient feature of extranational income is that it arises in spaces (or with respect to materials) subject to the CHoM principle.[18] Whereas it is readily acceptable, on 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 based on international agreements to manage the exploitation of extranational spaces in ways that benefit all of mankind.

III. National Space, Extranational Space, and the Common Heritage of Mankind

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.

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

[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." Vann, above n 10, 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". General Assembly Resolution 61/295, 13 September 2007.

[19] A straightforward description of national borders and territories (on land, on the sea, and in the air) is more interesting than it appears as a wide range of legal issues is 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*; Subdiv. 960-T, *Income Tax Assessment Act 1997*.

[20] E.g., "The term 'United States' when used in a geographical sense includes only the States and the District of Columbia." United States Internal Revenue Code §7701(a)(9).

[21] Australian tax law defines Australia to include enumerated external Territories and statutory offshore areas, and specifically includes the country's continental shelf and EEZ, as authorized by UNCLOS. Section 960-505 *Income Tax Assessment Act 1997*. Section 255 of Canada's Income Tax Act defines Canada to include (and to have always included) for 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, Arts. 2, 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, though United States domestic legislation adopts the 12 nautical mile limit. Article 33 confers additional sovereignty

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,

> "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."

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."[26]

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.[27] Subsequent efforts to improve

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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".

[23] See UNCLOS, Arts. 55-56, 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." UNCLOS, Art. 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." Art. 5.

[25] UNCLOS, Art. 57. The economic significance of the world's EEZs is underappreciated; the economic value to large coastal countries like 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% 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] Both countries' claims to airspace are questionable in light of the provisions of UNCLOS, but beyond the scope of this paper.

[27] Convention on the High Seas, 450 U.N.T.S. 82; Convention on the Continental Shelf, 499 U.N.T.S. 311; Convention on the Territorial Sea and Contiguous Zone, 516 U.N.T.S. 205.

and update the treaties' incomplete coverage[28] in the 1970s and 1980s 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.[29] The International Seabed Authority was established as an autonomous organization under UNCLOS (and the 1994 agreement relating to its implementation) to manage, organize, and control, on behalf of mankind 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.[30]

However, a sticking point during the conferences that led to UNCLOS was the fact that many countries, prominently including 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 continental shelf" or "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 for such areas to be recognized as subject to (limited) national sovereignty, but countries must share a percentage of the value of the resources exploited from such areas to be redistributed equitably to disadvantaged countries. As more fully discussed in Section III, there is disagreement as to whether the resulting UNCLOS provisions dealing with ECS areas evidence a compromise with regard to sovereignty or simply enshrined 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 the "common heritage of mankind". However, as a term of art, the "common heritage of mankind" 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, the "common heritage of mankind" has also become a more generic catch-all term referring to 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 resources located there are to be maintained and used for the benefit of all mankind).[31] This more generic usage of the term is used in this paper

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[28] 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 & Michael N. Schmidt, 'The Law of the Sea and Naval Operations' (1997) 42 *Air Force Law Review* 119.

[29] 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.

[30] UNCLOS, Art. 1; Part XI. The seabed covers around 70% of the earth's surface, making the Area the largest terrestrial commons space.

[31] There are multiple variations of the term and its application, in both applicable treaties and the secondary literature. See, e.g., Michael Lodge, 'The Common Heritage of Mankind' (2012) 27 *The International Journal or Marine and Coastal Law* 733, 734 (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,

(except when noted otherwise) and refers to the principles that have emerged through the various treaty negotiations and compromises that comprise the international body of law applicable to the geographic commons. As such, it is useful not only in considering the governance of extranational spaces, but also the theoretical legitimacy of extranational taxation. This sense of the term "CHoM", and the principles to which it relates, is briefly traced below.

