A MIGHTY STONE FOR DAVID'S SLING: THE INTERNATIONAL SPACE COMPANY

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I. INTRODUCTION

This study's goal is to engender an awareness and empathy for two distinct, but related interests—outer space commerce and offshore financial centers (OFCs).[1] Although unchampioned and underexposed, both are worthy of promotion in the economy of the new millennium, and both are vitally affected by taxation.

For the majority of the public, the concept of space commerce is still far removed from reality. It does little more than create a mental caricature of a *Popular Science* cover, or, for the slightly more perceptive mind, it is nothing more than the next novel experiment to be conducted on one of NASA's Space Shuttle missions. Out of public view, however, the aerospace industry and a new breed of entrepreneurs have produced a number of feasible, low cost rockets which will eventually enable business enterprise to reach beyond the Earth's atmosphere.[2]

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[1] Offshore financial centers have various definitions.

> There is no universally accepted definition of an offshore financial centre; some are coastal areas or even landlocked. But there are characteristics that help to identify them. The first is that business comes mainly from outside the centre itself. Secondly, the style of regulation tends to be subtle and unbureaucratic, and finally the centre operates in a nil or low-tax environment.

Peter Gartland, *Survey of European Financial Centres*, EUROBUSINESS, June 1, 1994, WL 13258338. According to the glossary in Mathew Bender's *Tax Havens of the World*, an offshore financial center is "[a] more sophisticated and internationally-acceptable foreign jurisdiction whose Government has enacted attractive no- or low-tax legislation and other incentives as a steadfast policy to encourage overseas investors to operate in its country or use these facilities worldwide in order to increase revenues." 1 GLOSSARY TAX HAVENS OF THE WORLD SCOPE, Matthew Bender & Company, Inc. (LexisNexis electronic ed. 2002). Generally speaking, the Organization for Economic Co-operation and Development's (OECD's) infamous "Harmful Tax Competition" report characterizes offshore financial centers, also known as tax havens, as being jurisdictions with low or no taxation and which allow fiscal and financial privacy. OECD, HARMFUL TAX COMPETITION, AN EMERGING GLOBAL ISSUE 23 (1998), *available at* http://www.oecd.org/pdf/M00040000/M0004517.pdf. The United Nations (U.N.) definition of an offshore institution is "any bank anywhere in the world that accepts deposits and/or manages assets denominated in foreign currency on behalf of persons legally domiciled elsewhere." Daniel J. Mitchell, *OECD Tax Competition Proposal: Higher Taxes and Less Privacy*, 2000 TNT 215-74 ¶ 36 (2000) (quoting *United Nations, Financial Havens, Banking Secrecy, and Money Laundering*, 8 UNDCP TECHNICAL SERIES, 1998, http://www.imolin.org/finhaeng.htm). "The Financial Stability Forum defines OFCs as 'jurisdictions that attract a high level of non-resident activity.'" *Id.* (quoting Financial Stability Forum, *Report of the Working Group on Offshore Centres* (2000)).

[2] The beginning boundary of "outer space" has various definitions. According to Jannat Thompson,

> [it] begins at a point approximately 90 to 110 kilometers above the Earth's surface. The general approach used to reach this conclusion is to measure the lower boundary of outer space at the lowest possible perigee (or orbit) in which a satellite may orbit. Under this test, "one can . . . say that at 96 kilometres one is definitely in outer space . . . the 110 kilometre line should satisfy even the most skeptical" [*sic*].

Jannat C. Thompson, *Space for Rent: The International Telecommunications Union, Space Law, and Orbit/Spectrum Leasing*, 62 J. AIR L. & COM. 279, 303 (1996) (citations omitted).

Whether such rockets or a Maglev[3] or space elevator are utilized, space-based manufacturing[4] and commercial space ventures are imminent.

OFCs, better known as "tax havens," are equally misunderstood by the general public; the term conjures up mental pictures of Swiss banks account or a James Bond Carribean hideaway. In reality, OFCs are vital to world commerce. The Cayman Islands, for example, have more than 575 offshore banks and trust companies with more than "$500 billion in assets."[5] However, OFCs are in danger of being damaged, if not destroyed, by fiscal forces. Just as the imposition of economic shackles on tax havens must be reasonable to prevent their extinction, the economic restraints on space commerce must be minimized for it to attract legitimate investors willing to risk their investment capital.

With respect to the issues affecting the economic viability of space commerce, so-called targeted tax rules that might otherwise be warranted are inefficient economic motivators.[6] Any such tilting of the playing field through tax favoritism or subsidies will result in a "misallocation of labor and capital resources and in a less

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> It is generally accepted that airspace activities cannot take place beyond an altitude of sixty kilometers. This would suggest that the sovereignty of airspace . . . based on the international law of the 1944 Chicago Convention, stops at a level of sixty kilometers. Beyond that altitude, the 1944 Chicago Convention does not apply . . . A logical lower boundary limit for outer space would be the lowest possible point of orbit sufficient to maintain a satellite . . . Thus, the beginning point of outer space can be determined . . . At present, that point is approximately ninety to 100 kilometers above the surface of the earth . . . [The] Soviet Union . . . advocates the demarcation . . . between airspace and outer space at an altitude of 100 kilometers.

Michael J. Finch, *Limited Space: Allocating the Geostationary Orbit*, 7 NW. J. INT'L L. & BUS. 788, 794-5 (1986) (citations omitted).

> The most heavily utilized Earth orbit, Low Earth Orbit (LEO), ranges from approximately 200 km above the Earth to about 2000 km. In this region, the greatest numbers of spacecraft (functional and non-functional) orbit in the 1400-1500 km region, while the 900-1,000 km region is the most densely populated by debris. Geosynchronous Earth Orbit (GEO) is the second most widely used Earth orbit. GEO spacecraft orbit at approximately 36,000 km above the Earth.

Peter T. Limperis, *Orbital Debris and the Spacefaring Nations: International Law Methods for Prevention and Reduction of Debris, and Liability Regimes for Damage Caused by Debris*, 5 ARIZ. J. INT'L & COMP. L. 319, 320-22 (1998) (citations omitted).

[3] > The heart of the MagLev system is its superconducting (SC) magnets or coils . . . The MagLev system is essentially a high-speed (hypersonic) vehicle flying in close proximity to the ground (within one inch of the guideway). As such, the knowledge and information we obtain are applicable to a wide variety of access to space opportunities.

Boeing Magnetic Levitation homepage, http://www.boeing.com/defense-space/space/maglev/maglevfeatures.html (last visited Feb. 26, 2002) (on file with the Regent Journal of International Law).

[4] "Manufacturing in space uses near-zero gravity to produce materials for commercial purposes. A market is developing for products such as metal alloys, plastics, glass, pharmaceuticals, and organic crystals produced in space." Bryan T. Johnson, *The New Space Race: Challenges for U.S. National Security and Free Enterprise*, The Heritage Foundation Backgrounder, (Aug. 25, 1999), *at* http://www.heritage.org/library/backgrounder/bg1316.html (on file with the Regent Journal of International Law).

[5] Tax Havens of the World, Cayman Islands, 5 Banking and Foreign Exchange, Matthew Bender & Company, Inc. (Lexis electronic ed. 2002).

[6] *See* William Lee Andrews III, *No Bull's Eye for "Targeted" International Tax Rule - Part 1: Policy Goals*, 10 J. INT'L TAX'N 7 (1999); William Lee Andrews III, *No Bull's Eye for "Targeted" International Tax Rules - Part 2: Ranking Section 936*, 10 J. INT'L TAX'N 4 (1999); William Lee Andrews III, *No Bull's Eye for "Targeted" International Tax Rules - Part 3: Ranking the FSC and Export Source Rules*, 10 J. INT'L TAX'N 30 (1999).

prosperous and stable economy."[7] The system perpetuates these tax breaks beyond their period of legitimate need, "complicates and undermines efficient enforcement of the revenue laws, introduces government intervention, and most importantly perhaps, is inefficient because of the inflexibility inherent in defining the proper objects of the subsidy in tax law terms."[8] The potential economic gains associated with space commerce are enormous and its relatively large costs will be dwarfed by these benefits if the profits are not subjected to onerous taxation.[9]

The first section of this study deals with the Organisation for European Co-Operation and Development (OECD), the current nemesis of the OFCs. The next section presents "the case for space commerce," which is followed by a section explicating tax structure relevant to its development. The last section makes an argument for a space tax holiday and offers a solution of rapprochement between taxing authorities and investors for energizing space commerce in the form of an International Space Company.

II. "INTERNATIONAL THUGGERY:" THE OECD

A. Taxation's Goliath

Armed with a coat of mail and a target of brass, a latter day Goliath is on the prowl. During the past few years, the OECD[10] has attempted to live up to its name by imposing "cooperation" on the OFC world. Although presented as "harmonization," this activity can be more aptly characterized as "international thuggery."[11]

The OECD released a report, *Towards Global Tax Cooperation* that identified thirty-five nations who are guilty of "harmful tax competition," accusing them of negatively affecting the world economy.[12] "In the OECD's view, harmful tax competition occurs when a nation has taxes so low that it lures investment away from highly taxed OECD countries."[13] The OECD has demanded that nations as diverse as Panama, Liberia and Bahrain, as well as the more familiar offshore financial centers in the Caribbean and the Pacific, put an end to their investment-luring low tax policies.[14] "In the OECD's view, it's bad when Canadians move to the United States to escape high taxes or when a French investor moves money

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[7] WARD M. HUSSEY & DONALD C. LUBICK, BASIC WORLD TAX CODE AND COMMENTARY 7 (1996) (Direct subsidies are more efficient than tax subsidies.).

[8] *Id.*

[9] *See* the favorable tax policy ranking in William Lee Andrews III, *Space Taxation, Targeted Tax Relief for Space Commerce - Part 3: The Good, the Bad, the Ugly, and the Beyond*, 11 J. INT'L TAX'N 34, 46.

[10] Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed: to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

Harmful Tax Competition, An Emerging Global Issue, *supra* note 1.

[11] Walter Williams, *International Thuggery*, WASH. TIMES, (Dec. 29, 2000), available *at* http://www.freedomandprosperity.org/Articles/articles.shtml.

