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Articles

The Limits of Administrative Guidance in the Interpretation of Tax Treaties

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This Article addresses the increasingly important role of administrative guidance in interpreting the United States' international treaty obligations. The relationship between administrative guidance and treaties raises important issues at the intersection of international law, constitutional law, and administrative law.

These issues are explored in the context of the United States' extensive tax treaty network. Tax treaties play an important role in a global economy; they attempt to reconcile the complex and ever-changing internal tax laws of different countries. The Treasury Department is considering the increased use of administrative guidance to interpret the meaning and application of tax treaties, particularly in response to the increasingly sophisticated business structures and cross-border transactions utilized by multinational corporations.

This Article considers the weight that courts should give to unilateral administrative guidance when interpreting tax treaties. The Article concludes that the Treasury's traditional, ad hoc approach based on informal technical explanations is entitled to little, if any, deference in interpreting previously negotiated bilateral agreements between sovereign nations. However, the Article identifies certain limited circumstances where formal Treasury regulations might enable the Treasury Department to influence the application of previously negotiated tax treaties without violating the United States' obligations under these treaties.

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I. Introduction

With the significant expansion of cross-border economic activity in recent years, the international aspects of the U.S. tax system have become increasingly important.¹ Numerous current and former government officials have suggested that these international tax issues will drive the next generation of significant tax reform in Congress.² However, unilateral legislation enacted by one country cannot resolve many of the issues that arise when multiple countries have legitimate claims to tax income in a cross-border setting. Instead, countries increasingly rely on tax treaties to resolve these issues. These treaties serve a dual purpose—they eliminate or mitigate the potential double taxation that might otherwise arise when a resident of one country receives income that has a connection to another country, and they facilitate the sharing of information between the tax authorities of the treaty countries in order to limit opportunities for tax evasion.

Tax treaties are bilateral treaties that are negotiated directly between two countries.³ These treaties are not negotiated from scratch, but instead tend to be based on various model treaties—most often the model treaty developed by the Organization for Economic Co-operation and Development (OECD Model Treaty),⁴ as well as model treaties developed by the U.S.

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1. See ABA Section of Taxation, *Report of the Task Force on International Tax Reform*, 59 TAX LAW. 649, 657–58 (2006) [hereinafter *ABA Task Force Report*]; Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 463–67 (2007) (both sources discussing globalization and its effect on tax laws).

2. See, e.g., Alison Bennett, *Congress Likely to Take Closer Look at International Reform*, *Kleinbard Says*, [2008] Daily Tax Rep. (BNA) No. 29, at G-5 (Feb. 13, 2008) (reporting the comments of Edward Kleinbard, Chief of Staff, Joint Committee on Taxation); Mark A. Weinberger, *Tax World Remains Dynamic; External Influences Loom*, 196 Daily Tax Rep. (BNA), at J-1 (Oct. 11, 2007) (reporting the comments of the former Assistant Secretary of the Treasury for Tax Policy).

3. Although the vast majority of income tax treaties worldwide—including all of the United States' tax treaties—are bilateral, a small number of multilateral tax treaties exist, most notably between the Nordic countries. See *infra* note 29 and accompanying text.

4. COMM. ON FISCAL AFFAIRS, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], MODEL TAX CONVENTION ON INCOME AND ON CAPITAL (condensed version 2008). This volume contains the treaty text, specific commentaries on each treaty article, and an introduction that provides further interpretive guidance. This Article will refer to these, respectively, as the "OECD Model Treaty," the "OECD Model Commentary," and the "OECD Model Treaty," with the citation designating when it refers to introductory guidance. The OECD is an international organization of thirty economically developed countries, including the United States, that focuses on economic policy matters. OECD, THE OECD 7 (2008), available at <http://www.oecd.org/dataoecd/15/33/34011915.pdf>.

Treasury Department.⁵ As a result, each of the more than sixty U.S. tax treaties in force⁶ generally shares a common structure containing many similar or identical provisions. Nonetheless, each tax treaty is negotiated separately in order to address issues that arise from the specific interaction of the two countries' tax laws and to address particular tax policies that might be important to one of the countries.⁷ As a result, variations exist among actual U.S. tax treaties and between particular U.S. tax treaties and the OECD Model Treaty.⁸

This widespread U.S. tax treaty network raises significant issues in a world where cross-border transactions and business structures change rapidly, and where multinational corporate taxpayers increasingly rely on aggressive tax planning—including treaty-based planning—to reduce their overall tax costs.⁹ The OECD (with U.S. participation) frequently revises and updates the text of the OECD Model Treaty to reflect new global economic developments and increasingly sophisticated methods of tax

5. *E.g.*, U.S. DEP'T OF THE TREASURY, UNITED STATES MODEL INCOME TAX CONVENTION, 1 Tax Treaties (CCH) ¶ 209 (Nov. 15, 2006) [hereinafter 2006 U.S. MODEL TREATY]. The 2006 U.S. Model Treaty updated and revised an earlier Model Treaty published by the Treasury Department in 1996. U.S. DEP'T OF THE TREASURY, UNITED STATES MODEL INCOME TAX CONVENTION, 1 Tax Treaties (CCH) ¶ 210 (Sept. 20, 1996) [hereinafter 1996 U.S. MODEL TREATY]. Both the 2006 U.S. Model Treaty and the 1996 U.S. Model Treaty closely parallel the OECD Model Treaty but contain some differences that reflect the preferred treaty policy of the United States regarding certain issues. *E.g.*, U.S. DEP'T OF THE TREASURY, UNITED STATES MODEL TECHNICAL EXPLANATION ACCOMPANYING THE UNITED STATES MODEL INCOME TAX CONVENTION OF SEPT. 20, 1996, 1 Tax Treaties (CCH) ¶ 215, tit. & pmb. (1996) [hereinafter 1996 U.S. MODEL TECHNICAL EXPLANATION].

6. *See* IRS, U.S. DEP'T OF THE TREASURY, PUB. NO. 901, U.S. TAX TREATIES (2008) [hereinafter IRS REPORT], available at <http://www.irs.gov/pub/irs-pdf/p901.pdf> (summarizing the provisions of the tax treaties currently in force). In addition to this network of income tax treaties, the United States is also a party to bilateral estate tax treaties, gift tax treaties, or both, with fifteen countries and an income tax treaty protocol with Canada addressing estate tax issues. *See generally* Jeffrey A. Schoenblum, *Bilateral Transfer Tax Treaties*, Tax Mgmt. Portfolios (BNA) No. 851 (reproducing the transfer tax treaties currently in force). Note that the treaty with Sweden has been repealed. U.S. Dep't of the Treasury, Press Release, U.S. Terminates Estate and Gift Tax Treaty with Sweden, <http://www.treas.gov/press/releases/hp463.htm>. This Article focuses on income tax treaties, and subsequent references to "tax treaties" refer to income tax treaties.

7. 1996 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 5, tit. & pmb. ("[V]ariations from the Model text in a particular case may represent a modification that the United States views as necessary to address a particular aspect of the treaty partner's tax law, or even represent a substantive concession by the treaty partner in favor of the United States.").

8. The most obvious difference among treaties arises with respect to the maximum tax rate that the source country can impose on dividends, interest, and royalties derived by a resident of the other treaty country. For a useful summary of these differing tax rates, see IRS REPORT, *supra* note 6, at 34 tbl.1.

9. *See ABA Task Force Report*, *supra* note 1, at 658.

avoidance and evasion.¹⁰ Less frequently, the U.S. Treasury Department updates the text of the U.S. model treaty.¹¹

Of course, modifying the text of a model treaty does not directly amend the text of the many U.S. tax treaties actually in force. Unlike some nontax treaties that contain tacit-acceptance procedures,¹² no U.S. tax treaty contains a provision that automatically incorporates subsequent changes to the OECD Model Treaty. Instead, the United States must take other steps to ensure that its actual tax treaties keep pace with these developments. The surest way to make certain that a particular tax treaty addresses new developments is to renegotiate the treaty. However, in order to update the entire U.S. treaty network in this manner, the Treasury Department would have to renegotiate more than sixty separate treaties—a daunting and time-consuming task. At the other extreme, Congress on occasion has addressed changing developments by enacting legislation overriding particular provisions of tax treaties, a step that constitutes a violation of the United States' obligations under the treaties and, accordingly, is generally discouraged by Treasury Department officials.¹³

Given the difficulty in updating the text of tax treaties to specifically address every modern development, significant pressure is placed on interpreting existing treaties in the context of these developments. In recent years, tax administrators have become more aggressive in using administrative-type interpretations to address ever-changing global economic

10. See OECD MODEL TREATY, *supra* note 4, intro., para. 9 (“In 1991, recognizing that the revision of the Model Convention and the commentaries had become an ongoing process, the Committee on Fiscal Affairs adopted the concept of an ambulatory Model Convention providing periodic and more timely updates and amendments without waiting for a complete revision.”).

11. The Treasury Department published a model tax treaty in 1981 and subsequently withdrew it in 1992. 1996 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 5, tit. & pmbl. It published a new Model Treaty in 1996 and again in 2006. See *supra* note 5.

12. See, e.g., International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 276. Under that Convention, an amendment automatically enters into force unless a specified percentage of contracting states object to the amendment within a certain length of time. *Id.* art. VIII. Given the political and economic importance of tax policy, it is highly unlikely that the United States would agree that future modifications to the OECD Model Treaty would be binding with respect to existing U.S. bilateral tax treaties. Indeed, the U.S. Senate was reluctant to approve the U.S.–Austria income tax treaty that contained a much more benign provision (in its accompanying memorandum of understanding) stating that the OECD Commentary, as it may be revised from time to time, constitutes a means of interpretation under the Vienna Convention. See *infra* notes 87–90 and accompanying text. The Senate ultimately gave its consent to the treaty only with the explicit understanding (reflected in the ratification instruments) that subsequent OECD Commentary would not apply to the extent that the United States entered a reservation or observation with respect to that item. See *infra* notes 88–90 and accompanying text.

13. See *infra* notes 122–35 and accompanying text. Professor Reuven Avi-Yonah has argued that the seriousness of the tax-treaty-override problem has been exaggerated and that in limited circumstances such overrides may be an appropriate way of preventing taxpayers from abusing tax treaties, particularly because “[t]ax treaties are too cumbersome to renegotiate every time taxpayers find a new way to abuse the treaty.” Reuven S. Avi-Yonah, *Tax Treaty Overrides: A Qualified Defence of U.S. Practice*, in 2 TAX TREATIES AND DOMESTIC LAW 65, 79, 65–80 (Guglielmo Maisto ed., 2006).

developments. This administrative-type guidance has arisen in several contexts. At the international level, the OECD publishes guidance in the form of commentaries, which are intended to aid in interpreting the provisions of the OECD Model Treaty and, indirectly, the actual treaties that are based on that model.¹⁴ The OECD Commentaries are updated from time to time to reflect evolving consensus among the member OECD countries regarding the meaning of particular Model Treaty provisions in the context of evolving global business practices.¹⁵

Within the United States, the principal administrative treaty guidance takes the form of technical explanations published by the Treasury Department. At a general level, the Treasury Department has published a model technical explanation to accompany both its 1996 Model Treaty and its 2006 Model Treaty.¹⁶ Unlike the regular periodic updates of the OECD Commentaries, the Treasury Department traditionally does not issue interim updates to its model technical explanations to reflect business-practice developments or changes to U.S. treaty policy. At a more specific level, the Treasury Department issues a technical explanation with respect to each actual treaty that it negotiates.¹⁷ Accordingly, dozens of these treaty-specific technical explanations exist, and while they share much in common with each other and with the model technical explanations, the differences among them raise significant questions of treaty interpretation.

The Treasury Department is also considering the more widespread use of other types of administrative guidance, including Treasury regulations, to interpret treaties. A Treasury Department official recently noted that “[t]axpayers have requested more guidance on broad treaty issues . . . that cut across treaties,” and “[w]e understand there is a need for more guidance’ . . . [and] the government is considering the best way to issue that guidance—whether through revenue rulings, regulations, or in some other form.”¹⁸ The official concluded that “[r]egulations may be the best way to achieve consistency and uniformity with respect to these issues.”¹⁹

14. See OECD MODEL TREATY, *supra* note 4, intro., para. 3 (“Member countries . . . should conform to this Model Convention as interpreted by the Commentaries . . .”).

15. See *id.* intro., para. 9 (discussing the introduction of an “ambulatory Model Convention” to respond to the need for constant revision).

16. 1996 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 5; U.S. DEP’T OF THE TREASURY, UNITED STATES MODEL TECHNICAL EXPLANATION ACCOMPANYING THE UNITED STATES MODEL INCOME TAX CONVENTION OF NOV. 15, 2006, 1 Tax Treaties (CCH) ¶ 215 (2006) [hereinafter 2006 U.S. MODEL TECHNICAL EXPLANATION].

17. *E.g.*, U.S. DEP’T OF THE TREASURY, TECHNICAL EXPLANATION OF THE PROTOCOL BETWEEN THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY, SIGNED AT WASHINGTON ON DEC. 14, 1998, 2 Tax Treaties (CCH) ¶ 3285 (Oct. 27, 1999).

18. Lisa M. Nadal, *More Generic Treaty Guidance Likely in Next Business Plan*, IRS Official Says, 2008 TAX NOTES TODAY 92-32, available at 2008 TNT 92-32 (Lexis) (paraphrasing and quoting Michael Mundaca, Deputy Assistant Secretary for International Tax Affairs).

19. *Id.* (paraphrasing and quoting Michael Mundaca, Deputy Assistant Secretary for International Tax Affairs).

These developments raise significant concerns regarding the weight, if any, that courts should give to unilateral administrative guidance when interpreting a bilateral agreement between two countries. The pressure for this guidance promises to expand in coming years as the interaction of countries' tax laws becomes more complicated and multinational corporate taxpayers become even more sophisticated. In the past few years, several scholars—primarily outside the United States—have focused on the relevance of ambulatory²⁰ OECD Commentaries as a means of treaty interpretation under international law.²¹ Less attention has been given to evolving forms of U.S. administrative guidance under U.S. legal principles.²² This Article attempts to remedy that situation.

This Article addresses the limits of unilateral Treasury Department administrative guidance in interpreting treaties under international law, constitutional law, and administrative-law principles. Part II of the Article provides background information regarding the U.S. tax treaty network and the various types of administrative guidance that might be relevant in interpreting the treaties. It discusses the reasons why tax administrators might utilize ambulatory guidance to interpret tax treaties, but also illustrates the practical complications that can arise from such an approach. Part III discusses general treaty-interpretation principles under both international law and U.S. law, and provides a framework for addressing the role of administrative guidance. Part IV applies these principles to Treasury Department technical explanations, the most common form of administrative treaty guidance, concluding that neither the U.S. model technical explanations nor specific treaties' technical explanations provide an effective ambulatory vehicle for interpreting previously negotiated treaties. Part V then considers

20. The OECD Commentaries are often referred to as “ambulatory” because they are continuously reexamined and modified to reflect changing developments. *See, e.g.*, N.Y. STATE BAR ASS'N TAX SECTION, REPORT ON THE MODEL INCOME TAX CONVENTION RELEASED BY THE TREASURY ON NOV. 15, 2006, at 4 (2007) [hereinafter NYSBA REPORT], available at <http://www.nysba.org/Content/ContentFolders20/TaxLawSection/TaxReports/1127rpt.pdf> (“The technical explanations of the U.S. model treaties, like their OECD counterpart, are ‘ambulatory’ in the sense that they reflect developments.”); Michael J. McIntyre, *Comments on the OECD Proposal for Secret and Mandatory Arbitration of International Tax Disputes*, 7 FLA. TAX REV. 622, 645 (2006) (questioning “so-called ambulatory” use of OECD Commentaries).

21. A study by the Canadian Branch of the International Fiscal Association summarizes recent scholarship. DAVID A. WARD ET AL., INT'L FISCAL ASS'N, THE INTERPRETATION OF INCOME TAX TREATIES WITH PARTICULAR REFERENCE TO THE COMMENTARIES ON THE OECD MODEL (2005) [hereinafter IFA STUDY].

22. Several authors have published useful overviews addressing the interpretation of tax treaties under U.S. law, including some aspects of administrative guidance. *See, e.g.*, Robert Thornton Smith, *Tax Treaty Interpretation by the Judiciary*, 49 TAX LAW. 845 (1996); John A. Townsend, *Tax Treaty Interpretation*, 55 TAX LAW. 219 (2001). Several authors have also focused specifically on the recent decision in *National Westminster Bank, PLC v. United States*, 512 F.3d 1347 (Fed. Cir. 2008), which addressed the applicability of a Treasury regulation in interpreting a tax treaty with the United Kingdom. *E.g.*, Richard L. Reinhold & Catherine A. Harrington, *What NatWest Tells Us About Tax Treaty Interpretation*, 119 TAX NOTES 169 (2008), available at 119 Tax Notes 169 (Lexis).

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

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 economy³² 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

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

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 *Medellin 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

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 treaties⁵⁴ 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

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

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.

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).

A. *The Vienna Convention*

1. *General Principles.*—The Vienna Convention on the Law of Treaties⁶⁷ (Vienna Convention) is recognized as the authoritative restatement of international treaty law.⁶⁸ The Vienna Convention was signed by the United States, but the Senate has never given its consent to ratification, and accordingly the Convention has not yet been ratified by the United States.⁶⁹ Nonetheless, the Department of State has, on numerous occasions, stated that it views the substantive provisions of the Convention as codifying existing customary international law that constitutes an authoritative guide to treaty law and practice.⁷⁰

The principal interpretive rule of the Vienna Convention states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁷¹ This general rule places primary emphasis on the text of the treaty and looks to the text of other documents only to the extent they constitute an “agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty”⁷² or an “instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”⁷³ In addition, the general rule is willing to look to a “subsequent agreement between the parties regarding the interpretation of the treaty”⁷⁴ and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁷⁵ The

67. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

68. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. III, introductory note (1987).

69. *Id.* (discussing the history of the Vienna Convention).

70. Office of the Legal Advisor, U.S. Dep’t of State, International Legal Authorities, <http://www.state.gov/s/l/treaty/authorities/international/index.htm> (noting that although the United States is not legally bound by the Vienna Convention, “[n]evertheless, the United States follows many of the rules in the [Vienna Convention] in the conduct of its day-to-day work on treaties”). The Restatement acknowledges:

[U]nless the Vienna Convention comes into force for the United States, this section [of the Restatement, which reflects the interpretive principles of the convention,] does not strictly govern interpretation by the United States or by courts in the United States. But it represents generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325 cmt. a (1987). This acceptance of the Convention’s principles applies only to the substantive provisions of the Vienna Convention, not to the dispute-resolution obligations of the Convention. *See id.* § 325.

71. Vienna Convention, *supra* note 67, art. 31(1).

72. *Id.* art. 31(2)(a).

73. *Id.* art. 31(2)(b).

74. *Id.* art. 31(3)(a).

75. *Id.* art. 31(3)(b).

general rule is willing to look to “[a] special meaning [of] a term if it is established that the parties so intended.”⁷⁶

The Vienna Convention, by placing such emphasis on evidence of agreement between the parties, reflects a strong desire to interpret treaties in accordance with the shared understanding of the parties. In achieving this result, the Convention places limitations on the role of supplementary materials. According to Article 32 of the Convention, supplementary materials, such as evidence from the negotiations or other preparatory documents (*travaux préparatoires*), may be looked to if the treaty text is “ambiguous or obscure [or] leads to a result which is manifestly absurd or unreasonable.”⁷⁷ Supplementary materials may also be considered “to confirm the meaning resulting from the application of [the general rule] of article 31.”⁷⁸ As a practical matter, these standards give courts significant leeway to look beyond the treaty text, permitting reference to supplementary materials both when a court finds the treaty text to be ambiguous and when it finds the text to be unambiguous (i.e., to confirm the meaning resulting from the text). Indeed, the International Court of Justice, when interpreting treaties under the Vienna Convention, frequently looks beyond the text of the document to these supplementary materials.

2. *Ambulatory OECD Commentaries.*—Under these principles, ambulatory administrative guidance seems to have little, if any, relevance under the Vienna Convention in interpreting an existing tax treaty. Although this Article is concerned primarily with the effect of ambulatory U.S. administrative guidance on earlier treaties, as an initial matter it is useful to consider briefly how these Vienna Convention principles apply in the related phenomenon of ambulatory OECD Commentaries. A group of prominent international tax scholars, under the auspices of the International Fiscal Association (IFA), recently published a study of foreign commentators and foreign case law applying the Vienna Convention principles to the ambulatory OECD Commentaries.⁷⁹

After a thorough analysis, the IFA study concludes that ambulatory updates to the OECD Commentaries are entitled to little weight in interpreting OECD Model-based tax treaties that were negotiated prior to the change in the Model Commentary:

In our view, later commentaries that represent a fair interpretation of the [OECD] Model and that clearly arise from the words of the Model [e.g., amplification of existing commentary by the addition of new examples or arguments to what is already there] and that do not conflict with commentaries current at the time the tax treaty was

76. *Id.* art. 31(4).

77. *Id.* art. 32.

78. *Id.*

79. IFA STUDY, *supra* note 21, at 78–111.

negotiated can be given weight as persuasive interpretations by the [OECD committee responsible for the Model] of the meaning of the particular Article of the Model but they cannot be considered to have been adopted by the treaty negotiators for purposes of the particular tax treaty. The new commentary would not fall within Article 31 [the general rule] of the *Vienna Convention* and therefore would only represent a helpful paraphrase or explanation of what could be said to be the meaning of the particular Article. Of course, if the interpretation is clear and unambiguous, the words in the particular tax treaty do not require references to the commentaries to be interpreted.⁸⁰

The study then addresses ambulatory commentaries that go even further than a mere amplification of existing commentaries by adding to what is already there.⁸¹ For example, it concludes that “there is little or no legal justification for the use of [new] commentaries where they fill gaps in the Model by purporting to fill gaps in the commentaries.”⁸² Instead, such gaps should be addressed by amending the OECD Model Treaty and, with respect to preexisting treaties, amending those treaties by a protocol or new treaty.⁸³ With respect to new commentaries that purport to follow state practice under

80. *Id.* at 80. The IFA study’s conclusions reflect the majority view among public international lawyers and international tax lawyers who have addressed this issue. See David R. Tillinghast, *Commentaries to the OECD Model Convention: Ubiquitous, Often Controversial, But Could They Possibly Be Legally Binding?*, 35 TAX MGMT. INT’L J. 580, 581 (2006) (discussing a recent international conference on this issue, in which a minority of the participants thought that ambulatory OECD Commentaries “may be legally binding on countries having treaties based on the OECD Model”). Tillinghast, however, agreed with the majority view that the Commentaries may have some limited relevance, but that they are not legally binding. See *id.* at 582.