Highlighting the difference between the generic and technical usages of the term, CHoM has been called "one of the most extraordinary developments in recent intellectual history",[32] but it has also been rejected as creating an "international socialist cartel".[33] Indeed, the fact that it lacks precise legal definition is a defining characteristic. At a general level, however, basic principles of CHoM can be observed. Areas and resources subject to the doctrine are not subject to appropriation (sovereign or otherwise), are to be used for peaceful purposes, are to be conserved, and are subject to shared and inclusive management.[34] Additionally, and most relevantly for this discussion, any 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 at any rate are open to wildly divergent interpretations.[35]

In particular, the aspects of CHoM related to the equitable sharing of the spoils of extranational space are at the crux of the controversy and indeterminacy around the term. In its technical, strongest, form, CHoM calls for the literal vesting of exclusive ownership rights over natural resources in all of humankind (common ownership). Coupled with the mandate to share the knowledge and material benefits of the exploitation of such resources in a way that furthers distributive justice, the sharing aspects of CHoM are both novel and controversial in international law.[36]

Thus, a brief history of the development of the CHoM principles highlights the emergent features of commons governance (sometimes explicitly under the label of "CHoM" and sometimes based on cognate concepts) that provide the theoretical justification for nascent treaty-based fiscal measures (such as the Article 82 regime discussed below) that are usefully characterised as (at least embryonic) global taxes.

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labour, public health, telecommunications, outer space, Antarctica and the environment"); Harminderpal Singh Rana, 'The "Common Heritage of Mankind" and the Final Frontier: A Revaluation of Values Constituting the International Legal Regime for Outer Space Activities' (1994) 26 *Rutgers Law Journal* 225; John Noyes, 'The Common Heritage of Mankind: Past, Present, and Future' (2012) 40 *Denver Journal of International Law and Policy* 447, 455. As used in UNCLOS, "CHoM" applies to the natural resources located in the seabed, not the territory itself. Christopher Joyner, "The Concept of the Common Heritage of Mankind in International Law' (1999) 13 *Emory International Law Review* 615 (620).

[32] Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (1998) at 7.

[33] Emilio Sahurie, *The International Law of Antarctica* (1992) at 389. Not all would agree that the two characterisations are mutually exclusive.

[34] 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 *Wisconsin International Law Journal* 409, 411-413.

[35] See Section IV below.

[36] Noyes, above n 31, 451.

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).[37] 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 as its main concern arms control and demilitarization. Due to lack of international consensus regarding Antarctic sovereignty claims, the Antarctic Treaty is purposefully vague and non-committal on the matter,[38] but the Preamble declares that the continent is a natural reserve devoted to science and that it is "in the interests of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes".[39] In order to keep the peace, the ATS permits of no mineral exploitation whatsoever: "Any activity relating to mineral resources, other than scientific research, shall be prohibited."[40]

While the Antarctic regime rejects certain specific features of the fulsome CHoM doctrine (especially relating to sovereignty), the prohibition on commercial exploitation and the concern with science and peace is an important recognition by international law of the collective interest in extranational space – an interest that carries over into space.[41]

With respect to the z-axis, there seems to be no law on how far down national jurisdiction extends,[42] but international law recognizes that nations enjoy unfettered sovereignty over their "air space".[43] Beyond national air space,[44] a series of treaties apply 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

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[37] 402 U.N.T.S. 71. Signed 1 December 1959 in Washington, D.C., 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).

[38] Antarctica has the curious attribute of having the unsettled nature of its sovereignty codified in its governing document. Article IV 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. Paragraph (2) provides:

> "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 recognise any other State's assertions of sovereignty. By its terms, the ATS is in place until 2048.

[39] Antarctic Treaty, Preamble. Australia claims the "Australian Antarctic Territory", but statutory definitions of Australia for tax purposes do not include the territory. Section 960-505 *Income Tax Assessment Act 1997*.

[40] Protocol on Environmental Protection to the Antarctic Treaty (April 24, 1991), Article 7, 30 I.L.M. 1455.

[41] The ATS was developed more or less concurrently with the birth of the space industry; UNGA Res 1348, 'Question of the Peaceful Use of Outer Space' (1958) was among the first official acknowledgements of the "common interest of mankind in outer space."