[12] *Id.*

[13] *Id.*

[14] *Id.*

overseas to avoid high taxes. The . . . agenda for the OECD is to establish a tax cartel in which nations get together and collude on taxes."[15]

Dr. Daniel J. Mitchell, McKenna Senior Fellow in Political Economy at the Heritage Foundation, and Andrew Quinlan, a former senior staff member of the Joint House/Senate Economic Committee, took exception to the OECD's brutish actions by co-founding the Center for Freedom and Prosperity ("CFP")[16] with the intent "to publicize and attack OECD's anti-taxpayer agenda."[17] "Mitchell and Quinlan argue[d] that the 'harmful tax competition' lament of the OECD is really in defense of the welfare state."[18] Competition by low tax nations (OFCs) against high tax nations threatens funding for the high tax nation's welfare states because it is forced to consider lowering taxes.[19] In an effort to coerce low tax nations to comply with its programs, the OECD is using threats of "economic sanctions, tariffs, quotas and other trade restrictions" to force compliance.[20] "Already, Bermuda, Cyprus, Malta, Mauritius, San Marino and the Cayman Islands have caved and promised they will cooperate with OECD tax edicts."[21]

The next victim of the OECD's anti-taxpayer agenda will be financial privacy, which will effectively compromise national sovereignty. Countries like the U.S. desiring to enact pro-growth tax policies, "such as elimination of death taxes or capital gains tax reduction," would be required to clear such policies with OECD's Paris or Brussels office before enacting them[22]—hardly the act of a sovereign state. It does not take a trained economist, much less a rocket scientist, to recognize that efforts to eliminate competition of any sort, including tax competition, can adversely affect a nation's growth potential and should be scrutinized carefully while they erect defensive barricades to protect their economies.[23]

B. Economics' "David"

Dr. Mitchell could be likened to David in his modern-day battle with the OECD. Mitchell and Andrew Quinlan formed the CFP with no major backing. But, just as David knew his God was greater than any giant,[24] Dr. Mitchell believes his principles are more potent than the propaganda of the OECD. Indeed, opposition to OECD policies is growing in the United States Congress and the giant is beginning to waiver.

While attending a CFP symposium in Barbados on January 7, 2001, House Majority Leader Richard K. Armey's (R-Texas) tax advisor, Elizabeth Tobias, briefed the press concerning her perception of growing opposition on Capitol Hill to OECD's policies. "I am here to tell you that signs are good that the new administration will not support the OECD's current efforts, but we don't know for

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

> That's precisely what many OECD nations did in the wake of massive cuts in the U.S.'s marginal tax rate during the Reagan administration. On the other hand, if high tax nations can force other nations to be high tax as well, they can more easily get away with legislating even higher taxes to support their welfare states.

Id.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] "And David said, 'Jehovah who delivered me out of the paw of the lion and out of the paw of the bear, he will deliver me out of the hand of this Philistine.' And Saul said unto David, 'Go, and Jehovah be with thee.'" 1 *Samuel* 17:37 (American Standard Version).

sure."[25] Tobias supported her contention that there was a growing Congressional opposition to the OECD in her review of a "strongly worded letter Armey sent to U.S. Treasury Secretary Lawrence Summers, calling for the U.S. government to withdraw its support for the OECD program on tax havens."[26]

Tobias was not the only CFP symposium speaker to raise issues associated with the OECD. Bruce Zagaris, an international tax attorney with Berliner, Corcoran, & Rowe, identified matters that he believes tax havens should address in future negotiations with the OECD.[27]

> One of his principal themes was that the OECD lacks a mandate to direct the activities of, or to impose demands upon nonmember states. He also argued that the U.S. government is violating many of its exchange-of-information agreements with tax treaty partners. The breach results from three factors: the termination of section 936 financing benefits, the value of convention deductions being diminished by the alternative minimum tax, and the repeal of the foreign sales corporation tax regime.[28]

For the CFP, the OECD meeting in Barbados was a turning point. Their mere presence as part of the Antiguan and Barbadian delegations "ruffl[ed] some feathers."[29] Some OECD members were surprised at the influence wielded by Mitchell and Quinlan with the blacklisted tax havens;[30] "[s]everal of the low tax jurisdictions credited the pair as 'a key factor' in their strategic decision making."[31] Their efforts demonstrated how a few individuals could confront and repel the advances of a more prominent global institution.[32]

After the Barbados meeting, the OECD issued a press release on January 10, 2001, stating that they and the (British) Commonwealth[33] had changed the elements of the definition used to identify tax havens from "no or only nominal taxes; lack of effective exchange of information; lack of transparency; and no substantial activities" to "shared support for the principles of transparency, [and] nondiscrimination and effective exchange of information on tax matters."[34] These modifications indicate that "the OECD may be . . . backing away from these two issues, which is the same as conceding defeat on a key aspect of their battle against

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[25] Robert Goulder, *Armey Aide Sees Growing Discontent With OECD Tax Haven Campaign*, 2001 TNT 8-4 (2001). For prior coverage, *see* Robert Goulder, *New Coalition Strikes Back at OECD Tax Haven Campaign*, 2000 TNT 234-4 (2000) (The CFP mantra is that "tax competition should be encouraged, not persecuted.").

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] In various discussions with this author prior to the event, Dr. Mitchell revealed that the CFP had hardly any knowledge of the particular prospective OECD attendees, but that they (CFP) were going on faith that they could make an impact.

[33] The Commonwealth consists of 54 independent nations, their dependencies, and two special members—the independent island nations of Nauru and Tuvalu. *Commonwealth of Nations*, ENCARTA ENCYCLOPEDIA (electronic ed. 2001), http://encarta.msn.com/index/conciseindex/50/050E0000.htm?z=1&pg=2&br=1#s3 (last visited September 15, 2002).

[34] Memorandum from Steven R. Sieker, Esq., Baker & McKenzie, Hong Kong, to William L. Andrews III, Esq., (January 30, 2001) (on file with the Regent Journal of International Law).

harmful tax competition."[35] The involvement of the Commonwealth, which includes countries such as Bermuda, the BVI, and the Cayman Islands, as well as the UK, Canada, Australia, and New Zealand, increases the clout of tax havens.[36]

All this was at least partially discredited by reports that emerged after a follow-up meeting that occurred during the weekend of January 26, 2001. The London encounter was supposed to pave the way for further multilateral talks.[37] However, Antigua and Barbuda High Commissioner Sir Ronald Sanders released a statement indicating that the OECD spent most of the time trying to regain ground they lost at the Barbados meeting.[38]

> We were dismayed that, at the outset of the meeting on Friday, 26th of January, the OECD members of the Group made no reference to the considerable progress that had been made at the Barbados meeting; instead they repeated the unilateral and arbitrary process that the OECD Secretariat had been demanding in the months prior to the Barbados consultation.[39]

Negotiators from the Caribbean and Pacific island states indicated that the London talks were "at risk of running into a wall if the OECD does not back off."[40] This could spur the World Trade Organization (WTO) "to take action . . . against the OECD and its member states."[41] At the same time, other sources close to the talks claimed that the OECD "is coming under pressure from member states to put its foot down."[42]

Amidst all the uncertainty, two points appear to be inarguable: (1) resolution will not be speedy or uncomplicated, and (2) Dr. Mitchell and the CFP are carrying David's sling for the low tax countries. Indeed, if nothing else, this global debate has provided an opportune forum for Dr. Mitchell to educate the world on the nature and merits of tax competition. Intending to stiffen backs and provoke thought, he has provided public policy makers from low-tax countries with a series of nine questions in a plea for their support to create a level playing field between the high- and low-tax countries:

1. Should both sides play by the same rules? In other words, if low-tax countries are supposed to agree to transparency and non-discrimination, are OECD nations going to eliminate the myriad credits, deductions, preferences, loopholes, shelters, subsidies, exemptions, and preferences that litter their tax codes?
2. And what about the penalties, surtaxes, and other excess burdens placed on some types of income in OECD nations,

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[35] *Id.*

[36] *Id.*

[37] Jason Gorringe, Tax-New.com, *OECD And Offshore Task Force Members Failed To Agree In London Talks*, February 1, 2001, http://www.tax-news.com/asp/story/story.asp?storyname=2062 (on file with the Regent Journal of International Law).

[38] *Id.*

[39] *Id.*

[40] *Tax haven talks threaten to collapse as OECD refuses to budge on sanctions*, AFX EUROPEAN FOCUS, January 29, 2001, *available at* http://www.freedomandprosperity.org/Articles/afx01-29-01/afx01-29-01.shtml.

[41] *Id.*

[42] *Id.*

particularly capital income? Is this not discriminatory tax treatment?

3. Does this mean that central governments and/or local governments in OECD nations will no longer be allowed to offer special tax packages to companies so they will build factories or locate headquarters in a particular location?
4. If the OECD is serious about this approach, will OECD nations sign the MOU? Indeed, will they agree to these provisions as part of a tax treaty?
5. Withholding is a more effective method of stopping tax evasion than information exchange, and it preserves competition, privacy, and sovereignty. Why not pursue this option?
6. More importantly, the OECD initiative assumes that a worldwide system of taxation is preferable to a territorial system. Should this not be the subject of debate?
7. More broadly, should politicians in one country be able to assert the right to tax income earned in other nations? And if they do claim this power, do they have a right to unilaterally compel other nations to act as adjunct tax collectors?
8. If some countries nonetheless want to pursue information exchange because they insist they have a right to tax income earned in other nations, shouldn't such steps be taken as part of bi-lateral tax treaties or tax information exchange agreements so that both sides might reap some benefit?
9. Last, but not least, why is there no discussion of taxpayer rights? Important civil liberties, such as the presumption of innocence, protection against unreasonable search and seizure, due process legal protections, and the right to privacy are being brushed aside. Should not the rights of the individual be considered?[43]

In its simplest context, tax competition occurs when governments or jurisdictions are forced to be more fiscally responsible in order to attract economic activity or to keep economic activity from fleeing to a lower tax environment. It is desirable because lower tax rates reduce the burden of government and create an environment more conducive to opportunity and economic growth. For example, after Ronald Reagan implemented sweeping tax rate reductions in the 1980's almost every industrial economy in the world was forced to lower tax rates because investors were shifting their activity to the US economy.[44]

Dr. Mitchell has criticized the OECD's threats against tax competition, warning that their actions would (1) cause higher taxes, (2) cause slower growth, (3) undermine tax reform, (5) threaten free trade, (6) violate national sovereignty, (7) attack privacy, (8) jeopardize American interests, (9) harm the developing world, and (10) endanger our hemisphere.[45] "[T]ax competition should be celebrated, not

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[43] *See* Task Force Strategy Memo, "London Task Force Meeting" from Center for Freedom and Prosperity to Public Policy Makers from Low-Tax Countries" (Jan. 22, 2001), http://www.freedomandprosperity.org/memo01-22-01.pdf (on file with the Regent Journal of International Law).

[44] Memorandum from Daniel J. Mitchell, CFP Chairman, to William L. Andrews III, Esq., (Feb. 7, 2001) (on file with the Regent Journal of International Law).