The OECD Commentaries themselves, without explicitly mentioning the Vienna Convention, contemplate that ambulatory commentaries will have at least some relevance in interpreting previously concluded tax treaties that are based on the OECD Model. The introduction to the Model states that changes or additions to the OECD Commentaries that are not a direct result of changes to the OECD Model text

are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD Member countries as to the proper interpretation of existing provisions and their application to specific situations.

. . . .

Tax authorities in Member countries follow the general principles enunciated in the preceding four paragraphs. Accordingly, the Committee on Fiscal Affairs considers that taxpayers may also find it useful to consult later versions of the Commentaries in interpreting earlier treaties.

OECD MODEL TREATY, *supra* note 4, intro., paras. 35, 36.1. According to the former chair of the committee working party responsible for the OECD Commentaries, this language is aimed at tax authorities as they interpret treaties. It “does not, of course, purport to give directions to national courts. . . . One might . . . expect States to [utilize the revised commentaries,] although this is not binding on taxpayers, let alone courts.” IFA STUDY, *supra* note 21, at 83 (citation omitted).

81. IFA STUDY, *supra* note 21, at 79 (listing Waters’s four categories of new commentaries). For examples of these types of ambulatory commentaries, see *id.* at 81–94.

82. *Id.* at 110.

83. *Id.*

existing treaties, the IFA study notes that Article 31(3)(b) of the Vienna Convention gives weight to such changes only “if these state practices are in fact adopted by the two states to any particular treaty and if the state practice ‘establishes the agreement of the parties regarding its interpretation’ and is a genuine interpretation and not effectively a change in the treaty.”⁸⁴ In this regard, the study further points out that “a change in the commentaries does not necessarily evidence a state practice of any particular OECD member state, or any two member states.”⁸⁵ Finally, with respect to the most aggressive use of ambulatory commentary, the study concludes “that later commentary contradicting previous commentary should never be taken into account in interpreting existing treaties.”⁸⁶

In very limited circumstances, U.S. tax treaty documents explicitly address the effect of ambulatory OECD Commentary guidance. For example, the memorandum of understanding (MOU) accompanying the U.S.–Austria tax treaty states that the tax treaty is based on the OECD Model Treaty and that the treaty’s provisions are “generally . . . expected to have the same meaning as expressed in the OECD Commentary.”⁸⁷ More importantly, the MOU then states that “[t]he [OECD] Commentary—as it may be revised from time to time—constitutes a means of interpretation in the sense of the Vienna Convention on the Law of Treaties of May 23, 1969.”⁸⁸ Because the U.S.–Austria MOU itself, which was agreed to by both parties in connection with the conclusion of the treaty, constitutes “context” within the meaning of Vienna Convention Article 31(2),⁸⁹ its explicit reference to subsequently developed OECD Commentary should make that ambulatory Commentary relevant in interpreting the U.S.–Austria treaty, at least to the extent that the United States or Austria did not enter a reservation or observation with respect to a new OECD Commentary.⁹⁰

84. *Id.*

85. *Id.* at 111.

86. *Id.* The IFA study observes that utilizing new commentary that contradicts the commentary in effect at the time of the negotiation of a preexisting treaty has no relevance “in establishing the intentions of the parties negotiating particular tax treaties . . . and delegate[s] to the [OECD Committee on Fiscal Affairs] an international law-making capacity for which there is no support.” *Id.*

87. Memorandum of Understanding Accompanying the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.–Austria, May 31, 1996, S. TREATY DOC. NO. 104-31 (1996).

88. *Id.* (emphasis added).

89. Vienna Convention, *supra* note 67, art. 31(2); *see also supra* note 72 and accompanying text.

90. *See* IFA STUDY, *supra* note 21, at 43 n.99 (“The [U.S.–Austria MOU] sentence indicates that both governments accept the ambulatory effect of the OECD Commentary. If there is an express understanding between the contracting states which is intended to have legal effect, it appears that the OECD Commentary can have ambulatory effect in the interpretive process.”). The Senate, during the U.S.–Austria treaty consent process, raised questions regarding the scope of the MOU’s incorporation of ambulatory OECD Commentary. *See* Townsend, *supra* note 22, at 289–90 (discussing Senate treatment of the U.S.–Austria tax treaty MOU). Ultimately, the Senate approved

B. U.S. Case Law

1. *In General.*—Having briefly considered the application of general international law principles as reflected in the Vienna Convention, the remainder of this Article focuses on the relevance of Treasury Department administrative guidance under U.S. judicial precedent.⁹¹ As noted above, the United States has not yet ratified the Vienna Convention.⁹² Nonetheless, the State Department has stated that it views the substantive provisions of the convention as codifying existing customary international law that constitutes an authoritative guide to treaty law and practice,⁹³ and U.S. courts generally look to canons of interpretation similar to those found in the Vienna Convention. However, U.S. courts have, on occasion, applied treaty-interpretation principles that differ from those of the Convention. This Article does not purport to address the broader normative issues regarding this relationship, which extends well beyond the context of tax treaties. Rather, it focuses on Supreme Court and other relevant cases to determine how U.S. courts have treated, and are likely to treat in the future, administrative guidance interpreting tax treaties. Relevant factors that affect a U.S. court's view of this guidance include a greater willingness of some U.S. courts to consider supplementary interpretive materials, the relationship between statutes and treaties under the U.S. Constitution, and institutional separation of powers under the Constitution.⁹⁴ The analysis also considers certain unique aspects of tax treaties that may impact a court's decision. Parts IV and V then apply these U.S. judicial principles in analyzing the authoritative weight of technical explanations and regulations in interpreting U.S. tax treaties.

As a threshold matter, it is important to note that U.S. court decisions do not necessarily provide a coherent, uniform approach to interpreting tax

the treaty based on the "understanding" that the OECD Commentary would not apply to the extent the United States entered a reservation or observation to a particular item. *Id.* This understanding was included in the ratification instrument ultimately exchanged with Austria. *Id.*

91. Professor Michael McIntyre has noted that in analyzing tax treaties, it is important to focus on the interpretive principles of local law, which might differ from the principles of international law. McIntyre, *supra* note 20, at 645. In criticizing the overreliance on the OECD's interpretation of the ambulatory effect of the OECD Commentary under international law principles, Professor McIntyre noted the importance of interpreting based on the "actual status of the Commentary under local law, not on the basis of the OECD's preferred treatment of the Commentary under local law." *Id.*; see also Avi-Yonah, *supra* note 13, at 65 (noting that in the United States, as well as in certain other countries, "courts are likely to follow domestic law even if it violates international law").

92. See *supra* notes 67–69 and accompanying text.

93. See *supra* note 70 and accompanying text.

94. Some commentators have suggested that a further distancing from the Vienna Convention interpretive principles should exist in the case of self-executing private-law treaties, such as the U.S. Sales Convention. *E.g.*, Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 706–08 (1998). Unlike those treaties, which focus on the relationship between private parties, a tax treaty involves the interaction of private parties and a country that is a party to the treaty. Because the country whose revenue is at issue has a significant interest in the application of a tax treaty, such arguments do not seem to apply to tax treaties.

treaties. Various decisions give different emphases to the interplay between the treaty text, the purpose of the treaty, the intent of the negotiators (as well as the understanding of the Senators who gave their consent), and what materials are relevant in analyzing these factors.⁹⁵

While consensus generally exists that the text of the treaty is of principal importance, the Supreme Court, consistent with—but not explicitly relying on—Article 32 of the Vienna Convention,⁹⁶ looks to supplemental materials when the text is ambiguous or when a literal application would lead to manifestly absurd or unreasonable results.⁹⁷ Of course, this leaves open the important question of whether the text is ambiguous and whether it produces absurd or unreasonable results.⁹⁸ Indeed, Supreme Court Justices themselves have often disagreed as to the application of these threshold standards in specific cases.⁹⁹

95. See *id.* at 743 (noting that “it is difficult to discern any coherence in the Court’s approach” regarding the role of *travaux préparatoires*).

96. Although this aspect of the Court’s approach is consistent with the Vienna Convention principles, the Court has not explicitly relied on the Vienna Convention regarding these principles. The Court’s only explicit reference to Articles 31 or 32 of the Convention appears in a dissenting opinion by Justice Blackmun. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting).

97. For example, in *O’Connor v. United States*, 479 U.S. 27 (1986), Justice Scalia, writing for a unanimous Court, concluded that a literal reading of a particular paragraph of the Panama Canal Treaty—which would have exempted U.S. workers in Panama from U.S. taxation—was “utterly implausible.” *Id.* at 31. Although Justice Scalia reached this conclusion by referring to the “context” of the treaty, he does not use that term in the same way it is used in Article 31(2) (i.e., agreements between the parties or unilateral instruments accepted by the other party). Instead, he uses the term “context” to include preparatory materials, such as evidence from the negotiations. *Id.* at 31 (emphasizing that the exemption of U.S. workers from U.S. taxation “has no foundation in the negotiations leading to the Agreement”). Although Justice Scalia does not cite to the Vienna Convention, this use of supplementary materials when a literal interpretation leads to unreasonable results is consistent with Article 32 of the Vienna Convention.

98. See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 976 (1994) (“[T]he problem is that of identifying the proper threshold of ambiguity at which a treaty interpreter should abandon the terms of the agreement and go in search of extrinsic sources of meaning.”).

99. See *id.* at 976–80 (comparing Justice Scalia’s opinion in *O’Connor* to his concurrence in *United States v. Stuart*, 489 U.S. 353 (1989)). For example, the Court’s decision in *Haitian Centers Council* turned on whether the word “return” in the United Nations Protocol Relating to the Status of Refugees was ambiguous. 509 U.S. at 180. The majority concluded that the term, as used in the protocol, did not have its ordinary, common meaning, whereas Justice Blackmun, in dissent, concluded that the term was unambiguous. Compare *id.*, with *id.* at 190 (Blackmun, J., dissenting). In the Supreme Court’s most recent treaty-interpretation case, the majority opinion viewed its conclusion (that the treaty was not self-executing) as flowing from the “natural reading” of the treaty text. *Medellín v. Texas*, 128 S. Ct. 1346, 1358 (2008). The majority then referred to supplementary materials only to confirm this reading. *Id.* at 1358–60. In contrast, the dissent asserted that “[t]he majority places too much weight upon treaty language that says little about the matter.” *Id.* at 1377 (Breyer, J., dissenting). The *Medellín* case might not be directly relevant regarding the standard for interpreting treaty text, as its principal focus is on self-execution concepts within the U.S. Constitution’s Supremacy Clause, rather than the interpretation of a particular treaty provision in isolation.

The Supreme Court has sometimes, in describing the threshold for looking to supplemental materials, used more lenient terms than those appearing in the Vienna Convention.¹⁰⁰ For example, the Supreme Court, in *United States v. Stuart*¹⁰¹ (involving the 1942 U.S.–Canada income tax treaty), observed that “[t]he clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a *result inconsistent with the intent or expectations of its signatories*”¹⁰² (in contrast to the “manifestly absurd or unreasonable” standard used in the Vienna Convention¹⁰³). Nonetheless, given the practical ease with which the Vienna Convention allows courts to resort to supplementary materials, this difference in the stated standard might be of little import.

U.S. courts have looked to a wide range of supplementary materials to illuminate the shared understanding of the United States and its treaty partners.¹⁰⁴ Direct evidence of shared understanding may include material from the negotiation history¹⁰⁵ or examples of the postratification application of the treaty by both parties.¹⁰⁶ Courts are also willing to find implicit shared

100. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325 cmt. g (1987) (“Courts in the United States are generally more willing than those of other states to look outside the instrument to determine its meaning.”); Bederman, *supra* note 98, at 965 (“American courts are frequently accused of being too quick to look behind the text of a treaty and thus to ignore the plain meaning of the words.”).

101. 489 U.S. 353 (1989).

102. *Stuart*, 489 U.S. at 365–66 (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (internal quotation marks and citation omitted)) (emphasis added). After briefly discussing the treaty language, the *Stuart* court then analyzed the treaty’s ratification history and subsequent operation, noting that “[n]ontextual sources . . . often assist us in ‘giving effect to the intent of the Treaty parties.’” *Id.* at 366 (citation omitted).

103. See *supra* note 77 and accompanying text.

104. See Schoenblum, *supra* note 6, pt. V(C) (providing examples of a variety of sources U.S. courts have considered).

105. See, e.g., *Xerox Corp. v. United States*, 41 F.3d 647, 654, 656 (Fed. Cir. 1994) (citing affidavits from the negotiators of the U.S.–U.K. tax treaty); see also *Medellín v. Texas*, 128 S. Ct. 1346, 1357, 1357–58 (2008) (“Because a treaty ratified by the United States is ‘an agreement among sovereign powers,’ we have also considered as ‘aids to its interpretation’ the negotiation and drafting history of the treaty as well as ‘the postratification understanding’ of signatory nations.” (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996))). But see ALI TAX TREATY PROJECT, *supra* note 23, at 51–52 (arguing that testimony of an individual negotiator should be given “little or no weight” because “his or her recollections or recordings of events may not reflect a consensus of those participating, even on behalf of one country, much less the other,” and also that a “battle of experts” pitting the recollections of negotiators against each other “seems a time-consuming and unreliable way to arrive at a sound interpretation”). The ALI Tax Treaty Project’s concerns were prescient with respect to the Federal Circuit’s *Xerox* decision, which was decided a few years after the project’s publication. See *infra* notes 190–96 and accompanying text.

106. See *Stuart*, 489 U.S. at 369 (“The practice of treaty signatories counts as evidence of the treaty’s proper interpretation, since their conduct generally evinces their understanding of the agreement they signed.” (citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984))). This principle is consistent with the Vienna Convention, which provides that “[t]here shall be taken into account, together with the context; . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Vienna Convention, *supra* note 67, art. 31(3)(b).

understanding by looking to treaty interpretations in existence at the time of the negotiations of which the negotiators are aware. Most notably, in the case of a tax treaty incorporating language from the OECD Model Treaty, courts place significant emphasis on OECD Commentary that is in existence at the time of a particular treaty's negotiation, on the assumption that the negotiators were aware of the existing Commentary and, by not providing otherwise in the treaty, implicitly agreed to that interpretation.¹⁰⁷

The Supreme Court, in *United States v. Alvarez-Machain*,¹⁰⁸ has also found indirect evidence of shared understanding by assuming that a treaty partner was aware of relevant U.S. legal doctrines at the time of the treaty negotiation.¹⁰⁹ Under this decision, which has been criticized as inconsistent with international law principles,¹¹⁰ if the treaty does not explicitly alter that existing doctrine, the court can conclude that the parties have mutually agreed that it remains in force.¹¹¹

Other types of extrinsic evidence that U.S. courts consider might be viewed as going beyond the treatment of the treaty as a bilateral agreement whose interpretive touchstone is the treaty partners' shared understanding.¹¹² For example, a court's use of Senate ratification history, such as the Senate floor debates utilized by the Supreme Court in *Stuart*,¹¹³ does not necessarily reflect the shared understanding of the treaty partners, given that the other treaty country has no formal role in the Senate ratification process. As

107. See, e.g., *N.W. Life Assurance Co. of Can. v. Comm'r*, 107 T.C. 363, 383–85 (1996) (applying the OECD Commentary in interpreting a U.S.–Canada tax treaty); *Taisei Fire & Marine Ins. Co. v. Comm'r*, 104 T.C. 535, 549–50 (1995) (applying the OECD Commentary in effect at the time of negotiation, but only after resolving an interpretive question regarding an incorrect conjunction in the Commentary itself).

108. 504 U.S. 655 (1992).

109. This was a nontax case finding that the U.S.–Mexico Extradition Treaty of 1978 did not preclude “forcible abductions” in certain criminal proceedings. *Id.* at 666.

110. See, e.g., *id.* at 682 (Stevens, J., dissenting) (criticizing the Court's failure to condemn an extra-treaty forcible abduction of a Mexican national, authorized by the Executive Branch, as a “flagrant violation of international law”).

111. See *id.* at 665–66 (concluding that, because the U.S.–Mexico Extradition Treaty of 1978 does not explicitly contradict the existing *Ker* doctrine, which developed in the nineteenth century and permitted certain forcible abductions, that doctrine remains in effect).

112. As one commentator observed:

Courts in the U.S. have been remarkably expansive in utilizing a wide variety of sources in interpreting treaty provisions. They have cited the following sources: Treasury Department technical explanations and Senate reports, even though both are unilateral documents of the United States prepared after execution of the treaty in connection with the advice and consent of the Senate In interpreting a specific treaty, courts and the [IRS] have cited corresponding provisions of other U.S. treaties, even though the other country was not a party, and Treasury Regulations issued under other treaties. Courts have also accepted as authoritative Treasury Regulations submitted to the other Contracting State without response, on the ground that silence meant acquiescence.

Smith, *supra* note 22, at 850–51 (internal citations omitted).

113. *United States v. Stuart*, 489 U.S. 353, 367 (1989) (citing 88 CONG. REC. 4714 (1942)).

Professor Moore observed, the reference to Senate preratification materials is not necessarily objectionable, provided the court does so for the purpose of ascertaining the treaty partners' mutual understanding, rather than relying on the unilateral understanding of the Senate.¹¹⁴ Justice Scalia, in his concurrence in *Stuart*, took exception with the majority's reference to Senate floor debates on these grounds, arguing that postsigning, preratification Senate floor debates are not relevant "[t]o discover Canada's and the United States' 'intent and expectations.'"¹¹⁵

In response, Justice Brennan's majority opinion in *Stuart* argued that its use of the Senate debate in interpreting the 1942 U.S.–Canada tax treaty is consistent with contract-like principles regarding the parties' mutual understanding.¹¹⁶ Justice Brennan noted that Senate debates are open to the public and are not "out of earshot of proposed treaty partners."¹¹⁷ Based on this, he implied that the other country reasonably should have known of the Senate's interpretation and, by not objecting prior to ratification, implicitly agreed with it.¹¹⁸

This inference of mutual understanding based on the other countries' nonresponse to a Senate floor debate is problematic. First, it assumes that the appropriate representatives of the other country are aware of the Senate floor-debate interpretation. While this would create an unmanageable burden in the case of a multilateral treaty, where each country would be expected to follow the ratification procedure in each of the other countries and object to

114. Professor Moore points out that the important question is not whether a court can look at Senate materials, but what the court does with those materials:

It is no more remarkable for United States courts to refer to Senate materials than it is for them to refer to law review articles or scholarly treatises. The question is whether in either case they do so because they regard the issue for decision as turning on the intent of the review or treatise writer or the intent of the Senate, as opposed, in an interpretation case, to the intent of the parties. The former *would* be truly remarkable in a treaty interpretation case and is not born out by . . . cases. But Senate materials, as with law review articles or treatises, may contain . . . relevant information concerning the intent of the parties. Citing or referring to such materials in Senate sources is simply to use a convenient source for quite ordinary interpretative materials. . . . [H]owever, this is not the same as looking at the Senate materials for the purpose of ascertaining the Senate intent of one of the parties as the basis for decision, as opposed to the shared intent of all the parties, as is well established under both international law and the foreign relations law of the United States.

Moore, *supra* note 65, 177–78 (internal citation omitted).

115. See *Stuart*, 489 U.S. at 373, 373–74 (Scalia, J., concurring) ("Even . . . if one generally regards the use of preratification extrinsic materials to confirm an unambiguous text as an innocuous practice, there is special reason to object to that superfluous reference in the present case."). For additional analysis of Justice Scalia's concurrence in *Stuart*, compare Detlev F. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L L. 546, 547–48 (1989), which criticizes Justice Scalia's underreliance on Supreme Court precedent, with Moore, *supra* note 65, at 177, which criticizes Professor Vagts's approach.

116. *Stuart*, 489 U.S. at 367 n.7.

117. *Id.*

118. See *id.* (citing "hornbook contract law").

any statement with which it disagreed, even in the case of a bilateral tax treaty it seems unrealistic. Indeed, the United States could not satisfy this burden in the reverse situation, as the Treasury Department does not routinely monitor the tax-treaty-ratification debates in the other country. This problem is exacerbated in situations where the treaty partner is a non-English-speaking country.¹¹⁹ Moreover, a finding of implicit agreement places the other country's representatives in the difficult position of having to navigate U.S. separation-of-powers issues, attempting to ascertain the relative weights of discussions with Treasury negotiators, contents of the technical explanation, Senate committee documents, and statements of particular Senators on the floor of the Senate, and determining which of these, if any, requires a formal response in order to avoid a later finding of implicit assent. While the other country is made aware of formal objections and reservations raised by the Senate and has the opportunity to officially respond through an exchange of notes, the other country's silence with respect to less formal aspects of Senate proceedings should not be viewed as evidence of implicit mutual understanding.

U.S. courts also have been willing to look to the purpose of a tax treaty as part of the interpretive process.¹²⁰ Frequently this reference to the treaty's purpose is used merely to confirm the interpretation the court has derived from the treaty language,¹²¹ but in some circumstances courts have relied on the treaty's purpose to apply a nonliteral interpretation of a tax treaty provision.¹²²

2. *Relationship Between Treaties and Federal Statutes.*—An additional consideration in interpreting treaties concerns the relationship between federal statutes and treaties. Under some countries' legal systems, treaty obligations have a higher status than internal laws and cannot be overridden by subsequent internal legislation.¹²³ However, under the U.S. Constitution,

119. *Cf. E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 541 (1991) (dismissing the official German translation of French treaty text, thereby illustrating translation-related problems that can arise in treaty interpretation).

120. *See generally* Smith, *supra* note 22, at 859–62 (arguing for purposive interpretations of U.S. tax treaties).

121. *See, e.g., United States v. Stuart*, 489 U.S. 353, 368 (1989) (observing that the Court's interpretation of the treaty language is consistent with "the evident purpose behind [the treaty]—the reduction of tax evasion by allowing signatories to demand information from each other").

122. *See, e.g., Estate of Burghardt v. Comm'r*, 80 T.C. 705, 717 (1983) (interpreting the term "specific exemption" in a U.S.–Italy estate tax treaty to include the estate tax unified credit in order to effectuate the purpose of the treaty). *But see* Schoenblum, *supra* note 6, pt. V(B) (critiquing the *Burghardt* case).