[42] Presumably, all countries taper down, in country-shaped cones, to a single point in the centre of the earth.

[43] Convention on International Civil Aviation, 7 December 1944, 15 U.N.T.S. 295 (the "Chicago Convention"), Art. 1 (Sovereignty).

[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 60km to 100km up).

[45] A few countries, for example the US and Luxembourg, are taking the lead on setting space policy through domestic legislation.

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

The Outer Space Treaty also came before an express articulation of the CHoM concept,[47] and while the "province of mankind" concept, as embodied in the Outer Space Treaty, forbids appropriation and the application of national sovereignty,[48] and calls for space to be used peacefully,[49] it falls short of explicitly calling for the equitable sharing of the benefits derived from space. Instead of 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 – between equality of access and equal sharing – facing the management of the global commons.[50]

On the heels of Sputnik, the Outer Space Treaty, like the Antarctic Treaty before it, was mainly concerned with peace rather than economic exploitation. Objections to making explicit the sharing principle relate to the strong version of CHoM's prohibition on exploitation (as in Antarctica) or on 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 of common ownership, to the Moon, other objects in our solar system, and their resources.[52] Supporters of the treaty were concerned that the Outer Space Treaty did not adequately protect the common interest in space. The Moon Treaty provides that the exploration and use of nearby celestial 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 contains 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

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[46] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967) 610 U.N.T.S. 205, Art. I. 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 UN in 1967 in a famous speech about the governance of the international seabed. See also, Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, UNGA Res 2749 (Dec 17, 1970) UN Doc A/8028, 24.

[48] The Outer Space Treaty, Art. II. But see, 'Declaration of the First Meeting of the Equatorial Countries' (the "Bogotá Declaration") 3 December 1976, International Telecommunications Union Doc. No. WARC-BS 81-E (1977) (regarding the mutually-recognised claims to sovereignty over the respective geostationary orbits of the signatory equatorial countries).

[49] Outer Space Treaty, Arts. III and IV.

[50] See, generally, Elinor Ostrom, *Governing the Commons* (Cambridge University Press, 1990).

[51] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, (1979) 1363 U.N.T.S. 3.

[52] Moon Treaty, Arts. 1(1), 11.

[53] Moon Treaty, Art. 11(2).

> 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 treaty's strong form of CHoM relating to communal ownership and equitable sharing has proven too strong and only a handful of countries, and none of the major spacefaring ones, have ratified the Moon Treaty.

Thus, while a generalised form of CHoM applies to outer space, there is not yet an explicit expression of the sharing principle that is an acceptable compromise between spacefaring and other nations. This remains a challenge to space governance as we continue to commercialise space.

UNCLOS, and its provisions regarding the seabed in ECS areas in particular, contains an interpretation of the CHoM sharing principle that provides a way forward for governance in extranational spaces. The compromise manifestation of the sharing principle in UNCLOS (embodied in Article 82) balances equal access and exploitation with redistributive concerns. The regime is of course a flawed set of compromises, but it is a form of sharing apparently acceptable to developed and developing nations alike. Furthermore, as the next section discusses, the regime is normatively supported by theories of sovereignty and taxation.

IV. UNCLOS, Article 82, and Canada

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

UNCLOS applies various versions of the CHoM principles to the various zones 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] and are to be "reserved for peaceful purposes."[58]

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[54] Moon Treaty, Art. 11(7)(d). The Moon Treaty was drafted in the midst of the UN's "New International Economic Order" initiative (1964 UN Conference on Trade and Development) reflecting the push from post-colonialist developing nations for the equitable distribution of resources. The US objected to such efforts as "international socialism controlled by the Third World." See Baslar, above n 32, 163 (internal citations omitted).
[55] See above n 62 and accompanying text.
[56] UNCLOS, Art. 87.
[57] UNCLOS, Art. 89.
[58] UNCLOS, Art. 88.

