

EXITING TREATIES

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This Article analyzes the under-explored phenomenon of unilateral exit from international agreements and intergovernmental organizations. Although clauses authorizing denunciation and withdrawal from treaties are pervasive, international legal scholars and international relations theorists have largely ignored them. This Article draws upon new empirical evidence to provide a comprehensive interdisciplinary framework for understanding treaty exit. It examines when and why states abandon their treaty commitments and explains how exit helps to resolve certain theoretical and doctrinal puzzles that have long troubled scholars of international affairs.

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INTRODUCTION

THE international legal system is grounded on a fundamental principle: *pacta sunt servanda*—treaties must be obeyed.¹ States, or more precisely the government officials who represent their interests at diplomatic negotiating conferences, are masters of their treaty commitments. No state can be forced to accept a treaty without its consent, nor can it be compelled to join an intergov-

¹ See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

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ernmental organization against its will. Once a state has assented to a treaty and has successfully shepherded it through its national approval process, however, it must observe its treaty commitments in good faith.

International law takes a dim view of challenges to this meta norm of treaty adherence. Claims of invalidity, changed circumstances, and other exculpatory doctrines are narrowly construed, with the result that most unilateral deviations are viewed as breaches of a treaty. True, a state may lawfully suspend adherence to a treaty or even cast it off altogether where another party has materially violated the agreement. But such reciprocal acts of non-compliance, suspension, and abrogation are governed by an elaborate set of limiting doctrines designed to avoid the vicious cycles of breach and counter-breach that would quickly cause interstate cooperation to unravel.²

Neither treaties nor the geostrategic context in which they are embedded are static, of course. When shifts in the political landscape or domestic preferences undermine a treaty's objectives or render its terms unduly burdensome or obsolete, international law directs states to eschew unilateral action in favor of negotiation with their treaty partners. The plausible outcomes of such collaborative efforts are constrained only by the parties' ingenuity. They range from a temporary suspension of the treaty, to a modification of its terms, to wholesale abrogation of the agreement with or without the adoption of a fresh set of treaty commitments.³

Yet buried at the back of most modern international agreements, and often overlooked by scholars, are provisions that call into question international law's unequivocal command that states must either obey treaties or cooperate in abrogating or revising them. Such provisions, known as denunciation or withdrawal

² For detailed discussion of the permissible responses to treaty breaches, see Shabtai Rosenne, *Breach of Treaty* 117–25 (1985) [hereinafter Rosenne, *Breach of Treaty*]; Ian Sinclair, *The Vienna Convention on the Law of Treaties* 188–90 (2d ed. 1984); John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 *Va. J. Int'l L.* 881 (1999).

³ See Arie E. David, *The Strategy of Treaty Termination: Lawful Breaches and Retaliations* 159–202 (1975) (discussing alternatives to unilateral termination and the legal procedures used to achieve them).

clauses, permit a state to “exit” from a treaty that the state had previously ratified and that is otherwise valid and in force.⁴

Distilled to their essence, exit clauses create a lawful, public mechanism for a state to terminate its treaty obligations or withdraw from membership in an intergovernmental organization. Denunciation and withdrawal are also fundamentally unilateral acts. They do not require the consent or approval of other states and may often be effectuated simply by providing notice to the other parties. Moreover, a state that invokes these clauses to quit a treaty occupies a very different position from a state that breaches its treaty commitments. An exiting state faces different burdens and benefits, different prospects of being sanctioned, different reputational consequences, and different responses by other parties than a state that breaches an international agreement.

Treaty clauses that authorize exit are pervasive. They are found in a wide array of multilateral and bilateral agreements governing key transborder regulatory issues, including human rights, trade, environmental protection, arms control, and intellectual property. More intriguingly, exit clauses impose different types and degrees of restrictions on a state’s ability legally to withdraw from a treaty and the obligations it imposes. And occasionally, exit clauses are absent altogether, raising the possibility that exit may be implicitly precluded as a matter of international law. This textual variation suggests that governments may be as interested in negotiating the conditions and contours of exit as they are in bargaining over a treaty’s substantive terms.

States that invoke denunciation clauses do so to achieve different objectives. For example, states have exercised their option to exit a treaty as a result of shifts in the preferences of domestic in-

⁴ In this Article, I use the terms “exit,” “denunciation,” and “withdrawal” interchangeably to refer to the act by which a state unilaterally quits its membership in a treaty (including a treaty that establishes an intergovernmental organization) pursuant to the terms of the treaty providing for such denunciation or withdrawal. See U.N. Office of Legal Affairs, *Final Clauses of Multilateral Treaties Handbook*, at 109, U.N. Sales No. E.04.V.3 (2003) [hereinafter 2003 Handbook] (“The words denunciation and withdrawal express the same legal concept.”). A state that exits from a treaty in this way terminates its future obligations under the agreement. It is not, however, released from obligations that occurred, nor excused from violations that existed, prior to the date that its denunciation or withdrawal took effect. See Vienna Convention, *supra* note 1, art. 70(1), 1155 U.N.T.S. at 349.

terest groups, changes in treaty obligations, or expansions of the functions of intergovernmental organizations.⁵ These developments may create a disconnect between national interests and international commitments that lead a state to pursue a policy of disengagement, as occurred, for example, when North Korea withdrew from the Nuclear Non-Proliferation Treaty and when the United States withdrew from the compulsory jurisdiction of the International Court of Justice.⁶

The consequences of withdrawal are also diverse. They include: isolation (as in the case of North Korea); unilateral or bilateral alternatives (the latter reflected in the Article 98 agreements that the United States negotiated after “unsigned” the treaty establishing the International Criminal Court);⁷ a la carte multilateralism (for example when Caribbean nations withdrew from a human rights treaty and then attempted to re-ratify the same treaty with a reservation concerning the death penalty);⁸ and the creation of a new treaty regime with competing norms or institutions (as occurred when Iceland denounced the International Convention for the Regulation of Whaling and, together with other pro-whaling states, established the North Atlantic Marine Mammal Commission).⁹ In these and other examples, exit provides a mechanism for states to disengage from or radically reconfigure existing forms of international cooperation.

At other times, however, states pursue exit (and threats of exit) not to dissociate themselves from future cooperation with other na-

⁵ In an earlier work, I referred to this dynamic as the “overlegalization” of international law and intergovernmental organizations. See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 *Colum. L. Rev.* 1832, 1851–58 (2002) [hereinafter Helfer, *Overlegalizing*].

⁶ See Masahiko Asada, *Arms Control Law in Crisis? A Study of the North Korean Nuclear Issue*, 9 *J. Conflict & Sec. L.* 331, 341 (2004); Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 *Colum. L. Rev.* 1445, 1445 (1985).

⁷ See Edward T. Swaine, *Unsigned*, 55 *Stan. L. Rev.* 2061, 2061–63 (2003) [hereinafter Swaine, *Unsigned*].

⁸ See Helfer, *Overlegalizing*, supra note 5, at 1881–82.

⁹ See David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 *Am. J. Int'l L.* 154, 155 (1995). Iceland denounced the Convention in 1992. It rejoined in 2002. See *Whale and Dolphin Conservation Society, Iceland's History of Whaling*, at <http://www.wdcs.org/dan/publishing.nsf/allweb/36FBBB89C0EF9A2980256F350055152D> (last accessed Aug. 27, 2005).

tions but, as Albert Hirschman famously explained in the domestic context, as a strategy to increase their voice within an intergovernmental organization or treaty-based negotiating forum.¹⁰ The United States' denunciation in the 1970s and 1980s of the agreements establishing the International Labor Organization ("ILO") and the United Nations Educational, Social and Cultural Organization ("UNESCO") follow this pattern.¹¹ In each instance, the United States used exit and threats of exit—and the loss of organizational support and funding these entailed—to pressure the organizations to change their behavior, after which it renewed its membership. The Soviet Union and its allies pursued a similar approach in the 1950s, temporarily withdrawing from but later rejoining the World Health Organization ("WHO"), UNESCO, and the ILO.¹² More recently, the United States and the European Communities used an exit strategy to close the Uruguay Round of trade talks that created the World Trade Organization ("WTO"). They withdrew from the old General Agreement on Tariffs and Trade ("GATT")—a treaty that gave special benefits to developing countries—and then also ratified the new WTO Agreement as a "single undertaking," forcing developing nations to accept a broad package of obligations favorable to United States and European interests.¹³

¹⁰ Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* 3–5, 15–20 (1970).

¹¹ See Mark F. Imber, *The USA, ILO, UNESCO and IAEA: Politicization and Withdrawal in the Specialized Agencies* (1989) (discussing the United States' use of threats of withdrawal and actual withdrawal from the ILO and UNESCO in the late 1970s to influence the organization's substantive focus); *Contemporary Practice of the United States Relating to International Law*, 97 *Am. J. Int'l L.* 962, 977–79 (Sean D. Murphy ed., 2003) (discussing the United States' withdrawal from UNESCO in 1984 and subsequent return in 2003 after UNESCO had addressed issues of concern to the United States).

¹² N. Feinberg, *Unilateral Withdrawal from an International Organization*, 39 *Brit. Y.B. Int'l L.* 189, 204–11 (1963) (WHO and UNESCO); Victor-Yves Ghebali, *The International Labour Organisation: A Case Study on the Evolution of U.N. Specialised Agencies*, in 3 *International Organization and the Evolution of World Society* 104–07 (Roberto Ago & Nicolas Valticos eds., 1989) (ILO). For a more recent example, see C. J. Chivers, *Uzbekistan: GUUAM Loses A 'U,'* *N.Y. Times*, May 7, 2005, at A2 (describing Uzbekistan's withdrawal from a "five-nation organization of post-Soviet states" in response to the organization's shift from a "pro-Kremlin" to a pro-Western policy orientation).

¹³ See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 *Int'l Org.* 339, 359–60 (2002).

Given the prevalent use and diverse design of denunciation and withdrawal clauses, it is surprising that the subject of exiting treaties has received so little attention in international law and international relations (“IR”) scholarship. A few legal scholars deplore denunciation in passing as “a mask for anarchy, a practice which weakens the whole structure of treaty-created international obligations.”¹⁴ This negative view may reflect the fact that the history of treaty exit includes one of international law’s darkest episodes—the failure of the League of Nations.¹⁵ Most legal scholars, by contrast, assume denunciation and withdrawal clauses to be mere boilerplate provisions that states negotiate rarely and invoke even less frequently.¹⁶

IR theorists, too, have mostly ignored the study of when and why states quit a treaty. Rather, these scholars have framed the two alternatives available to treaty parties as either cooperation or defection. Yet the ability of states to exit from international agreements—and from their costs and benefits, their avenues of persuasion and influence, and their information-sharing, monitoring, and sanctioning mechanisms—belies the assumption that states face only a dichotomous choice between complying with treaties on the one hand or violating them on the other.

Viewed even more broadly, taking treaty exit seriously complicates existing understandings of interstate cooperation and compli-

¹⁴ See, e.g., C. Wilfred Jenks, *A New World of Law? A Study of the Creative Imagination in International Law* 180 (1969).

¹⁵ In the decade leading up to the Second World War, Germany, Italy, Japan, and several other League members exercised their right to withdraw from the organization, thereby avoiding even the mild sanctions that the global body had attempted to impose. Stephen C. Schlesinger, *Act of Creation: The Founding of the United Nations: A Story of Superpowers, Secret Agents, Wartime Allies and Enemies, and Their Quest for a Peaceful World* 26–27 (2003). The widespread withdrawals from the League explain in part why the United Nations Charter does not contain an express denunciation clause. See Feinberg, *supra* note 12, at 197–202.

¹⁶ See, e.g., Richard B. Bilder, *Managing the Risks of International Agreement* 20–21 (1981) (“Certain types of provisions, such as ‘final clauses’ . . . , have now become standardized or ‘boiler-plate’ in international agreements”); Arnold McNair, *The Law of Treaties* 510 (1961) (noting that treaty clauses permitting unilateral denunciation “occur[] so frequently that [they] hardly require[] illustration” or discussion); Aleksander Witold Rudzinski, *Book Review*, 71 *Am. J. Int’l L.* 805, 806 (1977) (reviewing Maria Frankowska, *Denunciation of International Treaties* (1976)) (stating that the “presumed right to withdraw has been very rarely invoked and never as an exclusive ground for [treaty] abrogation”).

ance with international law, whatever their disciplinary provenance. When the option to exit is factored into the doctrinal rules of international law and the paradigms of IR theory, it calls into question assumptions and hypotheses that each discipline has taken for granted. Conversely, understanding when and why states exit treaties—or simply preserve their right to do so—helps to resolve certain theoretical and doctrinal puzzles that have long troubled scholars of international affairs.

The pervasiveness of treaty exit clauses and their largely unexamined theoretical and empirical implications highlight the need for a comprehensive interdisciplinary study of why governments negotiate clauses that authorize denunciation and withdrawal, the forms such clauses take, the functions they serve, and the conditions under which states actually invoke the clauses to abandon their treaty commitments. This Article will provide a theoretical and empirical framework for understanding treaty exit and will lay the groundwork for future interdisciplinary research.

Before proceeding, however, two cautionary notes are in order. First, treaty exit provisions do not exist in a vacuum. Rather, they often operate in tandem with or as an alternative to myriad other flexibility devices—such as subject matter and membership restrictions, reservations, duration and amendment rules, escape clauses, and renegotiation provisions—that treaty makers use to address the pervasive uncertainty of international affairs.¹⁷ The first parts of this Article will hold these other risk management tools constant to identify the distinctive characteristics of exit and will isolate their

¹⁷ See Kal Raustiala, *Form & Substance in International Agreements*, 99 *Am. J. Int'l L.* 581 (2005) [hereinafter Raustiala, *Form & Substance*]. For an early and influential assessment of these issues by an international legal scholar, see Bilder, *supra* note 16. The claim that the different components of international agreements and institutions are the product of conscious tradeoffs by governments has also attracted the attention of IR theorists. The Fall 2001 issue of the journal *International Organization* is devoted to a “rational design” project, which assesses the theoretical claim that “states use international institutions to further their own goals, and they design institutions accordingly.” Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 *Int'l Org.* 761, 762 (2001). The rational design project gives extended treatment to flexibility devices, such as escape clauses, that treaty makers adopt in the face of future uncertainty. *Id.* at 793–95; see also B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 *Int'l Org.* 829, 835 (2001) (discussing escape clauses). The project gives much shorter shrift, however, to issues of exit.

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influence on interstate cooperation and treaty compliance. The Article's concluding Sections will relax this assumption to consider the relationship between exit and other treaty-based tools that states use to address uncertainty and manage risk.

Second, and notwithstanding the linkages among these treaty design provisions, exit occupies a unique and somewhat paradoxical position at the juncture of international law and politics. In particular, exit has both cooperation-detracting and cooperation-enhancing attributes. On the one hand, exit can be the ultimate act of disrespect for international rules and institutions. A state that absents itself from international organizations or agreements may effectively discredit those entities in the eyes of other states or domestic interest groups. On the other hand, exit can have a law promoting function. Particularly given the international legal system's relatively anarchic environment, in which surreptitious shirking of treaty obligations is often plausible, a state's decision to follow the rules of the game, publicize a future withdrawal, and open itself to scrutiny demonstrates a kind of respect for international law. One of this Article's objectives, therefore, will be to begin the complex process of disentangling the cooperation-detracting functions of exit from its cooperation-enhancing and law promoting functions and to explore the relationships among them.

The remainder of this Article will proceed as follows. Part I will identify six distinctive characteristics of exit and distinguishes them from the breach of a state's treaty commitments. I will return to these attributes of exit throughout the Article, amplifying their functions and explaining their relationship to existing theoretical paradigms. Parts II and III will describe the lack of attention to exit issues in, respectively, international law and IR scholarship. These parts will identify and analyze implicit but mistaken assumptions and omissions in each scholarly approach and illustrate how introducing an exit option into the theoretical mix enriches our understanding of the forms and functions of treaty-based cooperation. Part IV will explore the significance of exit for international law and politics. It will identify four unsettled or unexplored issues of interstate cooperation, two doctrinal and two theoretical, and consider how the analysis of exit developed in this Article helps to resolve those issues.

I. SIX DISTINGUISHING CHARACTERISTICS OF TREATY EXIT

Although many observers conflate exit with a state's failure to comply with its treaty obligations, the act of quitting a treaty is distinctive in at least six ways from unsanctioned violations of international law.

First, exit, as I have defined it, is a formal, public act that requires the denouncing state to inform its treaty partners or an intergovernmental organization of its intention to withdraw.¹⁸ The inherently public nature of such an act contrasts with many treaty breaches (to use the parlance of international law practitioners and scholars) or treaty defections (the term favored by political scientists and economists), where states shirk from a promised course of conduct while hiding that fact from other cooperating states.¹⁹ Given the international legal system's relatively weak monitoring and sanctioning mechanisms,²⁰ one might reasonably wonder why a government would ever choose public exit if private cheating is both available and unlikely to be detected.

A second distinctive feature of exit follows from its public nature—the ability of states to use it to challenge or revise disfavored legal norms or institutions or to placate domestic interest groups. Withdrawing from an agreement (or threatening to withdraw) can give a denouncing state additional voice, either by increasing its leverage to reshape the treaty to more accurately reflect its interests or those of its domestic constituencies, or by establishing a rival legal norm or institution together with other like-minded states.²¹ Exit thus sits at a critical intersection of law and power in international relations.

¹⁸ See *supra* note 4.

¹⁹ The ability of states to cheat on their treaty commitments surreptitiously should be distinguished from what might be called “noisy” breaches, in which a state uses a strategy of noncompliance to promote treaty revision or reform. Such a strategy is likely to be more costly than exit and threats of exit, however, since it involves the public violation of a treaty, an act that may trigger a range of sanctions, including reciprocal noncompliance by adversely affected states.

²⁰ See Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 *J. Legal Stud.* 303, 325–26 (2002).

²¹ See, e.g., Caron, *supra* note 9, at 155; Richard A. Melanson, *Human Rights and the American Withdrawal from the ILO*, 1 *Universal Hum. Rts.* 43, 52–54 (1979); Steinberg, *supra* note 13, at 349.

