EXCERPT FROM

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more formal types of administrative guidance—in particular, Treasury regulations—and identifies the limited circumstances where Treasury might use regulatory guidance as a means to affect the application of existing tax treaties in order to keep pace with ever-changing developments in the global economy.

II. The Allure of Ambulatory Administrative Guidance

A. The Tax Treaty Process

When a resident of one country derives income from another country, both the country of residence and the country in which the income arises (the source country) may tax that income.[23] The principal purpose of tax treaties is to mitigate this potential for double taxation and thereby remove an important potential obstacle to global commerce.[24] A secondary purpose of tax treaties is to facilitate information sharing between countries' tax authorities, thereby strengthening the enforcement of each country's tax laws and preventing tax evasion.[25]

Tax treaties mitigate the potential for double taxation by delineating the circumstances under which the residence and source countries may impose tax on various types of income. For example, tax treaties generally prevent the source country from taxing the business income of a resident of the other country unless the business income is attributable to a permanent establishment in the source country.[26] With respect to passive investment income, such as dividends and interest, tax treaties generally cap the maximum tax rate that the source country can impose.[27] Tax treaties also contain numerous

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23. ALI, FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION II: PROPOSALS OF THE AMERICAN LAW INSTITUTE ON UNITED STATES INCOME TAX TREATIES 1–2 (1992) [hereinafter ALI TAX TREATY PROJECT].

24. *Id.* at 5.

25. *See* OECD MODEL COMMENTARY, *supra* note 4, commentary on art. 1, para. 7 ("It is also a purpose of tax conventions to prevent tax avoidance and evasion."). This twofold purpose of tax treaties is highlighted by the official titles of many income tax treaties. For example, the suggested title of treaties based on the 2006 U.S. Model Treaty is "Convention Between the Government of the United States of America and the Government of ___ for the *Avoidance of Double Taxation* and the *Prevention of Fiscal Evasion* with Respect to Taxes on Income." *See* 2006 U.S. MODEL TREATY, *supra* note 5, intro. (emphasis added).

26. *See, e.g.*, OECD MODEL TREATY, *supra* note 4, art. 7(1) (providing the permanent-establishment threshold to determine whether business income may be taxed in its country of origin).

27. *See, e.g.*, *id.* art. 10(2) (capping the source-country tax rate at the "reasonable" maximum figure of either 5% or 15%, depending on various other circumstances); *id.* art. 11(2) (limiting the maximum source-country tax rate on interest to 10%); *id.* art. 12 (forbidding the source country from taxing royalties as income). Unlike the 10% source-country tax allowed on interest income by the OECD Model Treaty, the U.S. Model Treaty does not allow any source-country tax on interest income. *See* 2006 U.S. MODEL TREATY, *supra* note 5, art. 11 (allowing only the state of residence to tax most forms of interest income).

other provisions that clarify these general principles and address other types of income.[28]

As noted above, bilateral income tax treaties are not negotiated from scratch. Instead, they are based on various model tax treaties, most notably the OECD Model Treaty. Indeed, more than 1,500 bilateral income tax treaties worldwide, including more than sixty U.S. tax treaties, are largely based on the OECD Model Treaty.[29] While the U.S. Treasury Department publishes a U.S. model treaty, that model itself is based on the OECD Model Treaty, with some departures intended to reflect the United States' preferred tax policy regarding certain issues.[30] Similarly, the United Nations has published a model income tax treaty that is based on the general structure of the OECD Model Treaty, although the U.N. Model Treaty generally plays a less important role in U.S. treaty negotiations.[31]

The U.S. tax treaty network does not remain static, but instead is constantly evolving. The United States frequently renegotiates its existing treaties to reflect ever-changing developments in the global economy[32] and seeks to enter into new treaties with an expanding list of countries. For

28. *See, e.g.*, OECD MODEL TREATY, *supra* note 4, art. 15 (dealing with all income derived from employment); *id.* art. 16 (addressing directors fees); *id.* art. 18 (limiting the source-country taxation of pensions); *id.* art. 20 (limiting the taxation of scholarships); *id.* art. 20 (providing a residual catchall provision for all forms of income not specifically addressed in the other articles).