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 mankind.[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 only came into force 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 mankind's ownership of the resources in the Area and 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). But, 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 similar in form to royalties, ISA regards the financial obligations set out in UNCLOS as tax-like in nature. In its most recent discussion paper,[64] ISA identifies traditional tax policy criteria as the principles guiding the development of a fiscal regime over the Area;[65] uses corporate tax rates as a comparator;[66] and identifies the issues of "double taxation",[67] transfer pricing, and anti-avoidance.[68] When this funding regime becomes

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[59] UNCLOS, Art. 136. See, generally, Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (1999) 223; Philip A. Burr, 'The International Seabed Authority,' (2006) 29 *Suffolk Transnational Law Review* 271, 274, n.21.

[60] UNCLOS, Art. 137(2); Part XI, Section 4. See, generally, Lodge, 'CHoM', above n 31. The ISA is charged with licensing exploration and managing the exploitation of mineral resources in the international seabed.

[61] See also UNCLOS, Art. 160(2).

[62] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3. See also, Lodge, "CHoM", above n 31, 739. The 1994 agreement is generally considered to have weakened the application of CHoM and the independence of the ISA, mainly to appease the US, which nonetheless ended up not signing onto UNCLOS.

[63] UNCLOS, Art. 171(b); UNCLOS, Annex III, art. 13.

[64] ISA, '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' (2015) ("ISA Discussion Paper").

[65] Ibid [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 [20(h)].

[67] Ibid [56] ("too lenient a financial model in the Area could shift profits toward a national taxing regime at the expense of the CHM"); [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 [64].

tangible rather than speculative, Part XI of UNCLOS will be 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. The application of Article 82 is imminent,[70] and Canada looks to be the first country whose obligations will be triggered. Equinor Canada (formerly known as 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 of the east coast of Newfoundland.[71] When they do, Canada's experience with its Article 82 obligations could be precedent-setting.

Canada, fittingly with its natural resource-driven economy, has always been one of the nations most sensitive to 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 those who saw the recognition of coastal states' ECS claims as being recognised at the expense of the Area, CHoM, and other coastal states).[72]

Regardless of how the negotiation is characterised, the resulting 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]

Notoriously short on details, Article 82 provides:

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[69] "Others have considered taxing resources recovered from what is often called the 'global commons' – that is, territory not within national boundaries such as Antarctica, other space, and, most importantly to date, the oceans. The UN, for example, suggested that a Global Undersea Resource Royalty should be imposed on … undersea mineral resources extraction" (internal citations omitted). Richard M. Bird, 'Are Global Taxes Feasible?', (2017) Rotman School of Management Working Paper No. 3006175, 6-7. Professor Bird defines a "global tax" as a "tax imposed not by any one nation but by a group of nations on a region or … worldwide basis". Ibid 2.

[70] While "Article 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 outer continental shelf is realistic." ISA, Implementation of Article 82 of the United Nations Convention on the Law of the Sea, ISA Technical Study No. 12 (2013) at 41, 43.

[71] Newfoundland's extended continental shelf is the world's broadest.

[72] Rowland J. Harrison, 'Article 82 of UNCLOS: The day of reckoning approaches' (2017) 10 *Journal of World Energy Law and Business* 488, 491-497 (citing Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (2016)). The argument is that Article 82 is the 'price' for allowing sovereignty over what would otherwise have been part of the CHoM. It is unlikely, however, that Canada (and other margineers) would call Article 82 a "compromise", as, 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 characterised and ultimately for determining who should pay for a country's Article 82 obligations (and how).

[73] Ibid 490. See also, Wylie Spicer, 'Canada, The Law of the Sea Treaty and International Payments: Where Will the Money Come From?' (2015) University of Calgary School of Public Policy Research Paper vol. 8(31), 9 ("UNCLOS balanced the 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* (Dräger Foundation, 2013), 37.

> “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 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.”