Third, exit, unlike breach, is an internationally lawful act.²² To denounce a treaty, all that a state must do is to follow the often quite minimal conditions (usually procedural) that the treaty specifies.²³ This lawfulness has important consequences for the imposition of sanctions and for the distribution of a treaty's burdens and benefits. In particular, exit enables a state to cease cooperation with other treaty parties while avoiding or at least reducing opportunities to be penalized for noncompliance. A state that properly follows the procedures for withdrawal from a treaty cannot be called upon to defend its failure to comply before a tribunal created by that treaty, nor can it be targeted for treaty-authorized sanctions (although extra-treaty sanctioning mechanisms may be available—a point I explore below). Moreover, because no breach of the treaty has occurred, the remaining states are unable to exercise their right under international law to engage in reciprocal acts of noncompliance.²⁴ They can, of course, seek to exclude the withdrawing state from the benefits of treaty membership. But their ability to do so depends upon the nature of the activities that the treaty regulates and whether they generate externalities that affect non-parties.

Fourth, exit implicates domestic foreign affairs issues distinct from those raised by treaty breaches. A country's failure to comply with its treaty commitments may stem from a variety of causes, ranging from simple inattention or inadvertence, to delays or resource constraints, to deliberate decisions of national policy. Depending on the explanation, such noncompliance can be attributed to legislators, executive branch officials, judges, private parties, or some combination thereof. A different set of actors, however, may be implicated in the formal and public denunciation of a treaty or

²² The only two possible exceptions to this statement are (1) exit from treaties that expressly preclude or do not contain any provision for denunciation or withdrawal, and (2) exit from treaties that overlap with customary international law. I discuss these issues in greater detail below.

²³ International law treats as ineffective an exit attempt that does not meet these conditions. As a result, a state that ceases performance after such an attempt will continue to be considered as a party to the treaty, albeit one that has breached its international obligations.

²⁴ See Vienna Convention, *supra* note 1, art. 60, 1155 U.N.T.S. at 346 (specifying conditions for termination or suspension of the operation of a treaty as a consequence of its breach).

the withdrawal from an intergovernmental organization.²⁵ Where national legal systems create such cleavages, the exit-breach distinction may implicate the balance of power among governmental actors, raising important issues of domestic politics.²⁶

Fifth, the public, formal, and lawful qualities of exit have distinct consequences for a state's reputation for compliance with international law, a key factor in explaining interstate cooperation.²⁷ On the one hand, the lawful, public, and generally infrequent nature of exit suggest that a denouncing state will suffer relatively little harm to its standing as a law abiding country—at least where it regularly participates in multilateral agreements. Exit clauses allow treaty parties to address openly the consequences of shifting domestic preferences or changed circumstances. A state that takes these issues seriously, follows the specified procedures, and explains the basis for its actions projects a real (if somewhat backhanded) respect for international rules, particularly where it is possible to profess adherence in theory but fail to comply in fact. On the other hand, where exit involves a politically salient act such as abandoning a broad package of international obligations or membership in

²⁵ Consider the United States as an example. Congress can choose to violate a treaty obligation (at least one with domestic effects) by failing to enact the necessary implementing legislation, refusing to fund activities or programs mandated by the agreement, or (less commonly) enacting subsequent legislation directly inconsistent with the treaty. For treaty withdrawals—at least withdrawals that are valid under international law—the conventional view is that the President may act without the approval of Congress. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 *Cornell L. Rev.* 97, 154–57 (2004) (distinguishing between treaty withdrawals and treaty violations when analyzing the President's authority under the Constitution and concluding that “[a]s long as a presidential decision to suspend, terminate, or withdraw from a treaty complies with international law, the President's action is consistent with his constitutional duty to ‘take Care that the Laws be faithfully executed’”); Joshua P. O'Donnell, Note, *The Anti-Ballistic Missile Treaty Debate: Time for Some Clarification of the President's Authority to Terminate a Treaty*, 35 *Vand. J. Transnat'l L.* 1601, 1625 (2002) (“The most widely-held modern view on the topic is that the President has the authority to terminate treaties, but it is still a highly controversial topic.” (internal quotations omitted)).

²⁶ For an account of the influence of American labor groups in precipitating the United States' withdrawal from the ILO, see Melanson, *supra* note 21, at 47–54.

²⁷ For scholarship discussing the significance of reputation, see, e.g., George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 *J. Legal Stud.* S95, S97 (2002); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *Cal. L. Rev.* 1823, 1827 (2002) [hereinafter Guzman, *Compliance-Based Theory*].

an intergovernmental organization, it may do more pervasive and lasting damage to a state's reputation than the breach of a specific treaty commitment.²⁸ I provide a framework for reconciling these competing perspectives and for distinguishing the reputational consequences of treaty exit and treaty breach later in this Article.

Finally, exit interacts with a treaty's other provisions to raise important issues concerning the form and structure of international agreements and institutions. Consider two preliminary examples. First, denunciation clauses function as an insurance policy, providing a hedge against uncertainty that allows a state to renounce its commitments if the anticipated benefits of cooperation turn out to be overblown. The existence of this insurance policy enables states to negotiate more expansive or deeper substantive treaty commitments *ex ante*, although it also raises troubling opportunities for strategic action *ex post*. Second, treaty makers can use exit clauses to segregate states according to their tastes for cooperation, helping to determine the optimal composition of a treaty's membership.²⁹ At the negotiation stage, a restrictive denunciation clause or a total ban on exit helps to weed out states that are less serious about future compliance. After a treaty enters into force, however, a permissive exit provision provides a safety valve for treaty parties that—as a result of changes in treaty rules, domestic preferences, external events, or some combination of these factors—would otherwise become habitual rule violators. As these examples illustrate, the decision of how constraining or capacious to make a denunciation or withdrawal clause raises difficult tradeoffs for treaty negotiators.

This brief overview of the distinctions between exit and breach suggests that exit is an important aspect of treaty negotiation,

²⁸ See Vienna Convention, *supra* note 1, art. 44(1), 1155 U.N.T.S. at 343 (“A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.”).

²⁹ See Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-making 195–220* (2003) (analyzing treaty participation, including the optimal number of member states, from a game theoretic perspective); George W. Downs et al., *Managing the Evolution of Multilateralism*, 52 *Int'l Org.* 397, 398 (1998) (arguing that restricting membership to states committed to a particular cooperative goal and then adding less committed states over time permits “deeper” cooperation as compared to broad, inclusive membership at the initial stages of treaty formation, followed by amendments and protocols).

treaty practice, and treaty compliance—issues that lie at the heart of international governance. I explore these issues in the next two Parts of the Article. I identify the ways in which international law and IR scholars have failed to address the exit option or have elided key distinctions between exit and breach, thereby ignoring an important part of the treaty compliance equation.

II. RETHINKING INTERNATIONAL LAW PERSPECTIVES ON TREATY EXIT

Exit clauses create discomfort for scholars and practitioners of international law. To a profession anxious to prove that nations obey international legal obligations, a state's right to unilaterally abrogate its treaty obligations—often without substantive restraint or meaningful sanction—is not something to be advertised. In fact, major public international law treatises (and even most specialized studies of treaty law and practice) all but ignore exit or give the issue only passing attention.³⁰ This short shrift given to exit glosses over many consequential issues of treaty design and practice.

A. Closing Exit

The one treaty exit issue that has attracted considerable attention from international law scholars is closing exit. Scholars have long debated whether a state may lawfully denounce an international agreement or withdraw from an intergovernmental organization that does not expressly authorize denunciation or withdrawal.³¹

³⁰ For representative examples, see, e.g., Ian Brownlie, *Principles of Public International Law* 592 (6th ed. 2003) (devoting only a single page of a 715-page treatise to unilateral denunciation and stating in passing that “[a] treaty may of course specify the conditions of its termination, and a bilateral treaty may provide for denunciation by the parties”); 1 L. Oppenheim, *International Law: A Treatise* § 538, at 938 (H. Lauterpacht ed., 8th ed. 1955) (devoting only one paragraph in a three-volume treatise to unilateral denunciation); Shabtai Rosenne, *Developments in the Law of Treaties, 1945–1986* (1989) [hereinafter Rosenne, *Law of Treaties*] (failing to discuss unilateral withdrawal or denunciation).

I distinguish situations in which a state abrogates its treaty commitments in response to the prior violation of the treaty by another party. International law scholars have extensively analyzed the legal rules that regulate such reciprocal treaty withdrawals. See generally Mohammed M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (1996); Rosenne, *Breach of Treaty*, *supra* note 2.

³¹ See, e.g., Egon Schwelb, *Withdrawal from the United Nations: The Indonesian Intermezzo*, 61 *Am. J. Int'l L.* 661, 661 (1967) [hereinafter Schwelb, *Withdrawal from*

Adopting a rule barring exit unless expressly permitted is highly consequential, turning the act of ratification into an irrevocable promise to cooperate (breach or renegotiation being the only other alternatives).³²

As explained below, however, these studies of whether “silent” treaties implicitly close exit suffer from several flaws. First, they have made little doctrinal headway, leaving the law in a state of flux. Second, the division among the studies largely reflects the authors’ preferences as to whether the presumptive closure of exit is or is not normatively desirable. And third, the studies have diverted attention from the far more prevalent practice of drafting express treaty exit clauses that condition or restrict—but do not entirely bar—unilateral denunciation or withdrawal.

Scholars debating the implied closure of exit fall into two camps. The first sees unilateral treaty withdrawal as an inherent right of states that can be waived only by an express provision precluding exit or by other unequivocal evidence (such as in the *travaux préparatoires*) that the parties intended to prevent withdrawals.³³ The second group argues against exit, emphasizing the allegedly perpetual character of certain intergovernmental organizations (such

the United Nations]; Joseph H. H. Weiler, Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community, 20 *Israel L. Rev.* 282, 282–88 (1985); Kelvin Widdows, The Unilateral Denunciation of Treaties Containing No Denunciation Clause, 53 *Brit. Y.B. Int’l L.* 83 (1982) [hereinafter Widdows, Unilateral Denunciation].

Treaties that expressly preclude unilateral exit are uncommon. The treaty memorializing the United States’ lease of Guantanamo Bay is a rare example. The lease effectively precludes Cuba’s unilateral withdrawal from the treaty. Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1682, 1683 (stating that the lease of Guantanamo Bay “shall continue in effect” “[u]ntil the two contracting parties agree to the modification or abrogation of” the lease, provided that the United States does not abandon the naval station).

³² For a decision reaching precisely this conclusion, see U.N. Human Rights Com., 53d Sess., General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 26(61), at 102 ¶¶ 1–5, U.N. Doc. A/53/40 (1998) [hereinafter General Comment] (expressing the view that it is not possible to denounce the ICCPR).

³³ See, e.g., György Haraszti, Some Fundamental Problems of the Law of Treaties 264 (József Decsenyi trans., 1973). This position has its roots in the foundational statement by the Permanent Court of International Justice that “[t]he rules of law binding upon States . . . emanate from their own free will . . . Restrictions upon the independence of States cannot therefore be presumed.” The Case of the S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

as the United Nations and the European Union)³⁴ or certain treaties whose need for permanence is particularly acute (notably, peace agreements and treaties fixing disputed boundaries).³⁵ Some scholars also make the broader claim that all implied withdrawals should be disfavored given their tension with the principle of *pacta sunt servanda*.³⁶

The drafters of the Vienna Convention on the Law of Treaties sought to resolve these doctrinal rifts by creating a rebuttable presumption that states may not unilaterally exit from a treaty that lacks a denunciation or withdrawal clause.³⁷ Yet, scholars writing after the Vienna Convention's adoption in 1969 continue to contest such basic issues as whether the presumption accurately reflects customary law, the types of treaties whose nature implies a right to withdraw, and the textual and extra-textual evidence that must be marshaled to overcome the presumption and recognize a unilateral right to exit.³⁸

Far more useful than these largely unresolved doctrinal debates is the positive analysis these studies provide of how states behave when faced with a rule barring unilateral withdrawal from an inter-governmental organization. The studies reveal that when the pres-

³⁴ See Feinberg, *supra* note 12, at 215–17 (United Nations); Thomas M. Franck, *Is the U.N. Charter a Constitution?*, in *Negotiating for Peace* 95, 96 (Jochen Abr. Frowein et. al. eds., 2003) (United Nations); Weiler, *supra* note 31, at 284–87 (European Community).

³⁵ See J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* 331 (Humphrey Waldock ed., 6th ed. 1963); Oppenheim, *supra* note 30, § 538, at 938.

³⁶ See, e.g., David M. Galligan, Note, *Wrapping Up the UNCLOS III “Package”*: At Long Last the Final Clauses, 20 *Va. J. Int'l L.* 347, 382 (1980); see also Haraszti, *supra* note 33, at 268 (summarizing the views of scholars opposed to implied unilateral withdrawal).

³⁷ Article 56 of the Convention provides that an agreement:

which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

Vienna Convention, *supra* note 1, art. 56(1), 1155 U.N.T.S. at 345. Treaties that contain express termination clauses are not governed by Article 56 and, in the absence of an express withdrawal clause, cannot be denounced prior to the time when the termination clause takes effect. See Haraszti, *supra* note 33, at 260–61.

³⁸ For an overview of these debates, see generally Widdows, *Unilateral Denunciation*, *supra* note 31.

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tures to exit are sufficiently high, some states will quit the organization notwithstanding any international rule to the contrary. The withdrawal of North Korea from the International Covenant on Civil and Political Rights (“ICCPR”) in 1997; of Indonesia from the United Nations in 1965; of Czechoslovakia, Hungary, and Poland from UNESCO in the 1950s; and of the Soviet Union and eight of its Eastern European allies from WHO in the same period are prominent examples.³⁹

A more unexpected finding, however, is how withdrawing states respond after the pressures to exit have dissipated.⁴⁰ In all of the examples above, the withdrawing states rejoined the organizations within a few years. And when they did so, they acquiesced in the organization’s re-characterization of their conduct as a temporary cessation of participation rather than a unilateral (and unlawful) withdrawal from membership. Indeed, states often bolster this re-writing of history by paying a portion of the dues assessed against them during their erstwhile absence.⁴¹

Scholars documenting this pattern of exit and return view it as compelling evidence that customary international law bans withdrawals from treaties that do not contain an express exit clause.⁴² But the pattern also suggests a different conclusion—that the closure of treaty exit, either expressly or by implication, may not be an optimal strategy to promote interstate cooperation. Yet international legal scholars have all but ignored the effects of express denunciation and withdrawal clauses on treaty-based cooperation.

³⁹ See Elizabeth Evatt, *Democratic People’s Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence?*, 5 *Austl. J. Hum. Rts.* 215, 215–17 (1999); Schwelb, *Withdrawal from the United Nations*, *supra* note 31, at 666–71; Widdows, *Unilateral Denunciation*, *supra* note 31, at 99–102; Feinberg, *supra* note 12, at 204–11.

⁴⁰ The response by the remaining member states is also noteworthy. After the denunciations of UNESCO described above, the United States successfully introduced an amendment to the organization’s constitution authorizing unilateral withdrawal. Feinberg, *supra* note 12, at 211.

⁴¹ Michael Akehurst, *Withdrawal from International Organisations*, 32 *Current Legal Prob.* 143, 146–49 (1979); Feinberg, *supra* note 12, at 205–11; Schwelb, *Withdrawal from the United Nations*, *supra* note 31, at 667–70. The retroactive payment of dues may function as a penalty for violating the implied rule against exit or it may signal a state’s willingness to reengage with an intergovernmental organization on new terms.

⁴² See Akehurst, *supra* note 41, at 149–50.

B. Identifying Variation in Treaty Exit Clauses

What forms do express denunciation and withdrawal clauses take? If these clauses are a topic of contention among treaty makers, we should expect to observe diversity in their structure. By contrast, if these provisions are mere boilerplate, as most international law scholars have assumed, they should be identical or highly similar, at least among treaties in the same issue area. These are empirically testable propositions. Materials published by intergovernmental organizations on “final clauses”⁴³ provide a framework around which such empirical testing can be structured. The following review of these heretofore unexamined sources of treaty practice reveals a significant degree of variation among treaty exit clauses.⁴⁴

In 1951, 1957, and 2003, the United Nations Office of Legal Affairs published a *Handbook of Final Clauses*. The Handbook is a reference tool of exemplars from existing treaties designed to assist government officials in drafting multilateral agreements.⁴⁵ The Council of Europe has employed a similar approach, adopting “model final clauses” to be included in treaties negotiated by its member states.⁴⁶ In the ILO, final clauses have followed a template

⁴³ Final clauses are typically found at the end of a treaty and include topics such as “the settlement of disputes, amendment and review, the status of annexes, signature, ratification, accession, entry into force, withdrawal and termination, reservations, designation of the depositary, and authentic texts.” 2003 Handbook, *supra* note 4, at 1; see also U.N. Treaty Section, Office of Legal Affairs, Treaty Handbook, at 57, U.N. Sales No. E.02.V.2 (2001) (providing glossary definition of “final clauses”).

⁴⁴ A May 2005 search of Westlaw’s “Journals and Law Reviews” database found only two references to the Handbooks of Final Clauses described above. See Palitha T.B. Kohona, The United Nations Treaty Collection on the Internet—Developments and Challenges, 30 Int’l J. Legal Info. 397, 400 (2002); Palitha T.B. Kohona, Current Developments, The United Nations Treaty Collection on the Internet, 92 Am. J. Int’l L. 140, 141 (1998).

⁴⁵ U.N. Div. of Immunities and Treaties, Legal Dep’t, Handbook of Final Clauses, at v, U.N. Doc. ST/LEG/1 (1951) [hereinafter 1951 Handbook]; U.N. Treaty Section, Office of Legal Affairs, Handbook of Final Clauses, at 1, U.N. Doc. ST/LEG/6 (1957) [hereinafter 1957 Handbook]; 2003 Handbook, *supra* note 4, at vi. See generally The Treaty Maker’s Handbook (Hans Blix & Jirina H. Emerson eds., 1973) (collecting examples of treaty texts, including texts of final clauses).

