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Flexibility in International Agreements

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The form and substance of international agreements are intimately linked. This insight, recently articulated by scholars working at the intersection of international law (IL) and international relations (IR) (Guzman 2005; Hathaway 2005; Raustiala 2005), has important implications for the study of legalized interstate cooperation. The relationship between form and substance affects issues central to the international legal system, including treaty design, the choice between hard and soft law, delegation of authority to international organizations and tribunals, and treaty compliance. The form and substance equation is, in turn, shaped by the many uncertainties that pervade international affairs, including insufficient information about future events, the preferences of other states, and shifts in domestic politics (Koremenos, Lipson, and Snidal 2001).

The linkage between form and substance also illuminates the choices and constraints that governments face, both when they negotiate international agreements and when they decide whether to comply with those agreements over time. Consider as a preliminary example a country that favors the adoption of a "deep" multilateral agreement that requires extensive changes to existing behavior. The state can pursue a range of different strategies to achieve its goal. It may limit participation to a smaller number of countries with similar preferences that will accept the treaty's onerous requirements. Or, it may broaden participation by offering incentives or concessions to nations reluctant to ratify the agreement. These inducements can take many forms, such as side payments, technical assistance, and other treaty membership benefits. But they can also include flexibility mechanisms that make the treaty more attractive by authorizing the parties to manage the risks of joining the agreement. These provisions function as insurance policies. They provide a hedge against uncertainty that allows a state to revise, readjust, or even renounce its commitments if the anticipated benefits of treaty-based cooperation turn out to be overblown (Bilder 1981; Sykes 1991; Helfer 2005).

Flexibility mechanisms also affect a state's calculus regarding treaty compliance. Continuing the previous example, deep international agreements may, notwithstanding their drafters' best efforts, turn out to be too deep, in that they require overly ambitious or unrealistic modifications of state behavior (Raustiala 2005: 613–14). Or, international tribunals or domestic courts may expansively interpret the agreements, resulting in treaties that become "overlegalized" (Helfer 2002). In either instance, when the costs of compliance outweigh the benefits, widespread violations are more likely to result. If, however, these deep agreements contain flexibility mechanisms, states may adjust their commitments instead of violating them.

On the other hand, overly capacious flexibility provisions may engender opportunistic behavior whenever economic, political, or other pressures make compliance inconvenient. Such opportunism also has wider pernicious consequences. Fearing that other treaty members may later invoke a treaty's flexibility mechanisms to shirk compliance, states that prefer to cooperate have a reduced incentive to invest the resources needed to implement and comply with the agreement (Swaine 2003).

As these introductory illustrations suggest, a principal challenge facing treaty negotiators is to select a suite of appropriately constrained flexibility mechanisms that facilitate agreement among states *ex ante* while deterring opportunistic uses of those mechanisms *ex post* after the treaty enters into force. Flexibility tools that are too easy to invoke will encourage self-serving behavior and lead to a breakdown in cooperation. Tools 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 violations if the costs of compliance increase unexpectedly (Ress 1994; Helfer 2005).

This chapter provides an overview of flexibility mechanisms in treaties and the role of such mechanisms in promoting or inhibiting international cooperation. The next section reviews the many flexibility devices available to treaty makers. It divides these tools into two broad categories – formal mechanisms (such as reservations, escape clauses, and withdrawal provisions) and informal practices (such as auto-interpretation, nonparticipation, and noncompliance). Section II, "The Study of Flexibility Mechanisms," reviews the IL/IR scholarship on the design and use of treaty flexibility mechanisms, focusing on studies of exit and escape clauses. The last section, "Stock Taking on the Study of Treaty Flexibility Mechanisms," highlights several conclusions that emerge from the burgeoning literature on treaty flexibility and suggests avenues for future research.