29. *See* OECD, About Tax Treaties, http://www.oecd.org/about/0,3347,en_2649_33747_1_1_1_1_37427,00.html ("Most bilateral tax treaties follow both the principles and the detailed provisions of the OECD Model. There are close to 350 treaties between OECD Member countries and over 1500 world-wide which are based on the Model, and it has had considerable influence on the bilateral treaties between non-member countries."); *see also* OECD MODEL TREATY, *supra* note 4, intro., paras. 12–14 (exploring the history and influence of the OECD Model Treaty over time); U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, intro., para. 9, U.N. Doc. ST/ESA/102, U.N. Sales No. E.80.XVI.3 (1980) [hereinafter U.N. MODEL TREATY] (explaining that the U.N. drafters had decided to use the OECD Model Treaty as their main reference text for their own Model Treaty). While almost all of these treaties represent bilateral agreements between two countries, a few countries—most notably the Nordic countries—are parties to a multilateral income tax treaty. *See* OECD MODEL TREATY, *supra* note 4, intro., para. 38 (describing the Nordic Convention on Income and Capital).

30. *See supra* note 5 and accompanying text.

31. *See* U.N. MODEL TREATY, *supra* note 29, intro., para. 9 (describing how the U.N. drafters incorporated various provisions of the OECD Model Treaty); *see also* OECD MODEL TREATY, *supra* note 4, intro., para. 14 (noting that the OECD Model Treaty "has been used as the basis for the original drafting and the subsequent revision of the United Nations Model Double Taxation Convention"). The U.N. Model, which is intended to reflect the tax-policy concerns of some less economically developed countries, plays only a limited role in U.S. tax treaty negotiations, in part because the OECD Model Treaty and OECD Commentary thereon were amended in 1997 to include the positions of a number of less economically developed non-OECD countries. *See id.* (discussing the addition of the positions of non-OECD countries).

32. The most notable example of this constant evolution is the U.S. income tax treaty with Canada, the United States' largest trading partner, which has been amended five times in the past twenty-five years. For the most recent protocol, see Protocol Amending the Convention with Respect to Taxes on Income and on Capital, U.S.–Can., Sept. 21, 2007, S. TREATY DOC. NO. 110-15 (2008).

example, in the past five years alone, the United States has renegotiated or signed new treaties with more than a dozen countries.[33]

Although each U.S. tax treaty in force generally is based on a model treaty, each treaty must be negotiated separately in order to address issues that arise from the specific interaction of the two countries' tax laws, to address particular tax policies that might be important to one of the countries, and to reflect general tax treaty policy developments since the publication of the model.[34] As a result, treaty negotiations involve a give-and-take between the two countries, with the final text sometimes reflecting a compromise rather than the model language.[35] The U.S. Treasury Department represents the United States during these tax treaty negotiations.[36]

Depending on a variety of factors, including the complexity of issues arising during negotiation and the level of each country's enthusiasm for completing the treaty, the treaty-making process can be relatively quick or can be very lengthy. Among the more rapid negotiations, the U.S.–Slovenia tax treaty was signed seven months after negotiations began.[37] In contrast, the current efforts to renegotiate the U.S.–Hungary treaty began in 2001 and have not yet been completed,[38] despite the high priority of this negotiation from the United States' perspective.[39] As an extreme example, the United States and Brazil have engaged periodically in tax treaty negotiations since 1947 but are still not close to agreement due to differences between the two countries on certain fundamental issues.[40]

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33. *See* U.S. Dep't of the Treasury, Tax Treaty Documents, http://www.ustreas.gov/offices/tax-policy/treaties.shtml (last updated Jan. 14, 2009) (providing a list and copies of current U.S. tax treaties and protocols).

34. *See* ALI TAX TREATY PROJECT, *supra* note 23, at 3–5 (describing how the United States will balance its own interests against the interests of the other country during treaty negotiations).

35. *Id.*

36. *See id.* at 16–22 (describing the process of treaty negotiation, consent, and ratification).