⁴⁶ Com. of Ministers, Council of Europe, Model Final Clauses for Conventions and Agreements Concluded within the Council of Europe (Feb. 1980), at <http://conventions.coe.int/Treaty/EN/Treaties/Html/ClausesFinales.htm> [hereinafter Model Final Clauses].

set out in the first ILO convention concluded in 1919 and revised in 1929.⁴⁷

A review of these guides to treaty making reveals that denunciation and withdrawal clauses cluster around six ideal types: (1) treaties that may be denounced at any time; (2) treaties that preclude denunciation for a fixed number of years, calculated either from the date the agreement enters into force or from the date of ratification by the state; (3) treaties that permit denunciation only at fixed time intervals; (4) treaties that may be denounced only on a single occasion, identified either by time period or upon the occurrence of a particular event; (5) treaties whose denunciation occurs automatically upon the state's ratification of a subsequently-negotiated agreement; and (6) treaties that are silent as to denunciation or withdrawal.⁴⁸

Divergences also exist as to the procedures for notice of denunciation, including the period of time that must elapse before a denunciation takes effect, to whom notice must be given, and whether notice may be withdrawn.⁴⁹ For some treaties, such as humanitarian law agreements, the effective date of withdrawal is made contingent upon external events, such as the cessation of armed conflict.⁵⁰ Among the many notice variations, the most common denunciation clause permits withdrawal only if the state provides advance notice of its decision to withdraw, sometimes

⁴⁷ See Possible Improvements in the Standard-setting Activities of the ILO, at 2, 7–10, ILO Doc. GB.286/LILS/1/2 (Mar. 2003), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb286/pdf/lils-1-2.pdf> [hereinafter Final Provisions of the International Labour Conventions].

⁴⁸ 1951 Handbook, *supra* note 45, at 119–36; 1957 Handbook, *supra* note 45, at 59–73; Model Final Clauses, *supra* note 46, at art. f; 2003 Handbook, *supra* note 4, at 109–11; see also Haraszti, *supra* note 33, at 246–50.

⁴⁹ Many of these divergences are noted in Haraszti, *supra* note 33, at 253–55.

⁵⁰ Common Article 63 of the four Geneva Conventions of 1949 provides that a denunciation generally takes effect one year after the notification. E.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 63, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 3152, 75 U.N.T.S. 31, 68 [hereinafter First Geneva Convention]. Yet, when a notice of denunciation is “made at a time when the denouncing Power is involved in a conflict[, denunciation] shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.” 6 U.S.T. at 3152, 75 U.N.T.S. at 68.

with the additional condition that the treaty has been in force for a specified number of years.⁵¹

The overwhelming majority of the denunciation and withdrawal clauses listed in these exemplary documents do not require a state to provide any justification for its decision to quit a treaty. To the contrary, notices of denunciation are generally short, stylized letters of two or three paragraphs that simply inform the treaty depository that a state is withdrawing from a particular agreement as of a specified date.⁵²

In a small number of agreements, however, a withdrawing state must explain its actions. Such explanations are particularly prevalent in arms control treaties.⁵³ Most arms control agreements also restrict withdrawal to particular factual contexts, although they leave it to the denouncing state to determine whether such facts exist.⁵⁴ States also provide justifications for denouncing international labor treaties. No ILO convention requires such statements, but in practice the ILO often requests, and governments often provide, explanations after consulting worker and employer representatives from that state.⁵⁵

⁵¹ See 1951 Handbook, *supra* note 45, at 119–36; 1957 Handbook, *supra* note 45, at 59–73; Model Final Clauses, *supra* note 46, at art. f; 2003 Handbook, *supra* note 4, at 109–11.

⁵² See *The Treaty Maker's Handbook*, *supra* note 45, at 114–16 (reproducing typical notices of withdrawal and denunciation).

⁵³ See Abram Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 *Harv. L. Rev.* 905, 957–58 (1972) [hereinafter Chayes, *Arms Control Agreements*]. A more recent example of this appears in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which recognizes the right of exit but requires denouncing states to provide “a full explanation of the reasons motivating this withdrawal.” Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art. 20 Sept. 18, 1997, 2056 U.N.T.S. 211.

⁵⁴ E.g., Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XV, May 26, 1972, 23 U.S.T. 3435 (recognizing the right to withdraw if either party “decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests” and requiring notice to the other party “of the extraordinary events the notifying Party regards as having jeopardized its supreme interests”); see also Chayes, *Arms Control Agreements*, *supra* note 53, at 957–58 (“The question whether events are ‘extraordinary,’ whether they are ‘related to the subject matter of this Treaty,’ and whether they ‘have jeopardized [its] supreme interests’ are all referred exclusively to the unilateral decision of the withdrawing party.”).

⁵⁵ See Kelvin Widdows, *The Denunciation of International Labour Conventions*, 33 *Int'l & Comp. L.Q.* 1052, 1055 (1984) [hereinafter Widdows, *ILO Denunciations*] (discussing the ILO Governing Body's unanimous adoption of a resolution requesting

The wide variety of denunciation and withdrawal clauses suggests that governments derive a benefit from tailoring exit rules to particular types of treaties. In particular, the high degree of textual variation suggests that exit clauses may function as risk management tools that allow governments to balance stability and continuity of membership with the flexibility to tailor treaties to an uncertain and changing world.⁵⁶ The next Section provides a more detailed account of how exit clauses help states to manage risk.

*C. Facilitating Agreement Ex Ante While Deterring
Opportunism Ex Post*

Uncertainty is a pervasive feature of international affairs. Denunciation clauses reduce uncertainty by giving states a low cost exit option if an agreement turns out badly. All other things being equal, such clauses encourage the ratification of a treaty by a larger number of states than would be prepared to ratify in the absence of such a clause.⁵⁷ They may also enable states to negotiate deeper or broader commitments than would be attainable for treaties without unilateral exit.⁵⁸ Taken together, these ex ante benefits of exit counsel negotiators to include broad and permissive withdrawal clauses in the treaties they draft.⁵⁹

that a state that has denounced an ILO convention provide “an indication of the reasons which had led to its decision”).

⁵⁶ See Bilder, *supra* note 16, at ix–x; Raustiala, *Form & Substance*, *supra* note 17, at 605–09. Bilder notes, however, that states “may include risk-management techniques in their agreements for reasons unrelated to any concern with risk,” such as routine, habit, a desire for “completeness[,] and conformity with other agreements . . .” Bilder, *supra* note 16, at 20–21.

⁵⁷ See Harold J. Tobin, *The Termination of Multipartite Treaties* 202 (1933); see also Jenks, *supra* note 14, at 179–80 (stating that where “conditions are particularly liable to change,” the inclusion of a denunciation or termination clause by a treaty’s drafters “may materially assist those who are attempting to secure acceptance of a draft”).

⁵⁸ Cf. Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 *U. Chi. L. Rev.* 255, 279 (1991) (analyzing how escape clauses enable negotiators to overcome fear of future economic and political shocks and include more reciprocal concessions in trade treaties).

⁵⁹ This incentive to include permissive exit rules ex ante is not altered even if states invoke exit clauses infrequently. Although a variety of costs (such as loss of voice and reputational harm) constrain exit as a political matter, a lawful method to abrogate treaty commitments remains useful to states for situations in which the benefits of noncompliance outweigh those costs.

Although the *ex ante* benefits of exit may be considerable, treaties that permit easy denunciation also create *ex post* costs that may impede future cooperation. One such cost is that states will overuse exit clauses and invoke them (or credibly threaten to) whenever economic, political or other pressures make compliance costly or inconvenient.⁶⁰ But the risks extend beyond such opportunistic behavior. Fearing that their treaty partners today may quit a treaty tomorrow, states that prefer to cooperate have a reduced incentive to invest the resources needed to comply with the agreement.⁶¹ These incentives suggest that governments seeking to make treaties more durable should eliminate or restrict exit opportunities, a position directly contrary to the *ex ante* perspective favoring broad exit rights.

These competing perspectives on the costs and benefits of exit reveal that a principal challenge facing treaty negotiators is to set optimal conditions on exit *ex ante* so as to deter opportunistic uses of exit clauses *ex post* after the treaty has entered into force.⁶² Treaty restrictions that are too easy to satisfy will encourage self-serving denunciations and lead to a breakdown in cooperation. Restrictions that are too onerous will discourage such behavior, but may prevent the parties from reaching agreement in the first instance, or, if agreement is reached, may lead to widespread treaty violations if the costs of compliance rise unexpectedly.⁶³

⁶⁰ Whether a state chooses to withdraw when faced with such pressures cannot be analyzed in isolation. For example, exit should be less frequent if the treaty permits reservations or authorizes noncompliance when circumstances fundamentally change. I discuss these issues below.

⁶¹ See Swaine, *Unsigning*, *supra* note 7, at 2074 (“Where parties are free to exit a relationship at any point and for any reason, they will under-invest in reliance—that is, fail to depend upon the relationship’s perpetuation in ways that might be efficient.”).

⁶² Paul Stephan has pointedly framed the question: “[H]ow can we distinguish a nation’s principled assertion of a right to withdraw from a relationship that has turned out badly from an opportunistic attempt to appropriate benefits that were created for a collective good?” Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 *U. Colo. L. Rev.* 1555, 1583 (1999); see also Georg Ress, *Ex Ante Safeguards Against Ex Post Opportunism in International Treaties: Theory and Practice of International Public Law*, 150 *J. Institutional & Theoretical Econ.* 279, 294–95 (1994).

⁶³ Cf. Sykes, *supra* note 58, at 297 (“The elimination of penalties for the avoidance of obligations would increase the propensity of signatories to make opportunistic use of [the escape clause in GATT].”).

If the ability of treaty negotiators to precisely calibrate optimal exit restrictions is questionable, it is further complicated by the fact that few treaties—at least outside the trade context—can credibly threaten to impose monetary penalties or other sanctions.⁶⁴ As a result, optimal exit rules must deter opportunistic invocations of exit clauses by harnessing such compliance-inducing mechanisms as the reputational consequences of withdrawal, exclusions from benefits available to treaty members, and extra-treaty sanctions or incentives. In addition, what qualifies as an optimal restriction or condition is likely to vary with the number of parties to the agreement, their relative power, the problems the treaty seeks to resolve, and the issue area in which it is situated. Before turning to a more detailed discussion of these issues, however, the next Section considers how frequently states actually invoke denunciation and withdrawal clauses to exit treaties.

D. Examining the Frequency of Exit from Multilateral Treaties

The conventional wisdom holds that treaty exits are extremely rare events that governments undertake only after exhausting all other avenues of persuasion and influence.⁶⁵ The supposition that exit is an extraordinary act relies on anecdotal evidence of a few high-profile denunciations and withdrawals. No comprehensive empirical assessment of denunciation and withdrawal has ever been attempted.

Systematic data on how frequently states exit international agreements is collected by the Treaty Sections of the United Nations, the ILO, the Council of Europe, and other intergovernmental organizations. These offices maintain databases and archives of all so-called “treaty actions,” including ratifications, denunciations,

⁶⁴ Schwelb, *Withdrawal from the United Nations*, supra note 31, at 672 (“[T]he United Nations has no legal remedy to enforce its claim for continued membership of the state purporting to withdraw.”); cf. Andrew T. Guzman, *The Design of International Agreements*, 16 *Eur. J. Int’l. L.* (forthcoming 2005) (on file with the Virginia Law Review Association) (noting that unlike domestic law, in international legal systems, “[w]here sanctions are provided, they are often not severe, and often only prospective”); Rosendorff & Milner, supra note 17, at 834–35 (arguing that the invocation of GATT’s escape clause is constrained by the obligation of the escaping state to compensate adversely affected GATT member or suffer an equivalent amount of retaliation).

⁶⁵ See, e.g., Galligan, supra note 36, at 384; Weiler, supra note 31, at 283.

and withdrawals from multilateral and bilateral agreements. Based on information collected from these treaty offices, as supplemented by other primary and secondary source materials, I have compiled a database of denunciations and withdrawals from multilateral treaties, from which I generate a variety of empirical snapshots that identify the incidence of exit from international agreements.⁶⁶

These snapshots are interesting in their own right. They reveal that denunciations and withdrawals are a regularized component of modern treaty practice—acts that are infrequent but hardly the isolated or aberrant events that the conventional wisdom suggests. These portraits also provide the empirical groundwork for the theoretical and doctrinal analysis of exit that follows.

Figure 1 illustrates the 1547 denunciations and withdrawals from all multilateral treaties registered with the United Nations in five-year intervals from 1945 to 2004.⁶⁷ It reveals a steady increase in the

⁶⁶ See Laurence R. Helfer, *Excel Database of Denunciations from Multilateral Treaties* (Sept. 5, 2005) (on file with author). The database is comprised of denunciations of and withdrawals from multilateral treaties that were notified to an intergovernmental organization, a treaty depository, or the other treaty parties on or after January 1, 1945 and before January 1, 2005. The database includes denunciations and withdrawals notified during this fifty-year period with respect to treaties that were negotiated and opened for signature on or after January 1, 1900.

I obtained information on each entry in the database from the United Nations Treaty Section Documentum Database; the United Nations Treaty Collection; the Treaty Sections and Archives of the United Nations, the International Labor Organization, and the Council of Europe; the websites of these and other intergovernmental organizations; and numerous secondary sources, including but not limited to those cited in this Article. I am indebted to Palitha Kohona, Chief of the United Nations Treaty Section, for granting me access to the Documentum Database.

Whenever possible, I cross-checked the information in each entry for accuracy. I did not consider a denunciation or withdrawal to be reliably documented (and thus excluded it from the database) unless I was able to identify, at a minimum, the following essential items of information: (1) year in which the treaty was concluded (and, whenever possible, the precise date that the treaty was opened for signature); (2) the country filing the notice of denunciation or withdrawal; (3) the year in which that country filed the notice of the denunciation or withdrawal (and, whenever possible, the precise date of the filing of the notice); and (4) the year in which the denunciation or withdrawal took effect (and, whenever possible, the precise date on which it took effect). I also excluded the following categories of entries from the database: (1) treaties whose number of members I could not determine; (2) treaties or intergovernmental organizations that expressly preclude denunciation or withdrawal or do not contain an express exit clause; and (3) notices of denunciation or withdrawal that were later withdrawn before their effective date.

⁶⁷ The United Nations also records denunciations and withdrawals from bilateral treaties, which are much higher than for multilateral agreements. However, I have ex-

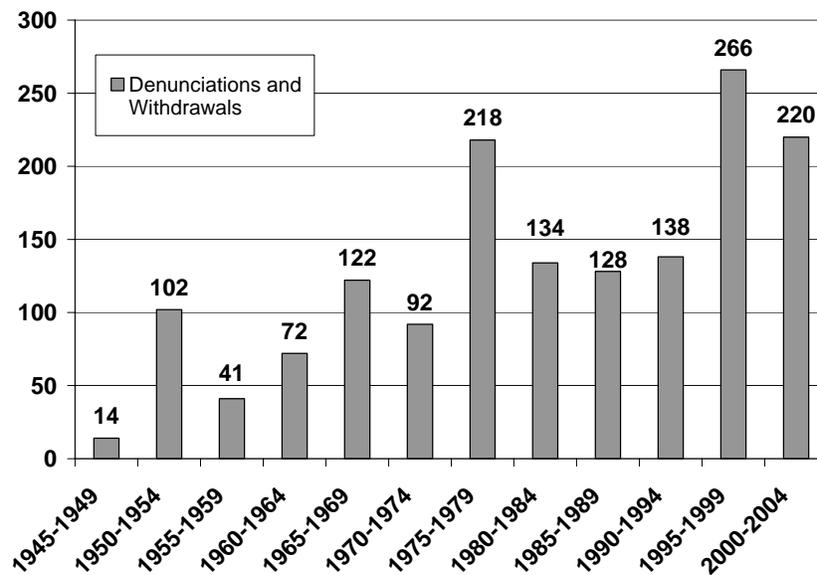


Figure 1: Total Denunciations and Withdrawals from Multilateral Treaties Registered with the United Nations, by Five-Year Period, 1945–2004 (n = 1547)

number of denunciations since the World War II, albeit with some variation in each five-year period.⁶⁸ That upward movement cannot, however, be understood in isolation. The increase in exits might simply reflect the rising number of states in the international community (including newly independent nations that emerged from colonialism in the 1960s), the increase in international treaty

cluded bilateral treaties from the tables set forth above on theoretical and practical grounds. First, in the case of two-party agreements, the unilateral denunciation or withdrawal by one party also causes a termination of the treaty, a result that does not occur for multilateral treaties, which remain in force for the nonwithdrawing parties. Second, the information in the UN Documentum database on withdrawals is less comprehensive, and therefore less reliable, than the analogous information on multilateral agreements.

⁶⁸ The databases do not provide sufficiently precise information to determine whether some nations quit multilateral treaties more frequently than others, either on absolute terms or in proportion to their total treaty ratifications. As a result, the evidence is equally consistent with the claim that only a few states are responsible for most denunciations and withdrawals as with the assertion that exits are spread more or less evenly among the members of the international community.

making and associated ratifications, or both. To assess the potential relationship among these trends, I compared the number of denunciations and withdrawals to the total number of multilateral treaty ratifications.

Figure 2 compares the total number of ratifications of multilateral treaties to the total number of denunciations and withdrawals,

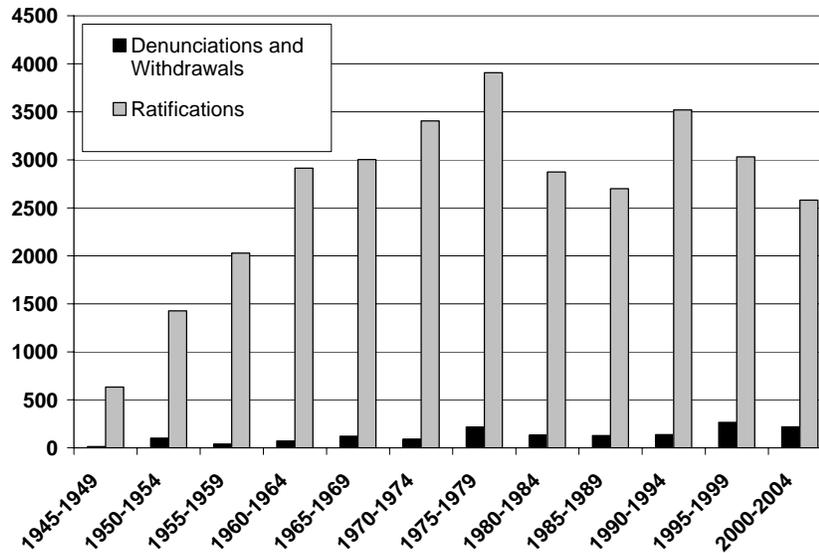


Figure 2: Total Denunciations and Withdrawals (n = 1547) from, and Total Ratifications (n = 32,021) of, Multilateral Treaties Registered with the United Nations, by Five-Year Period, 1945–2004

illustrating the treaty activity in each five-year period. Not surprisingly, there have been far more ratifications of treaties (32,021) than denunciations and withdrawals (1547) since 1945. Figure 3 shows the same data, but with exits in each five-year period expressed as a percentage of the cumulative ratifications registered by the United Nations from 1945 through the end of each period. This graph reveals that the rate of denunciations and withdrawals has held relatively constant or declined only slightly over the last fifty years, even after controlling for the large increase in treaty

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ratifications and the emergence of new nations in the 1960s and 1970s.