[45] *Id.*

persecuted. It is a liberalizing force in the world economy, making it more difficult for governments to impose punitive and oppressive tax systems."[46]

If any other competition is good, then *tax* competition must also be good. But the OECD does not appear to agree. Mitchell noted that the OECD, in its two major reports, *Harmful Tax Competition: An Emerging Global Issue*[47] and *Towards Global Tax Cooperation: Progress in Identifying and Eliminating Harmful Tax Practices*,[48] argued that tax competition is not fair to high tax countries (HTC) because taxpayers shift their investment activity to low tax jurisdictions.[49] However, this is not its most persuasive argument; rather the OECD increasingly asserts their anti-tax competition proposal as a means of stopping tax evasion and money laundering.[50]

Dr. Mitchell's astute analysis cuts to the core of the OECD's motives and overall tax agenda: under the pretext of confronting a tax evasion epidemic, the OECD has drawn attention away from the more important debate between territorial taxation (withholding) and worldwide taxation (information exchange).[51] The OECD strongly pushes for "information exchange," a system in which all countries give up their financial privacy to collect taxes on their taxpayers' income earned in other countries.[52] That scheme would produce far greater revenue for the member states than a "withholding" scheme, where countries would retain only the right to tax all income earned within their borders and not those from outside their borders.[53]

The territorial system threatens the power and interest of European states for several reasons.[54] First, quite unlike worldwide taxation, the system furthers competition among investors and entrepreneurs seeking pro-market jurisdictions with lower taxes.[55] It guarantees financial privacy by taxing capitol income in the source country and allowing companies to pay shareholders' taxes ahead of time, regardless of where they live.[56] The territorial system gives countries maximum freedom to set their tax rates and minimizes the type of conflict arising when one country taxes income earned in another country.[57] Finally, Mitchell notes that this system is friendlier to fundamental tax reforms, such as the flat tax. This is particularly true when reforms only reach to income earned inside national borders.[58] HTCs favor worldwide taxation because they can double-tax income on savings and investment, an ill-advised practice that most tax reform plans abolish.[59]

C. Modern Philistinism

Philistinism permeates the OECD's branding of their blacklisted jurisdictions. Dr. Mitchell is not the only one blowing the whistle in this regard. On February 5, 2001, the U.S. Senate Government Affairs Permanent Subcommittee on Investigations (PSI) "issued a stinging report that criticized U.S. financial institutions

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[46] *Id.*

[47] *Harmful Tax Competition: An Emerging Global Issue*, *supra* note 1.

[48] OECD, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices*, 2000, *available at* http://www.oecd.org/pdf/M000014000/M00014130.pdf.

[49] Memorandum from Daniel J. Mitchell, *supra* note 44.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* (In stark contrast, worldwide taxation would ensure that at least two governments have access to a taxpayer's financial records. *Id.*)

[57] *Id.*

[58] *Id.*

[59] *Id.*

for failing to adequately monitor their correspondent accounts with high risk foreign banks, facilitating international money laundering and tax evasion."[60] A senior committee member "told reporters that lax self-enforcement of financial regulations in the area of correspondent accounts has enabled criminals and tax evaders to launder billions of dollars each year through U.S. banks."[61] Allegedly "worldwide money laundering exceeds $1 trillion annually, with half of the illegal activity taking place in the U. S., [an OECD member nation]."[62]

Corroborating the point, "the U.N. reports, '[m]oney laundering can proceed very easily without bank secrecy [typically associated with tax havens]; in fact, it may well be that launderers avoid . . . [bank secrecy/tax havens] precisely because . . . [they] act . . . as a red flag.'"[63] Indeed, the Brookings Institute has noted that the U.S. is the "largest repository of ill-gotten gains in the world."[64]

Trumped-up allegations of OFCs involvment in money laundering schemes bear all the trappings of a witch hunt. It is widely suspected that money laundering is merely a vehicle through which the OECD hopes to undermine financial privacy and pave the way for a worldwide system of information exchange.[65] However, money laundering laws create "an ever-increasing regulatory burden on the banking industry."[66] "Financial institutions had to file 13 million currency transaction reports in 1999, each requiring twenty-four minutes, at a cost to the industry of more than $100 million. Yet fewer than one one-thousandth of one percent of these reports are ever used in money laundering convictions."[67]

Some money laundering laws create a legal minefield because financial institutions risk committing a crime if they fail to ask their customers the right questions.[68] These queries are not trivial requests for social security numbers and home mailing addresses. Instead, the government wants banks to ask "questions about their [customers'] personal background, even their lifestyles and spending habits."[69] In essence, "Congress has forced bankers to become spies" against their customers.[70] "These regulations have become so intrusive that federal bureaucrats . . . were forced to withdraw a [money laundering] proposal after public protest."[71]

Also missing from the money laundering equation is any cost-benefit analysis of applicable laws.[72] "There are 700,000 daily electronic money transfers involving $2 trillion. With this magnitude of transactions, finding criminal money by asking customers personal questions is not very successful."[73] "The Treasury Department has estimated that 99.9 percent of the criminal money arriving into the U.S. is

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[60] Robert Goulder, *U.S. Senate Report on Money Laundering Faults Banking Practices*, 2001 WTD 30-35 (2001).

[61] *Id.*

[62] *Id.*

[63] Mitchell, *supra* note 1, ¶ 94 (quoting United Nations, "Financial Havens, Banking Secrecy, and Money Laundering").

[64] *Id.* (quoting Raymond Baker, *Testimony of Raymond Baker before the Permanent Subcommittee on Investigations of the Committee on Government Affairs*, U.S. Senate, November 10, 1999).

[65] Memorandum from Daniel J. Mitchell, *supra* note 44.

[66] Mitchell, *supra* note 1 ¶ 91 (citation omitted).

[67] *Id.* (citation omitted).

[68] *Id.* ¶ 92 (paraphrasing and quoting Bruce Zagaris, *The Assault on Low Tax Jurisdictions: A Call for Balance and Debate*, EUROPEAN FINANCIAL FORUM, May 1999, at 53).

[69] *Id.* (paraphrasing and quoting Testimony of Robert Bauman to the House Banking Committee, March 9, 2000).

[70] *Id.* (quoting and paraphrasing Testimony of Robert Bauman to the House Banking Committee, Mar. 9, 2000).

[71] *Id.* (quoting Maureen Murphy, *Banking's Proposed 'Know Your Customer' Rules*, CONGRESSIONAL RESEARCH SERVICE, March 23, 1999).

[72] *Id.* ¶ 93 (citation omitted).

[73] *Id.* (quoting United Nations, *Press Briefing on Money Laundering*, June 5, 1998).

successfully laundered."[74] "Other countries such as Germany have reached similar conclusions about their own financial systems."[75]

Unclean money is not a problem endemic only to low tax nations and "it is not necessarily associated with financial privacy."[76] It is reported that the majority of the "service providers" connected to money laundering, such as financial managers, accountants, attorneys, and the like, are domiciled in OECD countries.[77] Some of the most celebrated money laundering scandals, "such as the Bank of New York-Russian money incident, occurred in OECD nations."[78]

This double standard is further entrenched by many OECD members' reluctance to eliminate their own bank secrecy laws.[79] Switzerland continues to refuse to dismantle financial privacy.[80] "Austria's constitution guarantees privacy and the government has battled to preserve bank secrecy. Luxembourg, Belgium, and Greece, to their credit, have also indicated an aversion to phase out financial privacy. Yet none of these nations are being imperiled with financial protectionism from other countries."[81] One well-respected report takes a certain pleasure in shocking traditional sensitivities by stating that,

> [i]t does not surprise anyone when I tell them that the most important tax haven in the world is an island. They are surprised, however, when I tell them that the name of the island is *Manhattan*. Moreover, the second most important tax haven in the world is located on an island. It is a city called *London* in the United Kingdom.[82]

Both the United States and the United Kingdom are high profile OECD member countries. Yet, both remain reluctant to label themselves as tax havens even though they actively and unapologetically attract wealth from all over the world.[83]

"A U.S. citizen or resident receiving interest from a U.S. bank deposit must pay federal income tax of up to 39.6 percent on that income."[84] Such income will also probably incur a state income tax levy. The amount of interest paid is reported annually by every U.S. bank to the I.R.S.[85] In stark contrast, a nonresident alien or foreign corporation is not liable for U.S. income tax on U.S. bank deposit interest.[86] Aside from rules for Canadians, "interest paid is not even supposed to be reported to the I.R.S., so the amount of that interest obviously is not being reported to other

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[74] *Id.* (paraphrasing and quoting Raymond Baker, *Money Laundering and Flight Capital: The Impact on Private Banking, Testimony to the Permanent Subcommittee on Investigations, Senate Governmental Affairs Comm.*, 106th Cong. (1999)).

[75] *Id.* (quoting Raymond Baker, *The Biggest Loophole in the Free-Market System*, THE WASHINGTON QUARTERLY, Autumn 1999).

[76] *Id.* at ¶ 94 (citation omitted).

[77] *Id.* (citation omitted).

[78] *Id.* (citing Peter Goldstein, *EU Tampere Summit to Null Anti-Money Laundering Measures*, October 1, 1999).

[79] *Id.* at ¶ 32.

[80] *Id.* (citation omitted).

[81] *Id.* (citations omitted).

[82] Marshall J. Langer, *Harmful Tax Competition: Who Are the Real Tax Havens?*, 2001 TNT 19, 66, ¶ 9, January 5, 2001, *available at* http://www.freedomandprosperity.org/Articles/tni12-18-00.pdf.

[83] *Id.* at ¶ 10.

[84] *Id.* at ¶ 12.

[85] *Id.*

[86] The Internal Revenue Code provides that "[I]n the case of any portfolio interest received by a nonresident individual from sources within the United States, no tax shall be imposed under paragraph (1)(A) or (1)(C) of subsection (a)." I.R.C. §871(h)(1). *See also* I.R.C. §881(c)(1) ("no tax shall be imposed under paragraph (1) or (3) of subsection (a)" on "any portfolio interest received by a foreign corporation from sources within the United States").

countries under U.S. tax treaties or tax information exchange agreements."[87] "Hundreds of billions of dollars of tax-free, interest-bearing bank deposits are held in U.S. banks by [person falsely claiming to be] nonresident aliens and foreign corporations."[88]

The U.S. does not stand alone as a tax-free bank deposit tax haven for foreign individuals and companies.[89] While most OECD countries provide this break directly, Switzerland does it *indirectly* by allowing Swiss banks to take "fiduciary deposits" that are held in foreign branches of Swiss banks in countries such as Luxembourg.[90] Utilizing these fiduciary accounts avoids a thirty-five percent Swiss withholding tax.[91] Canada affords relief by offering tax-free bank deposits to foreigners, when held in currencies other than Canadian.[92]

With respect to taxing its residents' worldwide income, the U.K. has been a much more forgiving haven than the U.S. Generally, the foreign income of residents who are not domiciled in the U.K. is not taxed unless it is remitted to the U.K. resident.[93] Between 1803 and 1914, "U.K. residents were taxable on overseas income only if the income was remitted to the United Kingdom. Since 1914, overseas income has been generally taxable, except for a non-U.K. domiciliary who remains taxable only on a remittance basis."[94] A resident individual not domiciled in the U.K. pays no tax on his income that originates abroad.[95] Unless he remits such monies to the U.K., he is not taxed on any repatriation of capital.[96] Other OECD member states have similar tax haven attributes.[97]

The net result has been a public outcry against OECD tax positions, particularly from members of the U.S. Congress who sense a sympathetic, empathetic ear in the White House.[98] These Congressmen hope that a formal U.S. anti-HTC position will render the OECD tax cartel powerless. Yet, the war is not over; Goliath is still

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[87] Langer, *supra* note 83 ¶ 13.