123. For a discussion of the differences among OECD member countries regarding the ability to override treaties via internal legislation, see OECD, TREATY OVERRIDE (1989), *reprinted in* COMM. ON FISCAL AFFAIRS, OECD, MODEL TAX CONVENTION ON INCOME AND CAPITAL, at R(8)-1 (2000) [hereinafter OECD TAX TREATY OVERRIDE REPORT]. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 n.1 (1987) (evaluating the U.S. doctrine derived from the Supremacy Clause that gives equal weight to treaties and federal statutes and requires the later in

both federal law and treaties constitute the “supreme Law of the Land.”¹²⁴ The Supreme Court has long interpreted this provision as giving treaties and statutes equal status, so that a treaty “may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.”¹²⁵ The Internal Revenue Code reinforces this equal status in the case of tax statutes and tax treaties, stating that “[f]or purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law.”¹²⁶

Notwithstanding Congress’s ability under U.S. constitutional principles to override treaty obligations, courts generally attempt, if possible, to interpret statutes in a manner that is consistent with existing treaty obligations.¹²⁷ However, when a clear conflict between the treaty and the federal law exists, courts generally apply a last-in-time rule,¹²⁸ unless Congress has indicated that it does not intend for subsequent legislation to override existing treaty obligations.¹²⁹

time to prevail). *But see* Avi-Yonah, *supra* note 13, at 78–79 (critiquing the OECD Tax Treaty Override Report as too extreme).

124. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

125. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871) (citations omitted); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 114–115 (1987); ALI TAX TREATY PROJECT, *supra* note 23, at 63–76 (both discussing the relationship between domestic law and treaties); *cf.* Anthony C. Infanti, *The Proposed Domestic Reverse Hybrid Entity Regulations: Can the Treasury Department Override Treaties?*, 30 TAX MGMT. INT’L J. 307, 307 n.3 (2001) [hereinafter Infanti, *Reverse Hybrid*] (citing historical Treasury Department statements discouraging the use of legislative overrides). *But see* Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677, 690–91 (2001) (arguing that Congress does not have constitutional authority to override treaties by legislation, but acknowledging that such an argument might not be successful due to stare decisis concerns).

126. I.R.C. § 7852(d) (2000); *see also* I.R.C. § 894(a)(1) (2000) (“The provisions of [the Internal Revenue Code] shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer.”).

127. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1987). This reluctance to find a statutory override of a treaty obligation is consistent with the early Supreme Court observation that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

128. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1) (1987); ALI TAX TREATY PROJECT, *supra* note 23, at 63.

129. For example, the Conference Report to the Omnibus Budget Reconciliation Act of 1987 provides:

If this provision of the conference agreement [regarding the taxation of foreign insurance companies] is found to be in conflict with any existing U.S. income tax treaty, the conferees do not intend to apply the general principle that, in the case of a conflict, a later enacted statute prevails over earlier enacted statutes or treaties.

H.R. REP. NO. 100-495, at 983 (1987) (Conf. Rep.), *reprinted in* 1987 U.S.C.C.A.N. 2313-1245, 2313-1729. The Tax Court cited this legislative history in *North West Life Assurance Co. of Canada v. Commissioner*, 107 T.C. 363, 377 (1996). *See generally* *Crow v. Comm’r*, 85 T.C. 376,

A legislative override of a U.S. treaty obligation constitutes a violation of the United States' obligations under international law.¹³⁰ Accordingly, the Treasury Department historically has opposed congressional exercise of this power.¹³¹ Nonetheless, no practical remedies exist for a foreign taxpayer affected by an override, and the potential remedies of the other treaty country are quite limited.¹³² Although the other treaty partner might be entitled to terminate the treaty in response to an override that constitutes a material breach, this is an "extreme and rarely taken step" in the context of a tax treaty.¹³³ Indeed, Professor Reuven Avi-Yonah has argued that in limited circumstances—particularly when taxpayers invoke the literal treaty text to eliminate taxation in both countries—a narrow legislative override might be defensible, particularly given the large amounts of money involved and the time-consuming nature of tax treaty renegotiation.¹³⁴ A few U.S. tax treaty

383–84 (1985) (explaining that had the government made a treaty-override argument, it would have been unpersuasive because of the explicit language in the statute saying that the statutory amendments did not override existing treaties); ALI TAX TREATY PROJECT, *supra* note 23, at 72 ("Expressions of Congressional intent in legislative history would undoubtedly be given significant weight by a U.S. court in determining whether Congress intended the statute to override treaties."). The report also notes:

There is language in some cases to the effect that a clear expression of Congressional intent is required before a treaty will be considered abrogated by ambiguous Congressional action. Nevertheless, even in the absence of an express statement of Congressional intent to supersede a treaty, such an intent may be inferred from the fact that the later statute flatly takes away a right granted by the treaty.

Id. at 65 (citation omitted).

130. Vienna Convention, *supra* note 67, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 cmt. a (1987); ALI TAX TREATY PROJECT, *supra* note 23, at 73.

131. See Avi-Yonah, *supra* note 13, at 74 (noting that the Treasury Department, "which is in charge of negotiating tax treaties, would usually prefer that there be no treaty overrides, given that these make the task of negotiating future treaties harder"); Tom Gilroy, *Bills to Disallow Foreign Treaty Benefits Could Affect Treaty Process, Solomon Says*, 40 Daily Tax Rep. (BNA), at G-2 (Feb. 29, 2008) (providing the comments of Eric Solomon, Assistant Secretary of the Treasury, discussing Treasury's preference for negotiating changes to treaties, rather than utilizing congressional overrides); see also Meg Shreve, *Grassley Warns Against Violating Tax Treaties With Farm Bill Tax Provision*, 116 TAX NOTES 627 (2007), available at 116 Tax Notes 627 (Lexis) (providing the comments of Senator Grassley, cautioning that "if lawmakers want to change tax treaties, they should renegotiate them instead of 'unilaterally' undercutting those agreements").

132. ALI TAX TREATY PROJECT, *supra* note 23, at 73–74 (noting that the aggrieved treaty partner's options "include conveying a complaint through diplomatic channels, invoking the mutual agreement procedure, or seeking to adjudicate the claim in the International Court of Justice," but observing that "[e]ach of these approaches requires the cooperation of the offending country and therefore is unlikely to succeed in many cases" (citations omitted)). The aggrieved treaty partner might also seek to terminate the treaty if the U.S. legislative override is material. *Id.*; see also Avi-Yonah, *supra* note 13, at 65–66 ("[B]oth taxpayers and the other treaty partner have little practical recourse in the case of a treaty override beyond terminating the treaty, which is an extreme and rarely taken step.>").

133. Avi-Yonah, *supra* note 13, at 66.

134. See *id.* at 78–79 (comparing past tax treaty overrides that Professor Avi-Yonah argues were justified with those that were not). Professor Avi-Yonah does "not believe the other treaty partner has a justified expectation that the treaty will not be overridden in cases of abuse." *Id.* at 79.

partners, concerned about the potential for a unilateral U.S. override, have insisted on including explicit treaty language that commits the United States to renegotiate the treaty in order to restore the balance of benefits in the case of a unilateral override.¹³⁵

3. *Role of Administrative Agency Interpretation.*—A final relevant concern regarding treaty interpretation involves separation-of-powers issues.¹³⁶ Statutes and treaties arise through different institutional channels in the United States.¹³⁷ Federal statutes are created in the Legislative Branch with the involvement of both houses of Congress, with the Executive Branch having a secondary role pursuant to the veto power (which may, in turn, be overridden by the Legislative Branch).¹³⁸ In contrast, treaties initially are drafted and negotiated by the Executive Branch, with one house of Congress (the Senate) having a secondary role pursuant to its advice-and-consent power.¹³⁹ This distinction is particularly interesting in the case of federal taxes given that the Constitution envisions a significant role for the House of Representatives regarding revenue laws,¹⁴⁰ yet the tax treaty process involves only the Senate.¹⁴¹

Indeed, in some circumstances (e.g., Canada's response to the I.R.C. § 894(c) "reverse hybrid" legislation), the other treaty partner has not objected to U.S. tax treaty overrides that were intended to prevent a perceived abuse of tax treaties. *See id.* at 77–78 (noting that Canada did not object to the U.S. treaty override "that denied treaty benefits to such a 'reverse hybrid'").

135. *See, e.g.*, Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.–Switz., art. 28(5), Oct. 2, 1996, 2 U.S.T. 1751; Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fraud or Fiscal Evasion, Protocol, U.S.–Italy, art. 7(1), Aug. 25, 1999 (not yet in force), available at <http://www.irs.ustreas.gov/pub/irs-utl/italyproposedweb.pdf>.

136. Much recent scholarship and Supreme Court jurisprudence focuses on separation-of-powers issues that arise among Congress, the President, and courts, particularly in the context of prominent treaties with broad foreign-policy implications. *See, e.g.*, *Medellín v. Texas*, 128 S. Ct. 1346, 1369–71 (2008) (discussing the distribution of treaty power between Congress and the President). This Article does not purport to debate such issues on their merits. Rather, it highlights those factors that are relevant in analyzing the legal authority to be given to ambulatory administrative interpretations of tax treaties.

137. The institutional differences between statutes and treaties are implicitly reflected in the structure of the Constitution, with the procedure for enacting statutes described in Article I (regarding legislative powers) and the procedure for implementing treaties described in Article II (regarding executive power). *Compare* U.S. CONST. art. I, *with id.* art. II.

138. *Id.* art. I, § 7.

139. *Id.* art. II, § 2. This statement describes the practical relationship between the Executive Branch and the Senate in the process of tax treaty negotiation. It does not purport to explore the more theoretical relationship between the Executive Branch and the Senate in treaty making. For a more detailed analysis of the relationship between the roles of the Executive Branch and the Senate in treaty making, see Moore, *supra* note 65, at 192–93, and Mahoney, *supra* note 65, at 836–37.

140. The Constitution provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. CONST. art. I, § 7. Although this provision has little, if any, practical effect given the Senate's ability to amend in full a revenue bill originating in the House, it nonetheless demonstrates the important role envisioned for the House in tax legislation.

141. As a practical matter, tax treaties generally do not "raise" revenue because their principal function is to surrender U.S. taxing rights over foreign persons in certain circumstances (in

Courts often purport to give significant weight to Executive Branch interpretations of U.S. treaties.¹⁴² As the Supreme Court has observed, “Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”¹⁴³ In the case of tax treaties, this results in courts looking to guidance issued by the Treasury Department (and the Internal Revenue Service, which is a bureau within the Treasury Department). Not only does the Treasury Department have the particular expertise in the subject matter (as well as the responsibility for enforcement of the area via the IRS), but it also is the Executive department that negotiates the tax treaties.¹⁴⁴

Of course, as the *Stuart* opinion notes, the administrative agency’s interpretation is not conclusive.¹⁴⁵ Indeed, in many tax cases, courts have interpreted treaties in a manner contrary to administrative guidance. For example, the Tax Court in *Crow v. Commissioner*¹⁴⁶ rejected an IRS revenue-ruling interpretation of a treaty that had been issued in anticipation of litigation, noting that the revenue ruling did not “constitute a consistent and long-standing administrative position with prior congressional or judicial approval [so] it is not entitled to any special deference in this Court.”¹⁴⁷ In *Snap-On Tools v. United States*,¹⁴⁸ the U.S. Claims Court refused to rely on the technical explanation to the U.S.–U.K. income tax treaty.¹⁴⁹ In the recent *National Westminster Bank*¹⁵⁰ (*NatWest*) decision, the Court of Appeals for the Federal Circuit rejected the application of a Treasury Department regulation concerning interest-expense apportionment, finding that the regulation was inconsistent with the plain language of the U.S.–U.K. tax treaty and other evidence purporting to demonstrate the parties’ mutual understanding.¹⁵¹ The balance of this Article focuses on the various forms of administrative guidance and provides more detailed guidance as to how much deference, if any, courts should give to these various types of

exchange for the other country surrendering its taxing rights over U.S. persons). See ALI TAX TREATY PROJECT, *supra* note 23, at 2 (discussing the reciprocal nature of tax treaties).

142. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 326(2) (1987) (“Courts . . . will give great weight to [a treaty] interpretation made by the Executive Branch.”).

143. *United States v. Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

144. See *supra* note 36 and accompanying text.

145. *Stuart*, 489 U.S. at 369.

146. 85 T.C. 376 (1985).

147. *Id.* at 389; see also ALI TAX TREATY PROJECT, *supra* note 23, at 58 (arguing that a revenue ruling adopted in anticipation of pending litigation “should not be entitled to any special deference as an agency interpretation of a treaty”).

148. 26 Cl. Ct. 1045 (1992), *aff’d*, 26 F.3d 137 (Fed. Cir. 1994).

149. *Id.* at 1060–61; see also *infra* notes 286–91 and accompanying text.

150. *Nat’l Westminster Bank, PLC v. United States (NatWest)*, 512 F.3d 1347 (Fed. Cir. 2008).

151. *Id.* at 1354–55. For a detailed discussion of the *NatWest* litigation, including the district and appeals courts’ treaty analysis, see Reinhold & Harrington, *supra* note 22, at 173–82. See also *id.* at 193 (suggesting that the treaty did not necessarily contain “plain language”).

administrative guidance, particularly in the case of guidance issued after a particular treaty enters into force.

4. *Unique Aspects of Tax Treaties.*—Before applying these treaty-interpretation principles to ambulatory Treasury Department guidance, it is important to note several unique aspects of tax treaties. These aspects involve both practical concerns surrounding tax treaties and particular provisions that appear in most tax treaties.

a. *Complex and Technical Nature of the Area.*—Tax treaties do not exist in a vacuum. Each of the treaty partners has its own complex, technical, and ever-changing internal tax-law regime. Indeed, the principal purpose for tax treaties is to bridge and at least partly reconcile these internal regimes.¹⁵² Given these complexities, it is not surprising that tax treaties cannot specifically address every tax issue that exists between the two countries, let alone anticipate the specific impact of subsequent changes in each country's tax laws or future developments in global business structures and transactions.

Moreover, even with respect to those issues that the treaty does address, in order to avoid unmanageable complexity, the treaty can set forth only general rules and principles that the countries agree to. As commentators have recently noted, tax treaties often have “generalized ‘treaty speak’ that has relatively little connotative value standing alone.”¹⁵³

b. *Treaty Provisions Incorporating Future Developments.*—By their express terms, U.S. tax treaties envision a role for some future developments in several contexts. First, the mutual-agreement-procedure article in tax treaties generally grants the competent authorities of the two treaty countries broad latitude to resolve jointly “any difficulties or doubts arising as to the interpretation or application of the Convention.”¹⁵⁴ Moreover, adopting a purposive approach, the treaty allows the competent authorities to reach agreements to eliminate double taxation even in cases not provided for in the treaty.¹⁵⁵ Among other things, this allows them to reach agreements regarding the application of the treaty to circumstances that arise when one of the country's tax laws change in the future.¹⁵⁶ Given that this provision has

152. See OECD MODEL TREATY, *supra* note 4, intro.

153. Reinhold & Harrington, *supra* note 22, at 203 (citing examples); see also Smith, *supra* note 22, at 879 (“Tax treaties are efforts to coordinate two different tax systems in a general way only, and do not achieve the degree of particularity and precision of either internal tax system.”).

154. 2006 U.S. MODEL TREATY, *supra* note 5, art. 25(3); OECD MODEL TREATY, *supra* note 4, art. 25(3).

155. Both the 2006 U.S. Model Treaty and the OECD Model Treaty provide that the competent authorities may “consult together for the elimination of double taxation in cases not provided for in the Convention.” 2006 U.S. MODEL TREATY, *supra* note 5, art. 25(3); OECD MODEL TREATY, *supra* note 4, art. 25(3).

156. See OECD MODEL COMMENTARY, *supra* note 4, commentary on art. 25, para. 34.

relevance only when the two countries' competent authorities mutually agree, it is not directly relevant to the unilateral administrative interpretations that are the focus of this Article.

Second, and more important for purposes of this Article, tax treaties explicitly contemplate that unilateral legal developments in one country may affect the interpretation of a treaty subsequent to its entry into force. Article 3(2) of both the OECD Model Treaty and the U.S. Model Treaty (as well as actual treaties based thereon) provides:

As regards the application of the Convention at any time by a Contracting State, any term not defined shall, unless the context otherwise requires, have the meaning that it has *at that time* under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.¹⁵⁷

The italicized language in the preceding quotation makes clear that the relevant internal law of a contracting state is “the law in effect at the time the treaty is being applied, not the law as in effect at the time the treaty was signed.”¹⁵⁸ As noted by an OECD report, “It cannot have been contemplated that, having once entered into a treaty, a State would be unable to change definitions of terms used in its domestic law provided such changes were compatible with the context of the treaty.”¹⁵⁹ According to the OECD Commentary, this ambulatory aspect of tax treaties addresses “the need to be able to apply the Convention in a convenient and practical way over time.”¹⁶⁰

Several other treaty provisions implicitly incorporate relevant internal law of one of the countries in specific circumstances. For example, under

157. OECD MODEL TREATY, *supra* note 4, art. 3(2) (emphasis added). The text here quotes the OECD Model Treaty version of Article 3(2). The U.S. Model Treaty provision is identical, except for minor punctuation differences and the explicit exception for circumstances when “the competent authorities agree to a common meaning pursuant to the provisions of Article 25.” 2006 U.S. MODEL TREATY, *supra* note 5, art. 3(2). The OECD addresses the relationship between Article 3(2) and Article 25 in a similar way, but it does so in the Commentary rather than in the treaty language. See OECD MODEL COMMENTARY, *supra* note 4, commentary on art. 3, para. 13.1 (“States that are able to enter into mutual agreements . . . that establish the meanings of terms not defined in the Convention should take those agreements into account in interpreting those terms.”).

The Supreme Court, interpreting the 1945 U.S.–U.K. tax treaty, applied an earlier version of modern Article 3(2). *Maximov v. United States*, 373 U.S. 49, 53 (1963). Because the term “person” was not defined in the treaty, the Court looked to internal U.S. tax law. *Id.* Finding that a trust was a “person” under U.S. tax law, the Court held that a U.S. trust was a resident of the United States for purposes of the treaty and could not claim treaty benefits against the United States. *Id.*; see also Townsend, *supra* note 22, at 264 (discussing *Maximov*).

158. 2006 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 16, art. 3, para. 2; see also OECD MODEL COMMENTARY, *supra* note 4, commentary on art. 3, para. 11 (noting that the OECD Model was amended in 1995 to provide explicitly that the relevant focus is the domestic law in force at the time the treaty is being applied, rather than the domestic law in force at the time the treaty was signed).

159. OECD TAX TREATY OVERRIDE REPORT, *supra* note 123, at R(8)-4.

160. OECD MODEL COMMENTARY, *supra* note 4, commentary on art. 3, para. 13.

Article 23 of most tax treaties, the United States generally agrees to allow a foreign tax credit to a U.S. citizen or resident “[i]n accordance with the provisions and subject to the limitations of the law of the United States (*as it may be amended from time to time without changing the general principle hereof*).”¹⁶¹ References to the applicability of internal law also appear in some treaty provisions addressing the taxation of a country’s former citizens and long-term residents,¹⁶² the determination of whether income involving certain fiscally transparent entities is treated as derived by a resident of a contracting state,¹⁶³ the scope of information exchange allowed between the countries’ tax administrators,¹⁶⁴ and several other specifically defined terms.¹⁶⁵

The ability to effect ambulatory changes in treaty interpretation via internal-law changes is not without limits, even when the treaty explicitly refers to internal law. For example, Article 3(2) defers to the (potentially ambulatory) meaning of a term under internal law only if the “context” does not otherwise require.¹⁶⁶ Similarly, Article 23 allows the United States to apply its internal-law limitations on the foreign tax credit only to the extent those limitations do not “chang[e] the general principle[s] hereof.”¹⁶⁷ These limitations are discussed in more detail in subpart V(A).

161. 2006 U.S. MODEL TREATY, *supra* note 5, art. 23(2) (emphasis added); *see also* 2006 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 16, art. 23, para. 2 (“[A]lthough the Convention provides for a foreign tax credit, the terms of the credit are determined by the provisions, *at the time a credit is given*, of the U.S. statutory credit.” (emphasis added)).

162. *See* 2006 U.S. MODEL TREATY, *supra* note 5, art. 1(4) (“[A] former citizen or former long-term resident of a Contracting State may, for the period of ten years following the loss of such status, be taxed in accordance with the laws of that Contracting State.”).

163. *See id.* art. 1(6). This article provides:

An item of income . . . derived through an entity that is fiscally transparent under the laws of either Contracting State shall be considered to be derived by a resident of a State to the extent that the item is treated for purposes of the taxation law of such Contracting State as the income, profit or gain of a resident.

Id.

164. *See id.* art. 26 (allowing the exchange of “such information as may be relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States”). The Supreme Court, in *Stuart*, addressed the interpretation of an analogous provision in the 1942 U.S.–Canada Income Tax Treaty. *United States v. Stuart*, 489 U.S. 353, 365 (1989).

165. *See, e.g.*, 2006 U.S. MODEL TREATY, *supra* note 5, art. 3(1)(b) (defining “company”); *id.* art. 3(1)(j) (defining “national”); *id.* arts. 4(1), (2), and (4) (all defining “resident”); *id.* art. 6(2) (defining “real property”); *id.* art. 10(5) (defining “dividends”); *id.* art. 11(3) (defining “interest”); *id.* art. 17(4) (defining “alimony”); *cf. id.* art. 3(1)(i) (incorporating references to international law to define the term “United States”); *id.* art. 27 (incorporating references to international law to define the limits on taxing diplomats).

166. *Id.* art. 3(2).

167. *Id.* art. 23(2).

IV. The Limits of Ambulatory Treasury Technical Explanations

A. *Legal Status of Technical Explanations*

The preceding Part analyzed relevant treaty-interpretation principles, particularly those under U.S. law. This Part applies those principles to determine the weight, if any, that should be accorded to technical explanations. It first addresses technical explanations promulgated simultaneously with, or prior to, the treaty in question. It then focuses on technical explanations published after the treaty in question has entered into force, including later revisions to the U.S. model technical explanations or technical explanations published in the context of subsequent treaties with other countries.¹⁶⁸ However, before focusing on this ever-changing body of technical explanations, it is important first to address the general legal status of technical explanations under U.S. administrative-law principles.