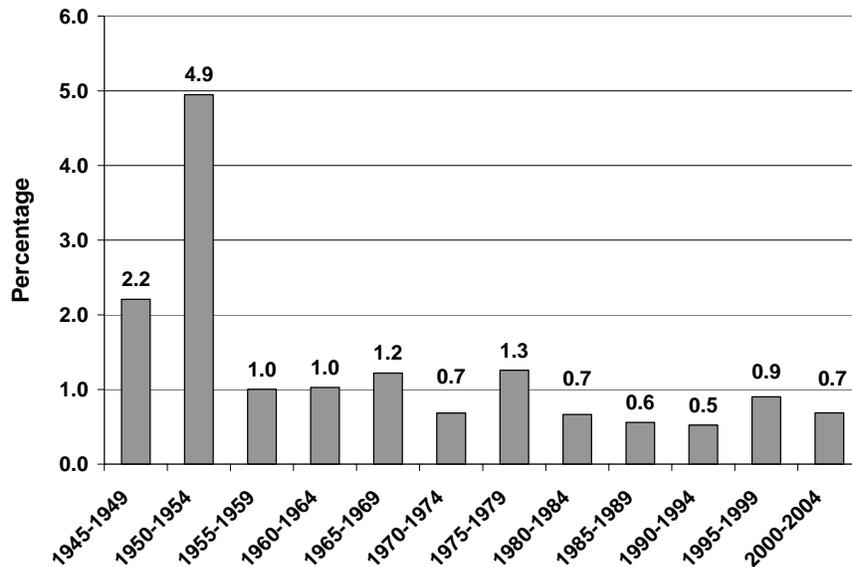


Figure 3: Total Denunciations and Withdrawals of Multilateral Treaties Relative to Cumulative Ratifications of Multilateral Treaties, by Five-Year Period, 1945–2004
(denunciations and withdrawals = 1547; ratifications = 32,021)

A different way to study the prevalence of exit is not by comparing total ratifications and denunciations, but rather by examining individual treaties. Figures 4 and 5 analyze this information.

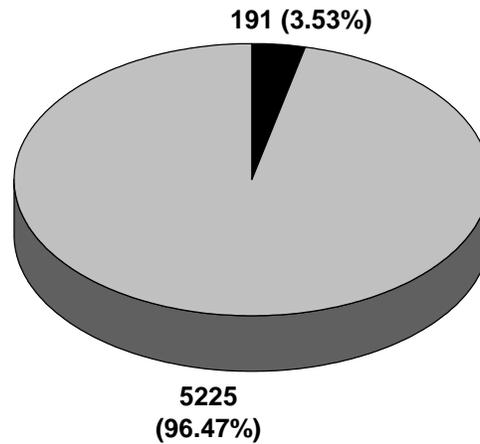


Figure 4: Percentage of Multilateral Treaties Concluded After 1945 that Have Been Denounced at Least Once (black)
(Total number of treaties = 5416)

Figure 4 reveals that of the 5416 multilateral agreements concluded after 1945, 191, or 3.5%, have been denounced at least once. In light of the 1547 denunciations filed during this same sixty-year period, this small percentage suggests that a few multilateral agreements have been denounced by multiple states. This suggests that a few treaties turn out badly for many parties, resulting in group exits.

Another revealing statistic is the timing of exit, in particular when denunciation and withdrawal occur relative to the date of a treaty's adoption. The UN Treaty Section collects treaty-level data which reveals that older multilateral agreements are denounced more frequently than recently adopted treaties.

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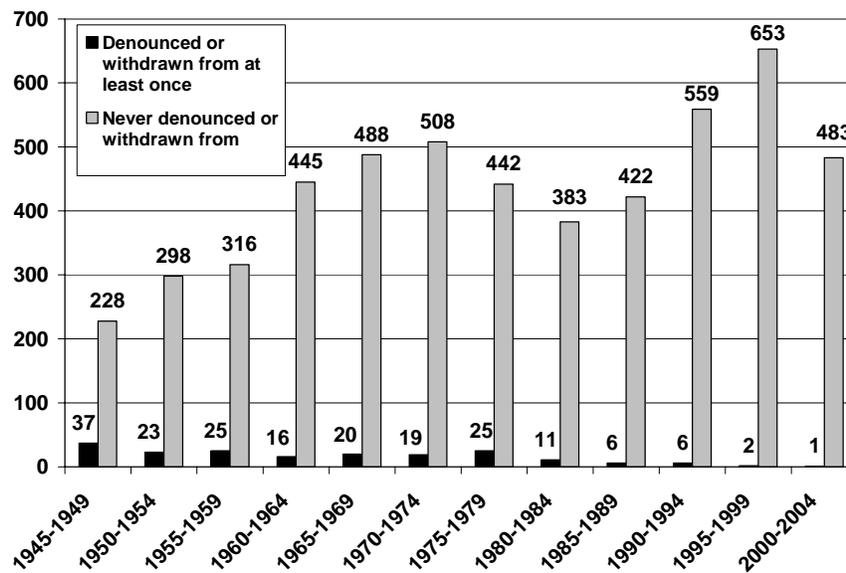


Figure 5: Multilateral Treaties Concluded After 1945 that Have Been Denounced or Withdrawn from at Least Once; and Multilateral Treaties Concluded After 1945 that Have Never Been Denounced or Withdrawn from, by Date of Conclusion of Treaty (Total number of treaties = 5416)

As Figure 5 illustrates, 37 of the 265 treaties (or 14%) negotiated in the first five years after World War II have received at least one denunciation or withdrawal. Thereafter, the number of “denounced” agreements decreases gradually in absolute terms and more rapidly as a percentage of treaties concluded in each period. The correlation between a treaty’s age and the likelihood of one or more states denouncing it may indicate that states use exit to abandon treaties that have become outdated or moribund. It may also suggest that multilateral agreements may have an average “shelf life,” the expiration of which is signaled by the onset of denunciation or withdrawal. A more detailed study of these treaties therefore appears warranted.

E. Assessing the Political Salience of Exit from Multilateral Treaties

The foregoing data suggests that exit is not merely a concern of overly cautious treaty negotiators nervous about the future. To the contrary, the data reveals that states quit multilateral treaties with a fair degree of regularity. To be clear, such invocations are only a small fraction of total treaty ratifications. But although infrequent, they are far more prevalent than international law scholars have previously asserted. Consider a revealing illustration: since 1975, a state has withdrawn from or denounced a multilateral agreement, on average, once every ten days.⁶⁹

Given this practice, why have scholars of international affairs largely ignored the practice of exiting treaties? Answering this question requires a more fine grained analysis. The data presented above treats each denunciation identically. From a deeper analytical perspective, however, such formal equality makes little sense. The political salience of a denunciation will vary according to factors such as (1) the subject matter of the treaty, (2) the identity and power of the withdrawing state in relation to the remaining treaty members, (3) the professed motivation for the state's withdrawal, and (4) whether withdrawal precipitated the termination or renegotiation of the treaty or was accompanied by the ratification of a revised agreement in the same subject area.⁷⁰

Seen from this perspective, some denunciations are likely to be more politically momentous than others and, as a result, attract greater attention from government officials, the news media, and academic commentators. It is not surprising, for example, that

⁶⁹ See *supra* Figure 1. The empirical evidence portrayed above undercounts the incidence of exit in at least one significant respect. Treaty databases do not record threats of exit. These threats include instances in which a state informally publicized its intent to leave a multilateral agreement but never actually did so. They also include exit threats that precipitated the filing of a formal notice of denunciation or withdrawal that the state later withdrew before its effective date. See, e.g., Bin Cheng, *A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)*, 53 *Int'l & Comp. L.Q.* 833, 836 (2004) (describing a strategy for treaty revision whereby the United States filed a notice of denunciation of the Warsaw Convention to precipitate change in aircraft liability rules and then withdrew the notice before it took effect after it had achieved its objectives). For this reason, the data significantly under-represents the prevalence of exit in international affairs, in particular its use as an instrument of voice in intergovernmental negotiating fora.

⁷⁰ This analysis builds upon my earlier treatment of treaty exit. See Helfer, *Overlegalizing*, *supra* note 5, at 1887–88.

withdrawals (or threatened withdrawals) from treaties establishing intergovernmental organizations have received widespread publicity and analysis, particularly where those organizations aspire to universal membership or are intended to be perpetual.⁷¹ Similarly, denunciation of treaties central to maintaining international peace and security—including arms control agreements, such as the Nuclear Non-Proliferation Treaty or the Anti-Ballistic Missile Treaty, and peace treaties terminating hostilities between two or more states—are likely to be viewed as more consequential. This is particularly the case where the withdrawing nation is an outlier as compared to other treaty parties, be it a global superpower such as the United States or a “rogue” state such as North Korea.

By contrast, governments may consider other types of treaty exits as raising few political or legal concerns. Plausible examples include denunciations carried out by a foreign ministry after culling through its catalogue of international agreements to identify outdated treaties that, while nominally still in force, are effectively moribund.⁷² In addition to these “housekeeping” denunciations, treaty withdrawals linked to the ratification of revised agreements are likely to fall below the political radar screen. For example, in the ILO and the International Maritime Organization, the ratification of certain revising conventions or protocols triggers the automatic or compulsory denunciation of earlier agreements relating to the same subject matter.⁷³ Such paired treaty actions update a gov-

⁷¹ See *supra* Section II.A.

⁷² See, e.g., Joint Standing Comm. on Treaties, Parliament of the Commonwealth of Austl., *Treaties Tabled in May and June 2003*, Report 53, chap. 5, at 46 (Aug. 2003), available at <http://www.aph.gov.au/house/committee/jsct/mayjune2003/report.htm> (last accessed May 17, 2005) (reporting analysis by the Australian Department of Foreign Affairs and Trade that the “continued application of [three international labor] conventions . . . serves no purpose” and that the proposed denunciations accord with the Department’s “objective of ensuring that Conventions which are no longer relevant to our national circumstances do not form part of Australia’s regulatory structures” (internal quotations omitted)).

⁷³ See, e.g., Final Provisions of the Int’l Labour Conventions, *supra* note 47, at 10 (discussing the practice of “automatic denunciation” of older ILO conventions that occur upon the ratification of “revising conventions”); Int’l Maritime Org., Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, art. 31, *in* International Conference on Liability and Compensation for Damage in Connexion with the Carriage of Certain Substances by Sea, 1984, at 26, 42 (1985) (providing a mechanism for compulsory denunciation of the older convention).

ernment's legal obligations without materially diminishing its overall level of commitment. Similarly, a few Council of Europe treaties supersede earlier agreements on the same subject by requiring ratifying nations to denounce the earlier agreements as a condition of membership.⁷⁴ In these instances, exit is closer to a technical or ministerial act. Perhaps more importantly, denunciations and withdrawals of this sort are fundamentally cooperative in nature, in contrast to unilateral exits not accompanied by the contemporaneous ratification of another, related treaty.

Finally, the rationales (if any) a state offers to justify its decision unilaterally to withdraw from a multilateral agreement provide an important indicator of a denunciation's political salience. Public pronouncements may reveal whether the state is seeking to renegotiate the treaty, to revise the mandate or procedures of an intergovernmental organization it establishes, or to create a rival institution that more effectively serves its interests.

Unfortunately, the treaty databases analyzed above rarely indicate the motivation for a state's denunciation or withdrawal. More fine grained historical analyses of individual treaties and individual acts of denunciation and withdrawal are required to unearth such rationales. Given the more than 1500 treaty exits (and the additional unknown instances of exit threats), the number of potential case studies appears daunting. As I explain in the next Part, however, situating exit within the IR literature on treaty-based cooperation and compliance helps to generate theoretically informed hypotheses that limit the number of plausible case studies and frame the parameters around which such studies should be structured.

III. RETHINKING INTERNATIONAL RELATIONS PERSPECTIVES ON TREATY EXIT

The foregoing review of treaty text and practice suggests that issues of denunciation and withdrawal have been ignored or underemphasized by international legal scholars. A similar lack of attention to exit, however, also characterizes studies of state behavior by IR theorists. In the Sections below, I introduce the omitted variable of exit into the political science literature and explore its con-

⁷⁴ See Jörg Polakiewicz, *Treaty-Making in the Council of Europe* 37 (1999).

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sequences for theories of international cooperation and compliance.

IR scholars view treaty exit and treaty breach as interchangeable examples of “defections” from international cooperation. This conflation ignores the distinctive institutional, legal, political, and reputational consequences of withdrawing from or denouncing an international agreement. These consequences include the loss of membership and voice, restricted opportunities for imposing intra-treaty and extra-treaty sanctions, and reduced harm to an existing reputation for treaty compliance where a state exits infrequently and can plausibly justify its decision to quit as a response to changed circumstances.

After closely analyzing these and other similarities and differences between exit and breach, I introduce an exit option into different IR models of cooperation and compliance. I explore the functions of exit in collaboration and coordination games and assess its relationship to treaty problem structures, such as agreements regulating public goods and club goods. Throughout, I highlight prescriptions for negotiators to structure denunciation and withdrawal clauses in ways that augment the cooperation-enhancing functions of exit while diminishing the incentives for unilateral opportunism.

A. Modeling Interstate Cooperation and Defection

IR scholars who study treaties and international regimes often use game theory to model interstate cooperation problems. The most well known game is, of course, the Prisoners’ Dilemma, in which two players must decide whether to “cooperate” or to “defect” in each round of play. The payoff structure of the game is fixed such that each player will rationally choose to defect rather than to cooperate. This dominant strategy leads to an equilibrium outcome of mutual defection, notwithstanding the fact that both players would have been better off had they chosen to cooperate.⁷⁵

⁷⁵ For a review of the basic principles of game theory as applied to IR, see Moshe Hirsch, *Game Theory, International Law, and Future Environmental Cooperation in the Middle East*, 27 *Denv. J. Int’l L. & Pol’y* 75, 78–94 (1998); Duncan Snidal, *Rational Choice and International Relations*, in *Handbook of International Relations* 73, 74–76 (Walter Carlsnaes et al. eds., 2002).

The classic, two-person Prisoners' Dilemma makes several assumptions. The players are unitary, rational actors who seek to maximize their individual welfare. In addition, the payoffs of the game are fixed in advance and are known to both players, who must either cooperate or defect in each round of play.⁷⁶ By relaxing one or more of these assumptions, IR scholars have modified the Prisoners' Dilemma to reflect the realities of interstate relations more accurately. They have, for example, developed games for multiple players (the so-called n-Prisoners' Dilemma), games that permit repeated rounds of play (iteration), and games that allow communication among the participants. These modifications mirror the cooperation-enhancing effects of international agreements and institutions. They enable the players (that is, the treaty parties) to overcome the incentive to defect by repeated contacts with other players, increasing access to information, mediating disputes, and sanctioning noncompliance.⁷⁷

The Prisoners' Dilemma has played a central role in helping IR scholars to explain why states cooperate under conditions of anarchy. But its assumption that players face a binary choice between "cooperation" and "defection" has produced a problematic, if unintended, result. By restricting state behavior to these two options, scholars have elided the distinction between breach of treaty obligations on the one hand and denunciation or withdrawal from treaties on the other.⁷⁸

⁷⁶ See Friedrich Kratochwil, Norms Versus Numbers: Multilateralism and the Rationalist and Reflexivist Approaches to Institutions—a Unilateral Plea for Communicative Rationality, *in* *Multilateralism Matters: The Theory and Praxis of an Institutional Form* 443, 447 (John Gerard Ruggie ed., 1993) [hereinafter *Multilateralism Matters*] (identifying explicit and implicit assumptions in game theoretic explanations of international cooperation).

⁷⁷ See generally Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984).

⁷⁸ Duncan Snidal has also critiqued the standard game theoretic assumption that states face only a dichotomous choice in each round of play. Duncan Snidal, *Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 *Am. Pol. Sci. Rev.* 923, 927–28 (1985). He does not, however, consider the consequences of including exit as one of the multiple options available to states. See *id.*

B. Conceptual Confusions: Conflating Exit and Breach

Evidence of this conceptual confusion is easy to identify. Many scholars equate “defection” with breach of a state’s treaty commitments, in the sense of cheating or free riding on the cooperative efforts of other states without incurring the corresponding burdens. This association between defection and noncompliance is sometimes made expressly; but it also is implied from the fact that a state aggrieved by its treaty partner’s defection may punish the defecting state by failing to cooperate in the next round of play.⁷⁹ For other commentators, by contrast, treaty defections include *any* form of non-cooperative behavior, including noncompliance, refusal to ratify, and formal treaty withdrawals.⁸⁰

That scholars have used the same label to describe two distinct types of state behavior suggests that something is amiss. Specifically, conflating exit and breach ignores the many ways in which the act of violating a treaty differs—institutionally, legally, politically, and reputationally—from the act of denouncing it. The Sections below identify and analyze the contrasting features of exit and breach, elaborating upon the preliminary discussion of those distinctions in Part I above.

1. Treaty Membership and Voice

Retaining or relinquishing treaty membership is one key difference between breach and exit. First consider breach. A state’s failure to comply with its treaty obligations has no necessary nexus to the mechanisms of cooperation and influence available to treaty

⁷⁹ See, e.g., Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 *Buff. L. Rev.* 679, 700–01 (2003) (describing “possible actions” in game theory as “cooperate/comply or defect/breach”); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 *Va. J. Int’l L.* 839, 842 (2002) (equating “defection” with “cheating”).