[88] *Id.* at ¶ 14.

[89] *Id.* at ¶ 32.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at ¶ 36 n.20. ("For an interesting discussion of the U.K. domicile rules and their impact on U.K. taxation, [Langer recommends] Goodeve-Docker, Nigel, *The Arcane World of Domicile and Tax*, OFFSHORE INVESTMENT, Oct. 2000, pp. 17-22.").

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at ¶ 40.

> [1.] Belgium does not tax most capital gains. People from the Netherlands and other high-tax countries regularly move to Belgium and remain in the country long enough to sell their securities tax free;
>
> [2.] Canada permits its new landed immigrants to escape tax on their foreign income for the first five years they are resident in Canada by setting up a pre-immigration offshore trust;
>
> [3.] Since 1986, France has provided tax breaks to investors in French overseas departments and territories. Until now, some investors were permitted to deduct their entire investment and to get some kind of double deduction for any losses. Beginning in 2001, these benefits will be partially curtailed;
>
> [4.] In February 2000, *The Wall Street Journal* reported that some towns in Hungary are attracting increasing numbers of offshore companies by offering them tax rates as low as 3 percent. No one in either the European Union or the OECD seems to have paid any attention to these towns. Hungary apparently also still has no tax on interest income.

[98] *See, inter alia*, an increasing number of letters from Congressmen *at* www.freedomandprosperity.org.

Goliath.[99] A stable present does not insure a profitable future—pro-activity is required.

If history is any indication, the "law of unintended consequences" will prevail and the OFCs, because of—and not in spite of—competition, will rise to the standards of professionalism and will beat them at their own game through regulation of the "onshores". Competition will increase, and untold business will stream into the former "tax havens" which will thus become even more dominant as full-fledged international financial centers.

Part of the catalyst for these consequences can be space commerce which has the potential to change society forever. OFCs are well positioned to capitalize on this new frontier.

III. SPACE AND THE FRONTIER THESIS

Frederick Jackson Turner's Frontier Thesis is germane to answering the question of why we should pursue space commerce:

> The result is that to the frontier the American intellect owes its striking characteristics. That coarseness and strength combined with acuteness and inquisitiveness; that practical, inventive turn of mind, quick to find expedients; that masterful grasp of material things, lacking in the artistic but powerful to effect great ends; that restless, nervous energy; that dominant individualism, working for good and for evil, and withal that buoyancy and exuberance which comes with freedom—these are traits of the frontier. Since the days when the fleet of Columbus sailed into the waters of the New World, America has been another name for opportunity, and the people of the United States have taken their tone from incessant expansion which has not only been open but has even been forced upon them. He would be a rash prophet who should assert that the expansive character of American life has now entirely ceased. Movement has been its dominant fact, and unless this training has no effect upon a people, the American energy will continually

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[99] *See generally* Robert Goulder, *U.S. Treasury Official Discusses Tax Competition at FBA Conference,* 2001 WTD 44-13 (Mar. 3, 2001) (addressing the battle being waged within the administration over harmful tax competition).

> Pamela Olson, the U.S. Treasury Department's acting deputy assistant secretary for tax policy, addressed the 25th annual tax conference of the Federal Bar Association on 2 March in Washington, offering a few more hints regarding the Bush administration's evolving stance on the OECD initiative against harmful tax competition . . .
>
> Yet, her comments also appeared to distance the United States from any dimension of the OECD project that could be seen as lending itself to increased taxation — even in foreign jurisdictions. U.S. tax attorney Joel Karp expressed a similar interpretation of the new U.S. posture toward the OECD at the recent meeting of the International Fiscal Association's U.S. branch on 23 February in Orlando, Florida . . .
>
> Her remarks also come one day after two additional senators — Jesse Helms, R-North Carolina, and Judd Gregg, R-New Hampshire — joined the growing cast of U.S. lawmakers who have called upon the Bush administration to distance itself from the OECD project. Former Treasury Secretary Lawrence Summers was an outspoken advocate of the OECD position on tax havens.

Id.

> demand a wider field for its exercise. But never again will such gifts of free land offer themselves.[100]

Yet this does not mean that the frontier spirit cannot be rekindled. "Frontier" is as much a state of mind as it is a territory. When the physical "space frontier" is opened up, the mental space frontier will be the true driving force that advances society.[101] Turner's concept of the frontier is persuasive and enduring—and that the vitality of the frontier spirit in this country can be revived through space exploration and especially through a new breed of space commerce entrepreneurs. The 1970s Alyeska Pipeline project in Alaska is one limited example of what the re-opening of the frontier can do. Not only were vast natural resources developed, but individual and corporate fortunes were made. Mainland sojourners were exposed to an entire new culture. The state of Alaska was enriched financially, and against all fears, the caribou survived!

A contemporary space commerce advocacy group makes Turner's frontier argument in a post-Cold War setting:

> [s]pace is a special kind of place—a frontier. In order to open this frontier to the American people, we believe free markets—and the entrepreneurial spirit—must be allowed to take over a larger share of our nation's activity in space. Commercial space enterprise is where our future lies.
>
> Commercial space is growing at well over twenty percent a year. In 1997, worldwide revenues from commercial space exceeded government expenditures in space for the first time. SpaceVest and KPMG Peat Marwick are forecasting a compound growth rate for commercial space of fifty-seven percent for the next several years. The telecommunications and computer revolutions are spilling over into space, and soon we will see the creation of multiple huge constellations of satellites in Low Earth Orbit (LEO). These new commercial systems are driving huge new private investments in commercial launch firms.
>
> The commercial space revolution will benefit more than just private industry and the American people. It will allow NASA to get back to its roots—to the Columbus, Drake and Lewis and Clark missions—to the exploration of the far frontier. If NASA can get out of (i.e. privatize) all routine operations in near Earth space including management of the International Space Station after construction is complete it will get Mars, the far Solar System and

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[100] Frederick Jackson Turner, The Significance of the Frontier in American History, Proceedings of the State Historical Society of Wisconsin 111, 112 (December 14, 1893).

> What the Mediterranean Sea was to the Greeks, breaking the bond of custom, offering new experiences, calling out new institutions and activities, that, and more, the ever retreating frontier has been to the United States directly, and to the nations of Europe more remotely. And now, four centuries from the discovery of America, at the end of a hundred years of life under the Constitution, the frontier has gone, and with its going has closed the first period in American history.

Frederick Jackson Turner, THE FRONTIER IN AMERICAN HISTORY 38 (1920).

[101] "It does not seem entirely coincidental that the Sixteenth Amendment to the Constitution . . . came on the heels of the closing of the western frontier." JUDE WANNISKI, THE WAY THE WORLD WORKS 194 (rev. ed. 1983).

Beyond.[102]

IV. THE ORIGIN OF "SPACE LAW"

Of importance to this discussion is a body of law unique to outer space. This *corpus juris spatialis*[103] spans traditional areas of domestic and international law, and according to some commentators, will eventually evolve into a separately recognized "Astrolaw."[104] Any legal analysis of space tax issues is hampered if not viewed within the context of the international legal norms that have developed over the last half century. Therefore, it is useful at this juncture to consider the relevant framework of international[105] and domestic laws within which U.S. tax rules operate.

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[102] ProSpace, *About ProSpace*, http://www.prospace.org/issues/SpaceCommerce/index.htm (last visited on Sep. 8, 2002) (on file with the Regent Journal of International Law).

> Our nation can encourage this revolution by supporting America's best and brightest space entrepreneurs, by:
>
> 1. promoting a major expansion of commercial activity in-and-around the Space Station;
> 2. promoting commercial purchase of space transportation services;
> 3. promoting commercial purchase of all space science data;
> 4. promoting and encouraging the commercial development and operation of reusable spaceplanes;
> 5. providing tax incentives the development of, and investment in, new commercial space industries; and
> 6. promoting free trade in space.

Id.

[103] This is the Latin rendering for "body of space law" commonly used today by commentators, *e.g.*, by Ty S. Twibell, in *Circumnavigating International Space Law*, 4 ILSA J. INT'L & COMP. L. 259, 295 n.17 (1997), and by Heidi Keefe, in *Making the Final Frontier Feasible: a Critical Look at the Current Body of Outer Space Law*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 345, 345 (1995). The term was coined by Argentine scholar, A.A. Cocca, who takes the position that space law forms a "harmonious set of principles." NATHAN C. GOLDMAN, AMERICAN SPACE LAW: INTERNATIONAL & DOMESTIC 66 (2d ed. 1996). *See* JOHN C. TRAUPMAN, THE NEW COLLEGE LATIN & ENGLISH DICTIONARY 121, 235, 393 (2d ed. 1995).

[104] GOLDMAN, *supra* note 104, at 223-39.

[105] *See* David Everett Marko, *a Kinder, Gentler Moon Treaty: a Critical Review of the Current Moon Treaty and a Proposed Alternative*, 8 J. NAT. RESOURCES & ENVTL. L. 293, 294-96 (1993) (citations omitted). *See also* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 480 n.1 (1998). "[P]ost-World War II legal theorists have become aware of another source of precedents for international law:" U.N. General Assembly resolutions intended to prod the COPUOS (Committee on the Peaceful Uses of Outer Space) into action, e.g., the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space established the agenda from which the 1967 Space Treaty emanated. GOLDMAN, *supra* note 104, at 68 (citation omitted).

> Another source for interpreting modern international law is the *jus cogens* principle. *Jus cogens* are peremptory norms of general law. Although they bear a resemblance to natural law, these norms are emanations of positive law, reflecting the evolving consensus of the civilized world. According to the Vienna Convention on Law of Treaties, provisions of treaties are void if they conflict with such norms. Even an existing treaty becomes void if it violates new peremptory norms. Christol has suggested that the modified *res communis* (space for the benefit of humanity) and other principles in the 1967 Outer Space Treaty are candidates for *jus cogens* status.

"Space law" charts new legal paths, particularly because of its nexus with international practice. Within this realm, traditional areas of law are involved. However, they must be adapted to the ever-evolving realm of outer space activities.