37. *See* Press Release, U.S. Dep't of the Treasury, Slovenia, United States to Begin Income Tax Treaty Negotiations (Oct. 23, 1998), *available at* http://www.treas.gov/press/releases/rr2771.htm (announcing the November 30, 1998 commencement of negotiations); Press Release, U.S. Dep't of the Treasury, U.S.–Slovenia Sign Income Tax Treaty (June 21, 1999), *available at* http://www.treas.gov/press/releases/rr3213.htm (announcing the June 21, 1999 signing).

38. *See* Press Release, U.S. Dep't of the Treasury, U.S., Hungary Set to Negotiate New Income Tax Treaty (Jan. 19, 2001), *available at* http://www.treas.gov/press/releases/ls1137.htm (announcing the March 5, 2001 commencement of negotiations); *see also* Nadal, *supra* note 18 (mentioning the still ongoing negotiation process).

39. This delay apparently is due to Hungary's lack of enthusiasm for including a "limitation on benefits" provision in a revised treaty, as the current U.S.–Hungary treaty is one of the few remaining U.S. treaties without such a provision. *See* U.S. DEP'T OF THE TREASURY, REPORT TO CONGRESS ON EARNINGS STRIPPING, TRANSFER PRICING AND U.S. INCOME TAX TREATIES 82–88 (2007) (describing the extensive, aggressive use of the current treaty by Hungarian entities due to the absence of a limitation-on-benefits provision, and the Treasury's efforts to end this practice by adding a limitation provision to the new treaty).

40. *See* Nadal, *supra* note 18 (highlighting the problems in reaching a tax treaty agreement with Brazil).

After the Treasury Department concludes negotiations with the other country and the treaty text is signed, the treaty is forwarded by the President to the Senate.[41] In anticipation of the Senate approval process, the Treasury Department prepares a technical explanation of the proposed treaty, which usually is sent to the Senate Foreign Relations Committee prior to that Committee's hearings on the proposed treaty.[42] Although the other country's negotiators may be aware of the most recently published U.S. model technical explanation,[43] they generally are not consulted when the Treasury Department, after the treaty has been negotiated and signed, prepares that treaty's technical explanation.[44] While a copy of the particular treaty's technical explanation may be sent to representatives of the other treaty country after it is completed and sent to the Senate, the other country generally is not involved in the preparation of the technical explanation, and its formal approval of the technical explanation is not sought.[45]

As with nontax treaties, U.S. tax treaties require the advice and consent of the Senate pursuant to a two-thirds vote.[46] As part of the approval process, the Senate sometimes attaches reservations to its approval, in which case the other country's agreement to that reservation must be sought before instruments of ratification are exchanged.[47] After the Senate gives its consent, the treaty enters into force once the Executive Branch and the other country exchange instruments of ratification.[48] In the United States, tax treaties are treated as self-executing, and therefore they do not need separate domestic legislation to make them effective.[49]

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41. *See* ALI TAX TREATY PROJECT, *supra* note 23, at 15–16 (articulating the roles of the Executive and Legislative Branches in the process of creating tax treaties).

42. *See id.* at 18 (describing the use of technical explanations in the tax-treaty-making process).

43. The Model Technical Explanations are publicly available on the Treasury Department's Web site. Tax Treaty Documents, *supra* note 33.

44. *See* ALI TAX TREATY PROJECT, *supra* note 23, at 18 (noting that the creation of technical explanations is generally a unilateral process).

45. The principal exception to this unilateral approach involves recent treaty protocols with Canada, where the Treasury Department and Canadian tax authorities have agreed to a joint technical explanation. *See infra* note 179 and accompanying text.