The fiscal regime in Article 82 is a unique extension of the CHoM doctrine;[74] it embodies a compromise conception of CHoM’s sharing principle that balances 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.”[75]

No States Party to UNCLOS have 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 will the costs actually be passed on to industry? Canada has

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[74] Michael Lodge, ‘The International Seabed Authority and Article 82 of the United Nations Convention on the Law of the Sea,” (2006) 21 *International Journal of Marine and Coastal Law* 323, 332-333; Helmut Tuerk, *Reflections on the Contemporary Law of the Sea* (2012), 40. Article 82 is the only provision of UNCLOS involving an incursion into spaces within national jurisdiction.

[75] Michael Lodge, ‘The Deep Sea Bed’, in Donald Rothwell et al (eds.), *Oxford Handbook of International Law of the Sea* (2015), 251. See also, Noyes, above n 31, 462.

[76] Harrison, above n 72, 490.

[77] See Spicer, above n 73. As the argument goes, if Article 82 were the price paid for a grant of sovereign access to the extended continental shelf, then there is a stronger case for placing the pecuniary burden on those private entities who 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 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).

yet to formalise policy in this regard, but notices on maps relating to exploration licenses published by the governmental body overseeing offshore petroleum resources contain disclaimers such as the following:

> 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 Sea.[78]

Furthermore, there appears to be an assumption among those countries who have considered the issue (besides Canada, the US 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).[79] For the sake of discussion, it is assumed that such costs will be passed on, enabling the next section to consider whether such an arrangement is indeed justified as a "tax".

V. Extranational Taxation?

Regardless of who pays, in no case would the Article 82 scheme meet the traditional definition of a "tax",[80] and indeed it seems that only those most fearful of it explicitly call it a tax.[81] But just because you are paranoid, it does not mean they are not out to get you.

Among those not fearful but simply pessimistic about global tax, Professor Bird points out that no global tax of the type being discussed has ever been imposed and offers a convincingly bleak assessment of the future possibility of truly global taxes.[82] One response is to expand what we mean by "tax" and re-examine the assumptions about sovereignty that underlie it.

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[78] See, e.g., Canada-Newfoundland & Labrador Offshore Petroleum Board's map of the Newfoundland and Labrador Offshore Area, available at https://www.cnlopb.ca/wp-content/uploads/maps/snr.pdf. See above n 72 and accompanying text.

[79] See Harrison, above n 72, 502-503; Spicer, above n 73, 16. Under section 5A of New Zealand's *Continental Shelf Act 1964*, the Minister setting the royalty rate under a license to exploit the outer continental shelf must have regard to New Zealand's Article 82 obligations.

[80] Professor Chircop referred to it as a "downstream fiscal burden". Aldo Chircop, 'International Royalty and Continental Shelf Limits: Emerging Issues for the Canadian Offshore' (2003) 26 *Dalhousie Law Journal* 273, 295. The payment is not technically a royalty either, though it is often referred to as such.

[81] One of the main reasons the United States has not ratified UNCLOS is a 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". 'The Testimony of William J. Middendorf on the United Nations Convention on the Law of the Sea' (April 8, 2004) Testimony before the Armed Service Committee, available at https://www.globalsecurity.org/military/library/congress/2004_hr/040408-middendorf.pdf.

[82] Bird, above n 69, 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." Ibid 23. See n 95 and accompanying text.

Common law jurisdictions lacking a comprehensive statutory definition of "tax" (such as Australia, Canada, and the United States) rely on caselaw, which, rather than coming up with a comprehensive definition, has been focused on characterising the particular payment at issue by way of 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 factors: 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 additional negative criteria; a tax is not arbitrary, a payment for property or services, nor in the nature of a penalty.