In *United States v. Mead Corp.*,¹⁶⁹ the Supreme Court held that an administrative interpretation

qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority . . . [through] notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.¹⁷⁰

Neither the model technical explanations nor an actual technical explanation prepared in anticipation of the Senate advice-and-consent process is published pursuant to such legislative authority.¹⁷¹ Accordingly, technical explanations do not carry the force of law.

168. As noted above, this question was asked, but not answered, in the New York State Bar Association's comments on the 2006 U.S. Model Treaty. See *supra* note 20 and accompanying text.

169. 533 U.S. 218, 226–27 (2001).

170. *Id.* at 226.

171. Some provisions in the Code delegate to the Treasury the authority to make regulations carrying the force of law. See *infra* notes 272–80 and accompanying text. However, the Treasury does not claim to be exercising such authority when it publishes technical explanations. Moreover, technical explanations are not promulgated through a formal, public-comment procedure. See David L. Raish et al., *Issues Paper on the Tax Treaty Making Process*, 46 TAX LAW. 477, 477 (1993) (“Unlike tax legislation and regulations, issues relating to U.S. treaties, the proposed text of treaties and the technical explanations, and committee reports are published too late to enable the public to participate in and influence the treaty making process.”). A representative of an international bankers’ trade group recently criticized the technical explanations to the recent Belgian treaty and German protocol on these grounds, alleging that they purport to change the interpretation of the consistency rule found in many U.S. treaties “through the release by the Treasury Department of technical explanations to treaties [with Belgium and Germany] rather than through a proper Congressional or regulatory process that allows for a full airing of the relevant policy and technical considerations.” Letter from Lawrence Uhlick to Eric Solomon, *supra* note 55. As a practical matter, interested parties may provide informal comments regarding provisions they would like to see in a forthcoming technical explanation.

In this regard, technical explanations are similar to revenue rulings,¹⁷² which are published “without the sort of public participation that is mandated as to regulations.”¹⁷³ While there is some disagreement in judicial opinions¹⁷⁴ and academic literature¹⁷⁵ regarding the precise level of deference accorded to revenue rulings—ranging from limited *Skidmore* deference to no deference—there is widespread agreement that they “are entitled to considerably less deference than an agency’s properly promulgated regulations.”¹⁷⁶ As a recent Fifth Circuit opinion observed, “Unlike treasury regulations, the IRS does not invoke its authority to make rules with the force of law when promulgating revenue rulings.”¹⁷⁷ Similarly, the Treasury Department does not invoke its authority to make rules with the force of law when

172. According to the Tax Court, “[N]either the Technical Explanation nor [a revenue ruling] is to be considered ‘the law of the United States’ for the purposes of [Article 23] of the U.S.–U.K. Convention.” *Compaq Computer Corp. v. Comm’r*, 113 T.C. 363, 372 (1999).

John Townsend has suggested that a treaty’s technical explanation “is entitled to deference because it is a regulation substitute and has important features that justify administrative deference.” Townsend, *supra* note 22, at 261. However, Townsend acknowledges that a technical explanation lacks the comment period of regulations. *Id.* While interested taxpayers might submit informal comments to the Treasury Department after a treaty is signed and before the technical explanation is published, the Treasury Department does not provide a formal, public opportunity to make comments and does not consider public comments (or make modifications) to a treaty’s technical explanation after it has been published. *Id.* In this regard, a technical explanation seems more analogous to a revenue ruling than a regulation (although, as noted in the text, the technical explanation may gain additional relevance by reason of the Senate relying on it—i.e., by reason of treaty-interpretation principles, rather than administrative law).

173. Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1042 (1995).

174. *See, e.g.*, *Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 452, 452–53 (5th Cir. 2008) (“Revenue Rulings do not have the presumptive force and effect of law but are merely persuasive as the Commissioner’s official interpretation of statutory provisions.”); *Black & Decker Corp. v. United States*, 436 F.3d 431, 441 (4th Cir. 2006) (“[T]he precise degree of deference owed to these rulings—particularly in the face of the IRS’s decision to interpret the statute differently in litigation—is unclear.”); *Aeroquip-Vickers, Inc. v. Comm’r*, 347 F.3d 173, 181 (6th Cir. 2003) (stating that “some” *Skidmore* deference is appropriate and citing other cases).

175. *See, e.g.*, Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317, 336 (2006) (noting that, with the exception of the Tax Court, “most courts treat revenue rulings with some form of deference,” and discussing the Sixth Circuit’s deferential treatment of revenue rulings); *cf.* Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 644–45 (1996) (describing courts’ self-described justifications for deferring to or ignoring revenue rulings as “mere window-dressing that does not have any effect on the ultimate resolution of the case”). *See generally* Galler, *supra* note 173 (offering an overview of the meaning of revenue rulings, the debate over deference, and the different standards of judicial review for revenue rulings in the Tax Court, the courts of appeals, and the Supreme Court). A recent report by an ABA Tax Section task force concludes that revenue rulings are not entitled to *Chevron* deference like regulations but should receive some limited *Skidmore* deference, “which directs courts to take into account the agency’s experience and its power to persuade, but to retain the ability to choose a better rule even if the agency interpretation is reasonable.” Irving Salem et al., ABA Section of Taxation, *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 719 (2004).

176. *Dominion Res., Inc. v. United States*, 219 F.3d 359, 366 (4th Cir. 2000).

177. *Kornman*, 527 F.3d at 454 (citing 26 C.F.R. § 601.601(d)(2)(v)(d) (2008)).

promulgating technical explanations.¹⁷⁸ Moreover, technical explanations, as administrative guidance, might be entitled to even less deference than the limited deference that some courts give revenue rulings. Whereas revenue rulings generally interpret the tax law created wholly within the U.S. legal system, technical explanations purport to interpret treaty provisions created with the additional involvement of another country, thereby adding an additional stakeholder who generally is not represented in the interpretation.

Because a technical explanation—either with respect to a particular treaty or with respect to the U.S. model—does not have the force of law, its only relevance, if any, arises in the context of the treaty interpretation principles discussed in the prior Part. In order to determine the limits of technical explanations under these principles, the following analysis begins with the strongest case for deferring to technical explanations under these principles and gradually moves to more tenuous cases.

B. Contemporaneous and Preexisting Technical Explanations

1. Joint Technical Explanation of a Specific Treaty.—In rare circumstances, the Treasury Department coordinates with the other treaty country when preparing the treaty’s technical explanation, and the other treaty country agrees to the explanation’s contents. For example, Canadian tax authorities recently agreed to the technical explanation prepared by the Treasury Department, in consultation with Canada, with respect to the 2007 Protocol to the U.S.–Canada tax treaty.¹⁷⁹

This joint technical explanation appears to have significant weight under the Vienna Convention, which defines the relevant context of the treaty to include “[a]ny instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties

178. See *supra* note 171 and accompanying text.

179. See *Testimony of Treasury Deputy Assistant Secretary for International Tax Affairs Michael F. Mundaca Before the S. Comm. on Foreign Relations on Pending Income Tax Treaties*, 110th Cong. D866 (2008), text available at <http://foreign.senate.gov/testimony/2008/MundacaTestimony080710p.pdf> (“The Technical Explanation to the Protocol with Canada was reviewed by Canada, and Canada subscribes to its contents, as will be confirmed by a press release from the Canadian Ministry of Finance.”). The U.S.–Canada technical explanation itself refers to its joint nature:

The Technical Explanation is an official United States guide to the Protocol. The government of Canada has reviewed this document and subscribes to its contents. In the view of both governments, this document accurately reflects the policies behind particular Protocol provisions, as well as understandings reached with respect to the application and interpretation of the Protocol and the Convention.

U.S. DEP’T OF THE TREASURY, TECHNICAL EXPLANATION OF THE PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND CANADA WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL 1 (2008), available at <http://www.treas.gov/press/releases/reports/tecanada08.pdf>. The Treasury Department considered a significant amount of public comment submitted with respect to the preparation of the joint Canada technical explanation.

as an instrument related to the treaty.”¹⁸⁰ Although the joint technical explanation was not prepared until after the treaty had been signed,¹⁸¹ its preparation was contemplated by the treaty negotiators, and it was completed in time to be considered by the Senate as part of its hearings.¹⁸² Accordingly, the joint technical explanation appears to have been made “in connection with the conclusion of the treaty” under Vienna Convention Article 31(2)(b). Even if it is not viewed as having been made in connection with the treaty’s conclusion, it would be taken into account under Article 31(3)(a), which considers “[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”¹⁸³

More importantly, for purposes of this Article, a joint technical explanation is likely to be given significant weight by U.S. courts under U.S. legal principles. As discussed above, the Supreme Court has been willing to look to extrinsic evidence when the treaty text is ambiguous.¹⁸⁴ To the extent that a joint technical explanation fills gaps not specifically addressed by the treaty text,¹⁸⁵ it provides strong evidence of the two countries’ mutual understanding and thus should have significant weight. Even to the extent that the joint technical explanation provides a result inconsistent with a literal reading of the words of the treaty, a court might give significant weight to the joint technical explanation. As the Supreme Court observed in *Stuart*, “The clear import of treaty language controls unless ‘application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.’”¹⁸⁶ Given that a joint technical explanation is created and agreed to as part of the treaty-creation process (after the negotiation, but before the entry into force), it seems to provide strong evidence of the signatories’ “intent or expectations,” particularly in specific examples addressed by the technical explanation. As the Tax Court noted with respect to a joint technical explanation to an earlier U.S.–Canada

180. Vienna Convention, *supra* note 67, art. 31(2)(b).

181. More typically, instruments jointly made “in connection with the conclusion of the treaty” are prepared and signed simultaneously with the treaty. See IFA STUDY, *supra* note 21, at 71 (“[It is] not uncommon practice for parties to a tax treaty to annex a protocol or an exchange of notes to the text of the treaty and . . . these interpretive declarations are therefore expressly accepted by the other party and have legal effect.”). Examples of these instruments include memoranda of understanding and exchanges of notes. See, e.g., Exchange of Notes Accompanying Protocol Amending the Convention with Respect to Taxes on Income and on Capital, U.S.–Can., Sept. 21, 2007, available at <http://www.treas.gov/offices/tax-policy/library/CanadaDipNotes07.pdf>.

182. See *Testimony of Treasury Deputy Assistant Secretary for International Tax Affairs Michael F. Mundaca Before the S. Comm. on Foreign Relations on Pending Income Tax Treaties*, *supra* note 172, at 6 (noting that the technical explanation was envisioned to serve as an official guide to the treaty).

183. Vienna Convention, *supra* note 67, art. 31(3)(a).

184. See *supra* notes 96–99 and accompanying text.

185. Of course, if the joint technical explanation merely confirms the clear meaning of the treaty text, the technical explanation is superfluous and plays little role in the interpretation.

186. *United States v. Stuart*, 489 U.S. 353, 365–66 (1989) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982)).

income tax protocol, “[T]he Treasury’s interpretation, set forth in the Technical Explanation, is particularly persuasive in light of the fact that the Canadian Department of Finance has generally accepted the Technical Explanation as an accurate portrayal of the understandings and context in which the Canadian Convention was negotiated.”¹⁸⁷

2. *Unilateral Technical Explanation of a Specific Treaty.*—The joint U.S.–Canada technical explanation is an anomaly. In the vast majority of treaties, the Treasury Department prepares the technical explanation after the treaty has been signed and with no direct involvement of the other treaty country.¹⁸⁸ While the Treasury Department might send a copy of the completed technical explanation to the other treaty country (simultaneously with the technical explanation’s submission to the Senate), the other country’s assent is neither solicited nor received. Indeed, a few technical explanations explicitly state that a copy of the technical explanation has been provided to the other country but are silent regarding the other country’s response or views regarding the explanation.¹⁸⁹

A significant question exists regarding the weight, if any, that a court would give to these self-serving statements, particularly in the absence of other evidence indicating a mutual understanding. The Federal Circuit opinion in *Xerox Corp. v. United States*¹⁹⁰ demonstrates the skepticism of some

187. *N.W. Life Assurance Co. of Can. v. Comm’r*, 107 T.C. 363, 385 (1996) (concluding, however, that the IRS in litigation misconstrued the meaning of that joint technical explanation). However, a Canadian court, interpreting the 1980 U.S.–Canada tax treaty, refused to defer to language in the U.S. technical explanation regarding the taxation of capital gains. *Canada v. Kubicek Estate*, [1997] 220 N.R. 316, 319 (Can.). Although the court acknowledged that the Canadian Minister of Finance had endorsed the U.S.-prepared technical explanation, it concluded that a literal reading of the technical explanation was inconsistent with the otherwise apparent intention of the parties. *Id.*; see also *Haas Estate v. Minister of Nat’l Revenue*, No. A-709-99, 2000 N.R. LEXIS 516 (F.C.A. Nov. 3, 2000) (Can.) (following *Kubicek Estate*); Ian J. Gamble, *Canada’s Failure to Apply the U.S. Technical Explanation to a New Treaty Article*, WORLDWIDE TAX DAILY, Feb. 19, 2009, 2009 WTD 31-6 (Lexis) (criticizing a recently published position by the Canada Revenue Agency that failed to apply an interpretation in the joint technical explanation to the recent U.S.–Canada tax treaty protocol).

188. See ALI TAX TREATY PROJECT, *supra* note 23, at 36 (“In all but exceptional cases, Technical Explanations are not agreed to by the treaty partner and, therefore, are unilateral documents.”).

189. See, e.g., 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 IRELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS SIGNED AT DUBLIN ON JULY 28, 1997 AND THE PROTOCOL SIGNED AT DUBLIN ON JULY 28, 1997, 2 Tax Treaties (CCH) ¶ 4435, intro. (July 28, 1997), available at <http://www.irs.gov/pub/irs-trty/iretech.pdf> (“This Technical Explanation has been provided to Ireland.”); U.S. DEP’T OF THE TREASURY, TECHNICAL EXPLANATION OF THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME SIGNED AT WASHINGTON ON OCTOBER 2, 1996 AND THE PROTOCOL SIGNED AT WASHINGTON ON OCTOBER 2, 1996, 4 Tax Treaties (CCH) ¶ 9145, intro. (Oct. 2, 1996) (“This technical explanation has been provided to Switzerland.”).

190. 41 F.3d 647 (Fed. Cir. 1994).

courts (and deference of others) regarding the extent to which the other country has acquiesced in a technical explanation's interpretation (or is even aware of it). In that case, the IRS argued that the technical explanation to the 1975 U.S.–U.K. treaty supported its position that the treaty did not require the United States to allow a foreign tax credit for the U.K. advance corporate tax.¹⁹¹ The U.S. Claims Court placed significant reliance on the technical explanation, finding that “the record indicates at least tacit acceptance by the U.K. of the U.S. interpretation . . . set forth in the Technical Explanation. . . . Knowledge of the U.S. interpretation, therefore, was clearly before the House of Commons during its own ratification debate.”¹⁹² The Claims Court's conclusion was based solely on an after-the-fact affidavit of one of the U.S. negotiators, who asserted that “copies of the Technical Explanation would have been sent to the U.K. negotiators.”¹⁹³

On appeal, the Federal Circuit was much more skeptical of the purported assent by the United Kingdom. Although the U.S. negotiator asserted that a copy of the technical explanation “would have been sent to the U.K. negotiators,” the Federal Circuit noted that “[n]o evidence of such ‘sending’ was provided, and it must be assumed that the Treasury's files contained no such support.”¹⁹⁴ Moreover, “[b]oth of the United Kingdom's Ministers for the Treasury averred that they did not accept, or even know of, the position taken in the Technical Explanation.”¹⁹⁵ Accordingly, the Federal Circuit concluded—in stark contrast to the lower court—that “[o]n this extremely one-sided record, it would violate any reasonable canon of construction to infer mutual assent by the signatories to the position taken by the Treasury.”¹⁹⁶

For similar reasons, a court might be reluctant to place much, if any, weight on the explicit, unilateral assertion in several recent technical explanations that they reflect “*understandings reached during the negotiations* with respect to the application and interpretation of the Convention,”¹⁹⁷

191. *Id.* at 653. See generally Townsend, *supra* note 22, at 301–03 (discussing the use of the technical explanation in *Xerox*).

192. *Xerox Corp. v. United States*, 14 Cl. Ct. 455, 463–64 (1988), *rev'd*, 41 F.3d 647 (Fed. Cir. 1994).

193. *Id.*

194. *Xerox*, 41 F.3d at 656.

195. *Id.*

196. *Id.*

197. See, e.g., 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, intro. (July 10, 2008), available at <http://www.treas.gov/press/releases/reports/teiceland08.pdf> (emphasis added); U.S. DEP'T OF THE TREASURY, TECHNICAL EXPLANATION OF THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF BULGARIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME, SIGNED AT WASHINGTON ON FEBRUARY 23, 2007, 1 Tax Treaties (CCH) ¶ 1841, intro. (July 10, 2008) (emphasis added).

particularly in the absence of other evidence that the interpretations actually reflect mutual understandings. This concern is particularly significant because that phrase contained in recent technical explanations to actual treaties is similar to the language in the 2006 Model Technical Explanation.¹⁹⁸ Accordingly, a court might view the assertion as mere boilerplate language copied from the Model, rather than a factually correct assertion regarding the negotiations of that particular treaty.¹⁹⁹

It is important to note that, as a practical matter, those lower court cases that look to a technical explanation generally have done so merely to confirm the interpretation that the court claims to have reached through some other interpretive approach, most typically the court's view of the plain meaning of the treaty language.²⁰⁰ Indeed, the Supreme Court's reference to the Senate debate in *Stuart* fits this same pattern—it merely used the Senate debate to confirm the interpretation the Court had already reached by other interpretive means.²⁰¹ To the extent that a technical explanation is referenced merely to

198. See 2006 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 16, intro. (“[The Technical Explanation] reflects the policies behind particular Convention provisions, as well as understandings reached with respect to the application and interpretation of the Convention.”).

199. A recent Tax Court decision might be interpreted as accepting this Technical Explanation assertion on its face with no inquiry into its factual veracity. See *Estate of Silver v. Comm’r*, 120 T.C. 430, 435 n.8 (2003) (referencing this language in support of the court’s reliance on the technical explanation to the 1995 U.S.–Canada Income Tax Treaty Protocol). As a factual matter, the statement in the protocol at issue in *Silver* was accurate—the Canadian tax authorities had expressly signed off on the technical explanation at the time it was issued. See Press Release, Can. Dep’t of Fin., Protocol to the Canada–United States Income Tax Convention: U.S. Technical Explanation (June 13, 1995), available at <http://www.collectionscanada.gc.ca/webarchives/20071122100207/http://www.fin.gc.ca/news95/95-048e.html>. The Tax Court, however, merely relied on the boilerplate statement in the technical explanation itself, apparently without verifying its accuracy or explicitly noting the technical explanation’s joint nature. *Silver*, 120 T.C. at 435.

200. See, e.g., *Haver v. Comm’r*, 444 F.3d 656, 658 (D.C. Cir. 2006); *Pekar v. Comm’r*, 113 T.C. 158, 163–64 (1999) (both concluding that the plain language of the U.S.–Germany treaty subjected the taxpayer’s foreign tax credit to the limitations of U.S. law, thereby permitting the IRS to apply the alternative-minimum-tax limitations, and citing to the technical explanation as confirmation); *Clayton v. United States*, 33 Fed. Cl. 628, 655 (1995) (noting that the technical explanation, like the plain language of the U.S.–Canada income tax treaty, failed to support the taxpayer’s argument regarding the residence of the trust).

A recent Tax Court case placed significant emphasis on the U.S.–Canada technical explanation (and a similar interpretation in the Senate report) without first addressing the plain meaning of the treaty text. See *Silver*, 120 T.C. at 434–35 (upholding the denial of a deduction for the decedent’s charitable bequest to the extent that the property was not included in the decedent’s U.S. gross estate). The Tax Court did not squarely address the legal rationale for deferring to the technical explanation, other than briefly quoting from the technical explanation itself, which states that the explanation is the “official guide to the Protocol. It explains policies behind particular provisions, as well as understandings reached during the negotiations with respect to the interpretation and application of the Protocol.” *Id.* at 435 n.8. Although not explicitly acknowledged in *Silver*, the U.S.–Canada technical explanation at issue in that case was a joint technical explanation that Canada had agreed to, and it would be entitled to greater weight than a unilateral technical explanation. See *supra* note 199.

201. This use of materials from the Senate consent process merely to confirm the plain meaning of the treaty text was criticized by Justice Kennedy in his *Stuart* concurrence. *United States v. Stuart*, 489 U.S. 353, 370 (1989) (Kennedy, J., concurring). Justice Brennan’s majority opinion

confirm an interpretation already reached in some other manner, the use of the technical explanation is of little consequence.²⁰²

A final factor concerning the deference given to a treaty's technical explanation relates to the Senate advice-and-consent process. The Treasury Department prepares the technical explanation for a treaty prior to the Senate Foreign Relations Committee hearing on the treaty, so both the Committee and the full Senate have access to this document prior to giving consent to the treaty.²⁰³ Indeed, for the benefit of the Foreign Relations Committee, the Joint Committee on Taxation prepares an explanation to the treaty in which it analyzes the interpretations set forth in the technical explanation.²⁰⁴

The Supreme Court in *Stuart* indicated a willingness to look to the Senate floor debate in interpreting a tax treaty. As discussed above, the Court's attempt to justify this reference was based on a relatively weak suggestion that the other country is assumed to have knowledge of the debate and, by not objecting, implicitly agreed that the Senate's interpretation reflects a mutual understanding.²⁰⁵ The case for extending the *Stuart* Court's rationale is somewhat stronger in the case of the technical explanation to the treaty being interpreted, at least in circumstances where there is evidence that the Treasury Department actually sent a copy of the technical explanation to the treaty partner in a timely manner (as opposed to the circumstances in *Stuart*, where the Court implied a potentially unrealistic obligation on the treaty partner to take the initiative to make itself aware of all public Senate hearings and other public materials regarding the treaty).²⁰⁶

Of course, the treaty partner's silence after receiving the technical explanation does not constitute direct evidence of agreement to the interpretations therein. Accordingly, the technical explanation should be given little weight when there is other, more reliable evidence of the parties' mutual understanding of a treaty's terms, such as OECD Commentary in existence at the time of the treaty negotiations. However, in the absence of such evidence, the technical explanation to the treaty in question is at least as

cited the Senate debate over the treaty, concluding that it supported the interpretation that the opinion had already reached regarding the meaning of the treaty language. *Id.* at 367 (majority opinion). Justice Kennedy argued that there was no need to consult the Senate debate or to determine the extent to which such consultation is permissible because the Justices unanimously agreed that the treaty text itself resolved the issue. *Id.* at 370 (Kennedy, J., concurring).