46. U.S. CONST. art. II, § 2, cl. 2.

47. *See* ALI TAX TREATY PROJECT, *supra* note 23, at 19 (explaining the effect of the Senate attaching reservations). A Senate reservation might further delay, or sometimes derail, the treaty. For example, in 1999 the Senate attached a reservation to its approval of both the Italy and Slovenia tax treaties, objecting to certain antiabuse provisions in the treaty text. Philip R. West, *Antiabuse Rules and Policy: Coherence or Tower of Babel?*, 49 TAX NOTES INT'L 1161 (2008), *available at* 49 Tax Notes Int'l 1161 (Lexis). While Slovenia agreed to remove those provisions and the treaty is now in force, Italy did not, so the U.S.–Italy treaty signed in 1999 still has not entered into force. *See* IRS, Italy Tax Treaty Documents, http://irs.gov/businesses/international/article/0,,id=169601,00.html (last updated Apr. 30, 2008) (displaying the most recent tax treaty with Italy, which was ratified in 1984).

48. *See* ALI TAX TREATY PROJECT, *supra* note 23, at 21–22 (outlining the requirement of the exchange of instruments of ratification).

49. *See id.* at 22 (distinguishing the U.S. system, where treaties are self-executing, with systems in other countries); *see also* Medellín v. Texas, 128 S. Ct. 1346, 1393 (2008) (Breyer, J., dissenting) (listing self-executing treaties). Professor Van Alstine also notes that tax treaties contain self-

B. Technical Explanations and Other Guidance

As noted above, each new treaty's technical explanation generally is based on the Treasury Department's then-current model technical explanation,[50] at least to the extent that the relevant treaty language follows the model treaty text. The Treasury Department does not explicitly identify instances where a particular technical explanation differs from the model technical explanation or from other treaties' technical explanations, nor does it provide an explanation for such changes.[51] Instead, these differences usually are evident only by comparing the wording of a particular treaty's technical explanation with the wording of another treaty's technical explanation or the model.[52]

Numerous differences among various recent treaty-specific technical explanations and the 2006 Model Technical Explanation have been identified.[53] For example, in interpreting treaty language that addresses the relationship between the Internal Revenue Code (the Code) and the treaty at hand, the recent technical explanations published in connection with the new

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executing provisions. Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 923 (2004). Although he cites various tax treaty technical explanations, those cited references to self-execution do not refer to self-execution as generally understood; instead, they refer to a taxpayer's ability to claim certain benefits under the treaty without the need for advance approval from the Internal Revenue Service. Nonetheless, Professor Van Alstine's general assertion that tax treaties are self-executing is consistent with the long-understood view. Indeed, taxpayers have been claiming the benefits provided by tax treaties for decades without any explicit domestic implementing legislation, with the express knowledge of both Congress and the Treasury Department. *See* Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 591 n.62 (2007) (citing cases spanning from 1946 to 1989 where courts "directly enforce[d] treaties without even discussing whether they [were] 'self-executing'"). As a practical matter, taxpayers generally have no incentive to challenge tax treaties as non-self-executing because tax treaties generally provide benefits that otherwise would not be available under the Internal Revenue Code. *But see* Lidas, Inc. v. United States, 238 F.3d 1076, 1080 (9th Cir. 2001) (holding that, in the context of an effort to quash a summons issued pursuant to a tax treaty with no implementing legislation, taxpayers lacked standing to challenge the income tax treaty as non-self-executing).

50. *See* 2006 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 16. The 2006 Model Technical Explanation superseded the Model Technical Explanation accompanying the 1996 U.S. Model Treaty. NYSBA REPORT, *supra* note 20, at 2.

51. *See* NYSBA REPORT, *supra* note 20, at 2. The report notes:

> It is not possible to understand what is new [in the 2006 Model Treaty and Technical Explanation] except by a painful side-by-side comparison of the two model treaties and the respective technical explanations; or, in many cases, to understand why the changes were made. It is sometimes difficult, therefore, to put provisions of the 2006 Model in a meaningful context.

Id.

52. *Id.* For a detailed comparison of the text of the 1996 U.S. Model Treaty and the 2006 U.S. Model Treaty, see JOINT COMMITTEE ON TAXATION, U.S. CONG., COMPARISON OF THE UNITED STATES MODEL INCOME TAX CONVENTION OF SEPT. 20, 1996 WITH THE UNITED STATES MODEL INCOME TAX CONVENTION OF NOV. 15, 2006, 1 Tax Treaties (CCH) ¶ 215A (May 8, 2007), and MARTIN B. TITTLE & REUVEN S. AVI-YONAH, THE INTEGRATED 2006 UNITED STATES MODEL INCOME TAX TREATY (2008).