The true origin of space law was in 1957 when the Union of Soviet Socialist Republic (U.S.S.R.) launched Sputnik, the first satellite, into orbit.[106] Until then, "the legal status of activities in space was a speculative matter rather than an immediate practical problem."[107] The basic body of law relating to outer space is a synthesis of multilateral international conventions and agreements, with the U.N. acting as catalyst. This synthesis parallels the law of the high seas and Antarctica, areas outside the ownership of any one nation, which are held in common by the international community.[108]

Space law is addressed within international agreements and domestic law. It is becoming more complex every day, especially as government agencies such as the U.S. Departments of Commerce and Transportation become increasingly more involved in the regulation of commercial space development.[109] The Cold War power struggle between the U.S. and the U.S.S.R. had an enormous impact on initial legal space structure and policy. Most of today's space law was established within the two decades following Sputnik and its progeny,[110] involving the seminal 1967 Space Treaty.[111] It sets out a basic structure of laws for activities conducted in outer space and on celestial bodies, encouraging cooperation of the state parties in its exploration and scientific research, and mandating joint responsibility for outer space activities. Importantly, the treaty also establishes that outer space and celestial bodies are "not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[112]

V. U.S. TAXING JURISDICTION ON FOREIGN INCOME

A. U.S. Tax on Foreign Income, "Whatever the Source"

> Even the rules for interpreting international treaties are not devoid of origins in customary international law. The Vienna Convention on Law of Treaties provides the rules for assessing duties and obligations of U.S. international treaties. The United States has never ratified this convention but recognizes its dictates as international customary law. When interpreting a treaty, the parties will rely on words first. Often, however, the language is ambiguous. Then the parties or the appropriate tribunal will rely on negotiating history of the treaty and the interpretations given by the parties. The consensus process in UNCOPUOS, including national interpretations, is a recent development, and it is not clear how that process will be assimilated into the interpretation of treaty obligations. Because no space controversy has ever gone so far, the status of state interpretations at UNCOPOUS and of state reservations in their ratifications has never been litigated. The consensus procedure should provide increased weight to the interpretation of the states as given in that drafting committee. The negotiating history of these treaties includes the national interpretations placed on the terms in order to obtain the consensual agreement.

Id. at 68-69 (citations omitted).

[106] Ty S. Twibell, *Space Law: Legal Restraints on Commercialization and Development of Outer Space*, 65 UMKC L. REV. 589, 591 (1997) (citation omitted).

[107] C. WILFRED JENKS, SPACE LAW 3 (1965).

[108] Twibell, *supra* note 107, at 592.

[109] *Id.* (citation omitted).

[110] *Id.*

[111] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410 [hereinafter 1967 Space Treaty].

[112] *Id.*

The United States taxes "U.S. persons"[113] on what usually is referred to as "their world wide income," pursuant to I.R.C. § 7701(a)(30) via sections 1, 11, 61 and 63. However, there are limitations with respect to taxation of foreigners and foreign entities by operation of sections 881, 882, 871 and 872 via section 11(d). "World wide income" is technically a misnomer. The actual language of section 61 states: "all income from whatever source derived."[114] On its face, "from whatever source" would seem to be inclusive of space-related[115] income as well.

The U.S. is "virtually unique" in taxing U.S. persons on income from whatever source, even if they have resided outside the U.S. for years for reasons wholly unrelated to taxes.[116] This is because the U.S. is a theoretically pure nationality-based taxing country. This system is generally based upon who earned the income, rather than on the national location from which the income was generated, as in territorial-based taxation.[117] In both regimes, however, the connection of the person to a country justifies the taxing jurisdiction.[118] Under nationality-based taxation, a *natural* or *incorporated person* is connected in a legal nexus to the taxing country.

Double taxation potentially arises when the U.S. claims taxing authority based on nationality and another country claims taxing authority based on the territory in which the income arose.[119] A new international taxing practice, however, would reduce the risk of double taxation. Under this emerging custom, the primary taxing authority[120] is also the source (territoriality-based) country, and the secondary taxing authority is the country of nationality or residence.[121] It is thus up to the nationality (residency) based taxing country to relieve double taxation.[122] The U.S., like most other English-speaking countries, "uses a credit system[123] under which foreign income taxes are credited against U.S. taxes."[124] In general, the foreign tax credit may not exceed the pre-credit U.S. tax on foreign source income.[125] This is called the "section 904 limitation amount."[126] Foreign taxes paid in excess of the section 904 limitation amounts are not currently credited as an offset against other U.S. taxes paid. Except for the fact that they may be carried forward or back,[127] they play into the onerous scheme of double taxation already discussed.

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[113] "U.S. persons" is defined in I.R.C. § 7701(a)(30)(D) and (E) as citizens, residents, domestic partnerships and corporations, and estates and trusts.

[114] *See* definition of "gross income," *infra* note 180. The "from whatever source derived" language emanates from the Sixteenth Amendment to the U.S. Constitution. U.S. CONST. amend. XVI. The U.S. Supreme Court, in *Cook v. Tait*, 265 U.S. 47, 56 (1924), held that neither the U.S. Constitution nor international law is violated by U.S. taxation of the worldwide income of citizens who reside and are permanently domiciled in a foreign country and who receive their income from property located there. BORIS I. BITTKER & LAWRENCE LOKKEN, FUNDAMENTALS OF INTERNATIONAL TAXATION 65-3, 4 (1997).

[115] Throughout this article "space" will be used interchangeably with "outer space" and deemed to have the same meaning.

[116] BITTKER & LOKKEN, *supra* note 115, at 65-3, 4.

[117] RICHARD A. DOERNBERG, INTERNATIONAL TAXATION 8 (1997). (Under territorial-based taxation, a *resident* of a particular country is connected in a factual nexus to the taxing country. *Id.* at 3.)

[118] RICHARD A. DOERNBERG, INTERNATIONAL TAXATION 8 (1997).

[119] *Id.* at 3.

[120] This primary right is a recognition that the source country has put in place the infrastructure, government systems, etc., to facilitate the earning of income. Phil McCarty, Lecture on U.S. Taxation of International Income II at the Georgetown University Law Center (Spring 1998).

[121] DOERNBERG, *supra* note 118, at 9.

[122] McCarty, *supra* note 121.

[123] I.R.C. § 901(a).

[124] BITTKER & LOKKEN, *supra* note 115, at 65-5.

[125] I.R.C. § 904(a).

[126] *Id.*

[127] I.R.C. § 904(c).

B. Reduced Foreign Tax Credit Limit and Classification Problems

Under nationality-based taxation, income from space activities is fully taxable to U.S. persons. Moreover, the sourcing rule[128] has an impact on the allowable foreign tax credit,[129] which is limited by the ratio of foreign source income to worldwide income. Since the Tax Reform Act of 1986 (TRA 1986)[130] treats space income earned as having a U.S. source, the ratio and the allowable foreign tax credit are reduced.[131] The limitation on the credit, however, applies separately to various types or "baskets"[132] of income, and space income is placed into the basket for shipping income. Before promulgation of TRA 1986, however, space income was treated as foreign source income, and the foreign tax credit did not apply separately for shipping income.[133] This made the foreign source to worldwide income ratio larger, thus allowing a larger credit against other U.S. taxes.[134]

The reduced foreign tax credit limit under the TRA 1986 regime is due to the culmination of two factors. First, space-sourced income is now treated as having a U.S. source for U.S. persons. Second, the foreign tax credit limitation is separately applied with respect to space income.[135] The net result of this is an increase in the total worldwide tax rate for space income.[136] This is relevant because taxes could be reduced substantially if income otherwise deemed space income,[137] could be transformed into foreign source income.[138]

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[128] *See* I.R.C. § 863(d).

[129] *See supra* note 126.

[130] Pub. L. No. 99-514, 100 Stat. 2085, (1986).

[131] Christopher Kelly, *Taxing Space and Ocean Activities*, 37 TAX NOTES 735, 738 (1987) (citations omitted).

[132] A full explication of the I.R.C § 904(d) "basket" approach of credit limitation is beyond the scope of this article. Suffice it to say that "Congress wanted to prevent U.S. taxpayers from arranging their affairs to maximize the foreign tax credit [by "averaging"] at the expense of U.S. taxes on U.S. source income." DOERNBERG, *supra* note 116, at 176. With averaging, that portion of the high taxes paid that otherwise would go only toward excess carry forward/backs is able to be used currently by filling in or averaging in with very low or no tax categories, whereas standing alone, basket-by-basket or item-by-item, the result is "excess (section 904) limit" amount and "excess credit" amount, with one not being to able to subsidize the other. McCarty, *supra* note 121.

[133] Kelly, *supra* note 132, at 739.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Or otherwise deemed U.S. source income for a U.S. person under I.R.C. § 863(d).

[138] To illustrate this concept,

> X, a U.S. corporation, is engaged in the business of manufacturing pharmaceuticals. During the tax year in question, X derived income of $1,000 from the manufacture of certain drugs in space. X also derives manufacturing income of $2,000 from a plant it operates in foreign country Y (taxed at a rate of 75 percent by country Y), as well as $2,000 of income from its manufacturing operations in the U.S. Assume a tax rate of 40 percent in the U.S. and disregard any expenses or deductions.
>
> Since X is a U.S. person, it is taxable on its income from all sources, that is, on foreign as well as U.S.-source income. In the above example, X's total income from all sources is $5,000. At a tax rate of 40 percent, X's total tentative U.S. tax liability would be $2,000 with $1,600 of the tentative tax liability attributable to income in the basket for manufacturing income (the residual basket under section 904(d)(1)(I)) and $400 attributable to income in the shipping basket (which includes the space income). X has paid $1,500 in taxes to country Y, on income assigned to the manufacturing basket. The foreign tax credit is limited, however, to the U.S. tax on that income. Since the ratio of foreign-source manufacturing income to total manufacturing income is one-half [$2,000 ÷ $4,000], the foreign tax credit may be used to offset only half of the $1,600 [or $800] in tentative tax liability attributable to manufacturing income.
>
> A separate limit would be figured for the space and ocean income. Assuming no other shipping income, the limitation would be zero. This result is due to the fact

The deleterious effects on space income are worsened by classification problems. There is no definition for the term "space," nor does the statute indicate how far from Earth one must go before the special space source rules apply.[139] Final regulations may provide more guidance. The application of different source rules makes it difficult to distinguish space and ocean income from transportation income and "international communications income."[140] Definitional ambiguities may also cause problems.[141] For instance, I.R.C. § 863(e) defines "international communications income" as including "all income derived from the transmission of communications or data from the U.S. and any foreign country."[142] The income of a U.S. person (resident) with fifty percent of his income sourced in the U.S. and fifty percent sourced outside of the U.S. is still considered one-hundred percent U.S. income. However, all such income for foreign persons is assigned a foreign source.[143]

"Transportation income" is defined expansively as "any income derived from, or in connection with — (A) the use (or hiring or leasing for use) of a vessel or aircraft, or (B) the performance of services directly related to the use of a vessel or aircraft."[144] If the transportation either begins or ends in the U.S., half of it is deemed to be from sources in the U.S.[145] But if the transportation is entirely within the U.S., all of the income is deemed to be from U.S. sources.[146]

The space and ocean source rules contain an exception for transportation income.[147] Apparently this means that income that appears to qualify as both space and ocean income and as transportation income will be treated, for sourcing

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> that all of the space and ocean income is from U.S. sources [$0/$1,000 x $400 = $0].
>
> In contrast, under . . . [pre-TRA 1986] law, space and ocean income was treated as foreign source, and the foreign tax credit was not applied separately for shipping income. The ratio of foreign source to worldwide income would have been three to five, and the foreign taxes paid to country Y could have offset 3/5 [($1,000 + $2,000) ÷ $5,0000] of the total U.S. tax. Thus the foreign tax credit limitation would have been $1,200 [*contra* $800 above] under prior law.