⁸⁰ See, e.g., Lisa L. Martin, *The Rational State Choice of Multilateralism*, in *Multilateralism Matters*, supra note 76, at 91, 101–02 (equating defection with both private cheating and public signaling about future actions); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 *Harv. Int’l L.J.* 139, 191 (1996) [hereinafter Setear, *Iterative Perspective*] (“A decision to participate in negotiations, to sign, to ratify, or to comply after entry into force is cooperative. A failure to participate, sign, ratify, or comply is equivalent to the ‘defect’ option in the Prisoner’s Dilemma.”); see also Guzman, *Compliance-Based Theory*, supra note 27, at 1844 (equating defection with “non-cooperative behavior”).

members. Treaty breaches are highly varied. They may affect only a single treaty article, a handful of obligations, or the entire treaty. In none of these examples, however, does noncompliance necessarily result in termination of the defaulting state's membership. Even in the most extreme cases—material breach or repudiation—the non-breaching states are entitled to terminate their relationship with the breaching state, but abrogation occurs only if all parties agree to do so.⁸¹

The decision to exit unilaterally from a treaty, however, has far more significant consequences for institutionalized cooperation within the framework of that treaty. A nation that exits is no longer eligible to send delegates to treaty conferences and negotiating sessions, to participate in the treaty's dispute settlement mechanisms, or to appoint one of its nationals to the treaty's information-sharing, monitoring, or dispute settlement bodies. It is thus foreclosed from the mechanisms of voice that the treaty establishes, mechanisms that can be used to influence both the parties' current behavior as well as future rounds of international rulemaking.⁸² In the parlance of game theory, a state that denounces a treaty—unlike a state that breaches one—is no longer in the same position to participate as a “player” in future “rounds” of play.⁸³

⁸¹ In the case of multilateral treaties, the Vienna Convention provides that a “material breach” by one of the parties entitles—but does not require— “[t]he other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) [i]n the relations between themselves and the defaulting State, or (ii) [a]s between all the parties.” Vienna Convention, *supra* note 1, art. 60(2), 1155 U.N.T.S. at 346. The Convention defines material breach as either “[a] repudiation of the treaty” or “[the] violation of a provision essential to the accomplishment of [its] object or purpose.” *Id.* art. 60(3), 1155 U.N.T.S. at 346. Treaty violations that do not rise to the level of material breaches do not trigger the right of the remaining parties to terminate the breaching party's membership.

⁸² Cf. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 *Colum. L. Rev.* 1492, 1562 n.296 (2004) (“Refusing to cooperate, for example, may sacrifice a nation's entitlement to continue benefiting from the institution's previous good works, or result in an international standard that is worse than the (admittedly imperfect) standard likely if some influence is maintained.”).

⁸³ The degree to which a withdrawing state suffers a diminution of voice may depend on whether the treaty is a free standing agreement or embedded within a larger institutional structure. A state that denounces an international labor convention retains its membership in the ILO and its institutionalized methods of lawmaking and cooperation. Conversely, a state that withdraws from the ILO continues to be bound by all of the international labor conventions that it has ratified, although it no longer partici-

Debates over whether the United States should participate in humanitarian law, environmental protection, and oceans law treaties illustrate the benefits of participation and the risks of non-membership and highlight the distinctions between breach and exit. Before President George W. Bush's decision to "unsign" the treaty establishing the International Criminal Court ("ICC"), Ambassador David Scheffer defended President Clinton's decision to sign the agreement as a way to enhance American influence with other treaty parties and shape the ICC's future development. As a signatory, Ambassador Scheffer argued, the United States "would be in a much stronger position to influence the entire establishment of the ICC and the decision-making within the Assembly of States Parties" than if it had remained outside the treaty regime.⁸⁴

Although signing but not (or not yet) ratifying a treaty confers a kind of quasi-membership status, it is an inferior position from which to influence the behavior of other states and the treaty's negotiation, rulemaking, and dispute settlement processes.⁸⁵ Observers of environmental protection agreements make this point expressly. For example, in the case of the Convention on Biological Diversity ("CBD"), which the United States has only signed, "the US delegation is at a disadvantage because the US Congress has not yet ratified the Convention and therefore the US is only an observer at the CBD."⁸⁶ The Department of Defense used similar arguments to urge the United States to join the United Nations Convention on the Law of the Sea. As Harold Koh has written, "U.S. military officials have now apparently concluded that the U.S. failure to ratify the Law of the Sea Treaty impinges on U.S. naval operations by barring American officials from full participation in de-

pates in these mechanisms. See Nicolas Valticos & Geraldo W. von Potobsky, *International Labour Law* 33–34 (1995).

⁸⁴ David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 *Cornell Int'l L.J.* 47, 58 (2002).

⁸⁵ There is no similar quasi-membership status available to exiting states, which move from full membership to non-membership as a result of an act of denunciation.

⁸⁶ Michel Petit et al., *Why Governments Can't Make Policy: The Case of Plant Genetic Resources in the International Arena*, at 36, GFAR Doc. GFAR/00/20-03 (May 15, 2002) (on file with the Virginia Law Review Association).

liberations over worldwide ocean policies, fishery management issues and sea transit talks.”⁸⁷

Of course, membership has its burdens as well as its privileges. In many treaties and intergovernmental organizations, members must provide financial contributions to support facilities, staff, and operations. Indeed, several states that withdrew or purported to withdraw from the ILO, UNESCO, and WHO justified their departures in part on the basis of their inability or unwillingness to pay for the organizations’ activities.⁸⁸ By contrast, breaching parties do not eschew their financial support obligations, although the failure to pay dues can itself rise to the level of an international law violation.

2. *Intra-treaty Sanctions*

Lumping exit and breach together under the single heading of defection also ignores a second distinction—the different sanctioning mechanisms that each action triggers. According to the Vienna Convention on the Law of Treaties and the customary international law rules of state responsibility, a state’s breach of its treaty commitments authorizes a range of responses by other states adversely affected by that breach. The responses permitted depend upon the nature of the violation. For more serious treaty breaches, an aggrieved state may engage in reciprocal acts of noncompliance or, in extreme cases, abrogate the treaty in whole or in part in relation to the breaching state.⁸⁹ For minor deviations from compliance, less extensive retaliations are permitted, including acts that would otherwise violate international law but for the earlier unlawful act.⁹⁰

⁸⁷ Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *Hous. L. Rev.* 623, 641 n.82 (1998).

⁸⁸ See Ghebali, *supra* note 12, at 110–13 (withdrawals from ILO); Feinberg, *supra* note 12, at 204–11 (withdrawals from UNESCO and WHO). The truth of such assertions is uncertain, however, given that the states ultimately paid a portion of their back dues upon rejoining the organizations. See *supra* note 41 and accompanying text.

⁸⁹ See Vienna Convention, *supra* note 1, art. 60, 1155 U.N.T.S. at 346 (specifying conditions for termination or suspension of the operation of a treaty as a consequence of its breach).

⁹⁰ See Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* 89–93 (1984); John K. Setear, *Responses to Breach of a Treaty and Ration-*

Neither the Vienna Convention nor the rules of state responsibility authorize such actions to be undertaken against a state that has denounced a treaty according to its terms.⁹¹ To the contrary, a state that imposes such sanctions or penalties may itself violate the agreement, triggering a fresh round of reciprocal noncompliance by other aggrieved treaty parties.

Nor are the remaining treaty members or intergovernmental officials likely to misperceive an act of exit as an act of breach, or vice versa. Most exit provisions are unambiguously drafted and require little or no justification from the withdrawing state. Except for the comparatively small number of agreements that do not contain express exit clauses, it would be exceedingly difficult for treaty parties to contest the legality of a unilateral withdrawal, thereby creating a plausible dispute about compliance that would enable them to sanction the withdrawing state.

More importantly, the remaining treaty parties also have a self-interested reason to avoid sanctioning the denouncing state. Refraining from penalizing exiting nations preserves a clear distinction between exit and breach that other parties may wish to exploit in the future. Exit clauses are drafted for the express purpose of authorizing conduct that would be a violation of the treaty in the absence of withdrawal.⁹² The prevalence of such clauses and their permissive structure suggest that governments benefit from pre-

alist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility, 83 Va. L. Rev. 1, 69 (1997).

⁹¹ See, e.g., Vienna Convention, *supra* note 1, art. 70, 1155 U.N.T.S. at 349 (“[A] State [that] denounces or withdraws from a multilateral treaty” is released “from any obligation further to perform the treaty . . . from the date when such denunciation or withdrawal takes effect.”).

⁹² The result is more complicated in the case of treaties that embody or codify customary international law. See, e.g., First Geneva Convention, *supra* note 50, art. 63, 6 U.S.T. at 3152, 75 U.N.T.S. at 68 (providing that denunciation of humanitarian law treaties does not “impair the obligations which the Parties to the conflict shall remain bound to fulfil [sic] by virtue of the principles of the law of nations”). A state that withdraws from such a treaty cannot withdraw from the customary law rules that underlie it unless the state has also persistently objected to the formation of the custom (an unlikely prospect given its ratification of a treaty that embodies that custom). As a result, a state that acts contrary to such a treaty after denouncing it may violate customary international law, triggering a range of permitted responses by other states aggrieved by the violation. See Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 Am. J. Int’l L. 946, 957 (1967).

servicing a relatively unencumbered right to walk away from treaties. Indeed, if states regarded the consequences of denunciation as equivalent to those of breach, there would be little point in drafting rules to specify the procedures and conditions under which denunciation may or may not occur.

3. Extra-treaty Sanctions

Skeptics of international rules and institutions may object to any distinction between exit and breach premised upon the responses that international law itself authorizes. According to these skeptics, even a state that “plays by the rules” and denounces a treaty according to its terms may be subjected to coercion, threats, or other unfriendly acts by states opposed to its denunciation. Such states may use a variety of methods—such as trade sanctions, withholding military aid or financial assistance, or threats to terminate other cooperative relationships—to dissuade the denouncing state from leaving or to force it to reconsider its decision to withdraw. Significantly, all of these strategies are external to the treaty from which the state has exited.

Differentiating exit from breach solely on the basis of intra-treaty sanctions is admittedly incomplete. But the use of extra-treaty sanctions and pressure tactics cannot be presumed. For example, coordinating sanctions against a withdrawing state poses significant collective action problems. Not all treaty parties may agree on the legality or wisdom of imposing such sanctions. And even if several states conclude that sanctions are appropriate, if more than one state has plausible claim to sanction the exiting nation, each party will prefer that some other state undertake the costs of imposing the sanction. In the absence of treaty-based rules to resolve these conflicts, sanctions may not be imposed or may be too weak to affect the target state’s behavior.⁹³

⁹³ Intra-treaty sanctions and acts of reciprocal noncompliance also raise collective action problems. See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 63–67 (1995); Frischmann, *supra* note 79, at 735 n.166. But such problems are more severe in the case of extra-treaty sanctions, which lack any institutions and rules to determine the need for and legality of sanctions, their type and amount, and the mechanisms for imposing them.

Given these constraints, we might expect extra-treaty sanctions to be imposed chiefly by powerful countries like the United States, either unilaterally or acting through institutions over which they exert significant influence. Hegemons often have greater resources or other advantages that reduce the costs of imposing sanctions and help to overcome collective action problems. Yet even for powerful countries, both the ability and the incentive to sanction will vary from issue to issue and from state to state.⁹⁴

For particularly high-stakes issues or treaties that are deeply nested within other international regimes and institutions, exit is unlikely to deter the imposition of extra-treaty sanctions. This is because the act of quitting the treaty does not disengage the withdrawing state from the legal and political environments in which the treaty is embedded. The Nuclear Non-Proliferation Treaty (“NPT”) provides an apt illustration. North Korea threatened to withdraw from the NPT in 1993 and in fact withdrew ten years later. Likening the country’s tactics to “nuclear blackmail,” the Director General of the International Atomic Energy Agency recently stated that North Korea’s denunciation of the NPT did not remove it from international scrutiny.

You read a lot that a country can just walk out of the NPT without any ramification; I think that’s wrong because they can walk out from their treaty obligation, but that does not get them off the hook of the Security Council And if the Security Council . . . finds a country’s withdrawal from the NPT a precursor to a situation that could threaten international peace and security, or in itself threaten international peace and security, then the Security Council can intervene and intervene early on.⁹⁵

⁹⁴ Cf. Barrett, *supra* note 29, at 73 (“[A theory of international cooperation] should not assume that a hegemon has both the wherewithal and the incentive to sustain cooperative outcomes under any and all circumstances. Nor should it assume that other countries will necessarily defer to the hegemon.”).

⁹⁵ Interview by Emma Belcher with Dr. Mohamed ElBaradei, Director General, Int’l Atomic Energy Agency (Dec. 2, 2003), *in* 28 Fletcher F. World Aff. 29, 37, 39 (2004). For a discussion of North Korea’s aborted withdrawal from the NPT in 1993 and analysis of whether NPT obligations survive denunciation, see Antonio F. Perez, *Survival of Rights Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Safeguards*, 34 Va. J. Int’l L. 749, 797 (1994).

Few treaty denunciations, however, rise to the level of such global threats or so seriously endanger the security interests of other countries. For more prosaic treaty withdrawals, embedding an agreement within a broader political and institutional framework may actually deter hegemony from imposing extra-treaty sanctions, either because related agreements make such actions legally impermissible or because geostrategic factors make them politically implausible.

The sanctions policy the United States has adopted against whale-hunting nations provides a telling example. On more than a dozen occasions, pro-whaling states have withdrawn or threatened to withdraw from the International Convention for the Regulation of Whaling ("ICRW") to protest moratoria or restrictions on commercial whaling adopted by an ICRW Commission.⁹⁶ The United States, which opposes whaling, has enacted domestic laws that authorize unilateral trade sanctions or restrict fishing rights in American waters against any state that fails to adhere to the Commission's regulations. Significantly, these laws apply to countries that never ratified the ICRW or have formally withdrawn from the treaty.⁹⁷ Recent studies of the whaling regime conclude, however, that no whaling state has ever been sanctioned by the United States for failing to comply with ICRW regulations.⁹⁸ Scholars attribute this fact to the harm sanctions would cause to American interests, and to the more consequential geopolitical and economic relationships that the United States maintains with pro-whaling nations such as Russia and Japan.⁹⁹ The more important theoretical

⁹⁶ See Barrett, *supra* note 29, at 160–61.

⁹⁷ See *id.* at 69–72.

⁹⁸ *Id.* at 70–71; Elizabeth R. DeSombre, Domestic Sources of International Environmental Policy: Industry, Environmentalists, and U.S. Power 208–13 (2000); see also Ronald B. Mitchell & Patricia M. Keilbach, Situation Structure and Institutional Design: Reciprocity, Coercion, and Exchange, 55 *Int'l Org.* 891, 908 (2001) (noting that threats by the United States to reduce fishing rights or restrict fish imports initially deterred commercial whaling by non-member states, but that such threats have become less effective over time, and that "Iceland has withdrawn [from the ICRW], Norway has recommenced commercial whaling, and Japan and Russia have threatened to do both").

⁹⁹ See Barrett, *supra* note 29, at 69–71; Richard Ellis, Men and Whales 440 (1991); see also Steve Charnovitz, Encouraging Environmental Cooperation Through the Pelly Amendment, 3 *J. Env't & Dev.* 3, 17–19 (1994) (noting a "pattern of declining effectiveness" in threats by United States against whaling states).

conclusion, however, is that extra-treaty sanctions can be difficult to impose, even for powerful countries such as the United States.

These contrasting examples of extra-treaty sanctions against withdrawing states reveal the close relationship between law and power in international affairs. But they also suggest a more consequential insight—that the distinction between intra-treaty responses to breach and extra-treaty responses to exit is a meaningful one that must be addressed by any robust theory of international cooperation.

4. Reputational Consequences

Material sanctions can be an important inducement to comply with treaty commitments. Even where sanctions are weak or difficult to impose, however, a state's concern with reputation acts as an independent inducement for a state to adhere to its international obligations. At the highest level of generality, the link between reputation and compliance is simply stated: If a state fails to comply with its treaty commitments, other states will be reluctant to enter into future agreements with that state or will demand additional assurances or concessions before doing so.¹⁰⁰

What are the reputational consequences of treaty exit and how do they compare to those of treaty breach? The most basic distinction is that a withdrawing state is actually adhering to the treaty's rules by publicizing its decision to exit prospectively.¹⁰¹ Given the generally weak mechanisms available to monitor and enforce compliance with treaty obligations, breach is often a plausible alternative to exit. The choice to denounce, therefore, together with any explanation the state offers to justify its decision, may signal an intent to "play by the rules" of future treaties as well. As a result, the harm to the withdrawing state's reputation as a law abiding nation may be minimal.

¹⁰⁰ See Guzman, *Compliance Based-Theory*, supra note 27, at 1849–50. Recent work on the role of reputation in international law suggests that states do not have a single, blanket reputation for compliance, but many reputations, which vary by issue area or even by specific treaty. See Downs & Jones, supra note 27, at S102–09.

¹⁰¹ This statement assumes that the treaty contains an exit clause and that the state follows its procedural rules regarding the notice and timing of withdrawal. For a discussion of the unsettled legality of exiting from treaties that do not contain an express withdrawal or denunciation clause, see supra Section II.A.

In practice, however, the reputational differences between exit and breach are more complex and require a more nuanced analysis. Three variables in particular stand out in assessing exit's distinctive reputational effects: (1) the frequency of denunciation and withdrawal; (2) the relationship between entering and exiting treaties; and (3) the risks of opportunism in light of the pervasive uncertainty of international affairs. I address each of these issues in the discussion that follows.

The empirical evidence reviewed above demonstrates that exiting from multilateral agreements is an infrequent event compared to treaty ratifications. Politically salient exits are likely to be even more rare. Explaining these behavioral patterns requires analyzing exit in tandem with why states enter into treaties in the first instance.