53. *See* NYSBA REPORT, *supra* note 20, at 4 (questioning how a tax treaty should be interpreted when language in the model technical explanation differs from the treaty-specific technical explanation without comment, and citing examples).

U.S.–Belgium treaty and the U.S.–Germany treaty protocol include language explicitly describing the application of the so-called "consistency rule" of tax treaties[54] in the context of calculating a foreign financial institution's business profits.[55] This explicit language does not appear in either the 2006 Model Technical Explanation or technical explanations of prior treaties.[56] As another example, the 2006 Model Technical Explanation explicitly states that guarantee and securities lending fees are covered by the residual "other income" article of the Model Treaty, although the technical explanations of many existing treaties do not explicitly address these fees.[57]

Because the Treasury Department does not provide official explanations for these and other differences among various treaties' technical explanations interpreting identical treaty language, it often is not clear why the Treasury Department made a particular change in the language of the technical explanation even though the underlying treaty text is the same. Possible explanations include a country-specific interpretation resulting from the negotiation of that particular treaty; an explicit clarification of the Treasury Department's already-existing (but not yet published) views regarding the interpretation of the treaty language; a change in the Treasury Department's views of the appropriate interpretation of the treaty language; or a mere stylistic change made by the Treasury Department personnel drafting the technical explanation.[58]

Modern developments in the global economy have placed increasing pressure on tax treaty interpretation. Not only has the amount of cross-border trade and investment affected by treaties increased significantly, but

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54. *See, e.g.*, U.S. DEP'T OF THE TREASURY, TECHNICAL EXPLANATION OF THE PROTOCOL SIGNED AT BERLIN ON JUNE 1, 2006 AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL AND TO CERTAIN OTHER TAXES SIGNED ON 29TH AUGUST 1989 art. I, para. 2 (2007), *available at* http://www.treas.gov/press/releases/reports/tegermany07.pdf (explaining the "consistency rule"—that "[a] taxpayer may not . . . choose among the provisions of the Code and the Convention in an inconsistent manner in order to minimize tax").

55. *See* Letter from Lawrence Uhlick, Inst. of Int'l Bankers, to Eric Solomon, Assistant Sec'y for Tax Policy (Oct. 1, 2007), *reprinted in* WORLDWIDE TAX DAILY, Oct. 5, 2007, 2007 WTD 194-18 (Lexis) (identifying and expressing concern with inconsistency between technical explanations in this context).

56. *See id.* Surprisingly, the technical explanation to the new U.S.–Iceland treaty, which was published July 10, 2008, does not include the full explanation of the consistency rule that appeared the year before in the Germany and Belgium technical explanations. U.S. DEP'T OF THE TREASURY, TECHNICAL EXPLANATION OF THE CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF ICELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME, 2 Tax Treaties (CCH) ¶ 4041, art. 7, para. 2, art. 10, para. 8 (July 10, 2008). However, a cross-reference in another part of the Iceland technical explanation implies that the same explanation was intended, leading to uncertainty as to whether the Iceland technical explanation is consistent with the Germany and Belgium technical explanations on this point. *Id.*

57. NYSBA REPORT, *supra* note 20, at 4.

58. *See id.* at 3–4 (listing sources of confusion from technical explanations of U.S. model treaties and specific treaties).

the character and sophistication of these transactions and the underlying structure of multinational corporate activities has become more complex. Moreover, multinational corporations and their tax advisors face increasing pressure to lower tax costs through aggressive tax planning—including treaty-based planning.[59] In addition, both U.S. tax laws affecting international transactions and the Treasury Department's preferred tax policy for dealing with these global developments evolve over time.