202. As the International Fiscal Association observed in an analogous interpretation of ambulatory OECD Commentaries under Vienna Convention principles, "Of course, if the interpretation [of the treaty text] is clear and unambiguous, the words in the particular tax treaty do not require reference to the commentaries to be interpreted." IFA STUDY, *supra* note 21, at 80; *see also supra* note 80 and accompanying text.

203. *See supra* note 42 and accompanying text.

204. *E.g.*, STAFF OF THE J. COMM. ON TAXATION, 110TH CONG., EXPLANATION OF PROPOSED INCOME TAX TREATY BETWEEN THE UNITED STATES AND BULGARIA (Comm. Print 2008) [hereinafter EXPLANATION OF PROPOSED TREATY].

205. *See supra* notes 112–119 and accompanying text.

206. For a discussion of the Federal Circuit's skepticism in *Xerox* as to whether the Treasury Department actually sent the technical explanation, *see supra* notes 190–96 and accompanying text.

relevant as other evidence that a court might consider. For example, courts have sometimes relied on affidavits of negotiators that are executed years later, in the context of litigation, and often after the negotiator has left government service.²⁰⁷ In contrast, the technical explanation to a particular treaty is published during the course of the ratification process, and perhaps most importantly, interested members of the public have access to it during that period. Indeed, as a practical matter, representatives of various industries and interest groups give detailed attention to the technical explanation and publicly highlight and express concern regarding potentially troublesome or unusual interpretations prior to the time that instruments of ratification are exchanged.²⁰⁸ Accordingly, while the unilateral technical explanation to the specific treaty certainly is not controlling,²⁰⁹ it can be viewed as providing at least some evidence of mutual understanding in the absence of more reliable evidence.

In rare circumstances, a factual question might arise regarding the Senate's understanding of a technical explanation. For example, in *Xerox*, the Federal Circuit observed that the Senate Executive Report "mentioned the 'difficult and complex issues' raised [by the Technical Explanation], and declined to 'adopt or reject' the 'amplifications' in the Technical Explanation."²¹⁰ In such circumstances, where there is an indication that the Senate itself questioned the interpretation provided in the technical explanation, the case for using that aspect of the technical explanation is significantly weakened.²¹¹

3. *Previously Published Model Technical Explanation.*—As discussed above,²¹² the Supreme Court in *Alvarez-Machain* was willing to find indirect evidence of shared understanding in a nontax setting by assuming that the treaty partner was aware of relevant U.S. legal doctrines at the time of the treaty negotiation. At least one commentator has suggested that *Alvarez-Machain* supports a conclusion that the treaty partner might be viewed as

207. See *supra* note 105.

208. See, e.g., Letter from Lawrence Uhlick to Eric Solomon, *supra* note 55.

209. See EXPLANATION OF PROPOSED TREATY, *supra* note 204, at 85 n.57 ("Although the Technical Explanation does indicate the Department of the Treasury's interpretation of the treaty, that interpretation is not legally binding on Bulgaria."); see also *Nat'l Westminster Bank, PLC v. United States (NatWest)*, 58 Fed. Cl. 491, 499 (2003) (observing that "even if the court were to read these statements more broadly, the unilateral views of the U.S. are not controlling," after concluding that the technical explanation did not support the IRS's litigating position), *aff'd*, 512 F.3d 1347 (Fed. Cir. 2008). While the *NatWest* court stated that the technical explanation was "not controlling," that does not necessarily mean that technical explanations should have no weight.

210. *Xerox Corp. v. United States*, 41 F.3d 647, 655 (Fed. Cir. 1994).

211. The court stated that while "[o]ne may debate the meaning of this cool treatment of the Technical Explanation [in the Senate Report]," what is clear "is that the Treasury's position was not embraced by the Senate." *Id.* at 655–66; see also *NatWest*, 58 Fed. Cl. at 499 (concluding that the IRS misinterpreted both a statement in the technical explanation and the Senate's understanding of the technical explanation).

212. See *supra* note 109 and accompanying text.

implicitly assenting to the interpretation contained in the U.S. model technical explanation in existence at the time of a particular treaty's negotiation, at least to the extent it did not object to the interpretation.²¹³

Assuming the Supreme Court were to follow *Alvarez-Machain* in future cases, this conclusion has some attraction, particularly if the negotiators focused significant attention on the then-existing model technical explanation as part of the negotiation process. However, several practical considerations significantly weaken the viability of this conclusion. First, the U.S. model technical explanation is not the only interpretive source to which the negotiators have access. In particular, to the extent that particular treaty language appears in both the OECD Model Treaty as well as the U.S. model treaty, the negotiators from the other country might be expected to have greater familiarity with the OECD Commentary interpretations, rather than the U.S. model technical explanation. In such circumstances, the case for finding implicit assent to the model technical explanation is weaker. Moreover, as a historical matter, the Treasury Department does not regularly update the U.S. model treaty and the model technical explanation to reflect ever-evolving treaty policies (in contrast to the OECD's more frequent updating of its Commentaries),²¹⁴ so even though the model technical explanation might be sent to the other country in advance of negotiations, it might not necessarily reflect the then-current views of the Treasury Department and its negotiators (let alone the other country's negotiators) at the time a particular treaty is negotiated.²¹⁵

In addition to this potential lack of mutual assent between the treaty negotiators, the model technical explanation has only limited relevance with respect to the Senate consent process. Even under a very broad reading of

213. Townsend, *supra* note 22, at 242–43.

214. As the Treasury Department observed in the 1996 Model Technical Explanation, the Treasury's treaty policies evolve over time:

[T]he Model is intended to be an ambulatory document that may be updated from time to time to reflect further consideration of various provisions in light of experience, subsequent treaty negotiations, economic, judicial, legislative or regulatory developments in the United States, and changes in the nature or significance of transactions between U.S. and foreign persons. The Technical Explanation is also intended to be ambulatory, and may be expanded to deal with new issues that may arise in the future. . . . *The manner and timing of such updates will be subsequently determined.*

1996 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 5, tit. & pmb. (emphasis added). Despite this anticipated updating of the Model, no update was issued for ten years. See 2006 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 16.

215. For example, the Treasury Department waited ten years before updating the 1996 U.S. Model Treaty with the 2006 U.S. Model Treaty (and the corresponding technical explanations). See *supra* note 214. During that time, the Treasury's policy on the interpretation of numerous provisions evolved, as reflected in various changes to the actual treaties negotiated (and technical explanations published) during that decade. This phenomenon is, perhaps, most noticeable in the evolution of the pension provisions (Article 18) and the limitation-on-benefits provisions (Article 22) of the models. For a detailed comparison of the 1996 and 2006 Model Treaties, see TITTLE & AVI-YONAH, *supra* note 52.

Stuart, the existence of the model technical explanation does not necessarily reflect understanding or assent. As noted above, the U.S. model treaty and model technical explanation are updated irregularly and might not necessarily reflect the most recent policies as of the time the treaty is negotiated, so the Senate, at least implicitly, might be reluctant to place too much emphasis on their contents when approving an actual treaty. Indeed, in a 2001 report, the staff of the Congressional Joint Committee on Taxation (JCT) explicitly criticized the lack of regular updating of the model treaty.²¹⁶ The JCT staff report recommended that the Treasury Department should update and publish a current version of the U.S. model treaty once during each Congress.²¹⁷ The recommendation noted that “[f]or purposes of clarity and transparency in this area, the U.S. model tax treaties should reflect the most current positions on U.S. treaty policy.”²¹⁸

While the recommendation focused on updating the model treaty itself, presumably the recommendation contemplated that the corresponding model technical explanation would also be updated regularly. After all, an update of the model treaty itself would only reveal those developments in U.S. treaty policy that were significant enough (in the Treasury’s view) to warrant a change in the treaty language; it would not reveal developments in the Treasury’s preferred interpretation of existing treaty language, particularly when the Treasury viewed the changes as not sufficient enough to warrant a change in the treaty language.

This JCT staff recommendation, if adopted by the Treasury, would strengthen the relevance of the model technical explanation under *Alvarez-Machain*. In particular, by more clearly and reliably identifying the United States’ interpretation of the model treaty at a particular time, a stronger case can be made that a treaty partner negotiating a treaty at that time would be aware of relevant U.S. legal doctrines, thereby justifying the application of the *Alvarez-Machain* principle (at least to the extent there was not contrary evidence, such as a contrary interpretation in the OECD Commentaries). However, in the absence of such regular updates reflecting then-current views, the model technical explanation in existence at the time a treaty is

216. STAFF OF THE J. COMM. ON TAXATION, 107TH CONG., 2 STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION, PURSUANT TO SECTION 8022(3)(B) OF THE INTERNAL REVENUE CODE OF 1986: RECOMMENDATIONS OF THE STAFF OF THE JOINT COMMITTEE ON TAXATION TO SIMPLIFY THE FEDERAL TAX SYSTEM 446 (Comm. Print 2001).

217. *Id.* at 447.

218. *Id.* at 446. While this recommendation was based, in part, on the desire for clarity and uniformity in U.S. treaty policy, it also reflected institutional concerns—in particular, a desire to keep the Senate and relevant congressional staff informed of the Treasury’s evolving policies, thereby placing a greater emphasis on the Senate’s “advice” role in the treaty process. According to the report, in developing its regular updates to the model treaty, “the Treasury Department should consult in advance with the Congress as to new treaty policies that are being considered for inclusion in an updated model treaty, as well as other issues that are relevant to the updating of U.S. treaty policy.” *Id.* at 447.

negotiated should be given little, if any, weight in interpreting that treaty. Even a Treasury Department official responsible for tax treaty issues recently acknowledged that the model technical explanation is “not an authoritative interpretation of the meaning of model-based treaties.”²¹⁹

4. *Previously Published Technical Explanations for Other Treaties.*—In addition to the U.S. model technical explanation in existence at the time of a particular treaty’s negotiation, many actual technical explanations exist with respect to previously negotiated and ratified tax treaties. The case for deferring to the interpretation in one of those preexisting technical explanations in interpreting a more recent treaty is even weaker than the case for using the model technical explanation.

First, given that separate technical explanations exist for dozens of existing treaties, in the absence of specific evidence arising from the negotiations, there is no reason to believe that the negotiators would have focused on any particular technical explanation among the many. Accordingly, if different technical explanations reflect different interpretations of the same treaty language, there is no basis to conclude that any particular one reflected the shared understanding of the negotiators of a subsequent treaty. Similarly, in the context of the Senate advice-and-consent process, there is no reason to believe that any particular previously existing technical explanation reflected the Senate’s understanding of the treaty at issue. As a result, no weight should be given to an interpretation that happens to appear in the technical explanation of a previously existing treaty with another country, unless there is evidence that the negotiators (or the Senate under a broad reading of *Stuart*) took notice of that particular preexisting interpretation during the negotiations or advice-and-consent process.

C. *Subsequent Technical Explanations*

The preceding subpart addressed the interpretive weight, if any, to be accorded technical explanations created prior to, or in conjunction with, a particular tax treaty being interpreted. The present subpart considers the weight to be accorded technical explanations created after the treaty at issue has entered into force. This group of technical explanations includes subsequent modifications to the model technical explanation and also technical explanations to subsequently negotiated treaties with other countries to the extent they interpret the same treaty language. As the following analysis demonstrates, these subsequent technical explanations are entitled to little weight, if any, in interpreting previously existing treaties, thereby precluding

219. Lee A. Sheppard, *Treasury Official Fends Off Treaty Questions*, 45 TAX NOTES INT’L 221 (2007), available at 45 Tax Notes Int’l 221 (Lexis) (quoting Benedetta Kissel, Deputy International Tax Counsel for Treaty Affairs).

the use of subsequent technical explanations as a form of ambulatory treaty guidance.

1. Analogy to Ambulatory OECD Commentary.—Before focusing on the relevance of ambulatory technical explanations under U.S. legal principles, it is informative to consider their relevance under Vienna Convention principles. As discussed above, numerous commentators already have considered the analogous question regarding the authority of ambulatory OECD Commentary under Vienna Convention principles.²²⁰ These commentators generally have concluded that such subsequently developed guidance has little relevance because of the Vienna Convention’s focus on the shared understanding of the parties at the time the treaty was negotiated.²²¹ Given the fragile standing of ambulatory OECD Commentaries under the Vienna Convention principles, it is not surprising that ambulatory technical explanations issued by the Treasury Department, such as a revision to the U.S. model technical explanation, have almost no relevance under these Vienna Convention principles in interpreting previously existing treaties. At its most benign, the new technical explanation language might merely amplify the ordinary meaning of treaty terms through the addition of examples that are consistent with the previously existing understandings of the provision. Of course, the line between a mere clarification and something more is not clear and therefore raises interpretive issues of its own.²²² Moreover, if the new technical explanation language merely reflects the existing meaning of existing treaty language, then it adds nothing to the result that would have otherwise resulted under Article 31 of the Vienna Convention.²²³

Assuming that the new technical explanation language purports to do more—e.g., to fill a gap not otherwise resolved by Article 31, to reflect what states have been doing in practice, or to contradict a meaning otherwise resulting from the application of Article 31—the new language will have no relevance under the Vienna Convention principles. As discussed above, documents are relevant in providing interpretive “context” under Article 31 only if they reflect an agreement between the parties in connection with the conclusion of the treaty or an instrument made by one of the parties and

220. See *supra* section III(A)(2).

221. See IFA STUDY, *supra* note 21, at 80 (concluding that the ambulatory OECD Commentaries are entitled to little interpretive weight under the principles of the Vienna Convention).

222. Cf. *id.* at 79 (noting that the classification of ambulatory OECD Commentaries as merely amplifying existing commentaries, rather than doing something more, does not reflect “entirely separate categories”).

223. See *id.* at 80 (noting that in the context of ambulatory OECD Commentaries, “if the interpretation [of the treaty language] is clear and unambiguous, the words in the particular tax treaty do not require references to the commentaries to be interpreted”).

accepted by the other party as related to the treaty.²²⁴ A later change to the language of the Treasury Department's model technical explanation, or a later change reflected in the technical explanation of some other U.S. tax treaty, clearly would not constitute such an agreement between the United States and a party to an existing tax treaty. Indeed, even the original technical explanation accompanying a particular treaty generally does not meet this strict definition of context because a technical explanation is prepared unilaterally by the Treasury Department as part of the Senate consent process (i.e., after the two countries have signed the treaty), and the other country generally does not provide its consent to the document.²²⁵

New language in a model technical explanation (or technical explanation regarding a subsequent treaty with a different country) would also not constitute the other types of relevant material to be taken into account under Article 31 of the Vienna Convention. With respect to Article 31(3), it would not constitute a subsequent agreement between the parties, and it would not necessarily reflect subsequent practice in the application of the treaty reflecting the parties' agreement. To the extent the new language happened to reflect such subsequent practice, Article 31(3) would look to the subsequent practice regardless of the new technical explanation language. Finally, the new technical explanation language would not be relevant regarding a "special meaning" under Article 31(4) because the new technical explanation language sheds no light on the intent of the parties to a previously negotiated treaty.

Article 32 of the Vienna Convention also provides little support for the use of later technical explanation language in interpreting a previously existing treaty. That Article permits recourse to supplementary means of interpretation—most importantly information regarding "the preparatory work of the treaty and the circumstances of its conclusion"²²⁶—to determine the meaning of treaty language only when the meaning of terms is "ambiguous or obscure,"²²⁷ or when the interpretation would otherwise be "manifestly absurd or unreasonable."²²⁸ Even if these conditions were satisfied, a unilateral declaration in a later technical explanation would not constitute the relevant *travaux préparatoires* contemplated by the Article.

224. Vienna Convention, *supra* note 67, art. 31(2).

225. See *supra* notes 43–45 and accompanying text. One exception would be in the rare circumstance where the United States and the other treaty country jointly agree to the language in the technical explanation. For example, the United States and Canada recently agreed to a technical explanation to the protocol to the U.S.–Canada income tax treaty. See *supra* note 179. Such a document would appear to constitute an "instrument which was made by one or more parties . . . and accepted by the other parties as an instrument related to the treaty" within the meaning of Article 31(2), thereby permitting its provisions to serve as interpretive context in determining the meaning of the underlying treaty. See Vienna Convention, *supra* note 67, art. 31(2)(b).

226. *Id.* art. 32.

227. *Id.* art. 32(a).

228. *Id.* art. 32(b).

Even the technical explanation of a particular treaty generally is not viewed as relevant under this standard because it is merely a unilateral document prepared by one party (and not necessarily accepted by the other party) after the treaty has been signed.²²⁹ Accordingly, ambulatory language in Treasury Department technical explanations—including new language in a revised model technical explanation or different language appearing in a more recent technical explanation to a different tax treaty—has little or no relevance under the Vienna Convention in interpreting the provisions of a previously existing tax treaty.

2. *Limited Authority Under U.S. Legal Principles.*—As discussed above, a technical explanation has no formal legal status under U.S. administrative-law principles, and therefore is not, standing alone, entitled to deference.²³⁰ Instead, its only relevance, if any, arises in the context of treaty-interpretation principles. Although a subsequently published technical explanation has no relevance in interpreting previously ratified treaties under Vienna Convention interpretation principles, as discussed previously, U.S. courts sometimes have been willing to consider a broader range of materials than are permitted under the Vienna Convention.²³¹ Even under this looser U.S. approach, however, subsequent technical explanations have little relevance as ambulatory means of interpreting existing tax treaties.

Most notably, the Supreme Court in *Stuart*, by citing the Senate floor debate regarding the 1975 U.S.–Canada income tax treaty, indicated a willingness to look at the understanding of the Senate in giving its advice and consent. While a broad reading of *Stuart* might support reference to the unilateral technical explanation prepared (and submitted to the Senate) with respect to the treaty at issue,²³² this reasoning does not support reference to a *subsequently* prepared technical explanation in interpreting a previously existing treaty. After all, the subsequently prepared technical explanation was not available to, and played no role in, the Senate giving consent to the earlier treaty.

Moreover, as noted above, some disagreement existed between the Justices regarding the extent to which that floor debate reflected merely the unilateral understanding of the Senate or the implicit mutual agreement of

229. See IFA STUDY, *supra* note 21, at 72 (“What seems to be clear in international law is that unilateral interpretive declarations are not binding on the other contracting party or parties although they do become binding if and when the declaring state consents to be bound by the treaty only if the specific interpretation set out in the interpretive declaration is accepted.”); *id.* at 70 n.170 (“[T]o the extent that such documents do not reproduce the content of letters or notes exchanged during the negotiation of the treaty, they fall outside the scope of Articles 31 and 32 of the *Vienna Convention*.” (citing KLAUS VOGEL ET AL., KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS (John Marin & Bruce Elvin trans., 3d ed. 1997))).

230. See *supra* notes 169–78 and accompanying text.

231. See *supra* notes 100–07 and accompanying text.

232. See *supra* text accompanying notes 205–09.

both treaty partners.²³³ To the extent that Justice Brennan's use of Senate materials in *Stuart* depends on his assertion that the Senate materials reflect an implicit assent by the treaty partner, rather than merely a unilateral understanding by the Senate (because the materials are public and the other country did not object), the case for looking to subsequently created technical explanations is even weaker. After all, even under a very broad reading of implicit assent, the other country cannot be viewed as assenting to a document that does not yet exist at the time the treaty is ratified.

An argument might be made that a subsequent technical explanation—most likely an update to the model technical explanation—should be relied on to the extent it reflects the existing practice of countries interpreting similar treaty language in existing treaties. The Supreme Court, consistent with (but not explicitly relying on) Vienna Convention principles,²³⁴ permits reference to the existing practice of the countries in order to ascertain the countries' mutual understanding of the treaty.²³⁵ This argument might be strengthened to the extent the subsequent technical explanation reflects developments in the OECD Commentaries,²³⁶ particularly to the extent that the other country whose tax treaty is at issue is an OECD member and did not express an observation or reservation regarding the OECD Commentary. However, as a practical matter, this argument has little effect. As a factual matter, updating the model treaty does not provide evidence of the practice of the partner to an existing treaty. To the extent evidence of such practice does exist, the promulgation of a new model treaty would be superfluous. Similarly, to the extent the model technical explanation reflects developments in the OECD Commentary, and those developments reflect existing treaty practice, the revision of the model technical explanation has little additional relevance.

As a final consideration, the Supreme Court has stated that “the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”²³⁷ While the Treasury Department (with the assistance of the IRS) prepares the model technical explanation, this dicta does not justify the use of the subsequent technical explanation interpretations. As previously discussed, the technical explanation to a subsequent actual treaty might, at least in theory, merely reflect the understanding in that particular negotiation, rather than an interpretation of the earlier treaty.²³⁸ Moreover, the model technical explanation does not represent a formal position of the Treasury Department, so it

233. See *supra* notes 115–18 and accompanying text.

234. See *supra* note 75 and accompanying text.

235. *United States v. Stuart*, 489 U.S. 353, 369 (1989).

236. See *supra* notes 80–88 and accompanying text.

237. *Stuart*, 489 U.S. at 369 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

238. See *supra* notes 214–18 and accompanying text.

should not be relied on in this context. In contrast, a Treasury regulation does constitute a more formal position and might be entitled to greater weight in this context. The role of regulations is discussed in Part V.

3. *Taxpayer Reliance on Subsequent Technical Explanations.*—

a. *Legal Authority.*—The current practice of the Treasury Department—whereby evolving treaty policy and interpretations are not regularly published in a frequently updated model treaty and technical explanation, but instead are revealed in an ad hoc manner through newly negotiated treaties and their corresponding technical explanations—creates a significant potential administrative problem for the government. As just discussed, a court should not give weight to these subsequently issued technical explanations when interpreting an already-existing treaty. Accordingly, to the extent that the subsequent technical explanations contain interpretations favorable to the government, they will not help the government in litigation concerning an earlier treaty.