But this list of relevant factors was never intended to be exhaustive, and subsequent caselaw and scholarship shows 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 factors provide neither certainty nor clarity; most of them are neither necessary nor sufficient; and collectively they evince no apparent binding principle.[85] Thus, for example and depending on the facts, taxes need not be 'compulsory',[86] nor imposed by a governmental or public body,[87] nor raised for a public purpose.[88]

Bowler-Smith and Ostik propose a more functional and purposive definition of "tax" that obviates the need for considering procedural features (as they 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." 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 gets at the heart of the purpose of tax. Indeed, it is arguable that redistribution is "the main function of a

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[83] See, e.g., Miranda Stewart and Kristen Walker, 'Restricting the Legislative Power to Tax: Australia – National Report' (2007) 15 *Michigan State University College of Law Journal of International Law* 192; Max Bessell, Karen Burford, and Scott Henderson, 'What Latham CJ Really Said About Taxation!' (1999) 11 *Corporate and Business Law Journal* 143.

[84] *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 at 176. In Australia (similar to Canada), 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 [5]. Presumably, the non-inclusion of negative factors 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.

[86] Compulsory "connotes a wide range of control, including situations where there is an absence of a legal obligation to pay." Ibid 613. See, e.g., *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390.

[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 C'th* [1993] HCA 10 at [13].

[88] "[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." *Air Caledonie International v Commonwealth* [1988] HCA 61 at [6].

government."[89] While redistribution via tax in the domestic setting is not a radical idea,[90] redistribution "has not proved to be a persuasive argument for global taxes"[91] because redistribution at the international level would require the ceding of national tax sovereignty to a supranational authority.[92] 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"[93]

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 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.[94] And while taxation might not be the optimal way to perpetrate redistribution, it does seem to be among the more politically feasible ways of doing it, as evidenced by its commonness in domestic tax systems, and its usefulness as an acceptable compromise solution to the issue of sharing the benefits of the common heritage of mankind.

With regard to tax globalism, the lack of a world government [95] and the "overwhelming weight of existing perceptions about the bounds of the state"[96] have meant "until recently, unequivocal resistance to multilateralism and a single world tax order."[97]

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[89] Bowler-Smith and Ostik, above n 85, 617. ("Therefore, if the state chooses to take money from one person and give to another, that's a proper public purpose").
[90] Richard Bird and Eric Zolt, 'Redistribution via taxation: the limited role of the personal income tax in developing countries' (2004-2005) 52 *UCLA Law Review* 1627.
[91] Bird, above n 69, 24. "[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." Ibid 29.
[92] "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." Ibid 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." Ibid 32. See also, Allison Christians, 'Sovereignty, Taxation, and Social Contract' (2009) 18 *Minnesota Journal of International Law* 99, 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").
[93] Ibid 30.
[94] See, e.g., Aileen Nowlan, 'Stumbling Towards Distributive Justice' (2012) 12 *Chicago-Kent Journal of International and Comparative Law* 1, 33 ("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 another'" (internal citations omitted)).
[95] 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 G. Shaffer and T. Halliday (eds.), *Transnational Legal Orders* (Cambridge University Press, 2015), 154-183, 157 ("The only way to simultaneously mitigate international double taxation and tax competition is to pool tax sovereignty internationally").
[96] Allison Christians, 'Human Rights at the Borders of Tax Sovereignty' (2017) working draft available at https://ssrn.com/abstract=2924925, 2.
[97] Ibid 11. See also, Bird, above n 69, 33 ("There is little political support for global income or wealth taxes, and no world government to implement them"). Consider, for example, the international policy coordination that

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 convergence in efforts to respond to perceived shortcomings in the international tax system is aptly demonstrated by the BEPS project. While the substantive results of policy coordination might be questioned,[98] the *process* of attempted policy coordination animating the BEPS initiative, along with established and increasing administrative cooperation and multilateralism (especially with regard to information sharing), evidences a trend toward global action.[99] The "OECD is signalling a major conceptual shift away from the conventional view that equates sovereignty with complete state autonomy over taxes,"[100] in recognition that the "sovereign autonomy over taxation is increasingly inconsistent with a global economic reality."[101] 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 credit for driving an emergent extranational element to the international tax regime, but the issue of extranational income analogously manifests the issues facing the current international tax order. Like stateless income, extranational income is a transnational problem requiring a transnational approach. While the challenge of stateless income is a practical one 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,[102] but there is a growing scholarly literature describing, with more nuance, "which relationships between a government and a potential taxpayer normatively justify taxation".[103] In a series of compelling papers analysing the justifications for tax sovereignty, Professor Christians lays out an account of taxing sovereignty that is limited and defined by considerations beyond simply the sovereign's own authority: its obligation to respect

the BEPS project is attempting and information sharing (e.g., FATCA, TIEAs, multilateral information sharing agreements).