It is understandable, then, that the Treasury Department or IRS might want to issue various types of unilateral administrative guidance addressing the application of particular tax treaty text to ever-changing circumstances,[60] just as they periodically issue administrative guidance addressing the application of tax statutes. This evolving treaty guidance might take various forms, such as issuing a new model technical explanation reflecting a new interpretation, even when the underlying model treaty text has not changed; incorporating the new interpretation into a subsequent technical explanation accompanying a new proposed treaty that is sent to the Senate, even though the proposed treaty's text is the same as that of earlier treaties; issuing a revenue ruling, revenue procedure, or notice reflecting the new interpretation; or promulgating Treasury regulations that affect the treaty interpretation.[61]

This ever-changing administrative guidance raises significant interpretive questions regarding previously existing treaties. A recent report on the 2006 U.S. Model Treaty asked (but did not attempt to answer) several of these questions:

> Will changes in the [technical] explanations, and in the evolution of the meaning given to the same language in different treaties, be taken into account in the interpretation of prior treaties? . . . Or suppose the treaty specific technical explanation includes items not mentioned in the [Model] Technical Explanation. . . . Can these be relied on?[62]

While this excerpt asks whether a taxpayer interpreting a previously existing treaty can rely on a newer technical explanation, thereby implying that the newer explanation is favorable to the taxpayer, the newer technical explanation might provide an interpretation that is unfavorable to a taxpayer. Under such circumstances, the corresponding question is whether the taxpayer is bound by the newer explanation.[63]

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59. *See ABA Task Force Report*, *supra* note 1, at 658 (noting that multinational taxpayers have increased their focus on reducing tax costs).

60. The IRS could also enter into a bilateral agreement with the other country's competent authority regarding the interpretation of a particular treaty, pursuant to the mutual-agreement-procedure mechanism of that treaty. 2006 U.S. MODEL TREATY, *supra* note 5, art. 25(3).

61. Nadal, *supra* note 18.

62. NYSBA REPORT, *supra* note 20, at 4.

63. *Cf.* IFA STUDY, *supra* note 21, at 107–08 (citing commentators who suggest that, as a matter of administrative practice, tax administrators should follow ambulatory OECD Commentaries in interpreting a treaty, even though taxpayers might not be bound by the ambulatory Commentaries).

In order to provide a framework for evaluating the weight, if any, to be given to this changing treaty guidance, Part III discusses relevant theories of treaty interpretation, under both international law and U.S. law. Part IV then applies this framework to technical explanations, concluding that a technical explanation has only limited legal authority in interpreting the treaty for which it was issued and almost no relevance in interpreting any other treaty. It also discusses the extent to which the variation among different technical explanations might provide taxpayers with opportunities to take aggressive reporting positions. Part V then considers alternative administrative approaches—in particular, the use of regulations—and concludes that they might provide some limited ability to ensure that existing treaties keep pace with ongoing developments in the global economy.

III. Relevant Treaty-Interpretation Principles

While statutory and treaty interpretation share many common principles, there also are significant differences due to the different natures of the two authorities.[64] Most fundamentally, treaties constitute a negotiated agreement between the United States and another country (or countries), whereas statutes are unilaterally created by the United States. In this context, treaty interpretation, unlike statutory interpretation, raises principles analogous to contract law, as it must reflect the interests of the two parties to the agreement.[65]

While general consensus exists that the starting point for treaty interpretation is the document's text, numerous other factors are often invoked in treaty interpretation, including the intent of the negotiators and the purpose of the treaty. As with the analogous debates regarding statutory and contract interpretation,[66] disagreement exists as to the proper application of these and other factors.

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64. *See* ALI TAX TREATY PROJECT, *supra* note 23, at 60 ("The natural tendency of courts to treat tax treaties like legislative enactments should be resisted.").

65. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. III, introductory note (1987) ("In some respects, the international law of international agreements resembles domestic contract law, as international agreements often resemble contracts. . . . But the international law of international agreements has its own character, and analogies from the contract law of any particular country are to be used with caution."). *See generally* John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 VA. J. INT'L L. 163, 197–205 (2001) (discussing the historical treatment of treaties as bargains between nations); Curtis J. Mahoney, Note, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 834–38 (2007) (discussing the historical treatment of treaties as contracts).

66. *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. III, introductory note (1987) (discussing the analogy between treaty interpretation and contract law).