Nonetheless, in those cases where a subsequent technical explanation contains an interpretation favorable to taxpayers, taxpayers and their advisors might attempt to rely on the subsequent technical explanation when determining the application of a previously existing treaty.²³⁹ Even though the subsequent technical explanation is not binding and might not be entitled to any deference in interpreting the earlier treaty if the matter goes to litigation (for the reasons discussed above), taxpayers and their advisors might nonetheless attempt to rely on that favorable subsequent technical explanation for purposes of reporting. The New York State Bar Association Tax Section, in its detailed comments on the 2006 U.S. Model Treaty, explicitly focused on this aspect of technical explanations (in particular the Model Technical Explanation):

Construing language in the 2006 Model that is often identical to that in existing treaties, the [Model] Technical Explanation makes statements as to intended meaning that may or may not be repeated in the technical explanations of specific tax treaties or protocols. Moreover, not all technical explanations of essentially identical treaty language are the same. In cases where the treaty language is substantively the same, can these statements be relied upon in interpreting treaties?²⁴⁰

As discussed earlier, good arguments support a taxpayer's ability to rely on an interpretation contained in the technical explanation to the particular

239. This discussion assumes that the earlier treaty that applies to the taxpayer contains similar or identical treaty language to that of the subsequent treaty that the subsequent technical explanation is interpreting.

240. NYSBA REPORT, *supra* note 20, at 3–4.

treaty at issue.²⁴¹ These arguments, however, do not allow a taxpayer to bind the IRS to an interpretation in the technical explanation to another treaty or subsequent modifications to the model technical explanation. First, another treaty's technical explanation might reflect a particular understanding reached during the negotiations of that other treaty and therefore would not necessarily reflect the mutual understanding of the negotiators of the treaty at issue.²⁴² Moreover, even to the extent that a technical explanation is relevant under the *Stuart* rationale by reason of its inclusion in the Senate consent process, that rationale extends only to the technical explanation of the particular treaty under consideration by the Senate. A subsequent treaty's technical explanation does not necessarily reflect the understanding of the Senate that consented to the earlier treaty, nor could it be viewed as reflecting any kind of implicit mutual understanding of the treaty partner to the earlier treaty even under a broad reading of *Stuart*. Accordingly, a taxpayer cannot pick and choose among subsequent treaties' technical explanations and expect to be able to bind the IRS to the most favorable one.

b. Avoidance of Penalties.—Even if the taxpayer cannot conclusively rely on subsequent technical explanations in interpreting an earlier treaty, these subsequent technical explanations might enable the taxpayer to take a favorable reporting position and avoid potential penalties if a court ultimately rules against the taxpayer on the treaty-interpretation issue. Under Internal Revenue Code § 6662, a taxpayer might be subject to significant penalties if a court ultimately finds that the taxpayer's position taken on a return was incorrect and resulted in a substantial understatement of income tax.²⁴³ However, this penalty does not apply to the extent that (i) “there is or was substantial authority” for the taxpayer's position,²⁴⁴ or (ii) the taxpayer adequately discloses the relevant facts on the tax return and there is a “reasonable basis” for the position.²⁴⁵

The relevant Treasury regulations provide that “[t]here is substantial authority for the tax treatment of an item only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment.”²⁴⁶ For purposes of this inquiry, relevant authorities include “tax treaties and regulations thereunder, and Treasury

241. *See supra* notes 206–09 and accompanying text; *see also* ALI TAX TREATY PROJECT, *supra* note 23, at 60–61 (“Whatever the weight to be given to unilateral materials in the treaty interpretative process . . . a taxpayer should be allowed to rely on such material to the same extent that reliance could be placed on similar administrative interpretations of a statute.”).

242. As discussed above, each treaty's technical explanation often contains a self-serving statement that it reflects the understandings reached by the negotiators, although this boilerplate language might raise questions as to its factual accuracy. *See supra* notes 197–99 and accompanying text.

243. I.R.C. §§ 6662(b)(2), (d) (2000).

244. *Id.* § 6662(d)(2)(B)(i).

245. *Id.* § 6662(d)(2)(B)(ii).

246. Treas. Reg. § 1.6662-4(d)(3)(i) (as amended in 2003).

Department and other official explanations of such treaties.”²⁴⁷ Under this standard, and particularly given the use of the plural form of “treaties” and “official explanations,” a taxpayer might be able to pick and choose among differing technical explanations from various treaties in order to establish “substantial authority.” The regulations provide some limited guidance in determining how various authorities should be weighed in order to determine whether there is “substantial authority.” For example, “[t]he type of document . . . must be considered . . . [and] the persuasiveness and relevance of a document, viewed in light of subsequent developments, should be taken into account.”²⁴⁸ This standard suggests that the technical explanation to the actual treaty at issue should be given greater weight than a subsequent treaty’s technical explanation for purposes of determining “substantial authority,” given the importance of the actual treaty’s technical explanation in the Senate consent process for that treaty. However, if the actual treaty’s technical explanation is silent or unclear regarding a particular interpretation, the regulations leave room for subsequent technical explanations, including updates to the model technical explanation, to be considered.²⁴⁹

As mentioned above,²⁵⁰ if a taxpayer adequately disclosed the relevant facts on the tax return, the taxpayer can avoid the substantial underpayment penalty merely by showing a “reasonable basis” for the position,²⁵¹ rather than having to meet the more stringent “substantial authority” standard.²⁵² As a practical matter, taxpayers facing the treaty-interpretation issues addressed herein generally will be subject to this lower standard, assuming they have complied with the separate provision of the Internal Revenue Code that

247. *Id.* § 1.6662-4(d)(3)(iii).

248. *Id.* § 1.6662-4(d)(3)(ii).

249. The regulation states that “[a]n older private letter ruling, technical advice memorandum, general counsel memorandum or action on decision generally must be accorded less weight than a more recent one. Any document described in the preceding sentence that is more than 10 years old generally is accorded very little weight.” *Id.* Although this provision does not explicitly apply to technical explanations, it might be argued that it places greater weight on interpretations contained in more recent technical explanations than older technical explanations, particularly if the technical explanation to the treaty at hand is silent on the issue. However, caution should be exercised in relying on this provision to justify placing significant weight on a newer technical explanation that is inconsistent with the technical explanation to the actual treaty. Whereas the IRS generally has the authority to modify its existing interpretations of a statute by issuing newer private letter rulings and related documents (and thus the newer guidance is given greater weight under this standard), the treaty-interpretation principles discussed earlier generally do not permit an ambulatory change to an existing treaty pursuant to subsequent technical explanations, and there is no reason to believe that a newer technical explanation reflects a more accurate interpretation of the language in an older treaty.

250. *See supra* note 245 and accompanying text.

251. The regulations define “reasonable basis” by describing it in relation to what it is not—it is “significantly higher than not frivolous or not patently improper” and “is not satisfied by a return position that is merely arguable or that is merely a colorable claim.” Treas. Reg. § 1.6662-3(b)(3) (as amended in 2003).

252. *See id.* § 1.6662-4(d)(2) (as amended in 2003) (observing that the “substantial authority” standard is “more stringent than the reasonable basis standard”).

generally requires disclosure of treaty-based return positions.²⁵³ As with the substantial-authority inquiry, the taxpayer must consider “the relevance and persuasiveness of the authorities, and subsequent developments,”²⁵⁴ but need only demonstrate that the position is reasonably based on one or more of these authorities.²⁵⁵ While this standard still seems to place the most relevance on the technical explanation to the particular treaty at issue, it creates additional leeway to rely on interpretations in more recent technical explanations. This reasonable-basis standard, if satisfied, will also protect the tax-return preparer from penalties, assuming there was adequate disclosure on the taxpayer’s return.²⁵⁶

V. Defending (Limited) Ambulatory Administrative Guidance

A. *Ambulatory Guidance via Changes to “U.S. Law”*

As the prior Part demonstrated, U.S. courts have been willing to look at supplemental materials beyond those contemplated by the Vienna Convention when interpreting treaties. However, even when Supreme Court precedent is interpreted broadly, it does not support deference to subsequently published technical explanations—whether model or in the context of actual treaties with other countries—when interpreting an earlier tax treaty. The principal shortcoming of these subsequent technical explanations is that they do not constitute either direct or indirect evidence of the mutual understanding between the United States and the other party to the earlier treaty. Accordingly, the Treasury Department’s historic approach to evolving interpretations of tax treaty language that is common to many treaties—i.e., through infrequent updates to the model technical explanation, along with ad hoc modifications reflected periodically in newer treaties’ technical explanations—fails to establish a uniform source of interpretation that is entitled to deference by U.S. courts under general treaty-interpretation principles. Moreover, as previously discussed, this ad hoc approach provides taxpayers with latitude to pick and choose among various technical explanations in establishing their reporting positions.

This Part considers another potential approach that might provide the Treasury Department with greater ability to develop ambulatory administrative guidance that is entitled to at least some deference in applying

253. See I.R.C. § 6114 (2000) (requiring treaty-position disclosure, which is made on IRS Form 8833).

254. Treas. Reg. § 1.6662-3(b)(3) (as amended in 2003).

255. *Id.*

256. See I.R.C. § 6694(a) (2000 & Supp. 2009) (protecting the tax-return preparer if there was adequate disclosure and a reasonable basis for the position). Under recent amendments to the Internal Revenue Code, the standards for a tax-return preparer to avoid penalties when there has not been adequate disclosure are now the same as those that apply to the taxpayer. See *id.* § 6694(a)(2)(A) (protecting the tax-return preparer if there was no disclosure but there was “substantial authority” for the position).

preexisting treaties. As discussed above, tax treaties contain provisions that, by their express terms, envision a role for some unilateral developments after a treaty enters into force.²⁵⁷ For example, Article 3(2) of both the OECD Model Treaty and the U.S. Model Treaty (as well as actual treaties based thereon) provides that any term not defined in the treaty shall have the meaning that it has at the time the treaty is applied under the laws of the country whose tax is at stake.²⁵⁸ In addition, Article 23 provides that the foreign tax credit provided by the United States is “subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof).”²⁵⁹ References to the application of internal law also appear in numerous other treaty provisions.²⁶⁰ The following analysis considers the extent to which the Treasury Department can promulgate administrative guidance that will be respected under these provisions, and also considers whether any other interpretive principles might justify the applicability of subsequent Treasury regulations.²⁶¹

1. *Inapplicability of Technical Explanations and Revenue Rulings.*—Articles 3(2) and 23 contemplate that the application of the treaty might change as the internal law of the country whose tax is at stake changes. As discussed above, technical explanations are not entitled to special deference and do not have the effect of law under general administrative-law principles. For example, if the Treasury Department were to update the model technical explanation to set forth a new meaning for a term not explicitly defined in the treaty, that interpretation would not be the law of the United States.²⁶² No reasonable argument exists for deferring to a technical explanation in interpreting the law of the United States independent of the treaty.²⁶³ Accordingly, an interpretation contained in an update to the model technical explanation could not bootstrap itself onto an earlier treaty pursuant to Article 3(2) or any other article of that treaty that looks to definitions contained in “the law” of the United States. Even if the Treasury Department were to adopt the JCT staff recommendation and publish regular updates to

257. See *supra* notes 154–67 and accompanying text.

258. See *supra* notes 157–60 and accompanying text.

259. See *supra* note 161 and accompanying text.

260. See *supra* notes 162–65 and accompanying text.

261. As discussed above, the mutual-agreement procedure of Article 25 also provides for ambulatory interpretations after a treaty enters into force. See *supra* notes 154–56 and accompanying text. Because that provision has relevance only when the two countries’ competent authorities mutually agree, it is not directly relevant to the unilateral interpretations that are the focus of this Article.

262. At most, a technical explanation might have limited relevance in interpreting the terms of a particular treaty under the treaty-interpretation principles discussed previously.

263. Technical explanations often contain brief summaries of relevant Code provisions. See, e.g., 2006 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 16, art. 7 (providing brief descriptions of the treatment of certain items of income under the existing Code and regulations). No one could reasonably argue that these brief interpretations constitute binding U.S. law by reason of the descriptions in the Model Technical Explanation.

the model treaty (and, presumably, the model technical explanation),²⁶⁴ those regular updates to the model technical explanation would not constitute U.S. law and would not be relevant for purposes of Article 3(2). Similarly, interpretations of U.S. law contained in revenue rulings do not constitute “U.S. law,”²⁶⁵ and therefore revenue rulings cannot be used as a vehicle for issuing ambulatory changes that will be given effect under Article 3(2).

The Tax Court addressed this issue in *Compaq Computer Corp. v. Commissioner*,²⁶⁶ reaching the same conclusion in the context of Article 23 of the U.S.–U.K. tax treaty.²⁶⁷ That Article, like the corresponding provision of the Model Treaty discussed above, made the taxpayer’s foreign tax credit “subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof).”²⁶⁸ In *Compaq*, the IRS cited the technical explanation to the U.S.–U.K. treaty and a revenue ruling, both of which purported to limit the taxpayer’s ability to claim a foreign tax credit.²⁶⁹ The Tax Court concluded “that neither the Technical Explanation nor [the revenue ruling] is to be considered ‘the law of the United States’ for the purposes of [Article 23].”²⁷⁰ The U.S. Claims Court in *Snap-On Tools v. United States* also rejected the relevance of technical explanations in determining the limitations of U.S. law for purposes of Article 23.²⁷¹

2. Regulations as U.S. Law for Purposes of Articles 3(2) and 23.—

a. Regulations as U.S. Law.—While technical explanations and revenue rulings do not constitute U.S. law for purposes of those treaty provisions that look to U.S. law, a different result may occur when the Treasury Department publishes guidance in the form of regulations.²⁷² Under

264. See *supra* notes 216–18 and accompanying text.

265. See *supra* notes 173–77 and accompanying text; *cf.* *Snap-On Tools, Inc. v. United States*, 26 Cl. Ct. 1045, 1060 (1992) (indicating that technical advice memoranda and general counsel memoranda are “not binding authority”), *aff’d*, 26 F.3d 137 (Fed. Cir. 1994).

266. 113 T.C. 363 (1999).

267. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, U.S.–U.K., art. 23, Dec. 31, 1975, 31 U.S.T. 5668.

268. *Id.* art. 23(1).

269. *Compaq Computer*, 113 T.C. at 370–71.

270. *Id.* at 372.

271. *Snap-On Tools, Inc. v. United States*, 26 Cl. Ct. 1045, 1075 (1992) (stating that technical explanations may not be used to amend a treaty, and therefore suggesting that technical explanations have limited relevance), *aff’d*, 26 F.3d 137 (Fed. Cir. 1994). *Snap-On Tools* is discussed in more detail at *infra* notes 286–91 and accompanying text.

272. This analysis focuses on the promulgation of Treasury regulations pursuant to a grant of authority under U.S. statutory law. In contrast, some early income tax treaties provided express grants of authority to a contracting state to prescribe regulations necessary to carry into effect that particular treaty. See, e.g., Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.–Switz., art. XIX, May 24, 1951, 2 U.S.T. 1751 (“[C]ompetent authorities of

Mead, a Treasury regulation is entitled to *Chevron* deference if it “appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority [through] notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”²⁷³ The Internal Revenue Code contains specific authority for numerous regulations whose application (at least indirectly) impacts tax treaties, including regulations affecting the branch profits tax,²⁷⁴ certain hybrid entities,²⁷⁵ anticonduit concerns,²⁷⁶ and some aspects of the foreign tax credit limitations.²⁷⁷ There is widespread agreement that these specific-authority regulations satisfy the *Mead* standard and are entitled to *Chevron* deference.²⁷⁸ The Code also contains a general grant of regulation-making authority to the Treasury in § 7805(a).²⁷⁹ While there had been some question as to the level of deference accorded regulations promulgated under § 7805, following the Supreme Court’s decision in *Mead*, there is increasing agreement among circuit courts and scholars that these regulations also are entitled to *Chevron* deference.²⁸⁰

the two contracting States may prescribe regulations necessary to carry into effect the present Convention within the respective States.”); Convention Respecting Double Taxation, U.S.–Can., art. XVIII, Mar. 4, 1942, 56 Stat. 1399 (“[C]ompetent authorities of the two contracting States may prescribe regulations to carry into effect the present Convention within the respective States and rules with respect to the exchange of information.”). For examples of regulations promulgated under this treaty-specific authority, see, e.g., T.D. 5206, 1943 C.B. 526 (providing for regulations under the 1942 U.S.–Canada treaty). See also *Samann v. Comm’r*, 313 F.2d 461, 462–63 (4th Cir. 1963) (citing regulations promulgated pursuant to the 1951 U.S.–Switzerland treaty). Many of these old treaty-authorized regulations have been removed as obsolete. See, e.g., T.D. 8228, 1988-2 C.B. 136, 173 (removing regulations under nine tax treaties); see also RHOADES & LANGER, U.S. INTERNATIONAL TAXATION & TAX TREATIES § 49.02 (2008) (noting that no new treaty-authorized regulations have been issued since 1969).

273. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (interpreting the limits of *Chevron* deference).

274. I.R.C. § 884(g) (2000).

275. I.R.C. § 894(c)(2) (2000).

276. I.R.C. § 7701(l) (2000).

277. I.R.C. § 904 (2000).

278. See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1559–63 (2006) (noting that the ABA Tax Section’s Task Force on Judicial Deference and scholars outside the Task Force recommend *Chevron* deference for specific-authority Treasury regulations).

279. See I.R.C. § 7805(a) (2000) (authorizing “all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue”).

280. E.g., *Swallows Holding, Ltd. v. Comm’r*, 515 F.3d 162, 167 (3d Cir. 2008) (reversing the Tax Court and holding that a regulation promulgated under I.R.C. § 7805(a)’s general grant of authority is entitled to *Chevron* deference); Hickman, *supra* note 278, at 1600–19; see also Steve R. Johnson, *Swallows Holding: Chevron’s Growing Traction in Tax Litigation*, 27 A.B.A. SEC. TAX’N NEWS Q. 1, 10, 11 (2008) (“The trend is in the direction of *Chevron*, but the Third Circuit’s opinion [in *Swallows Holding*] was premature in implying that the issue is settled or nearly so.”). Of course, a regulation entitled to *Chevron* deference is not automatically valid. The regulation is upheld only if it satisfies the two-part *Chevron* test: (1) the statute is silent or ambiguous regarding the matter

Provided that the specific- or general-authority regulation is valid under *Chevron* deference, the regulation has the “force and effect of law,”²⁸¹ and accordingly, it should apply with respect to those treaty provisions—such as the reference in Article 3(2) to terms not otherwise defined in the treaty, or the reference to internal-law limitations on the foreign tax credit under Article 23—that explicitly defer to the law of the United States. Indeed, it would be extremely difficult to interpret the Article 23 reference to internal-law limitations without reference to Treasury regulations because the large majority of details regarding the foreign tax credit limitation are contained in regulations, rather than the tax code.²⁸²

Klaus Vogel, in his extensive analysis of income tax treaties from a European perspective, supports this view that a country’s domestic “law” for purposes of Article 3(2) includes more than just statutory law.²⁸³ For example, he concludes that both legislative and administrative laws constitute German “law” for purposes of this provision.²⁸⁴ Similarly, Professor Vogel concludes that the “law” of member states of the European Union includes prevailing treaties, regulations, and directives.²⁸⁵

The reasoning of the U.S. Claims Court in *Snap-On Tools* also supports the conclusion that regulations generally constitute U.S. law for purposes of those treaty provisions that defer to such law. In *Snap-On Tools*, the court addressed a timing issue with respect to the creditability of the United

addressed by the regulation, and (2) the regulation is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); see Hickman, *supra* note 278, at 1586 (criticizing less deferential interpretations of the second step).

281. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301, 301–03 (1979); cf. Richard L. Doernberg, *Treaty Override by Administrative Regulation: The Multiparty Financing Regulations*, 2 FLA. TAX REV. 521, 546–47 (1995) (discussing circumstances where Treasury regulations have the force and effect of law); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1736–40 (2007) (questioning the Treasury’s compliance with procedural requirements with respect to some 7,805 regulations). Professor Doernberg addresses the limits of treating a regulation as law in the context of the Supremacy Clause, considering the circumstances when a regulation can override a contrary treaty provision. Doernberg, *supra*, at 548–50. This issue is not relevant to the current discussion in the text, which involves circumstances where U.S. law, as reflected in regulations, is consistent with and expressly referred to by the treaty language. *Id.* at 524 (“It is important to distinguish the use of domestic law to override treaties—a clear violation of international law—from the lawful use of domestic law to define terms left undefined by treaty [under Article 3(2)].”). Professor Doernberg’s analysis of potential treaty override by regulation is relevant to the discussion in subpart V(B), *infra*.

282. Compare Treas. Reg. §§ 1.904-0 to 1.904(j)-1 (as amended in 2008) (comprising over one hundred small-print pages in the CCH publication), with I.R.C. § 904 (2000) (comprising twenty-seven larger print pages, including historical notes, in the CCH publication).

283. KLAUS VOGEL ET AL., KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS 210–11 (John Marin & Bruce Elvin trans., 3d ed. 1997).

284. *Id.*

285. *Id.* at 211.

Kingdom advance corporation tax under the 1975 U.S.–U.K. tax treaty.²⁸⁶ Although the Treasury regulations (as authorized by a relevant Code provision) generally provided that a taxpayer could treat dividends paid in the first sixty days of the year as having been paid from profits of the preceding year, the United States argued that this provision did not apply to the U.K. tax that was made creditable by the treaty.²⁸⁷ The Government cited the treaty’s technical explanation, which gave the IRS authority to disregard the sixty-day rule for purposes of the treaty.²⁸⁸ The court disagreed, concluding that this technical explanation did not constitute U.S. law for purposes of applying the Article 23 limitation on creditability.²⁸⁹ However, in dicta the court acknowledged “that the Department of Treasury can change earlier interpretations of law through the issuance . . . of revisions to one of the regulations,”²⁹⁰ thereby implying that a change in the law pursuant to regulation would be respected as U.S. law for purposes of that treaty provision.²⁹¹ The Tax Court, in *Estate of Burghardt v. Commissioner*,²⁹² also implied, in dicta, that a regulation could constitute U.S. “law” for purposes of an estate-tax-treaty provision similar to Article 3(2).²⁹³

Because Treasury regulations generally constitute U.S. law for purposes of tax treaty provisions that explicitly defer to U.S. law, the promulgation of regulations provides a possible avenue through which the Treasury Department might effect ambulatory changes in the application of existing treaties. However, this use of regulations is subject to important limitations.

286. *Snap-On Tools, Inc. v. United States*, 26 Cl. Ct. 1045 (1992), *aff’d*, 26 F.3d 137 (Fed. Cir. 1994).

287. *Id.* at 1052.

288. *Id.* at 1068–69.

289. *Id.* at 1075. The court also rejected the relevance of the technical explanation under the 1975 U.S.–U.K. tax treaty.

290. *Id.* at 1074.