First, adopting an *ex ante* perspective, states might simply decline to join multilateral treaties that do not serve their interests or for which they can envision future political or economic shocks that will later force them to withdraw. States might thus select themselves into membership only in those treaties that they intend to honor.¹⁰² Second, certain categories of treaties contain modest commitments or weak monitoring mechanisms.¹⁰³ For these "shallow" treaties, ratification is largely inconsequential and exit largely unnecessary.¹⁰⁴ In the former case, the treaty requires a state to do nothing more than it would otherwise do,¹⁰⁵ in the latter, a state can

¹⁰² See Barrett, *supra* note 29, at 160.

¹⁰³ Many international environmental agreements are shallow, that is, they do little more than codify the status quo. See, e.g., Jeffrey L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 *Harv. Envtl. L. Rev.* 241, 270–71 (1995); Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 *Case W. Res. J. Int'l L.* 387, 392 (2000) [hereinafter Raustiala, *Compliance and Effectiveness*]. Many human rights conventions also have weak monitoring and enforcement mechanisms. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *Yale L.J.* 1935, 1938, 2008 (2002).

¹⁰⁴ The statement above describes the extreme case. Some international agreements are moderately shallow, requiring modest changes to national laws and practices that can be monitored, albeit imperfectly, by treaty review bodies and reporting and information-sharing mechanisms.

¹⁰⁵ Raustiala, *Compliance and Effectiveness*, *supra* note 103, at 391–92; see also *Up in Smoke*, *News Journal* (Wilmington, Del.), Mar. 1, 2005, at A8, available at 2005 WLNR 3159219 (criticizing the United States' failure to ratify the Framework Convention for Tobacco Control and stating that the country "could garner a lot of international favor simply by agreeing with the treaty to do what it already does").

violate the treaty without being caught. In either case, a state has little to gain either by declining to ratify or by exit.¹⁰⁶

Stated more broadly, the theoretical conjecture I advance is that where denunciation and withdrawal are infrequent events, their reputational effects will more closely resemble those of declining to ratify a treaty than they will the reputational consequences of breach.¹⁰⁷ Further, where a state's non-entry and exit of multilateral treaties are *both* uncommon occurrences, the reputational costs of those few non-ratifications and withdrawals that do occur should be modest, all other things being equal. By participating in numerous multilateral agreements and by remaining a member of those agreements until they are terminated or revised by all treaty parties, a state signals its overall commitment to multilateral cooperation with other states—and thus bolsters its reputation as a cooperator—even if it declines to participate in certain treaty regimes in exceptional or politically inconsequential cases.

By contrast, multiple refusals to ratify—as with multiple denunciations of previously ratified agreements—signal a state's propensity to eschew multilateral cooperation and carry much the same reputational cost as a track record of violating treaty commitments.¹⁰⁸ This effect is likely to be especially pronounced where the non-ratifying or exiting state participated in the negotiating conferences that helped to shape the treaties' form and substance.

The unilateralist behavior of the United States provides a salient example. The United States has recently refrained from ratifying—or has withdrawn from—numerous multilateral agreements that are widely ratified by other nations and that it at one time championed. These treaties include the Kyoto Protocol, the Rome Statute establishing the International Criminal Court, the Landmines Con-

¹⁰⁶ Future studies may usefully explore the relationship between depth of treaty commitments and exit, for example by examining whether treaties with more onerous obligations are denounced more frequently than those whose commitments are shallow.

¹⁰⁷ I discuss the analytical insights of explicitly linking treaty entry and treaty exit issues in greater detail below.

¹⁰⁸ I exclude from this statement denunciations and withdrawals that are formally or informally linked to the ratification of an updated or revised treaty within the same regime. See *supra* text accompanying notes 72–73. Such exits are fundamentally cooperative in nature and do not signal an intent to avoid multilateral interactions with other nations.

vention, the Comprehensive Nuclear Test Ban Treaty, the Convention on Biological Diversity, International Covenant on Economic, Social and Cultural Rights, the United Nations Convention on the Law of the Sea, and, most recently, the Framework Convention for Tobacco Control and the Optional Protocol to the Vienna Convention on Consular Relations.¹⁰⁹ By remaining outside these treaties through non-entry or exit, the United States has, according to many observers, cast doubt on its commitment to multilateral cooperation.¹¹⁰

A significant part of the negative reaction to the United States' non-participation in these treaty regimes can be attributed to resentment of its unique status as a world hegemon and the disproportionate military and economic power it possesses relative to other nations.¹¹¹ But another component of the dissatisfaction relates to the perception that the United States, by failing to participate in treaty after treaty, is reaping the benefits of cooperation by others without incurring any corresponding burdens. Stated another way, if the world is less violent, less polluted, and more protective of individual freedom *as a result of these agreements*, it is not because of any assistance from the United States. This suggests another dimension for comparing the differential reputational effects of treaty exit and treaty breach—opportunistic behavior in relation to other treaty parties.

Opportunistic exit takes a variety of forms, the reputational consequences of which will be similar to opportunistic breach in some instances but quite distinct in others. Consider first temporal op-

¹⁰⁹ See Wade Boese, U.S. Will Not Join Landmine Treaty; Position on Fissile Material Cutoff Pact Uncertain, *Arms Control Today*, Mar. 2004, at 42; Curtis A. Bradley, U.S. Announces Intent Not to Ratify International Criminal Court Treaty, *ASIL Insights* (May 2002), at <http://www.asil.org/insights/insigh87.htm>; Chester Brown, The Kyoto Protocol Enters into Force, *ASIL Insights* (Mar. 2005), at <http://www.asil.org/insights/2005/03/insights050301.html>; Adam Liptak, U.S. Says It Has Withdrawn From World Judicial Body, *N.Y. Times*, Mar. 10, 2005, at A16; Up in Smoke, *supra* note 105.

¹¹⁰ See, e.g., John F. Murphy, *The United States and the Rule of Law in International Affairs* 4-9 (2004); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 *N.Y.U. L. Rev.* 1971, 1978 (2004); Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 *Law & Contemp. Probs.* 195, 218 (2004).

¹¹¹ See generally *United States Hegemony and the Foundations of International Law* (Michael Byers & Georg Nolte eds., 2003); Detlev F. Vagts, *Hegemonic International Law*, 95 *Am. J. Int'l L.* 843, 846 (2001).

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portunism, which arises where the parties' performance is non-synchronous and one party withdraws from the treaty after its partners have performed but before its own performance has been completed.¹¹² The risk that Iran will withdraw from the NPT provides an apt and timely example. Since ratifying the treaty, Iran has received technological assistance in exchange for dismantling its nuclear weapons program. But the treaty contains a potential design flaw: "it permits countries to build nuclear programs for peaceful purposes and then, with 90 days notice, pull out of the treaty. That means [Iran] can develop facilities under the treaty, then shift them to weapons programs."¹¹³

Careful drafting of exit clauses can reduce or prevent temporally opportunistic exit. In bilateral investment treaties, for example, the risk of opportunism arises because invested assets are relation-specific, enabling the host country to expropriate the assets with little risk of the investor moving the assets elsewhere.¹¹⁴ In theory, the host country could denounce the treaty after the investments had been made and then expropriate the investments without violating its treaty obligations. To reduce this risk, many investment treaties bar denunciation for ten years after the treaty enters into force and stipulate that investor protections remain in effect for previously invested assets.¹¹⁵ These clauses, drafted at the insistence of investor countries, deter opportunistic denunciation by governments of host countries.

¹¹² See Richard Morrison, *Efficient Breach of International Agreements*, 23 *Denv. J. Int'l L. & Pol'y* 183, 188–89 (1994).

¹¹³ David E. Sanger, *Threats Shadow Talks on Nuclear Arms: Iran and North Korea*, *N.Y. Times*, May 1, 2005, at A1.

¹¹⁴ See Reinhilde Veugelers, *Reputation as a Mechanism Alleviating Opportunistic Host Government Behavior Against MNEs*, 41 *J. Indus. Econ.* 1, 1 (1993); see also David A. Lake, *Anarchy, Hierarchy, and the Variety of International Relations*, 50 *Int'l Org.* 1, 14 (1996) ("[T]he more [relationally] specific the asset, the greater the state's opportunity costs and thus the greater the costs inflicted by the partner's opportunistic behavior.").

¹¹⁵ The 2004 model bilateral investment treaty ("BIT"), which the United States uses as the template for negotiating BITs with dozens of developing countries, provides that neither party can terminate the treaty during its ten-year initial term and that "[f]or ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination." 2004 Model BIT art. 22, at 22–23, available at <http://www.state.gov/documents/organization/38710.pdf> (last accessed Aug. 25, 2005).

When a state's opportunism is temporal in nature, employing a strategy of exit rather than breach does little to mitigate the harm to a state's reputation. In both instances, the state is consciously gaming the treaty to capture the benefits of the other parties' performance without undertaking the burdens of its own compliance. In the case of the NPT, for example, the United States has stressed that North Korea violated the treaty for several years prior to its denunciation,¹¹⁶ an accusation that heightens the opportunistic nature of North Korea's withdrawal and blurs the distinction between exit and breach. Moreover, a recent study labeled the NPT's exit clause a "loophole" that aspiring nuclear powers could exploit to their advantage, and the report made closing that loophole a priority at the Spring 2005 NPT Review Conference.¹¹⁷

Not all strategic uses of exit are the reputational equivalent of treaty breach, however, even where they possess elements of opportunism. Consider a threatened or actual withdrawal that triggers a revision of the treaty to include terms more favorable to the withdrawing state.¹¹⁸ Is the use of such an exit strategy the reputational equivalent of a threatened or actual "breach in order to extract concessions from the other side"?¹¹⁹ The answer depends upon whether the other treaty parties perceive the strategy as an attempt to modify a previously bargained-for exchange, or, alternatively, as a response to changed circumstances.¹²⁰

¹¹⁶ See Press Release, U.S. Dep't of State, Top U.S. Official Calls on U.N. To Act To Curb Proliferation (Sept. 26, 2003), <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=September&x=20030926170536alretnuh0.8621027&t=xarchives/xarchitem.html>.

¹¹⁷ Oliver Thränert, *The Future of the Nuclear Non-Proliferation Treaty: Perspectives in Advance of the 2005 Review Conference*, SWP Research Paper (Stiftung Wissenschaft und Politik, Berlin, Germany), Aug. 2004, at 27 n.52, 28–29, http://www.swp-berlin.org/common/get_document.php?id=1062. According to one proposal, "states seeking to leave the NPT [would] have to justify this desire before a special conference of treaty members to be called immediately. This would considerably raise the bar for leaving the treaty. A withdrawal given in writing without any specific explanation would no longer suffice." *Id.* at 29.

¹¹⁸ Barrett, *supra* note 29, at 160 ("The threat of withdrawal . . . can be a powerful means of influencing the behavior of other countries, provided of course that the threat is credible.").

¹¹⁹ Morrison, *supra* note 112, at 189; see also Lake, *supra* note 114, at 13 (labeling such a strategy as a form of opportunism).

¹²⁰ These two positions are polestars; intermediate exit strategies are also plausible. A prominent example is the manner in which the United States and the European

In the former case, if the withdrawing state has sufficient leverage, the remaining countries may ultimately acquiesce in a revision of the treaty's benefits and burdens rather than lose the state as a treaty partner. (Imagine the concessions that countries with low-lying coastal plains might make to a nation with a large manufacturing industry to preserve its membership in, and compliance with, a climate change convention.) But the reputational cost of such a maneuver will closely resemble a violation of the treaty if the exiting state is merely seeking to capture gains or redistribute losses whose allocation the parties had previously negotiated.

By contrast, exit in response to changed circumstances—particularly unforeseen external circumstances or those that specially affect the denouncing party—may have very different reputational consequences. Although treaty makers try to anticipate such changes and provide rules or procedures for resolving them, they do not have perfect information. In some instances, states face unexpected economic or political shocks that increase the costs of compliance. In others, regulatory environments shift in response to technological advances. In still others, international tribunals or intergovernmental organizations may interpret a treaty in ways that its drafters had not envisioned.

In each of these instances, exit can be a less costly response for the affected state than continued adherence to the treaty. More important from a reputational perspective, exit in these cases is easier to justify to the other parties than overt noncompliance.¹²¹ This is particularly true if the withdrawing state uses the formal pre-exit notice period or informal statements to explain its decision to quit the treaty.

Communities closed the Uruguay Round of trade negotiations. The governments adopted a “power play” in which they ratified the new WTO Agreement and then denounced the GATT 1947. In doing so, they effectively forced other GATT members to do likewise if they were to enjoy the WTO's benefits—benefits that were more favorable to the United States and the European Communities. Steinberg, *supra* note 13, at 360. This example lies between the two scenarios I discuss in the text, in that the WTO Agreement both expanded the pie of the world trading system and gave a larger slice to industrialized countries.

¹²¹ Changed circumstances also provide a plausible explanation for why there are more denunciations of older treaties than recent ones. See *supra* Section II.D Figure 5.

Such explanations can be particularly important where the line between opportunistic withdrawal and withdrawal in response to changed circumstances is ambiguous. For example, in March 2005, the United States denounced the Optional Protocol to the Vienna Convention on Consular Relations, a treaty that confers jurisdiction on the International Court of Justice (“ICJ”) over interstate disputes relating to the Vienna Convention.¹²² Shortly after the withdrawal, a State Department official defended the United States’ decision in a manner calculated to minimize the potential harm to its reputation.¹²³ He emphasized that the ICJ’s interpretation of the Vienna Convention was unexpected, that the United States would continue to adhere to the Vienna Convention itself, and, moreover, that it would comply with the judgments against it that the ICJ had already issued.¹²⁴ The official also sought to bolster

¹²² See Frederic L. Kirgis, Addendum to ASIL Insight, President Bush’s Determination Regarding Mexican Nationals and Consular Convention Rights, ASIL Insight (Mar. 9, 2005), at <http://www.asil.org/insights/2005/03/insights050309a.html> [hereinafter Kirgis, Addendum] (quoting Letter from Condoleezza Rice, U.S. Sec’y of State, to Kofi Annan, United Nations Sec’y-General (Mar. 7, 2005)). The Bush Administration withdrew from the Optional Protocol after the International Court of Justice heard three cases involving foreign nationals on death row in the United States. In each case, the United States had violated the Vienna Convention by failing to provide consular notification to the defendants or their respective governments. Although the United States conceded that it had violated the treaty, it disputed the remedy for such violation, specifically whether its courts were obligated to provide review and reconsideration of death sentences that had become final. See Frederic L. Kirgis, President Bush’s Determination Regarding Mexican Nationals and Consular Convention Rights, ASIL Insight (Mar. 9, 2005), at <http://www.asil.org/insights/2005/03/insights050309.html>.

¹²³ The political wisdom and political consequences of the withdrawal from the Optional Protocol have divided commentators. Compare Fred Rosen, Opinion-US Is Worried About Mexican Security and Migration: It’s Not About Water, *El Universal* (Mexico), Mar. 21, 2005, 2005 WLNR 4346985 (criticizing the withdrawal from the Optional Protocol and suggesting that it will hamper the United States’ efforts to resolve other treaty disputes with Mexico), and Editorial, U.S. Pulls Out of Protocol, *Miami Herald*, Mar. 14, 2005, at A20 (“[The withdrawal] is both ironic and disappointing. Ironic because the United States itself proposed the protocol in 1963 as a way of protecting U.S. residents abroad. Disappointing, because the United States should engage the world community, not hold itself apart from it.”) with, Editorial, Defensible Diplomacy, *Wash. Post*, Mar. 13, 2005, at A22 (“The Optional Protocol was never meant to regulate the domestic judicial systems of its signatory states. The administration is right not to stand for the international court’s attempt to do so now.”).

¹²⁴ Adam Ereli, Deputy Spokesman, U.S. Dep’t of State, Daily Press Briefing (Mar. 10, 2005), at <http://www.state.gov/r/pa/prs/dpb/2005/43225.htm>. The withdrawal also

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the United States' action by linking its withdrawal to the non-entry of other Vienna Convention parties, stating that "70 percent of the countries that are signatories to the Vienna Convention also decided not to sign up to the optional protocol so it's not just the United States going against everybody else. . . . [W]e are . . . joining an existing majority in not participating in the optional protocol."¹²⁵

* * *

The foregoing Sections have elaborated upon the similarities and differences between treaty exit and treaty breach, emphasizing their institutional, legal, political, and reputational dimensions. The analysis does not provide a precise formula for calculating the costs and benefits of exit in comparison to those of breach. It does, however, reveal that the consequences of the two actions are often distinct, highlighting the need to disambiguate exit from breach when modeling interstate behavior.

C. Introducing Exit

How then to introduce exit into models of international cooperation and compliance? Although IR scholars have yet to address this question, a few experimental studies have considered how cooperation is affected when the players face a trinary choice between cooperation, defection, and exit. One such study highlights the unreality of a Prisoners' Dilemma that "offers no escape from the externalities that are the crux of the problem. The game assumes a fixed population, and its unfortunate players have no alternative but to stay and accept the payoff that is dictated by their personal cooperate-defect choice and the concurrent cooperate-defect choices of others."¹²⁶ According to the authors of this study,

raises difficult legal issues concerning the intersection of treaty-based and customary international law. In particular, because the Optional Protocol does not contain an express withdrawal clause, the validity of the United States action must be analyzed under customary international law and the ambiguously-worded Article 56 of the Vienna Convention on the Law of Treaties, to the extent that it reflects such custom. See Kirgis, Addendum, *supra* note 122; see also *supra* Section II.A (discussing Article 56 of the Vienna Convention and the unsettled legality of exiting from treaties that do not contain an express exit clause).

¹²⁵ Erel, *supra* note 124.