Kelly, *supra* note 132, at 739.

[139] Arthur C. Clarke and others have proposed hooking one end of a cable to a point on the equator of the Earth and running it on out into Space. Space Elevator, posted by "Scott Smith, Sept. 15, 1998 at 19:57:22" (AOL meta search: Feb. 4, 2001) (on file with the Regent Journal of International Law). As noted by Nathan Wilson:

> The system is based on a "space elevator" and space hotel in low Earth orbit. The hotel would orbit 775 miles above the Earth, and would suspend a space dock 160 miles above the Earth, via a hanging tether. Passengers and cargo would be brought to the dock by a new suborbital reusable launch vehicle, and would travel up the tether via a space elevator. The launch vehicle latches onto the dock, and is carried back to the launch site. The dock moves at only 79% of orbital velocity, which quadruples the payload capacity of the launch vehicle. An upward deployment tether can be extended from the top station to release or capture payloads onto or off of trajectories to higher orbits or to the Moon. The tether system can reuse orbital momentum taken from returning crafts, so that for balanced round trip travel, no propellant is consumed (once the payload reaches the dock).

Nathan Wilson, Space Elevators, Space Hotels, and Space Tourism, July 11, 2000, http://members.aol.com/Nathan2go/SPELEV.HTM (last visited September 2, 2002) (on file with the Regent Journal of International Law).

[140] *See* "international communication income" I.R.C. § 863 (e).

[141] *Id.*

[142] I.R.C. § 863(e)(2).

[143] I.R.C. § 863(e)(1)(A).

[144] I.R.C. § 863(c)(3).

[145] I.R.C. § 863(c)(2)(A).

[146] I.R.C. § 863(c)(1).

[147] "The term 'space or ocean activity' shall not include - (i) any activity giving rise to transportation income (as defined in section 863(c))." I.R.C. § 863(d)(2)(B).

purposes, as belonging to the latter classification.[148] Space taxpayers may find the differences in sourcing among these often indistinguishable categories of income to be substantial and, therefore, costly.[149] For example, the provisions relating to space and ocean income and international communications income distinguish between U.S. and foreign persons, while the rules relating to transportation income do not.[150] Both space and ocean and international communications income are classified as a one hundred percent foreign source in the hands of foreign persons.[151] For U.S. persons, however, space and ocean income is assigned a one hundred percent U.S. source, while international communications income is treated as only a fifty percent U.S. source.[152] Furthermore, while both space and transportation income fall into the separate shipping income basket of I.R.C. § 904(d)(1)(D)[153] for purposes of the foreign tax credit limitation, international communications income does not. Although both U.S. and foreign persons will be interested in the proper characterization of such income, the classification may not always be readily discernable.[154]

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[148] Kelly, *supra* note 132, at 738.

[149] *Id.*

[150] Compare I.R.C. §§ 863(d), (e) with I.R.C. § 863(c).

[151] Kelly, *supra* note 132, at 737.

[152] *Id.*

[153] *See also* I.R.C. § 954(f) (providing that the term foreign base company shipping income "includes any income derived from a space or ocean activity (as defined in I.R.C. § 863(d)(2))"). Kelly, *supra* note 132, at 737.

[154] Kelly, *supra* note 132, at 738.

1. X is a foreign corporation that owns and leases communications satellites to A, a foreign corporation which uses the satellites to relay television signals from the U.S. to Europe. Presumably X's income is space and ocean income, while A's income is international communications income. Both types of income would, under the existing rules, be assigned a foreign source and would not be taxable by the U.S.

2. Y, a foreign corporation, manufactures and sells satellites in the United States. The purchase price of a satellite also includes Y's agreement to launch the satellite as well as to provide maintenance services during the satellite's useful life. The maintenance services are conducted in part from Y's computer control room in the United States. Is the portion of the purchase price attributable to launch services space and ocean income (foreign source) or U.S.-source manufacturing or personal services income? What about the maintenance services? Would all or a portion of such launch or maintenance services be deemed to be performed in space, and thus sourced as space and ocean income?

3. Z, a United States corporation, owns and operates a "space shuttle" style spacecraft which it uses to retrieve ailing satellites from orbit. Z launches a shuttle in the United States to retrieve a satellite for A, a European customer. The shuttle lands in Europe. Is the income derived from such services space and ocean income (100 percent U.S. source) or transportation income (50 percent U.S. source)?

4. V, a foreign corporation, provides research and development services in the upper stratosphere using a variety of craft including high altitude balloons and rocket-powered aircraft. The aircraft are released or take off from locations in the United States. Is any of the income attributable to such research and development considered space and ocean income—or United States source personal service income? Where does space begin?

Id. Note that proposed Treasury regulations under I.R.C. section 863 have been published. See Prop. Treas. Reg. § 1.863-8, 66 Fed. Reg. 3903 (2001).

VI. FACTORS IMPACTING U.S. JURISDICTION TO TAX SPACE INCOME

International legalities, if not the entire *corpus juris spatialis*, could have a potentially deleterious impact upon the ability of the U.S. to effectively tax space income. To compound the situation, the domestic space tax laws are not quite clear. It is not as if there is a rock solid body of codified and judicially-tested U.S. space tax laws upon which an international template may be superimposed. U.S. space tax laws are largely undefined, "untried" and unembellished by final regulations.[155] Other than *Smith v. United States*,[156] there is no mention of the major space tax rule,[157] I.R.C § 863(d), in any reported federal case.[158] Four Technical Advice Memoranda and one Private Letter Ruling refer to "space and ocean activities," but the subject matter of each relates to ocean income.[159] The Congressional Joint Committee on Taxation's explanatory Bluebook provides a few general examples of "space activities," but gives no definition of "space."[160] The U.S. provides little official guidance on space taxation, other than the few specific code sections. This is expected due to the inchoate status of the space industry. Notwithstanding the above, prospective space tax treatment interpretation becomes "interesting" when various parts of the *corpus juris spatialis* are blended in.

A. "Equality" in Article One of the 1967 Space Treaty

"Equality" is a notion that the U.S. should not take lightly. Unfortunately, there is no definition for the term, nor has there been much debate over its meaning. Discussion of Article I has centered around more pragmatic issues, such as the relationship between developing and developed countries, the nature of international cooperation between States in outer space, the degree of cooperation required between States with respect to outer space, and enforceability.[161] According to treaty history, there is general agreement that the greater part of the 1967 Space Treaty derives from the U.N. General Assembly Resolution 1962 (XVIII) of December 13, 1963[162] and the Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space.[163] The Declaration of Principles formed the basis of most of the discussions concerning the international law of outer space,[164] and particularly that "[o]uter space and celestial bodies are free for exploration and use by all States on a basis of equality and in accordance with international law."[165] However, knowing the source of the term "equality" still fails to render the term meaningful.

The negotiations surrounding Resolution 1962 do provide some insight into the original intent of the language. Discussing the free access clause, the U.S. initially

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[155] *See supra* note 155.

[156] Smith v. United States, 507 U.S. 197 (1992) (Stevens, J., dissenting).

[157] An additional tax provision specifically referring to space (here "spacecraft") is I.R.C. § 168(g)(4)(L), dealing with exceptions to the alternative depreciation system for certain property.

[158] *See* William Lee Andrews III, *Space Taxation, Targeted Tax Relief for Space Commerce - Part 3: the Good, the Bad, the Ugly, and the Beyond*, 11 J. INT'L TAX'N 34, 36 (2000).

[159] Tech. Adv. Mem. 93-27-001 (July 9, 1993), Tech. Adv. Mem. 93-27-003 (July 9, 1993), Tech. Adv. Mem. 93-27-004 (July 9, 1993), Tech. Adv. Mem. 93-48-001 (Dec. 3, 1993), Priv. Ltr. Rul.96-10-015 (Mar. 8, 1996).

[160] STAFF OF JOINT COMM. ON TAX'N, 99TH CONG., 2d Sess., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 934-35 (Comm. Print 1987).

[161] N. Jasentuliyana, *Article I of the Outer Space Treaty Revisited*, 17 J. SPACE L. 129, 129 (1989).

[162] Hereinafter referred to as "Resolution 1962."

[163] Eric Husby, *Sovereignty and Property Rights in Outer Space*, 3 J. INT'L L. & PRAC. 359, 363 (1994). Hereinafter referred to as "Declaration of Principles."