291. The *Snap-On Tools* opinion contains some ambiguous language as to the role of regulations as law for purposes of Article 23. After concluding that a technical explanation does not constitute U.S. law for this purpose, the opinion states that Article 23 “clearly refers the taxpayer back to the applicable United States Code provisions.” *Id.* at 1075. In the context of the opinion, this reference to the U.S. Code should not be viewed as exclusive (i.e., to the exclusion of regulations). On the facts of the case, the relevant U.S. law upon which the taxpayer relied happened to be contained in the Internal Revenue Code. *See id.* (focusing on the plain language of I.R.C. § 902 (1976), which provided a foreign tax credit for taxes paid by certain subsidiaries). However, the language quoted in the text regarding the Treasury’s ability to change the interpretation of law pursuant to regulations—particularly in contrast to the mere use of a technical explanation that the court criticized—suggests that a change effected by a properly authorized regulation would have been respected as U.S. law in this context.

292. 80 T.C. 705 (1983).

293. *Id.* at 711. The *Burghardt* case involved the interpretation of the term “specific exemption” in an estate tax treaty, which contained a provision similar to Article 3(2) of the income tax treaties. *Id.* at 707. The Tax Court, in concluding that the Article 3(2)-type provision did not apply, observed “that neither the Internal Revenue Code nor the Treasury Regulations use the term ‘specific exemption’ in the estate tax area.” *Id.* at 711. By examining the Treasury regulations, the court implied that had the regulations defined the term, that definition would have constituted U.S. “law” for purposes of the treaty article.

The most significant limitations on the ability of one country to affect the application of the treaty by unilateral changes in internal law appear in the language of the treaties themselves. As noted above, the principal treaty provisions that defer to internal law—i.e., the reference in Article 3(2) to terms not otherwise defined in the treaty, and foreign tax credit limitations under Article 23—contain explicit limits.²⁹⁴ In the case of Article 3(2), an internal-law definition does not apply “unless the context otherwise requires,”²⁹⁵ while under Article 23 the foreign tax credit limits of U.S. law apply only if they do not “chang[e] the general principle hereof.”²⁹⁶

b. “Context” Limitation Under Article 3(2).—Numerous commentators have addressed the circumstances in which an internal-law definition will not apply because the “context otherwise requires.”²⁹⁷ As summarized by Professor Vogel, both the wording of Article 3(2) and its historical development suggest that the use of “context” to depart from an internal-law definition should be the exception.²⁹⁸ Because this departure can occur only when “require[d],” “not every apparently convincing interpretation from the context should give rise to a divergence from the rule of [Article 3(2)], but only those based on relatively strong arguments.”²⁹⁹

In determining whether this high standard for departure from the domestic-law definition is satisfied, the OECD Commentary and 2006 Model Technical Explanation,³⁰⁰ as well as Professor Vogel,³⁰¹ suggest that the

294. See *supra* notes 166–67 and accompanying text.

295. OECD MODEL TREATY, *supra* note 4, art. 3(2).

296. 2006 U.S. MODEL TREATY, *supra* note 5, art. 23.

297. Professor Vogel provides a thorough summary and analysis of the various positions commentators have taken. See VOGEL, *supra* note 283, at 213–16. See generally ALI TAX TREATY PROJECT, *supra* note 23, at 41 (discussing disagreements between those who argue that “every effort should be made to find a contextually-based definition before turning to domestic law,” and those who argue that the context-based limitation is the exception and argue against a “systematic preference” for contextual interpretation”); Schoenblum, *supra* note 6, art. V(D) n.895 (citing commentators); Smith, *supra* note 22, at 878–82; cf. Infanti, *Reverse Hybrid*, *supra* note 125, at 312 (citing this provision in arguing that proposed domestic reverse-hybrid regulations issued under § 894(c) are not consistent with some U.S. tax treaties).

298. VOGEL, *supra* note 283, at 214. While acknowledging that the current Model Treaty language gives priority to the internal-law definition in the absence of strong context-based arguments, Professor Vogel suggests that a revision of this language might be appropriate. *Id.* at 208–09. After citing a Germany–Sweden treaty that reverses the Model’s priority by allowing the use of internal law only when the context requires it, Professor Vogel observes that “[h]opefully, this example will find followers.” *Id.* at 209.

299. *Id.* at 214. The ALI Tax Treaty Project acknowledges that “[i]n any event, there will clearly be a number of cases in which a specific interpretation will not be ‘required’ by the ‘context.’” ALI TAX TREATY PROJECT, *supra* note 23, at 41.

300. Both the OECD Commentary and the 2006 U.S. Model Technical Explanation contemplate that the “context” includes the intention of the parties when the treaty was entered into. However, the two documents focus on slightly different time periods and actors in this regard. The Commentary focuses on the “intention of the Contracting States when signing the Convention,” OECD MODEL COMMENTARY, *supra* note 4, commentary on art. 3, para. 12, while the Technical Explanation focuses on “the intentions of the negotiators and of the Contracting States when the

relevant “context” that can be considered is broad. For example, the context can include not only the treaty text and supplementary materials, but also the relevant definition under the other country’s laws,³⁰² the OECD Commentaries,³⁰³ and the underlying purpose of the treaty to avoid double taxation and prevent fiscal evasion.³⁰⁴ However, as discussed above, even with this broad definition of “context,” the domestic-law definition will be disregarded only when there are “‘weighty arguments’ in favour of such a departure.”³⁰⁵

For example, the OECD Model Treaty and the U.S. model treaties, as well as the actual treaties based thereon, limit the source country’s ability to tax interest, dividends, and royalties if the “beneficial owner” of that income is a resident of the other treaty country.³⁰⁶ The determination of beneficial ownership raises significant complications with modern international-financing and holding-company structures.³⁰⁷ Because the term “beneficial owner” is not defined in the text of the treaties, Article 3(2) permits reference to the definition under U.S. law (assuming U.S. tax is at stake) unless the context otherwise requires. Indeed, a Treasury official recently stated that

treaty was negotiated and ratified.” 2006 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 16, art. 3. Presumably, the Technical Explanation’s inclusion of the ratification process leaves room for considering interpretive issues raised during the Senate advice-and-consent process. The OECD Commentary goes further than the Model Technical Explanation by also establishing context by looking to “the meaning given to the term in question in the legislation of the other Contracting State (an implicit reference to the principle of reciprocity on which the Convention is based).” OECD MODEL COMMENTARY, *supra* note 4, commentary on art. 3, para. 12.

301. Professor Vogel observes that the scope of the context contemplated by Article 3(2) is different from the “context” referred to in Article 31(2) of the Vienna Convention. *See* VOGEL, *supra* note 283, at 214.

302. *See, e.g.*, OECD MODEL COMMENTARY, *supra* note 4, commentary on art. 3, para. 12 (“The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State.”).

303. *See* VOGEL, *supra* note 283, at 215 (arguing that “context” should include the OECD Commentaries).

304. *See id.* at 214. Indeed, Professor Vogel suggests that the mere fact that the application of the domestic-law definition might lead to double taxation does not, standing alone, necessarily mean that the context requires a departure from that domestic-law definition. *See id.*

305. *Id.* at 215 (citing authorities).

306. *See supra* note 27 (describing Articles 10, 11, and 12 of the treaties).

307. *See, e.g.*, INFORMAL CONSULTATIVE GROUP ON THE TAXATION OF COLLECTIVE INV. VEHICLES AND PROCEDURES FOR TAX RELIEF FOR CROSS-BORDER INVESTORS, OECD, THE GRANTING OF TREATY BENEFITS WITH RESPECT TO THE INCOME OF COLLECTIVE INVESTMENT VEHICLES 11 (2009), available at <http://www.oecd.org/dataoecd/34/26/41974553.pdf> (discussing controversy regarding the definition of “beneficial owner” in the context of tax treaties); Jakob Bundgaard & Niels Winther-Sørensen, *Beneficial Ownership in International Financing Structures*, 50 TAX NOTES INT’L 587 (2008), available at 50 Tax Notes Int’l 587 (Lexis) (describing interpretation of “beneficial ownership” with respect to OECD Model Treaty); Townsend, *supra* note 22, at 265 (noting that “beneficial ownership” is an undefined term derived from a common law concept, and a treaty partner may not be able to interpret the term, or it might not interpret the term in such a way that is consistent with the United States’ interpretation).

the government is considering issuing regulations to clarify the meaning of beneficial ownership for purposes of tax treaties.³⁰⁸

If the Treasury Department were to issue regulations defining beneficial ownership, the determination of whether the “context” requires a different interpretation should not focus narrowly on the treaty negotiators’ mutual understanding or intent as to which particular individuals or entities would be beneficial owners under particular facts. After all, many modern complex financial structures might not have been contemplated by the treaty negotiators, particularly if it is an older treaty in question. Instead, the focus should be on the underlying purpose of the parties in limiting the treaty benefits regarding interest, dividends, and royalties to the beneficial owner. As long as the hypothetical regulation’s definition, as applied under those treaty provisions, is not inconsistent with that purpose, the definition should be respected, even though it might address specific fact patterns not originally contemplated by the negotiators of the particular treaty at issue.³⁰⁹

The ALI Tax Treaty Project suggests an additional potential limitation under Article 3(2), stating that “a country may [not] amend its law for the exclusive purpose of altering the application of a treaty provision.”³¹⁰ Although it provides no explicit rationale, the ALI project’s concern might be grounded in the general principle that a treaty be interpreted in “good faith.”³¹¹ As an example, it discusses a proposed bill³¹² that would have redefined certain corporate liquidation or redemption distributions as dividends (rather than gains) solely in those circumstances where a treaty prohibits the United States from taxing gains but allows it to tax dividends.³¹³ In all other circumstances, the law would have retained the previously existing definition, which might have treated a portion of the distribution as gain for purposes of the Code. Thus, the new internal-law definition would only apply when it would expand U.S. taxing rights under the treaty and would not apply under nontreaty circumstances. Although this example focuses on a change in the law effected by a statute, the same analysis presumably would apply to a change via regulations (assuming that the regulations were valid).³¹⁴

308. Nadal, *supra* note 18, at 92-32 (quoting Michael Mundaca, Deputy Assistant Secretary for International Tax Affairs).

309. See ALI TAX TREATY PROJECT, *supra* note 23, at 62 (providing examples of circumstances where reference to domestic law is and is not consistent with the underlying purpose of the treaty provision).

310. *Id.* at 42.

311. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325(1) (1987) (“An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”).

312. Foreign Tax Equity Bill of 1990, H.R. 4308, 101st Cong. (2d Sess. 1990).

313. ALI TAX TREATY PROJECT, *supra* note 23, at 42.

314. For a discussion of the authority for regulations in the context of Article 3(2), see *supra* notes 273-91 and accompanying text.

As the ALI Tax Treaty Project notes, this unilateral change in domestic law would be inconsistent with the “context” of the treaty, as the treaty partner would not have expected that the United States would carve out a special definition that treats a transaction differently solely in circumstances that benefit the United States under a treaty.³¹⁵ Although the project describes the problem as arising when the United States “amend[s] its law for the exclusive purpose of altering the application of a treaty provision,”³¹⁶ the concern seems to be slightly more narrow than that. The principal concern with the proposed bill was that it would have created inconsistent definitions: with a special definition solely for purposes of applying treaties, while retaining a different definition of the same transaction for purposes of the Code.³¹⁷ It is possible to envision a regulation establishing a uniform definition of a term, even though that term has its principal significance only in applying treaties. As long as that definition does not result in the application of the substantive treaty provisions in a manner that is inconsistent with the provision’s purpose, the context might not require that the definition be disregarded.

c. “General Principle” Limitation Under Article 23.—A similar analysis applies in the context of Article 23, which expressly subjects the foreign tax credit “to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof).”³¹⁸ The taxpayer in a recent D.C. Circuit case expressed concern that this cross-reference to ambulatory internal-law limitations on the foreign tax credit might “allow the United States to deny the foreign tax credit to an unlimited extent, and thus effectively eviscerate the benefits of Article 23(1).”³¹⁹ Because there had been no changes to the relevant internal-law limitations since the treaty at issue had been negotiated, the D.C. Circuit stated that it was unnecessary for the court to determine how far an internal-law change could go “without changing the general principles” of the Treaty.³²⁰

315. See ALI TAX TREATY PROJECT, *supra* note 23, at 42 (stating that “such selective overrides could not have been intended by the drafters” of the relevant treaty provisions). Although not directly on point, it is worth noting that the Treasury Department itself, in a nontreaty context, has attempted to limit the ability of other countries to selectively enact tax provisions that apply only to the extent that they produce U.S. tax benefits. The anti-“soak up” provision of the foreign tax credit regulations provides that no tax credit is allowed with respect to a foreign tax if the foreign country imposes the tax only in circumstances where the residence country (e.g., the United States) is willing to give a credit for it. Treas. Reg. § 1.901-2(a)(3)(ii) (as amended in 1991).

316. ALI TAX TREATY PROJECT, *supra* note 23, at 42.

317. See *id.* (“The effect of the proposed change would thus have been . . . no different in effect from a direct legislative override of the affected treaty provisions.”).

318. 2006 U.S. MODEL TREATY, *supra* note 5, art. 23(2).

319. *Haver v. Comm’r*, 444 F.3d 656, 659 (D.C. Cir. 2006). The case involved the applicability of the foreign tax credit limitation under the alternative minimum tax. The court noted that this limitation had been in existence at the time the U.S.–Germany income tax treaty was negotiated, and therefore the reference to amendments in U.S. law was not relevant. See *id.* at 658.

320. *Id.* at 659.

The taxpayer's concern in that case is overstated. Indeed, the "without changing the general principle hereof" language expressly prevents the United States from changing its internal-law limitations in a way that would eviscerate the benefits of Article 23. The general principle underlying Article 23(2) is that the United States, when exercising residence-based jurisdiction, must provide a foreign tax credit to the extent necessary to eliminate double taxation, something that the Internal Revenue Code generally provides even in the absence of a tax treaty.³²¹ Accordingly, the touchstone inquiry is whether, after a change in the regulations addressing the foreign tax credit limitation (or the underlying statute), the taxpayer is still allowed tax-credit relief to the extent necessary to eliminate double taxation of the same item of income. Given that the principal focus of these regulations (and the underlying statute) is to prevent taxpayers from claiming a foreign tax credit in circumstances when there has not been double taxation,³²² broad latitude exists for amendments in this area of U.S. law (either by regulation or by statute) without changing the general principle of Article 23.

3. *Regulations in Other Treaty Contexts.*—The viability of Treasury regulations as a means to make ambulatory changes to the application of a treaty is much more limited outside of those treaty provisions—e.g., Articles 3(2) and 23—that explicitly defer to U.S. law. Under those provisions, a properly authorized and promulgated regulation obtains its status by reason of its role as U.S. law, which is incorporated pursuant to the terms of the treaty itself (subject to the "context" and other limitations discussed above).³²³ In contrast, outside of those treaty provisions, U.S. regulations (as well as statutory law) have no special role under the terms of the treaty, and, accordingly, the regulations have relevance only pursuant to the general treaty-interpretation principles previously discussed.³²⁴

321. In this regard, the treaty provision does not add anything to the relief that a taxpayer would already be entitled to under the Code. However, the treaty might provide certain additional safeguards that would not otherwise be available under U.S. law. For example, Article 23(3) provides a re-sourcing rule in the case of income that might otherwise be treated as U.S. source income under the Code, thereby enabling the taxpayer to avoid certain limitations that otherwise would apply under U.S. law. 2006 U.S. MODEL TECHNICAL EXPLANATION, *supra* note 16, art. 23, para. 3.

322. See generally CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS 371–90 (3d ed. 2006) (providing a general overview of policies underlying the U.S. foreign tax credit limitation).

323. As the ALI Tax Treaty Project Report notes, Article 3(2) reflects "a *lex specialis* which displaces in part the more generally applicable interpretative rules." ALI TAX TREATY PROJECT, *supra* note 23, at 40.

324. See *supra* subpart III(B). Reinhold and Harrington note that the Government argued its *NatWest* case based primarily on general treaty-interpretation principles and failed to press its plausible argument that the regulations defined terms not otherwise defined in the treaty and should be judged under the standards of Article 3(2). See Reinhold & Harrington, *supra* note 22, at 204 (noting that this failure was "enigmatic," and that "[b]ecause the government did not seriously press

As discussed earlier, courts interpreting tax treaties often observe, “Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”³²⁵ The following analysis considers the extent to which this dicta, as well as other interpretation principles, might support the use of Treasury regulations in interpreting previously ratified tax treaties.

The purported deference given to the Executive agency charged with a treaty’s negotiation and enforcement might be grounded in concerns that the President is the principal for ensuring that the United States speaks with one voice in foreign affairs with other countries.³²⁶ This concern about foreign affairs is less pressing in the context of tax treaties, which focus on the rights and liabilities of private taxpayers, rather than broader issues of foreign relations.³²⁷ As the Restatement of Foreign Relations notes, U.S. courts are less likely to defer to executive interpretation in cases where individual rights or interests are concerned.³²⁸

Accordingly, the deference, if any, owed to these Treasury regulations must be grounded in more general principles underlying treaty interpretation. As discussed above, because tax treaties are bilateral agreements between two countries, courts generally attempt to discern the mutual understanding of the parties.³²⁹ In so doing, U.S. courts (as well as the Vienna Convention) place primary emphasis on the ordinary meaning of the treaty text to determine the parties’ understanding. However, U.S. courts are often willing to look to supplementary materials to ascertain that shared understanding.³³⁰ For example, courts have considered direct evidence of mutual understanding from the negotiating history,³³¹ as well as indirect evidence, such as the OECD Commentary in effect at the time the treaty was negotiated (assuming

this interpretation in the litigation, one is not clear what type of reception the argument might receive in another setting”).

325. This language comes from *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982). Numerous courts have favorably quoted this language. See, e.g., *United States v. Stuart*, 489 U.S. 353, 369 (1989); *Nat’l Westminster Bank, PLC v. United States (NatWest)*, 512 F.3d 1347, 1358 (Fed. Cir. 2008); *Snap-On Tools, Inc. v. United States*, 26 Cl. Ct. 1045, 1071 (1992), *aff’d*, 26 F.3d 137 (Fed. Cir. 1994) (emphasis removed); *Estate of Silver v. Comm’r*, 120 T.C. 430, 434 (2003); *N.W. Life Assurance Co. of Can. v. Comm’r*, 107 T.C. 363, 378 (1996). The *NatWest* opinion cautioned, however, that the agency’s interpretation “merits less deference” when the other treaty country disagrees with the interpretation. *NatWest*, 512 F.3d. at 1358 (citing *Iceland S.S. Co. v. U.S. Dep’t of the Army*, 201 F.3d 451, 458 (D.C. Cir. 2000)).

326. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 326 cmt. a (1987) (explaining that the President’s authority to interpret international agreements stems from his identity as the country’s “sole organ” in its international relations).

327. Arguably, the only significant foreign-affairs issue arising from tax treaties arises in the rare circumstances where one country asserts that the other country has violated the terms of the treaty.

328. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 326, reporter’s note 2 (1987).

329. See *supra* notes 91–107 and accompanying text.

330. See *supra* notes 96–99 and accompanying text.

331. See *supra* note 105 and accompanying text.

the treaty text follows the then-current OECD Model Treaty).³³² The Supreme Court in *Stuart* was even willing to find implicit mutual understanding based on the Senate floor debates during the advice-and-consent process.³³³ Often, as in *Stuart*, a court states that the plain meaning of the treaty text supports its conclusion and cites the supplementary materials merely as additional evidence of the already-declared plain-meaning interpretation.³³⁴

Within this framework, Treasury regulations promulgated after a treaty has entered into force would seem to have little or no relevance.³³⁵ After all, a later promulgated regulation provides no evidentiary weight in and of itself as to the mutual understanding of the countries at the time the treaty was negotiated and ratified. While the later promulgated regulation might, in fact, be consistent with the mutual understanding of the earlier treaty partners, this coincidence does not give the regulation itself any weight.³³⁶

As posited earlier in the context of updates to the model technical explanation,³³⁷ an argument might be made that a regulation should be given weight to the extent that it reflects the existing practice of countries interpreting similar language in existing treaties. This argument might be at its strongest when a regulation reflects developments in the OECD Commentaries, particularly to the extent the other country whose tax treaty is at issue is an OECD member and did not express an observation or reservation regarding the OECD Commentary.³³⁸ However, the promulgation of the regulation does not itself provide evidence of the practice of the treaty partner (although it does provide stronger evidence of U.S. practice than does an update to the model technical explanation). To the extent evidence of such practice does exist, the promulgation of the regulation is largely superfluous.

332. See *supra* note 107 and accompanying text.

333. See *supra* notes 112–18 and accompanying text.

334. See, e.g., *Nat'l Westminster Bank, PLC v. United States (NatWest)*, 512 F.3d 1347, 1354–59 (Fed. Cir. 2008) (supporting its conclusion that the United States had violated the terms of a U.S.–U.K. tax treaty by referring first to the plain language of the treaty, and then finding additional support through reference to supplementary evidence).

335. In contrast, a regulation existing at the time of a treaty's negotiation might be relevant under general treaty-interpretation principles. In particular, to the extent the other country was aware of the existing U.S. interpretation and did not object, the court might view that preexisting regulation as evidence of shared understanding. See *supra* notes 108–11 and accompanying text. This argument, however, would not necessarily preclude changes to preexisting regulations that constitute “U.S. law” for purposes of applying Articles 3(2) or 23. As discussed previously, those Articles contemplate that the U.S. law (including validly issued Treasury regulations) in existence at the time of the treaty negotiation might change in the future and generally give respect to such poststratification changes in U.S. law.

336. In these circumstances, the regulation does not give any weight to the supplementary materials that themselves establish the treaty partners' mutual understanding.