[98] As Professor 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 Cooper, Coordinating Inconsistent Choices – the Problem of Hybrids (December 2014), Sydney Law School Legal Studies Research Paper No. 14/108.

[99] Bird, above n 69, 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."), available at https://ssrn.com/abstract=3006175.

[100] Christians, 'Social Contract', above n 92, 101.

[101] Ibid 99.

[102] See, e.g., Ibid fn 9 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 Foundation, 1991) 7.

[103] See, e.g., Christians, 'Human Rights', above n 96; Diane Ring, 'What's at Stake in the Sovereignty Debate' (2008) 49 *Virginia Journal of International Law* 155.

fundamental rights at the heart of international law (such as human rights) and its rights and obligations via membership in the international community.[104]

This paper admittedly takes Professor Christians's essential points out of their specific analytical context (of theoretical restrictions on national tax sovereignty) and extends them to a discussion of justifications for an extranational tax regime in the global commons.[105] It is in the context of abstaining from harmful tax competition, for example, that Christians identifies the need for sovereigns 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."[106]

States already go to great lengths to voluntarily give up tax sovereignty in service of being members of this community and making the international tax system work. There is an "implicit social contract" around "global community tax standards" that demands adherence to universal principles and respect for fundamental rights (specifically, human rights) in taxation.[107]

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."[108] This relationship must be "an expression of the individual's consent to the jurisdiction" and is (imperfectly) sought to be captured by concepts of "nexus" such as residence and source.[109] Professor Christians develops a nexus model, in the context of national tax sovereignty and its interaction with fundamental rights, based on the "membership principle" in which one affirmatively declares one's membership in the community.[110] 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 formalise consensual membership in the 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 they can also support the case for the existence 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

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[104] Christians, 'Human Rights', above n 96; 'Social Contract', above n 92.
[105] Professor Christians's analysis does not de-center the nation-state; noting, 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[.]" Christians, 'Social Contract', above n 92, 152.
[106] Ibid 148.
[107] Ibid 103, 111. See also, Christians, 'Human Rights', above n 96, 5 ("the 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").
[108] Christians, 'Social Contract', above n 92, 151.
[109] Christians, 'Human Rights', above n 96, 19.
[110] Ibid 15, 26.

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.

VI. Conclusion

The practical and political hurdles to true global taxation are, as Professor Bird has detailed, huge and perhaps insurmountable.[111] But the general trend of international taxation, including recent efforts to combat harmful tax competition and stateless income, points toward transnational approaches to transnational issues. Furthermore, extranational taxation is normatively justified by the CHoM sharing principles and expansive, purposive, conceptions of "tax" and "tax sovereignty".

During the UNCLOS negotiations, fiscal measures like the one in Article 82 proved an effective compromise between developed countries who want private enterprise to be able to access and exploit the commons and developing countries who want to be able to share in the spoils from places and resources that under international law belong to all of mankind. 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 recognised the importance of extranational spaces.[112] 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?"[113] Canada's experience with Article 82 is about to answer that question.

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[111] 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 Professor Bird (transparency, linkage to national administration, and widely beneficial). Bird, above n 69, 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-province maritime resources agreements. See Harrison, above note 72, 497.

[112] Elizabeth Riddell-Dixon, 'The seven-decade quest to maximize Canada's continental shelf' (2014) 69(3) *International Journal* 422.

[113] A. Peter F. Cumyn, 'Can Canada Levy Tax on the Continental Shelf?' (1981) 4 *Canada-United States Law Journal* 165, 170.