[164] *Id.*

[165] G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. No. 15, at 15, U.N. Doc. A/5515 (1963).

argued that the phrases "on the basis of equality" and "without discrimination of any kind" were redundant. However, America was persuaded that inclusion of both phrases would emphasize the rights of all countries to freely enter and use outer space.[166] Ultimately, former U.S. Ambassador Arthur J. Goldberg endorsed the apparent redundancy on the basis that it made clear the intent of the treaty that outer space and celestial bodies are and will be available not only to the big powers or the first arrivals, but to all countries.[167]

This concept of a level playing field is currently being employed by the U.S. as a shield. The U.S. has endorsed the "free and fair market"[168] principle to protect itself against unfair competition from non-market economies. The Treasury Department has stressed "[c]ompetitivenes [through which] U.S. firms [are able] to compete successfully with foreign firms in both domestic and international markets."[169] This is one of five goals for international tax policy. [170] The Department also states that "the U.S. tax system should not place either foreign or domestic businesses at a disadvantage in the U.S. market."[171]

One recent international expression of equality is the February 12, 1998 U.N. Resolution which advocates "promoting the exploration and use of outer space for peaceful purposes and in continuing efforts to extend to all States the benefits derived there from, and also . . . taking into account the concerns of all countries, particularly those of developing countries."[172] It seems that "equality," in the international space context, should be described as "equality of opportunity." If true equality of opportunity is to exist in space, that equality must flow to space commerce and the taxation, thereon. The easiest way to accomplish this is to eliminate income taxation for space commerce. France, for example, has a territorial system for corporate taxation that does not tax a French corporation's income generated from a foreign source. If income from space activity is deemed a foreign source, French corporate space income would theoretically be exempt from taxation. However, residence-based tax countries theoretically would assess income taxes on all of their nationals' income, including income generate from space activity. And the U.S.'s lack of tax equality is further exacerbated by a high corporate tax rate when compared to other nations, a comparison highlighted in Hugh C. Ault's work on comparative taxation.[173]

Against the back-drop of an express international policy of equality heartily endorsed by the U.S., U.S. space tax policy results in an inequality of opportunity for U.S. taxpayers (vis-à-vis foreign taxpayers). Consequently, U.S. tax-paying companies vie for opportunities on unequal footing with other space faring countries who offer higher net returns to investors because they are not required to pay

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[166] Barry J. Hurewitz, *Non-Proliferation and Free Access to Outer Space: The Dual-Use Dilemma of the Outer Space Treaty and the Missile Technology Control Regime*, 9 HIGH TECH. L.J. 211, 215 (1994) (discussing Paul G. Dembling & Daniel M. Arons, *The Evolution of the Outer Space Treaty*, 33 J. AIR L. & COM. 419, 430 (1967)).

[167] *Id.* (discussing Arthur J. Goldberg, U.S. representative to the U.N. General Assembly, Address Before the U.N. Gen. Assembly (Dec. 17, 1966), *in* 56 DEP'T ST. BULL., 78, 81 (1967)).

[168] Fact Sheet from the White House Office of the Press Secretary, Commercial Space Launch Policy, (Sept. 5, 1990) (on file with the author).

[169] U.S. Department of the Treasury, International Tax Reform, an Interim Report 1 (1993).

[170] Fact Sheet from the White House Office of the Press Secretary, Commercial Space Launch Policy, (Sept. 5, 1990) (on file with the author).

[171] *Id.*

[172] Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, G.A. Res. Agenda Item 85, U.N. GAOR, 52d Sess., A/RES/52/56(1998), *available at* gopher://gopher.un.org/00/ga/recs/52/RES52-56.EN.

[173] HUGH C. AULT, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 352-53 (1997).

corporate taxes. The U.S. espouses notions of equality, yet in its tax policy, it manifests what is tantamount to inequality in the world market.

B. The Issue of Sovereignty and Its Effect on the Taxing Jurisdiction

Under current space law, there is no possibility of national sovereignty in outer space.[174] In addition, according to the 1979 Moon Treaty, all lands outside Earth and within our solar system are deemed to be the "common heritage of all mankind."[175] It is assumed herein that the provisions in the 1979 Moon Treaty regarding sovereignty and ownership of outer space surfaces are effective because these provisions have never been challenged. However, the provisions have the effect of nullifying the possibility of colonialism in outer space.[176] Without new laws, pioneers who desire to settle on the moon, or any other celestial body, will be subject to the requirements of the existing *corpus juris spatialis* and the uncertainty of ownership. Lacking the assurance of possessory ownership or leasing interests, settlers will be discouraged from incurring monetary expense and spending inordinate amounts of time transforming a foreign, potentially hostile environment into a home when earth-bound governments could determine that the settlement would better "benefit all mankind" through some other use.[177] The settlers could be displaced in favor of a new venture because they have no legal control over the land upon which their settlement is built.

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[174] Twibell, *supra* note 107, at 266-79 (citations omitted).

> The no-sovereignty provision is Article II of the Space Treaty. It explicitly states that "outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." This provision, along with the other less- or non-restraining concepts (regarding space industrial development), has replicated itself throughout international law. Most international multilateral and bilateral agreements contain references to the 1967 Space Treaty, and, invariably, the no-sovereignty provision contained within the Treaty has spread, *infecting* all international law and domestic law following it. Even if a treaty or law does not contain reference to the 1967 Space Treaty or no-sovereignty provision, it is still guided by it because the 1967 Space Treaty has become part of the customary international law.

Id.

[175] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of December, 1979, July 11, 1984, 1363 U.N.T.S. 22, art. 1, ¶ 1, art. 11, ¶ 1 [hereinafter 1979 Moon Treaty]. The Common Heritage of Mankind (hereinafter CHM) principle is present in the 1979 Moon Treaty and in the Convention on the Law of the Sea, both of which are agreements covering a commons area. In each case, the Group of 77 and other developing nations lobbied strongly for the CHM principle. Under the CHM principles, mankind as a whole acts as steward and beneficiary of CHM areas, environmentalism acquires the force of law, and property rights analogous to ownership are vested in humanity as a collective. *See generally* Harminderpal Singh Rana, *The "Common Heritage of Mankind" & The Final Frontier: A Revaluation of Values Constituting the International Legal Regime for Outer Space Activities*, 26 RUTGERS L.J. 225, 228-30 (1994); *see also* Richard Berkley, *Space Law Versus Space Utilization: The Inhibition of Private Industry in Outer Space*, 15 WIS. INT'L L.J. 421 (1997).

On this premise, there is no possibility for ownership of any land on the moon or other celestial body. It is important to note that of the States with space-faring capabilities, only France and India are signatories to and only Australia has ratified the 1979 Moon Treaty. United Nations Treaties and Principles on Outer Space, U.N. Doc. A/AC 105/572, at 60-71 (1994); Brian M. Hoffstadt, *Moving the Heavens: Lunar Mining and the "Common Heritage of Mankind" in the Moon Treaty*, 42 UCLA L. Rev. 575, 581 n.30 (1994).

[176] United Nations Treaties and Principles on Outer Space, U.N. Doc. A/AC 105/572, at 60-71 (1994); Hoffstadt, *supra* note 176, at n.30.

[177] *See* 1979 Moon Treaty, *supra* note 176, art. 11, ¶ 5; Heidi Keefe, *Making the Final Frontier Feasible: a Critical Look at the Current Body of Outer Space Law*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 345, 366 (1995).

And regarding U.S. taxation jurisdiction, it appears that sovereignty has no affect on the Internal Revenue Service's ability to tax. As noted above, by the various mentioned Internal Revenue Code sections and through the Sixteenth Amendment[178] of the U.S. Constitution, the federal government is legally empowered to tax income from "whatever source."[179] There is no distinction between domestic and foreign, or sovereign and non-sovereign. Given the United States' colonial experience with remote taxation by England, the concept of taxing income from space commerce might have been repugnant to the drafters, had it occurred to them.

Space profits may be construed to be analogous to income generated in Antarctica or from the high seas. These areas are also considered "non-sovereign."[180] However, they are distinguishable from outer space. Economic activity on the high seas, and in an even more attenuated manner, in Antarctica, typically bears at least some geographical nexus with the home base of the profit producing entity, if only for supplies and fuel. Emergencies can be handled relatively quickly. The relationship between economic activity and its home base is similar to the "fruit of the tree doctrine"[181] in which the assignor of a gratuitous assignment of income is liable for taxes on the assigned income, i.e., the fruit remains with the tree. On the high seas and even in Antarctica, the fruit (outpost or ship) is never severed from the tree (home base, State of incorporation, etc.). There exists a practical link, whether it is communications, supplies, or the like. In space, the link is not so practical. Despite the wonders of space age communications and the speed of space travel, the outpost's umbilical cord to its home base will be stretched so thin that it will effectively be cut—certainly not to any lesser extent than that of our ancestral American colonists with Great Britain. Yet even the American colonist had property rights. But in outer space, unless the *corpus juris spatialis* changes, future colonists will never have traditional property rights and much like our ancestral American colonists, will be faced with taxation without representation.

The statute is clear: I.R.C. § 61 allows taxation from whatever source. But forcing that law on a truly extra-terrestrial, non-sovereign may prove to be untenable or confusing to the venturesome, who are otherwise expecting encouragement.[182]

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[178] *See supra* notes 102, 115.

[179] Definition of gross income:

> (a) General definition - Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, fringe benefits, and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

I.R.C. § 61. It also has become customary to refer to the U.S. taxing jurisdiction as applicable to all "worldwide income." *Id.* Boris I. Bittker, a well known and prolific writer on international taxation, consistently uses this terminology. BITTKER & LOKKEN, *supra* note 119, at 65-3, 65-35, 65-50.

[180] *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410 [hereinafter 1967 Space Treaty].

[181] *See* Lucas v. Earl, 281 U.S. 111 (1930).

[182] Note, however, that

C. Smith v. United States[183] - Is Outer Space "Foreign" for U.S. Income Tax Purposes?

In *Smith v. United States*, Antarctica was deemed to be a "foreign country" for purposes of the Federal Tort Claims Act (FTCA).[184]

> Though the FTCA offers no definition of "country," the commonsense meaning of the term undermines petitioner's attempt to equate it with "sovereign state." The first dictionary definition of "country" is simply "[a] region or tract of land."[185] To be sure, this is not the only possible interpretation of the term, and it is therefore appropriate to examine other parts of the statute before making a final determination. But the ordinary meaning of the language itself, we think, includes Antarctica, even though it has no recognized government . . . If Antarctica were not a "foreign country," and for that reason included within the FTCA's coverage, § 1346(b) would instruct courts to look to the law of a place that has no law in order to determine the liability of the United States—surely a bizarre result. Of course, if it were quite clear from the balance of the statute that governmental liability was intended for torts committed in Antarctica, then the failure of § 1346(b) to specify any governing law might be treated as a

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[b]oth English common law and American law have consistently recognized that a country's right to exercise sovereignty over its own nationals supports its exercise of civil jurisdiction in sovereignless places. Lauren S.-B. Bornemann, *This Is Ground Control to Major Tom . . . Your Wife Would Like to Sue But There's Nothing We Can Do . . . the Unlikelihood That the FTCA Waives Sovereign Immunity for Torts Committed by United States Employees in Outer Space: a Call for Preemptive Legislation*, 63 J. Air L. & Com. 517, 537 (1998) (citations omitted). *See* United States v. Spelar, 338 U.S. 217, 212-13 [*sic*] (1949) (citing Mostyn v. Fabrigas, 98 Eng. Rep. 1021, 1032 (K.B. 1774)); Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (stating, "If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress."); American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1909) (containing Justice Holmes's statement that, "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."); Dutton v. Howell, 1 Eng. Rep. 17, 21 (H.L. 1693). *See also* Old Dominion Steamship Co. v. Gilmore, 207 U.S. 398, 403 (1907) (holding that Delaware could apply its wrongful death statute to a claim for death on the high seas because both parties were Delaware corporations, and stating that "the bare fact of the parties being outside the territory in a place belonging to no other sovereign [does] not limit the authority of the State"). The United States also freely exercises criminal jurisdiction over Americans who commit crimes outside U.S. territory, provided it faces no threat of entanglement in foreign legal systems. *See, e.g.*, United States v. Flores, 289 U.S. 137, 155 (1933) (extending criminal jurisdiction under admiralty and maritime law to a murder committed upon an American vessel that was attached to shore by cables at a port 250 miles inland from the mouth of the Congo River).