337. See *supra* notes 234–36 and accompanying text.

338. See *supra* note 80 and accompanying text.

This skepticism regarding later enacted regulations (outside the context of treaty provisions that explicitly defer to U.S. law, such as Articles 3(2) or 23) is consistent with the recommendations of the ALI Tax Treaty Project, which “would substantially limit the weight to be given to subsequently promulgated administrative interpretations which are neither the product of a competent authority agreement nor an interpretation that is clearly followed by the treaty partner as well.”³³⁹ While the project focuses on revenue rulings issued by the IRS, the same conclusion would apply to Treasury regulations. Even though a Treasury regulation has significantly greater weight than does a revenue ruling in the context of U.S. administrative law, neither of them constitutes evidence of mutual understanding of a previously negotiated treaty. Indeed, the project notes that once a treaty has been negotiated and ratified, even legislative enactments do not constitute evidence of the mutual understanding of a previously negotiated treaty.³⁴⁰

The Federal Circuit’s recent *NatWest* decision reflects this reluctance to look to a subsequently enacted Treasury regulation as a means to interpret a preexisting treaty under general treaty-interpretation principles.³⁴¹ The relevant issue in the case was whether Treasury regulations, which applied a formula approach for determining the interest expenses of a United Kingdom bank’s U.S. branch, could apply, despite the 1975 U.S.–U.K. treaty’s requirement that the branch’s profits be calculated as if the branch were a “separate enterprise.”³⁴² The court, applying general treaty-interpretation principles,³⁴³ focused on the mutual understanding of the parties at the time they entered into the treaty.³⁴⁴ The court held that the plain language of the treaty supported the conclusion that a formula approach was not allowed.³⁴⁵ The court then cited supplementary materials to demonstrate that its reading of the plain meaning of the language was not inconsistent with the intent or expectations of the signatories.³⁴⁶ This supplementary material included the OECD Commentary in existence at the time (of which the negotiators would

339. ALI TAX TREATY PROJECT, *supra* note 23, at 56.

340. *See id.* at 57 (positing that “[a]fter the treaty has been negotiated and ratified, there seems to be no reason to attribute any more weight to subsequent administrative interpretation than would be the case with respect to a corresponding legislative enactment”). Of course, subsequent legislation (and to the extent discussed in the next subpart, Treasury regulations) might *override* an existing treaty obligation, but overriding a treaty is a different issue from interpreting a treaty. *See infra* subpart V(B).

341. For a more thorough discussion of the treaty-interpretation issues raised by *NatWest*, see Reinhold & Harrington, *supra* note 22, at 192, 192–203 (examining “the *NatWest* decision in light of the textual, contextual, and purposive analytical approaches” toward treaty interpretation).

342. *Nat’l Westminster Bank, PLC v. United States (NatWest)*, 512 F.3d 1347, 1353 (Fed. Cir. 2008).

343. As noted in note 324, *supra*, the Government failed to press the Article 3(2) definitional argument, which might have resulted in a more favorable standard. *See Reinhold & Harrington, supra* note 22, at 204.

344. *NatWest*, 512 F.3d at 1353.

345. *Id.* at 1359.

346. *Id.* at 1355–59.

have been aware), as well as evidence regarding the contemporaneous understanding of the parties.³⁴⁷ Of particular relevance for purposes of this discussion, the court rejected the application of the regulation stating that it is “entitled to minimal deference where it contravenes the treaty’s language and negotiation history, as well as the contemporaneous expectations of the United Kingdom.”³⁴⁸ Accordingly, where a court finds evidence of the mutual understanding of the treaty parties—either in the plain language of the treaty or other relevant supplementary materials under general treaty-interpretation principles—there is little role for a subsequently enacted Treasury regulation in interpreting a treaty,³⁴⁹ at least outside of the context of treaty provisions, such as Articles 3(2) and 23, that explicitly defer to internal law.

As a side issue, a question might arise as to the proper time frame in which to determine whether a regulation is promulgated subsequent to a treaty. The facts in *NatWest* were complicated in this regard, given that the treaty at issue was signed on December 31, 1975, successive diplomatic notes and protocols were exchanged over the next few years, and instruments of ratification were not exchanged until March 25, 1980.³⁵⁰ The regulation at issue was proposed on February 27, 1980 (a few weeks before the treaty’s instruments were exchanged), and was adopted on December 30, 1980 (after the treaty’s instruments were exchanged).³⁵¹ The Federal Circuit in *NatWest*, in ascertaining the mutual understanding of the parties, focused its attention on the date the treaty was signed (December 31, 1975)³⁵² and ignored other developments—including the proposal of the regulations and other conduct consistent with that regulation—that occurred after the 1975 signing but before the instruments of ratification were exchanged in 1980.³⁵³

The court’s narrow focus on the date of signing, to the exclusion of subsequent developments that occurred prior to the exchange of instruments, is inconsistent with the rationale in Justice Brennan’s majority opinion in *Stuart*. As discussed above, Justice Brennan, in interpreting the 1942 U.S.–Canada income tax treaty, referred to the Senate floor debate on the treaty to support the Court’s interpretation of the treaty language.³⁵⁴ In response to

347. *Id.* at 1359.

348. *Id.*

349. The related question of whether a regulation could override a treaty provision is discussed briefly in subpart V(B), *infra*.

350. Reinhold & Harrington, *supra* note 22, at 174. The United Kingdom executed its instrument of ratification on March 10, 1980. *Id.* at 199 n.179.

351. *NatWest*, 512 F.3d at 1351.

352. *Id.* at 1359 (“[T]he Government fails to adequately support its contention that this conduct [including the adoption of the regulation] is consistent with the expectations of the United States and the United Kingdom when the 1975 Treaty was signed.” (emphasis added)).

353. *Id.* at 1351. As Reinhold and Harrington observed, this focus on the date of signing “tilt[ed] the balance in favor of the United Kingdom’s perspective.” Reinhold & Harrington, *supra* note 22, at 204, 203–04.

354. See *supra* notes 113–18 and accompanying text.

Justice Scalia's objection to the use of preratification Senate debate to ascertain the mutual intent and expectations of the treaty parties,³⁵⁵ Justice Brennan claimed that the use of the Senate debates is consistent with a contract model because the debates are public and therefore are within the "earshot of proposed treaty partners."³⁵⁶ Implicit in Justice Brennan's reasoning is an assumption that the treaty partner, if it "heard" something in the Senate debate that it disagreed with, could raise an objection before exchanging instruments of ratification with the United States. As discussed previously, the validity of this view is subject to significant criticism. Nonetheless, if a court were to follow the *Stuart* dicta, it might consider developments occurring between the date of signing and the date instruments of ratification are exchanged, including regulations such as those at issue in *NatWest*.³⁵⁷

While the *NatWest* court's focus on the shared understanding of the parties is correct as a matter of law, the case also illustrates the significant practical difficulties that arise in applying this standard. A recent analysis by Richard Reinhold and Catherine Harrington illustrates many of these difficulties.³⁵⁸ In particular, tax treaties often utilize "generalized 'treaty speak' that has relatively little connotative value standing alone."³⁵⁹ The analysis observed that, notwithstanding the court's assertion regarding the plain meaning of the language at issue, "more than one good-faith reading seems eminently reasonable."³⁶⁰

Under such circumstances, if a court were to acknowledge that the plain meaning of the text was ambiguous, greater pressure would be placed on the supplementary materials. Here, too, Reinhold and Harrington noted the flexibility that courts exercise in considering supplementary materials, concluding that the *NatWest* court's decisions as to which materials were relevant "tilt[ed] the balance in favor of the United Kingdom's perspective."³⁶¹ These criticisms do not necessarily mean that the *NatWest* case was incorrectly decided. Rather, they demonstrate the practical difficulty of applying general principles of treaty interpretation in the intersection of two countries' complex tax regimes.

355. *United States v. Stuart*, 489 U.S. 353, 373 (1989) (Scalia, J., concurring).

356. *Id.* at 368 n.7.

357. This approach would not change the conclusion discussed earlier that regulations promulgated "subsequent" to a treaty have little relevance under general treaty-interpretation principles. Rather, it merely would redefine preratification regulations as forming part of the mutual understanding of the treaty partners.

358. Reinhold & Harrington, *supra* note 22.

359. *Id.* at 203 (comparing the technical language at issue in *NatWest* to more ordinary language at issue in some other cases).

360. *Id.*

361. *Id.* at 204; *cf.* Schoenblum, *supra* note 6, subpart V(A) (observing that with respect to the interpretation of estate-tax treaties, "[w]hile the judges may actually believe they are applying established principles of treaty interpretation, the same open-ended and contradictory principles could have been applied to produce a different result").

These practical concerns might provide the strongest (although still circumscribed) case for a court to give some deference to a subsequently promulgated regulation issued by the “agenc[y] charged with [the] negotiation and enforcement”³⁶² of tax treaties (outside of circumstances, such as Articles 3(2) and 23, that more clearly contemplate such use). As discussed earlier, tax treaties bridge and attempt to reconcile the complex, technical, and ever-changing internal tax regimes of the two treaty partners.³⁶³ Given these complexities, it is not surprising that the treaties cannot specifically address every tax issue that exists at the time of negotiation, let alone anticipate future developments in global business structures and changes in the countries’ tax laws.

While the plain language of the tax treaties undoubtedly resolves the vast majority of circumstances faced by taxpayers,³⁶⁴ it is not unreasonable to assume that a certain number of issues will not be resolved by the plain language, particularly as business structures and transactions become more complex. Indeed, even in the context of relatively simple language in nontax treaty settings, Supreme Court Justices have disagreed as to whether or not a word was ambiguous.³⁶⁵

Under such circumstances, courts should be willing to acknowledge that certain tax treaty language does not necessarily provide a clear answer. Moreover, courts should be willing to acknowledge that traditional supplementary materials, such as the OECD Commentary and the limited evidence available from the negotiations, might not readily demonstrate a shared understanding. Under such circumstances, a court should be willing to give at least some weight to the Treasury regulation, taking into consideration other factors, such as the general purpose of the relevant provision of the treaty and the unilateral views of the other country. This argument is particularly strong when a validly authorized and promulgated regulation prevents what might otherwise be an abuse of the purpose of a treaty—e.g., by preventing the allowance of double nontaxation.³⁶⁶

While this standard is, admittedly, vague, the main point is to suggest that courts should be willing to acknowledge that, in limited circumstances, the principal sources for ascertaining mutual intent will not resolve complex tax issues under a treaty. In those limited circumstances, Treasury’s formal determination—which takes into consideration Treasury’s view of relevant statutory law, Treasury’s role in overseeing the tax treaty network, and also

362. See *supra* note 325 and accompanying text.

363. See *supra* note 153 and accompanying text.

364. After all, the vast majority of situations involve the routine application of established principles, which are resolved by the taxpayers completing their tax returns or completing the appropriate paperwork for withholding, with no involvement by the IRS.

365. For a discussion of *Haitian Centers Council*’s interpretation of “return,” see *supra* note 99 and accompanying text.

366. Cf. *Avi-Yonah*, *supra* note 13 at 77–78 (suggesting that even treaty overrides might be justifiable in such circumstances).

public notice and comment—warrants some weight, even though it might not necessarily reflect the (unknowable or possibly nonexistent) shared understanding of the parties on the issue.

B. Administrative Interpretation Versus Override

Even if a regulation is valid under *Chevron*, a court nonetheless might find it inapplicable to a treaty under general treaty-interpretation principles (and under the suggestions set forth in the preceding section).³⁶⁷ Under such circumstances, it is important to consider one other potential justification for applying the regulation—the possibility that the Treasury regulation overrides the treaty provision and must therefore be applied, notwithstanding its conflict with the treaty under the foregoing principles. Of course, to the extent that the regulation is applicable under the interpretation principles discussed previously, its application would be consistent with the treaty and would not be viewed as an override.³⁶⁸

As discussed above, Congress has the authority, under the Constitution, to override a treaty obligation by a subsequent statute.³⁶⁹ Nonetheless, such an override would be a violation of the United States' obligations under international law, and accordingly, courts generally attempt, if possible, to interpret statutes in a manner that does not cause an override.³⁷⁰

Professor Richard Doernberg has provided a thorough analysis of the extent to which this override authority can be delegated to the Treasury Department.³⁷¹ Professor Doernberg, after analyzing the relationship between treaties and statutes as well as relevant Supreme Court delegation-doctrine precedent, concludes that “it seems likely that the power to override treaties can be delegated.”³⁷² However, this delegation is valid only in the

367. In the case of a regulation that might fit within Article 3(2) or 23, a court might find the regulation inapplicable because the context requires otherwise, while in other circumstances, the court might find the regulation inapplicable under the general principles of the treaty provision. See *supra* section V(A)(2).

368. “[T]here is no override where the treaty contains a provision essentially similar to” Article 3(2) and the change in internal law comports with that provision. OECD TAX TREATY OVERRIDE REPORT, *supra* note 123, at R(8)-4. “It cannot have been contemplated that, having once entered into a treaty, a State would be unable to change definitions of terms used in its domestic law provided such changes were compatible with the context of the treaty.” *Id.*

369. See *supra* notes 123–35 and accompanying text.

370. See *supra* note 123 and accompanying text.

371. See Doernberg, *supra* note 281, at 534–40. See generally Infanti, *Reverse Hybrid*, *supra* note 125 (questioning the Treasury’s authority to override treaties via regulation).

372. Doernberg, *supra* note 281, at 541; cf. RHOADES & LANGER, *supra* note 272, § 43.07 (“Treasury’s authority to override earlier, inconsistent treaty obligations through the promulgation of regulations is open to debate.”). For a brief contrary view, see Infanti, *Reverse Hybrid*, *supra* note 125, at 312 (“[A]n aggrieved [taxpayer] might argue that, if a power to change the terms of existing tax treaties is to be exercised unilaterally by the United States at all, its importance dictates that it should be exercised only by the duly elected branches of government through the legislative process established in Article I of the Constitution.”).

narrow circumstances when Congress “issue[s] a clear statement and provide[s] adequate standards”³⁷³ regarding the override.³⁷⁴

The Ninth Circuit, in an unpublished opinion, recently held that certain Treasury regulations overrode a tax treaty because “[t]he regulations were issued pursuant to express Congressional authorization and are fully consistent with Congress’ statutory scheme. To the extent the regulations abrogate (if they do at all) any treaty obligation, they only do so at the command and express authorization of Congress.”³⁷⁵ The Ninth Circuit’s (nonprecedential) standard appears to be more willing to find an administrative override than is Professor Doernberg, given that it does not require the authorizing legislation to provide adequate standards regarding the scope of the override authority. In any event, the opinion’s reasoning is of limited usefulness for two reasons (in addition to its unpublished, nonprecedential nature). First, notwithstanding the court’s finding that there was an “express authorization” from Congress, the relevant statutory authorization merely stated that the underlying substantive tax statute, which had general applicability outside of the treaty context, would override any contrary tax treaty³⁷⁶—the statute did not expressly state that regulations interpreting the statute would override an existing treaty. Second, it is not clear from the facts of the case that the regulation at issue was inconsistent with the treaty.³⁷⁷

373. Doernberg, *supra* note 281, at 541.

374. This delegation must be explicit, rather than implicit. Citing *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984), Professor Doernberg notes that the Supreme Court is unwilling to find that a federal statute implicitly overrides a U.S. treaty commitment. *Id.* at 542. From this, he concludes that “[i]f Congress cannot implicitly override U.S. treaty commitments, an administrative agency surely cannot override a treaty based on implicit congressional authority.” *Id.* Under this standard, the court in *NatWest* would not have allowed the regulation at issue to override the treaty result, given that there was no indication that Congress intended—either explicitly or even implicitly—that the regulations under the relevant Code section would override treaty obligations.

Professor Doernberg also identifies complications regarding the later-in-time rule, particularly with respect to treaties that enter into force after the date of the authorizing legislation but before the promulgation of the regulation. *See id.* at 544–50 (concluding that the relevant date for determining later-in-time is the date the authorizing legislation is enacted, not the later date when the treaty is promulgated).

375. *Am. Air Liquide, Inc. v. Comm’r*, 2002 WL 1994118, at *724 (9th Cir. Aug. 29, 2002) (mem.).

376. *See id.* (citing a 1988 technical correction providing that a particular statutory amendment made by 1986 legislation would override the treaty).

377. The taxpayer attempted to invoke former Code § 904(d)(3)(C), which would have given the taxpayer a more favorable result under the foreign tax credit limitation. *See id.* at *722–23. On its face, the favorable statute did not apply to the taxpayer. The taxpayer argued that the regulation’s failure to provide an exception that would have made the statute apply constituted a violation of the nondiscrimination clause. *Id.* at *723. The Ninth Circuit, in effect, concluded that the regulation’s failure to provide an exception that would have benefited the taxpayer constituted an override of the nondiscrimination provision. *Id.* This conclusion—that Treasury’s omission of an exception from a regulation constitutes a treaty override—seems like a stretch, particularly because Congress had not explicitly delegated the power to override the treaty in the first place. A more appropriate approach would have addressed the substantive treaty question—i.e., was the nondiscrimination clause violated—before looking to the override question. The Tax Court had

Assuming the standard set forth by Professor Doernberg applies, regulations promulgated under the general authority of Code § 7805(a)³⁷⁸ would not meet the standard and thus would not override a contrary provision of a treaty. That Code section does not provide a clear statement of Congress's intent to override a treaty (and accordingly, also does not provide clear standards for doing so).³⁷⁹ In contrast, regulations promulgated under specific grants of regulatory authority would have to be analyzed on a case-by-case basis.³⁸⁰

In 2007 the House of Representatives passed the Farm, Nutrition, and Bioenergy Act of 2007,³⁸¹ which contained a provision that, had it been enacted, would have satisfied Professor Doernberg's criteria. The provision would have prevented foreign multinational corporations from claiming treaty benefits for certain deductible payments routed through related parties in treaty countries.³⁸² By its very nature, the provision was intended to apply notwithstanding conflicting provisions of existing treaties, and accordingly, courts would have applied it to override treaties.³⁸³

More interestingly for purposes of this discussion, the provision contained an express delegation of authority for Treasury to promulgate regulations "as are necessary or appropriate to carry out the purposes of this section," including regulations addressing two specifically identified issues involving the treatment of members of foreign-controlled groups of entities.³⁸⁴ Given the express and sole purpose of the statute—to deny treaty

taken this approach in ruling against the taxpayer, finding that there was no nondiscrimination violation. See *Am. Air Liquide, Inc. v. Comm'r*, 116 T.C. 23, 27 (2001), *aff'd*, 2002 WL 1994118 (9th Cir. Aug. 29, 2002) (mem.).

378. For a discussion of general rulemaking authority under I.R.C. § 7805(a) (2000), see *supra* notes 279–80 and accompanying text.

379. See *Infanti, Reverse Hybrid*, *supra* note 125, at 312 (suggesting that § 7805 only grants authority to the Treasury Department to promulgate rules and regulations and does not grant the power to override a treaty).

380. As an example, in *NatWest*, the Federal Circuit held that Treasury regulations regarding the calculation of a bank branch's interest expenses were not applicable because of the U.S.–U.K. treaty. *Nat'l Westminster Bank, PLC v. United States (NatWest)*, 512 F.3d 1347, 1363 (Fed. Cir. 2008). For a discussion of *NatWest*, see *supra* notes 341–49 and accompanying text. The Government, after losing the treaty-interpretation issue, did not argue that the regulations overrode the treaty. Such an argument would have been unsuccessful under Professor Doernberg's test because there was no clear delegation of treaty-override authority.

381. H.R. 2419, 110th Cong. § 12001 (2007) (as passed by the House on July 27, 2007). The relevant provision, which was used as a revenue offset to a farm bill, originated in a bill introduced by Rep. Lloyd Doggett. See H.R. 3160, 110th Cong. § 1 (2007).

382. H.R. 2419, § 12001.

383. For a discussion of general circumstances when federal statutes can override treaties, see *supra* notes 123–29.

384. See H.R. 2419, § 12001(a) (proposing the addition of I.R.C. § 894(d)(5)). The bill specifically contemplated regulations that would provide for:

- [T]he treatment of two or more persons as members of a foreign controlled group of entities if such persons would be the common parent of such group if treated as one corporation, and

benefits under certain circumstances—this authorization appears to be a specific delegation of authority for Treasury to promulgate regulations that would override a treaty. Moreover, it also appears to provide adequate standards for their exercise, particularly in the situations involving foreign-controlled groups that are specifically targeted in the statute’s grant of regulatory authority. Accordingly, it would satisfy the standards delineated by Professor Doernberg. Because of concerns about the ramifications of a sweeping treaty override in this area,³⁸⁵ the provision ultimately was dropped from the farm bill.³⁸⁶

VI. Conclusion

Tax treaties play an important role in resolving the complex interactions between different countries’ internal tax regimes in an increasingly global economy. Taxpayers, tax administrators, and courts must sometimes struggle to interpret these treaties, particularly as multinational business structures and cross-border transactions become increasingly sophisticated. This process raises important questions regarding the interaction of international law, constitutional law, and administrative law.

The Treasury Department’s traditional approach to treaty interpretation, which relies on the ad hoc modifications of various technical explanations, has several shortcomings in these ever-changing circumstances. In particular, it fails to create guidance that courts will rely on when interpreting treaties, yet it provides taxpayers with flexibility to take aggressive reporting positions.

The Treasury Department should, instead, focus its efforts on providing guidance in the form of Treasury regulations. Regulations can have their greatest influence in the context of those treaty provisions, such as Articles 3(2) and 23, that explicitly defer to U.S. law as it may change from time to time. However, even in the context of other treaty articles, postratification Treasury regulations need not necessarily be disregarded under general treaty-interpretation principles. Under these principles, the regulations’ applicability will depend, at least in part, on the willingness of

-
- [T]he treatment of any member of a foreign controlled group of entities as the common parent of such group if such treatment is appropriate taking into account the economic relationships among such entities.

Id. § 12001(d)(5) (formatting added).

385. For a discussion of the consequences of a treaty override, see *supra* notes 130–35.

386. See generally West, *supra* note 47, at 1165 (describing the negative reaction to a proposed treaty override “not only from the private sector, but also from the chair and ranking member of the Senate Finance Committee”). A modified version of this provision was included in a tax-reform bill sponsored by House Ways and Means Committee Chairman Charles Rangel. See Tax Reduction and Reform Act of 2007, H.R. 3970, 100th Cong. § 3204(a) (2007) (eliminating the application of the provision if the foreign multinational parent was itself eligible for treaty benefits); see also STAFF OF H. WAYS & MEANS COMM., 100TH CONG., STAFF SUMMARY: H.R. 3970, TAX REDUCTION AND REFORM ACT OF 2007 (Comm. Print 2007) (describing differences between H.R. 2419 and H.R. 2970 provisions).

courts to acknowledge that, due to the complex nature of tax treaties as a bridge between two countries' complex tax regimes, in some circumstances neither the plain text of the treaty nor other supplementary treaty materials will reveal a shared understanding between the parties regarding the application of the treaty to certain situations. Under these limited circumstances, regulations might provide a mechanism whereby the Treasury Department can influence the application of tax treaties to increasingly complex international transactions, while at the same time not violating the United States' obligations under its treaties.