¹²⁶ John M. Orbell et al., Do Cooperators Exit More Readily than Defectors?, 78 *Am. Pol. Sci. Rev.* 147, 147-48 (1984); see also Rudolf Schuessler, Exit Threats and

a player's ability to remove herself from the positive or negative externalities generated by other players is the defining characteristic of exit:

[T]he idea of externalities lets us define a person who exits as one who, in some way, moves beyond the reach of whatever external effects are generated by group members. This might be accomplished, of course, by various tactics short of geographic movement (one can sometimes withdraw from a group while remaining in the same location), but geographic movement is the classic form of exiting Thus, in the context of the prisoners' dilemma, a person who exits is one whose payoff is not dependent on the number of group members cooperating and defecting. The exiting person is freed from group dependency, either beneficial or harmful.¹²⁷

To correct the omission of exit, the authors offered the players in a Prisoners' Dilemma game the possibility of an attractive exit option (in the form of a fixed payoff available to both cooperators and defectors). Based on this payoff structure, they predicted that cooperators—who by definition receive lower payoffs than defectors in the Prisoners' Dilemma game—would find an exit option more attractive than defectors.¹²⁸ Contrary to the authors' expectations, defectors rather than cooperators left the game in greater numbers, a result that they attributed to an “ethical or group-regarding impulse” that led cooperators not to act solely on the basis of “dollar rationality.”¹²⁹

Putting to one side the merits of why cooperators stay in the game rather than leave, this study suggests two central insights for the study of international affairs: first, that many real world cooperation problems can more accurately be modeled by adding a third exit option to the binary choice of cooperation or defection; and second, that it is important to link exit to externalities by in-

Cooperation Under Anonymity, 33 *J. Conflict Resol.* 728, 732 (1989) (challenging the absence of an exit option in an iterated Prisoners' Dilemma and stating that “[a]bandoning a partner after a round of interaction is usually possible, although sometimes costly, in real life”).

¹²⁷ Orbell et al., *supra* note 126, at 149.

¹²⁸ *Id.* at 149–50.

¹²⁹ *Id.* at 147, 157.

quiring whether a state that quits a treaty must also abjure the burdens and benefits of treaty-based cooperation by the remaining member states.

In the Sections that follow, I explore each of these insights in turn. I first consider the effects of exit on coordination and collaboration games. These two models of interstate behavior have payoff structures and equilibria that differ from the classic two-person Prisoners' Dilemma, but they share with it the basic assumption that states must either cooperate or defect in each round of play.¹³⁰ I then assess the consequences of exit for "problem structure" theories of IR. This framework analyzes the types of conflicts that states seek to resolve, and the externalities they generate, to assess the likelihood of interstate cooperation.¹³¹

1. Collaboration Games

Collaboration games transfer the bilateral Prisoners' Dilemma to multilateral settings in which nations act collectively to overcome "dilemmas of common interests."¹³² As Lisa Martin argues, states facing such dilemmas have a strong incentive to renege on prior commitments. "In a multilateral organization with a large number of members having diverse interests, the problem of temptations to free ride will become especially acute. Although ongoing mutual cooperation provides long-term benefits, without the threat of specific retaliations, the temptation to cheat in order to maximize immediate payoffs rises substantially."¹³³ To alter these incentives, treaty makers "should search for mechanisms to increase the shadow of the future" and "the sense of obligation among states"

¹³⁰ See generally Andreas Hasenclever et al., *Theories of International Regimes* 44–59 (1997) (reviewing game theoretic models including collaboration games and coordination games).

¹³¹ See generally Hasenclever et al., *supra* note 130, at 59–68 (reviewing problem structure scholarship).

¹³² Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in *International Regimes* 115, 120 (Stephen D. Krasner ed., 1983) (using a multi-player Prisoners' Dilemma to explain "[t]he dilemma of common interests," which occurs "when independent decision making leads to equilibrium outcomes that are Pareto-deficient—outcomes in which all actors prefer another given outcome to the equilibrium outcome").

¹³³ Martin, *supra* note 80, at 97.

so that “the immediate costs associated with cooperation will be offset by long-run benefits of mutual assistance.”¹³⁴

One way to change states’ calculation of costs and benefits is to create robust international institutions or sanctioning mechanisms that deter states from enjoying the cooperation’s gains without incurring its corresponding burdens. But restricting exit opportunities provides another mechanism to extend time horizons and increase multilateral cooperation, one that can supplement, or perhaps even supplant, strong monitoring and enforcement mechanisms.¹³⁵

Treaties that seek to close the hole in the ozone layer or reduce the emission of greenhouse gasses provide helpful examples. Protecting the earth’s ozone layer and reducing global warming are classic collaboration problems. All countries would benefit from phasing out or reducing ozone-destroying chemicals and greenhouse gasses. In the short term, however, each nation has an incentive to free ride by continuing to use those substances while allowing other states to switch to more costly, but environmentally-friendly, alternatives.¹³⁶

Treaty makers can increase the long-term benefits of cooperation and reduce the short-term incentives to cheat by encouraging “repeated, formalized interactions between nations.”¹³⁷ One way to encourage such interactions is by increasing the duration of treaty commitments. As John Setear explains in his study of the ozone treaty regime,

any limitation on the exit of individual parties is useful. Indeed, an outright bar against exit is presumably best, for the same reasons that support an indefinite duration as the default length of

¹³⁴ *Id.* at 96, 97.

¹³⁵ The cooperation-enhancing function of exit restrictions in collaboration games also helps to explain why international law scholars have focused on multilateral agreements that implicitly bar denunciation or withdrawal. See *supra* Section II.A.

¹³⁶ See Todd Sandler, *Global Challenges: An Approach to Environmental, Political, and Economic Problems* 30–32 (1997); John K. Setear, *Ozone, Iteration, and International Law*, 40 *Va. J. Int’l L.* 193, 200 (1999) [hereinafter Setear, *Iteration*].

¹³⁷ Setear, *Iteration*, *supra* note 136, at 203. In the ozone regime, iteration takes the form of a principal convention and a series of later protocols and revisions. States use ratification of these tiered agreements as a signal of their adherence to particular levels of commitment, thus promoting more durable cooperation and higher levels of compliance. *Id.* at 213–16.

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time during which a treaty is effective after its entry into force, i.e. the parties are required to cooperate for the indefinite future.¹³⁸

Setear makes the useful and underappreciated point that restricting exit is one of the tools by which governments can encourage multilateral cooperation. But his claim that treaty makers should restrict exit to the maximum extent possible is insufficiently theorized. Constraining unilateral exit seems sensible when viewed from the perspective of a treaty that is already in force and has been ratified by all of the states affected by a collaboration game. But it fails to consider the costs of restricting exit *ex ante*, both when states are negotiating the agreement and when they are deciding whether to ratify a treaty whose costs and benefits are uncertain. At these earlier stages of an agreement's life, permissive withdrawal clauses and few restrictions on denunciation are preferable. The principal challenge treaty makers face is not, as Setear argues, closing exit, but rather setting optimal conditions on exit to encourage ratification while deterring opportunistic withdrawals after the treaty has entered into force.¹³⁹

2. *Coordination Games*

Exit is also relevant in another strategic context—a type of coordination game known as the “battle of the sexes.” This game is characterized by two equilibrium outcomes, one of which is preferred by each of the players.¹⁴⁰ Yet the actors in a battle of the sexes game also share “a common interest in *avoiding* a particular outcome.” In other words, they do not agree on a preferred result, but “do agree that there is at least one outcome that all want to avoid”—non-cooperation.¹⁴¹ Coordination—aided by international agreements and institutions that facilitate interstate bargaining—is required if the players are to steer clear of the least preferred result.

¹³⁸ Id. at 223.

¹³⁹ See *supra* Section II.C.

¹⁴⁰ The name of the game is derived from the common example of a couple who would like to spend an evening together, but would prefer different activities, such as going to the movies and going to the opera. Hasenclever, *supra* note 130, at 47.

¹⁴¹ Stein, *supra* note 132, at 125.

The process by which states have allocated radio frequencies, developed satellite communications policies, established air traffic control procedures, and harmonized technical standards for products and transportation are all examples of battle of the sexes coordination games.¹⁴² Unlike a state that is a member of a treaty that regulates a collaboration problem, once an equilibrium for these coordination problems is reached, no state has an incentive to deviate from it unilaterally since doing so would only harm itself.¹⁴³ In concrete terms, states prefer that all air traffic controllers speak English or all national railways use 36-inch gauges over the alternative of no coordination—a multiplicity of languages and railway gauges leading to transportation delays or disasters.

The equilibrium achieved through coordination in a battle of the sexes game is the first-best outcome for some states. But it is only the second-best outcome for others, for example, a state that prefers the native language of its aviation industry or the gauge width of its domestic railways. Countries in this second best position have no incentive to breach their treaty commitments unilaterally. They do, however, have a strong incentive to compel or induce their treaty partners to renegotiate the agreement to adopt their preferred outcome. As Lisa Martin explains, such pressure is applied not by surreptitiously violating previous commitments but rather by publicly signaling information about the state's future plans.

In coordination problems, no incentive exists for surreptitious cheating. Since the point of diverging from an established equilibrium is to force joint movement to a new one, defection must be public. . . . [T]he point is to impose high costs on others in order to force them to change their policies in a specified manner, which requires publicity about the reasons for and nature of defection.¹⁴⁴

Although Martin labels such moves as “public defections,” her description of the underlying behavior closely tracks many of the dis-

¹⁴² For more detailed discussions of these examples, see Robert O. Keohane, *When Does International Law Come Home?*, 35 *Hous. L. Rev.* 699, 704 (1998); Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *World Pol.* 336, 353–60 (1991).

¹⁴³ Martin, *supra* note 80, at 101; Stein, *supra* note 132, at 130.

¹⁴⁴ Martin, *supra* note 80, at 102.

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tinctive characteristics of denunciation and withdrawal. In particular, exit provides an ideal strategy for changing to a new, more favorable equilibrium. As explained in Part I, exit is public, it requires prior notice to other treaty members, and, because it does not involve a breach of the treaty, it carries a reduced risk of being sanctioned.

An even more important characteristic is the delay between notice of denunciation and withdrawal and the date exit takes effect. This notice period provides a window within which the denouncing state may *threaten exit*, forcing the other parties to move to a new equilibrium (by renegotiating the existing treaty or drafting a new agreement) without actually following through on its threat to withdraw. Such a strategy describes exactly the behavior that IR scholars have predicted: “An actor will [publicly] threaten to defect before actually doing so; it may choose to go through with its threat only if the other actor does not accede to its demands.”¹⁴⁵

Incorporating a formal exit option into analyses of treaties regulating battle of the sexes coordination games also resolves an even more basic puzzle identified in Part I. It explains why a state would choose to publicize its intent to deviate from a treaty when weak enforcement mechanisms make surreptitious treaty breach difficult to detect. The payoff structure of coordination games is such that international agreements reflecting such games, once established, are self-enforcing and largely impervious to *private* cheating. But that same structure makes those agreements popular targets for *public* threats of denunciation and withdrawal as a means of shifting to a new equilibrium.

The foregoing analysis is incomplete, of course, without accounting for changes in power and technology. Powerful states are likely to be far more successful in using a denunciation strategy than weaker nations since their deviation from an existing equilibrium is likely to be more widely felt. But shifts in the geostrategic landscape may open up opportunities for weaker states to initiate a change in the rules, particularly if they act collectively.¹⁴⁶ New technologies may also render an existing coordination point outdated,

¹⁴⁵ Stein, *supra* note 132, at 130 (emphasis omitted).

¹⁴⁶ For a discussion of such strategies as adopted by developing countries, see Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *Yale J. Int'l L.* 1, 55–59 (2004).

suggesting a collective move to a new equilibrium. But path dependencies or sunk costs may deter even moves that would be improvements for all states. In such situations, denunciation threats may serve as a necessary shock to move treaty parties to a more efficient outcome.¹⁴⁷

3. Problem Structure and Externalities

Unlike game theory, problem structure theories of IR analyze subject-specific policy domains (such as trade, human rights, and arms control) and the conflicts within those domains to model interstate cooperation.¹⁴⁸ Although the precise contours of the problem structure approach are somewhat unsettled, its focus on the underlying objects of contention among nations generates useful real world insights. In particular, problem structure highlights the importance of externalities, both positive and negative, in identifying the consequences of treaty exit.

The central insight is that exit has radically different consequences depending upon whether externalities are present and can be restricted to treaty members. The distinctions between treaties that govern private or club goods and those that regulate public goods aptly illustrate these concepts.¹⁴⁹

In the former category are free trade agreements that reduce tariffs for products and services from other treaty parties. For these treaties, both the benefits and the burdens of lower trade barriers are restricted to member states. The ability to exclude non-members means that a state which unilaterally withdraws from a trade agreement cannot surrender the burdens of membership without also relinquishing its benefits. The prospect of losing these

¹⁴⁷ Cf. Martin, *supra* note 80, at 114 (stating that in coordination games, “[c]hanges that give rise to a longer time horizon will likely lead to attempts to change the regime” since the “short-term costs of forcing movement to a new equilibrium may be outweighed by the long-run benefits of the new outcome” (emphasis omitted)).

¹⁴⁸ See, e.g., Volker Rittberger & Michael Zürn, *Towards Regulated Anarchy in East-West Relations: Causes and Consequences of East-West Regimes*, in *International Regimes in East-West Politics* 9, 11–13 (Volker Rittberger ed., 1990).

¹⁴⁹ See Richard Cornes & Todd Sandler, *The Theory of Externalities, Public Goods, and Club Goods* 347 (2d ed. 1996) (defining a “club good” as a good characterized by “the sharing of an excludable (nonrivalrous) public good”); Downs & Jones, *supra* note 27, at S112 (characterizing trade agreements as “treaties that regulate the exchange of private or club goods where exclusion is possible”).

benefits is sufficient to deter states from leaving, even where the treaty provides an unfettered right to withdraw.

This analysis yields an important prescriptive insight for treaty makers: when negotiating agreements that regulate private or club goods, drafters can include capacious exit clauses to encourage broad ratification or enhance depth¹⁵⁰ with less risk that states will later invoke those clauses to denounce the agreement.¹⁵¹ The point is even more consequential where private or club goods are packaged with other cooperation problems into a single treaty or series of related agreements.¹⁵² For global package details of this nature—of which the WTO Agreement is the most prominent example—permissive exit clauses may allow states to play a two-level game,¹⁵³ appeasing domestic interest groups opposed to the treaty or uncertain of its future benefits without diminishing the credibility of their commitments to other treaty partners.¹⁵⁴

Withdrawals from “public goods”¹⁵⁵ treaties (such as military alliances or conventions to protect the global environment) have very different consequences. Neither the burdens nor the benefits of public goods treaties can be restricted to members.¹⁵⁶ As a result,

¹⁵⁰ See supra Section II.C (identifying ex ante and ex post costs and benefits of treaty exit clauses).

¹⁵¹ Anticipating that club goods treaties will have this binding tendency, governments may demand broad exit rules to facilitate later withdrawal. But even the most liberal exit rule (that is, an unfettered right to withdraw at any time for any reason) will not encourage opportunistic withdrawal if the benefits of membership are sufficiently high. See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 *Nw. J. Int'l L. & Bus.* 681, 683 (1997) (noting that international “organizations offer significant benefits to their members, and few international rules impose costs on a particular country so great as to justify resigning from a desirable club”). It is also plausible that the tendency of a club goods treaty to bind its members will emerge only over time after the consequences of membership become apparent.

¹⁵² See David W. Leebron, *Linkages*, 96 *Am. J. Int'l L.* 5, 6–18 (2002) (describing different types of issue area linkages in international agreements).

¹⁵³ See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *Int'l Org.* 427, 433–35 (1988).

¹⁵⁴ Cf. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 *Am. J. Int'l L.* 247, 267 (2004) (“In the contemporary WTO context, the threat of unilateral exit has limited credibility because it would be costly.”).

¹⁵⁵ Cornes & Sandler, *supra* note 149, at 8 (defining a public good as one characterized by nonrivalry of consumption and nonexcludability of benefits).

¹⁵⁶ See Orbell et al., *supra* note 126, at 148 n.1 (“[T]he absence of an escape opportunity is part of the standard definition of public goods.”). Nonexcludability cuts both

a state that denounces a public goods treaty (or that fails to ratify such an agreement in the first instance), can free ride on the cooperation of other nations without being exposed to treaty-based sanctions.¹⁵⁷ The challenges thus facing treaty makers seeking to promote cooperation over international public goods are twofold: encourage all affected states to ratify and constrain those states that have already ratified from denouncing the treaty.

Treaty makers use different strategies to meet this dual challenge. They may, for example, provide that a treaty will not enter into force until a critical mass of states has ratified the agreement, defined by number of countries, by their size, or by their financial or material contributions to the problem at hand. Alternatively, the drafters may specify that the treaty will terminate where denunciations have reduced ratifications below a specified threshold. Both rules ensure that states do not incur the costs of cooperation unless a sufficient number of other nations do as well.¹⁵⁸

Negotiators can structure exit clauses to augment these cooperation-enhancing design features. For example, in cases of public goods treaties intended for ratification by only a small number of parties, an effective strategy may be to require all states to ratify the treaty before it enters into force and thereafter to bar unilateral exit altogether.¹⁵⁹ For treaties regulating public goods that affect a large number of countries, however, such an approach creates an

ways, however, since the “‘impossibility of exclusion’ [from public goods] implies the . . . ‘impossibility of rejection’ in the case of public bads,” in which actors absorb the full benefit of their actions but only a portion of the cost. *Id.* Examples of “public bads” are tragedies of the commons and transborder environmental harm.

¹⁵⁷ See Adam Chase, *Barriers to International Agreements for the Adaptation and Mitigation of Global Climate Change: A Law and Economics Approach*, 1 *Envtl. L.J.* 17, 36 (1994). As noted above, however, extra-treaty sanctioning mechanisms may sometimes be available to deter free riding. See *supra* Section III.B.3.

¹⁵⁸ For an insightful analysis of treaty membership rules in international environmental agreements, see Barrett, *supra* note 29, at 133–220.

¹⁵⁹ The Framework Convention for the Protection of the Marine Environment of the Caspian Sea follows this design approach. The Convention, concluded in November 2003, will enter into force only once it has been ratified by all five Caspian Sea littoral states. An initial draft of the treaty contained a denunciation clause, but the drafters later removed the clause to preclude the possibility of unilateral withdrawal by any of the five nations that had contributed to the Caspian Sea’s environmental degradation. E-mail from Danica Valnicek, Associate Expert, Policy & Law, UNEP Regional Office for Europe, to Author (Nov. 27, 2003, 03:50 EST) (on file with the Virginia Law Review Association).

increased risk that one or more non-ratifying states will prevent the treaty from entering into force. If negotiators reduce the agreement's ratification threshold or broaden its exit clause to avoid this problem, however, they must provide other incentives for all affected states to join the treaty and to remain as treaty members.