BITTKER & LOKKEN, *supra* note119.

[183] Smith v. United States, 507 U.S. 197 (1992) (Stevens, J., dissenting).

[184] *Id.* at 201-02; 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (Supp. II 1988).

[185] WEBSTER'S NEW INTERNATIONAL DICTIONARY, 609 (2d ed. 1945).

> statutory gap that the courts could fill by decisional law. But coupled with what seems to us the most natural interpretation of the foreign-country exception, this portion of § 1346(b) reinforces the conclusion that Antarctica is excluded from the coverage of the FTCA.[186]

This analysis would render sovereign-less outer space, a "foreign country" under the FTCA. Though a number of commentators[187] join with Justice Stevens in his strong dissent, to date, this case stands as settled law. Therefore, the door is open to presuming that in other judicial contexts, outer space might be deemed "foreign," and hence a foreign source with respect to space income. If this is true, a conflict exists with I.R.C. § 863(d) which declares: "space activities . . . derived by a United States person, shall be sourced in the United States."[188] This discord is, at best, unnerving to the tax planner.

D. National Jurisdiction

Jurisdiction is essential to the application of U.S. law to space activities. International law recognizes a country's jurisdiction over its nationals, lands, waters, and airspace, as well as registered ships and aircrafts. The fact that international law would allow an extension of U.S. jurisdiction in a specific instance does not indicate that such an extension has occurred.[189] Without a specific statement of congressional intent, U.S. courts have been hesitant to impart extraterrestrial reach to certain domestic laws.[190] Indeed, the Supreme Court has shown that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[191]

Arguendo, a case could be made that because TRA 1986 was devoid of detail (not even including a definition of "space") upon enactment, Congress did not assert jurisdiction. If this reasoning holds firm, the viability of the U.S. sourcing in I.R.C. § 863(d) may be brought into question. The confusion here is why such a potentially

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[186] Smith, *supra* note 184, at 201-02.

[187] *E.g.*,

> In addition to its misplaced application of the presumption against extraterritoriality, the Smith Court contorted the "foreign country" exception to justify excluding claims arising in Antarctica (and presumably outer space) from FTCA coverage. In narrowing the scope of the FTCA's waiver of immunity and broadening the scope of that exception to include Antarctica as a foreign country, the Court completely controverted the only legislative history available that directly addresses the exception, as well as more than four decades of judicial interpretation of the Act. It also rejected the preferred interpretation of the term "foreign country" as stated in Spelar, the only Supreme Court case to address the issue. That Court stated, "[W]e know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation."

Bornemann, *supra* note 183, at 537 (citations omitted).

[188] I.R.C. § 863(d)(1)(A).

[189] U.S. Congress, Office of Technology Assessment, *Space Stations and the Law: Selected Legal Issues - Background Paper* (OTA-BP-ISC-41) 26, 29 (Washington, DC: U.S. Government Printing Office, August 1986).

[190] *Id.* at 26. *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); United States v. Cordova, 89 F. Supp. 298 (E.D. N.Y. 1950).

[191] Smith, *supra* note 184, at 204 (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949))).

important area of the economy has received very little attention, especially with the plethora of rules emanating from the Taxpayer Relief Act of 1997.[192]

E. The Charming Betsy Canon

The "Charming Betsy canon," of construction ("the canon") is a general interpretive tool used when dealing with international law. In an 1804 decision, *Murray v. The Schooner Charming Betsy*, the Supreme Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[193] This canon of construction has been a significant element in the legal regime defining the U.S. relationship with international law. It is employed regularly by the Supreme Court and lower federal courts, and is "enshrined in the black-letter-law provisions" of the influential Restatement (Third) of the Foreign Relations Law of the United States.[194]

By its terms, the canon operates only "wherever possible," implying that irreconcilable conflicts between statutes and international law are to be resolved according to some other formula.[195] However, this principle, under which U.S. courts are directed to interpret statutes consistently with international law, has come to include both customary law and treaties in its reference to "international law."[196] "The relevance of a treaty in the interpretation of a statute is not necessarily limited to those cases in which the statute implements the treaty."[197] Even when such a statute is before the court, as in *Cardoza-Fonseca*,[198] "there may be a customary understanding of the conventional norm that channels the interpretation of text."[199]

The canon could place the authority of a domestic U.S. tax law in jeopardy when it conflicts with the notion of equality in the 1967 Space Treaty, as discussed above. Equally significant are the tax consequences of the characterization of U.S. source income derived from space. If, under *Smith*, "space" is deemed foreign and the customary laws of nations, likewise, deem space as foreign, U.S. tax law must resolve the conflict.

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[192] Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.).

[193] 6 U.S. (2 Cranch) 64, 118 (1804); Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1998).

[194] "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Restatement (Third) of The Foreign Relations Law of the United States § 114 (1987). Bradley, *supra* note 197, at 482. As venerable as the canon is, the appropriateness of its application is not without debate. However, for purposes herein, there seems to be unquestionable relevance. One modern commentator concludes that "neither the legislative intent conception nor the internationalist conception provides an adequate justification for the use of the canon today . . . The separation of powers conception [favored by the instant commentator] views the canon as a means for the courts to shift certain types of decision making to the political branches" thereby reducing friction between them and the judiciary. *Id.* at 485. Another dwells on theoretical conflicts regarding the canon's nexus with dualism and monism. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1127-34 (1990).

[195] Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1129 (1990).

[196] *Id.* at 1161, n.260 ("The Restatement (Third) affirms this conclusion and explicitly combines customary and conventional international law into a unified statement of Charming Betsy and its progeny.").

[197] *Id.*

[198] Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987) (involving a domestic implementing statute before the court that was interpreted in conformance with the 1967 United Nations Protocol Relating to the Status of Refugees).

[199] *Id.*

F. Uncertainties in Current Space Law

The uncertainty in the application and consequences of the current body of space law renders it unattractive. Depending on the effect of the various factors discussed: equality, non-sovereignty, a canon of construction, and national jurisdiction, the interpreted law could result in a favorable or harmful outcome. The best solution to resolve these uncertainties is to relieve space commerce from the tax burden in preparation for the development of space industry in the next millennium. This is the "beyond."

VII. THE BEYOND AND THE INTERNATIONAL SPACE COMPANY

Tax relief on space commerce would be a move into the future and a path for a new frontier. What is called for is essentially a tax holiday for new space related activities (products made and services performed in space), efficient space launches, and space asset capital gains. An important feature would be a sunset provision to phase out the statute and insure against lingering, unanticipated, ill-effects. U.S. Congressman Dana Rohrabacher has been sponsoring a draft bill with similar features.[200] For other countries to remain competitive, their leaders would need to make similar attempts.

An International Space Company, or "ISC", would be the anticipated natural result of this and similar acts. The ultimate motive for such an entity would be to institutionalize the salutary features of the new law, as well as to further stimulate space entrepreneurs. The ISC would be subject to no income tax liability, so long as the preponderance of its gross revenues stemmed from actual outer space activities, that is, enterprise "occurring 90 to 110 kilometers above the Earth's surface."[201] The reason for this formulation is that no Earth-bound company is yet capable of operating exclusively in space, so practical reality necessitates allowance for some Earth-based turnover (sales). If an ISC generates 51% of its business far enough above the Earth's surface, its non-space income is tax free.

As with the genesis and development of the *corpus juris spatialis*, multi-lateral cooperation through, for example, the U.N., might enable adopting a global model or standard for the ISC. A seminal opportunity, therefore, is created for the formation of an offshore entity to take the lead in forming, servicing, and managing ISCs. Becoming the expert in ISCs would allow bridges to be built to the onshore jurisdictions, since presumably the latter group would have the insight to promote this novel commercial structure.

Elaborate transportation systems, steel mills or high rise office complexes are not a *sine qua non* to "make hay" in the future. A well-educated, stable, and moral populace, with nimble, effective leadership and an adequate communications system, will be sufficient.[202] But "nimble" is the key. While the OECD types of the world remain overcome with their bureaucratic struggles to police the world, not to mention themselves, the OFCs could aggressively target space related support functions. Preponderantly computer-based, these support functions not only could offer corporate and fiscal incentives, but substantive human resource packages as well. In this regard, a joint Caribbean specialized training and education initiative might be in order.

Furthermore, the ability to legislate customized statutes expeditiously can play a key role in elevating the OFCs. Various jurisdictions, such as Bermuda with their "Electronic Transaction Act 1999" and "Segregated Accounts Companies Act 2000,"

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[200] Zero Gravity, Zero Tax Act of 2001, H.R. 2504, 107th Cong. (2001).

[201] *See supra* note 2.

[202] Today, for example, there is sophisticated Web hosting and consumer call centers located in the Caribbean.

have already gained international recognition for such cutting-edge efforts. Tailor-making space company legislation would attract attention from companies already interested in OFCs.[203]

On a grander scale, because of their locales' climactic conditions and proximity to the equator, which is the optimum departure point to space, many of the OFCs could be naturally advantaged for space technology projects, if not launches. However, from the fiscal standpoint, what will catapult ISC "liftoff" is a global or even regional move toward territoriality taxation, as discussed in relation to Dr. Mitchell above. Undoubtedly, such action would mitigate or eliminate anti-deferral[204] concerns that now plague multinational tax planning.

It is apparent that if the OFCs seize the opportunity and apply themselves, the International Space Company might be their "mighty stone."

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[203] "As Robert Perlman, Intel's vice president of taxes, stated before the Senate Finance Committee on March 11, 1999 (much to the consternation of Senator Daniel Patrick Moynihan, D-N.Y.) . . . Intel wishes it had incorporated in the Cayman Islands, rather than in the United States." Hermann B. Bouma, *International Tax Attorney Urges Proper Focus on Subpart F*, 1999 TNT 89-164 (May 7, 1999).

[204] What has been called the "deferral privilege" is one of the fundamental features of certain systems for taxing "international income." Robert J. Peroni et al., *Getting Serious about Curtailing Deferral of U.S. Tax on Foreign Source Income*, 52 SMU L. REV. 455, 457 (1999) (citations omitted). Under that privilege, "persons" or other entities that conduct business or investment activity abroad through a foreign corporation ordinarily do not pay tax on the foreign source earnings of the foreign corporation until those earnings are repatriated or the person or entity sells the foreign corporation's shares. *Id.*