Restrictive exit clauses can also be effective for public goods treaties in which either the externalities that the treaty seeks to address or the burdens and benefits that it generates are asymmetrically distributed among the parties. A recent study of nonreciprocal environmental harms and state power by Ronald Mitchell and Patricia Keilbach helps to illustrate this idea. According to this study, where a powerful nation produces a negative externality that injures a weaker state, the latter can induce the former to mitigate the externality only by making side payments that increase the hegemon's utility from cooperation.¹⁶⁰ Conversely, where a weak state is the externality producer and a powerful state is the unwilling consumer, the latter can use coercion to force a commitment to reduce the externality, although it too "may turn to rewards because making threats credible and potent can be difficult."¹⁶¹ In both cases, the parties fear that the other side will not live up to its commitments: "Victims fear that perpetrators will 'take the money and run'; perpetrators fear that victims will renege on compensation."¹⁶² Closing or limiting exit may allay these concerns, "increasing normative and social pressures on the other to carry out its part of the bargain"¹⁶³ and producing a mutually beneficial and durable agreement once the initial hurdles to participation have been overcome.

The broader theoretical point, however, is that exit interacts with externalities and problem structures in ways that treaty makers can use to promote international cooperation. By tailoring denunciation and withdrawal clauses to address these issues, negotiators can improve the chances that a treaty will achieve its objectives.

¹⁶⁰ See Mitchell & Keilbach, *supra* note 98, at 903.

¹⁶¹ *Id.*; see also *id.* at 902 ("When the victims of an asymmetric externality are stronger than the perpetrators, the former may simply threaten the latter to compel them to mitigate an externality at their own expense.").

¹⁶² *Id.* at 903.

¹⁶³ *Id.*

IV. THE SIGNIFICANCE OF TREATY EXIT FOR INTERNATIONAL LAW AND POLITICS

The previous Sections of this Article have identified the distinguishing characteristics of treaty exit, differentiated those characteristics from breach of international obligations, and introduced the exit option to reexamine international law and IR scholarship on when and how nations cooperate. This Part sets the stage for future research on exiting treaties by identifying four doctrinal and theoretical insights that result from the foregoing analysis. The first two Sections link exit to other risk management devices to help resolve unsettled issues of international law doctrine: (1) the relationship between treaty reservations and treaty denunciations, and (2) the status of the contested rule for terminating a treaty as a result of changed circumstances. The second two Sections analyze the consequences of exit for future empirical and theoretical research in international relations: (1) specifying different payoffs of exit to model the relationship among the options of exit, defection, and cooperation in game theory, and (2) explaining group exit from standard setting treaties as a product of shifting equilibria in battle of the sexes coordination games.

A. Linking Treaty Entry to Treaty Exit

Unlike exit, numerous international law studies have been devoted to front-end treaty issues such as ratification and reservations.¹⁶⁴ None of these studies, however, considers the link between treaty rules that condition acceptance of legal obligations *ex ante* and those that close or restrict withdrawal from those obligations *ex post*.¹⁶⁵ Pairing these two perspectives helps to resolve an unsettled question of treaty law—the consequences for a state that has ratified a treaty with a reservation later determined to be invalid.

To facilitate the widespread adoption of multilateral agreements, governments often refrain from compelling their partners to accept the entire package of treaty commitments. Rather, they permit

¹⁶⁴ See, e.g., Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties 2–4 (1988); Rosenne, Law of Treaties, *supra* note 30, at 356–57, 424–36; Edward T. Swaine, Reserving (Aug. 2005) (unpublished manuscript, on file with the Virginia Law Review Association).

¹⁶⁵ For a recent exception, however, see Swaine, Unsigning, *supra* note 7, at 2071–77.

states to append reservations before expressing their consent to be bound to the agreement.¹⁶⁶ Such reservations enable states to opt out of particular treaty provisions, insulating particular domestic laws or practices from international scrutiny. They thus transform a single negotiated text into a kaleidoscope of a la carte legal commitments.

For those treaties that do not preclude such unilateral opt outs, it is not always clear whether a particular reservation is compatible with the agreement's "object and purpose."¹⁶⁷ If a tribunal or treaty review body later concludes that the reservation is invalid on this ground, the consequences for the ratifying country are uncertain. Three alternatives are possible. First, the state's ratification may be nullified (and its treaty membership terminated) absent an indication of its intent to be bound to the treaty without the reservation.¹⁶⁸ Second, the state may be considered a party to the treaty except for those provisions to which its invalid reservation applied. And third, the state may be deemed a party to the entire treaty, including the article to which its now stricken reservation was attached.¹⁶⁹

Commentators are sharply divided over the relative merits of these three approaches, particularly for human rights treaties which states have ratified with dozens of legally dubious reservations.¹⁷⁰ Until recently, most observers favored either the first or second test. Scholars advocating the third approach have argued

¹⁶⁶ See Vienna Convention, *supra* note 1, art. 2(1)(d), 1155 U.N.T.S. at 333 (defining a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State").

¹⁶⁷ *Id.* art. 19, 1155 U.N.T.S. at 336–37 (requiring all reservations to treaties that do not expressly authorize or preclude reservations to comply with an "object and purpose" of the treaty test).

¹⁶⁸ This was the rule endorsed by the International Court of Justice ("ICJ") in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 29 (May 28).

¹⁶⁹ For a comprehensive and thoughtful discussion of these three alternatives, see generally Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 *Am. J. Int'l L.* 531 (2002).

¹⁷⁰ See, e.g., Rosalyn Higgins, *Introduction to Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions*, at xv–xvii (J.P. Gardner ed., 1997); Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* 3–12 (1995).

that, because states have an incentive to include more reservations than necessary to secure ratification, an invalid reservation should be presumed to be severable, leaving the state bound to the entire treaty.¹⁷¹

Analyzing reservations together with denunciations yields an important insight that helps to resolve these doctrinal rifts. In the case of treaties that implicitly or expressly preclude exit,¹⁷² the costs of making an erroneous severability decision are high. If the reservation was in fact a condition of the state's consent to be bound, holding the state to the entire treaty without the benefit of the reservation binds the state to obligations to which it expressly declined to consent and from which it may not lawfully withdraw.¹⁷³

By contrast, where exit is available, error costs are lower and the presumption of severability far more defensible. If the reservation were in fact essential to the government's decision to ratify, the state could correct the mistaken severance by invoking the denunciation clause, as Trinidad and Tobago did in 2000 after the United Nations Human Rights Committee severed its death penalty reservation to the ICCPR's First Optional Protocol.¹⁷⁴ The more significant and underappreciated theoretical point, however, is that selecting an optimal rule for conditioning treaty entry cannot be made without considering the concomitant rules of treaty exit.

¹⁷¹ Goodman, *supra* note 169, at 537 (identifying the incentives for a state to "include more reservations than required to obtain its consent" and stating that the "administrative costs of monitoring and reviewing other states' reservations make states 'sluggish in their reaction to reservations'" (quoting Sinclair, *supra* note 2, at 63).

¹⁷² At least four major human rights agreements do not contain denunciation or withdrawal clauses. See International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), Dec. 18, 1979, 1249 U.N.T.S. 13; Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414. Under the prevailing interpretation of the Vienna Convention, state parties are precluded from withdrawing from these treaties. See General Comment, *supra* note 32 (interpreting the lack of a denunciation clause in the ICCPR as precluding withdrawal by any ratifying state).

¹⁷³ Such an outcome harms not only the reserving state, but also the treaty system of which it is now a partially unwilling participant, since that system is likely to see higher rates of noncompliance by reserving states.

¹⁷⁴ See Helfer, *Overlegalizing*, *supra* note 5, at 1880–81.

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B. Exit and Changed Circumstances

Diplomats, government officials, and international law scholars have long debated the legality and wisdom of authorizing unilateral withdrawal from a treaty or nonperformance of its obligations as a result of a fundamental change of circumstances. Employing the Latin appellation *rebus sic stantibus* (loosely translated as “so long as conditions remain the same”), states seeking to unburden themselves from past treaty commitments have argued for such a doctrine on the ground that such changes radically transform the parties’ obligations and undermine premises that were essential to their initial bargain. Arrayed against this position have been equally vociferous claims that recognition of a changed circumstances doctrine would be subject to rampant abuse and would undermine the international legal system’s commitment to treaty compliance.¹⁷⁵

Since the mid-nineteenth century, the doctrine has waxed and waned, operating “as both a vehicle for, and a brake on, change in the international order.”¹⁷⁶ In recent years, however, *rebus sic stantibus* has fallen into desuetude. It was codified in the Vienna Convention in 1969, but in an extremely narrow and restrictive form.¹⁷⁷ More importantly, “there has never been a successful assertion of [the doctrine] in a court case and . . . no clear example of its successful use in diplomatic exchanges.”¹⁷⁸

¹⁷⁵ For detailed discussions of the doctrine, see Sinclair, *supra* note 2, at 192–96; György Haraszti, *Treaties and the Fundamental Change of Circumstances*, in 146 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 1, 16–37 (1977).

¹⁷⁶ David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 *Am. J. Int’l L.* 1, 38 (1988).

¹⁷⁷ Professor Bederman explains:

The Vienna Convention provides that *rebus sic stantibus* cannot be invoked as a ground for termination unless the change in circumstances complained of (1) was an essential basis of consent by the parties . . . ; (2) was not foreseen at the time of negotiation; (3) radically transforms the obligations of the parties . . . ; (4) was not a result of breach by the complaining state; and (5) does not affect the establishment of a boundary.

Id. at 28 n.156 (discussing the Vienna Convention, *supra* note 1, art. 62, 1155 U.N.T.S. at 347).

¹⁷⁸ Detlev F. Vagts, *Book Review*, 98 *Am. J. Int’l L.* 614, 615 (2004); see also Setear, *Iterative Perspective*, *supra* note 80, at 171, 209–10 (characterizing the doctrine as controversial and discredited by most states).

Commentators have largely ignored the doctrine's decline or have attributed it to a renewed faith in the competing legal norm that treaty commitments must be obeyed. However, the option to exit from a treaty provides a more plausible explanation for why the *rebus sic stantibus* doctrine has all but evaporated from the discourse of compliance with international commitments. Because states may unilaterally denounce or withdraw from most treaties without justifying their conduct to other treaty parties, they need not rely upon the narrower and more controversial doctrine. Exit provides a far simpler—and legally incontestable—alternative for states seeking to remove themselves from treaties whose circumstances have altered. The fact that exit, although infrequent, nevertheless occurs far more often than successful invocations of *rebus sic stantibus* supports this conclusion,¹⁷⁹ although more detailed study of how many and what type of treaties states denounce when circumstances change would be useful.

C. Assigning a Payoff Value to Exit

IR scholars have all but ignored exit when modeling interstate cooperation, an omission this Article seeks to remedy. As discussed above, however, a few experimental studies have offered an exit option to the players in a Prisoners' Dilemma game.¹⁸⁰ A key issue these studies have confronted is what payoff to award an exiting player relative to the payoffs for the alternatives of cooperation or defection. In one such study, the payoff for exit was positive and took the form of a fixed payoff available equally to cooperators and defectors.¹⁸¹ Another study allowed any player to leave the game at no cost.¹⁸²

In international affairs, however, specifying a "payoff" for treaty exit is more complex. It requires a weighing of institutional, legal,

¹⁷⁹ See *supra* Section II.D (examining the frequency of exit from multilateral agreements).

¹⁸⁰ See *supra* Section III.C.

¹⁸¹ See Orbell et al., *supra* note 126, at 147 (offering an "attractive exit option" to players in an iterated Prisoners' Dilemma game).

¹⁸² See Schuessler, *supra* note 126, at 729 (offering a "no cost" exit option in an iterated Prisoners' Dilemma game).

political, and reputational costs and benefits.¹⁸³ And it also involves assessing whether a treaty regulates private, club, or public goods, or a combination thereof.¹⁸⁴ The identification of these distinct categories of exit costs and benefits provides the foundation upon which to build formal game theoretic models that tailor exit pay-offs to these diverse real world settings to provide more accurate predictions of how nations behave.¹⁸⁵

A related theoretical point is that deciding what payoff to award players who exit cannot be set exogenously. Rather, such payoffs are an endogenous feature of the problem structural setting in which the players (that is, states) find themselves. This suggests an important pathway for future empirical research: exploring the degree to which treaty negotiators consciously tailor exit rules according to the identity of the parties or nature of the problem they seek to resolve.

D. Group Exit, Coordination Games and New Equilibria

A second promising avenue for future research concerns group exit from technical and standard setting treaties as a way to test IR hypotheses concerning state behavior in coordination game settings.¹⁸⁶ The database of treaty denunciations and withdrawals has revealed two broad types of group exits: (1) exit from multilateral standard-setting agreements (for example, treaties concerning roadway and maritime signals, ship measurements, and stops on

¹⁸³ See supra Section III.B (identifying the consequences of exit as including the loss of institutional membership and voice, intra- and extra-treaty sanctions, and reputational costs); see also Rachel Brewster, *The Domestic Origins of International Agreements*, 44 *Va. J. Int'l L.* 501, 518–19 (2004) (identifying the costs associated with withdrawal from multilateral agreements).

¹⁸⁴ See supra Section III.C.3 (analyzing exit and externalities).

¹⁸⁵ For example, game theoretic models could set payoff structures to reflect the fact that states sometimes exit permanently from treaties and sometimes return to membership after several years. See supra Section II.A.

¹⁸⁶ See supra Section III.C.2 (discussing exit and coordination games).

bearer securities);¹⁸⁷ and (2) exit from an earlier treaty as a condition of ratifying a later agreement concerning the same issue.¹⁸⁸

Treaties in the first category appear mundane and uninteresting. But this superficial banality obscures a rich theoretical body of evidence. In particular, the subject matter of these agreements suggests the underlying situation structure of a battle of the sexes coordination game. And the subsequent denunciations by multiple countries suggest an attempt to move to a new equilibrium point within that game.

Denunciations en masse may reflect an equilibrium shift that benefits all states, for example, as a result of technological improvements. Denunciations by a smaller number of treaty parties may indicate an attempt to shift from an old equilibrium that benefits some states and disadvantages others to a new equilibrium with different distributional consequences. Both sorts of moves have been described in the IR literature on international cooperation, but few real world examples have been identified to assess these claims.

Future research should also consider whether, and if so how, treaty makers influence these equilibrium shifts. For example, rules that specify a minimum number of ratifications for an agreement to remain in force may act as tipping points that force all states to move to a new coordination point after the designated threshold is reached.¹⁸⁹ Treaties that require participating states to withdraw from an earlier agreement concerning the same subject matter can accelerate these trends and quickly lock in new equilibria. These

¹⁸⁷ See, e.g., Convention Concerning the Unification of Road Signals, Mar. 30, 1931, 150 L.N.T.S. 247; Agreement Concerning Maritime Signals, Oct. 23, 1930, 125 L.N.T.S. 95; Convention Regarding the Measurement of Vessels Employed in Inland Navigation, Nov. 27, 1925, 67 L.N.T.S. 63; Convention Relating to Stops on Bearer Securities in International Circulation, May 28, 1970, Europ. T.S. No. 72.

¹⁸⁸ See, e.g., European Convention on the Protection of the Archaeological Heritage (Revised), art. 14(2), Jan. 16, 1992, Europ. T.S. No. 143 (requiring the denunciation of the European Convention on the Protection of the Archaeological Heritage, May 6, 1969, Europ. T.S. No. 66, prior to or contemporaneously with ratification of the Convention). Such a practice is common in the labor standards conventions adopted in the ILO. See Widdows, *ILO Denunciations*, supra note 55, at 1052 (noting the special rules applicable to denunciation followed by ratification of a revising Convention).

¹⁸⁹ See, e.g., Convention Concerning the Unification of Road Signals, supra note 187, art. 15, 150 L.N.T.S. at 257 (specifying that the agreement will terminate if and when fewer than five states remain as parties).

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examples suggest the need for detailed case studies of when and why states denounce treaties with these structural features.¹⁹⁰

CONCLUSION

Treaty exit is a fact of life in the international legal system, although it has often been shunned or ignored by international legal scholars and IR theorists alike. Deciding how much or how little to constrain exit is a concern of treaty negotiators, who use denunciation and withdrawal clauses to promote ratification and reduce uncertainty about the future. And deciding whether and when to invoke these clauses is a concern of government officials when changed circumstances, shifting domestic preferences, or dissatisfaction with treaty-based institutions create tensions between national interests and international commitments. This Article develops an interdisciplinary framework for analyzing the underexplored phenomenon of treaty exit and provides a blueprint for future research.

The analysis in this Article has been largely positive in nature, offering a theoretical, empirical, and doctrinal account of the design and use of treaty exit clauses. The normative implications of this analysis, however, cannot be ignored. Although the possibility of unilateral denunciation and withdrawal may seem anathema to the successful functioning of international law, this Article suggests a strikingly different conclusion—that exit may sometimes enhance interstate cooperation.

A desire to promote cooperation may explain why treaty clauses authorizing exit are pervasive. As one among a suite of risk management tools available to treaty makers, exit clauses can provide the security states need to negotiate more extensive international commitments or encourage ratification by a larger number of nations—outcomes that are often essential to resolving genuinely global transborder problems.

Many denunciation and withdrawal clauses also impose conditions on exit which help to promote cooperation among the parties. Such clauses prohibit denunciation in the early years of a treaty's

¹⁹⁰ See Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 *Am. J. Int'l L.* 361, 362–63 (1999) (highlighting the importance of case studies to interdisciplinary scholarship).

life or after a state's accession to membership, and they require notice to the other parties. These restrictions help to stabilize treaties. They create an initial window of cooperation, force governments to think twice before going through the formal and public process of withdrawal, and provide a cooling off period during which the parties may renegotiate the agreement or otherwise address the withdrawing state's concerns.

Yet formal legal rules provide only a partial explanation for why governments continue to adhere to their treaty commitments even when a lawful and largely unfettered exit option is available. What keeps nations cooperating—and what drives them to leave treaties or to threaten to do so—are the institutional, political, and reputational costs and benefits of exit relative to alternatives, including compliance, noncompliance, and any of the other flexibility devices or safety valves that a treaty contains. Understanding these dynamics, and their relationship to the forms and functions of law, will improve the accuracy of social scientific theories of how nations cooperate and will help international lawyers harness exit to better serve the ends of world order.