I. FLEXIBILITY MECHANISMS IN INTERNATIONAL AGREEMENTS: A BRIEF PRIMER

Government officials, international lawyers, and diplomats have long been interested in shaping the form and content of treaties to manage the risks of international cooperation. These risks include a tendency to gravitate toward "lowest common

denominator" provisions that reflect the preferences of "the most intransigent or risk-averse nations," uncertainty over which nations will join an agreement, difficulty in predicting the future behavior of treaty parties, uncertainty over what the "eventual outcomes from participating in the agreement are likely to be," and the possibility that international courts or review bodies will interpret the agreement in a manner contrary to the interests of one or more treaty parties (Bilder 1981: 64–65).

State representatives have responded to these risks by devising an array of formal flexibility mechanisms and incorporating them into the multilateral and bilateral agreements they negotiate. These mechanisms are the subject of several handbooks and model treaty clauses published by the United Nations and other international organizations (United Nations Legal Department 1951, 1957, 2003). In addition, prominent international lawyers and diplomats have authored detailed guides to treaty making that contain numerous examples of flexibility provisions (Blix and Emerson 1973; Boockmann and Thurner 2006; Aust 2007, 2010; United Nations Environment Programme 2007).

A review of these materials reveals the breadth and diversity of formal flexibility tools. Those tools include unilateral reservation and declaration clauses; entry-into-force requirements; limitations on territorial application; duration provisions; amendment and revision procedures; and rules governing suspension, withdrawal, and termination. There is considerable variation within each of these categories. For example, some multilateral agreements prohibit reservations, others allow reservations only to particular clauses, and still others impose substantive conditions on reserving (Helfer 2006*a*; Swaine 2006). Whatever their precise combination and content, flexibility provisions usually appear at the end of the agreement and are referred to collectively as the treaty's "final clauses."

Formal flexibility mechanisms do not, however, exhaust the flexibility tools available to states. The decentralized and partly anarchic nature of the international legal system means that compliance with treaty commitments cannot be taken for granted, nor can the existence of decision-makers authorized to settle disputes or interpret treaty texts. In this environment, "it is not unusual to discover . . . that the authority formally provided in a written [agreement] may be ignored, or totally redefined by unwritten practice" (McDougal, Lasswell, and Reisman 1967: 260). Informal or unwritten practices that enhance the flexibility of treaties include ad hoc supplementary accords (Aust 1986), "understandings, practices and usages, traditions, conventions, and gentleman's agreements" (Cogan 2009: 215; see also Reisman 2002), de facto modification of treaty obligations through conduct (Aceves 1996), auto-interpretation of ambiguous terms, withholding of financial support, and nonparticipation in treaty activities (van Aaken 2009). Some commentators have even argued that noncompliance itself is a type of flexibility mechanism, one that can sometimes function "as a sort of necessary safety valve . . . rather than an inherent flaw in the system" (Alter 2005: 141; see also Cogan 2006; Pauwelyn 2008).

Table 7.1 provides a simplified typology of common treaty flexibility mechanisms, both formal and informal. It groups these mechanisms into three broad categories: (a) those concerning entry into force, (b) those that operate after the agreement enters into force, and (c) those concerning the cessation of treaty obligations. Table 7.1 also organizes these mechanisms according to whether they are invoked by a single state unilaterally or require a collective decision by all negotiating nations or treaty parties.

Table 7.1 illustrates a number of key points about the universe of treaty flexibility mechanisms. First, such mechanisms exist throughout a treaty's lifecycle, from gestation and birth (negotiation and entry into force) to death (termination). In addition, multiple unilateral and collective options are available at each stage of that cycle.

Second, different flexibility tools serve very different functions. To take one obvious example, unilateral mechanisms typically reduce uncertainty only for the states that invoke them. Collective mechanisms, in contrast, generally mitigate risk for all treaty parties.

A third point follows from the previous two: treaty negotiators can attempt to design "an effective risk management system [by making] a careful choice of those techniques best suited to meet the parties' concerns" (Bilder 1981: 20). The tradeoff among formal flexibility tools is illustrative. "[W]here an agreement includes strong general risk management provisions limiting the subject matter or duration of the agreement or providing for easy withdrawal, there will be less need for other more specific risk management provisions" (Bilder 1981: 20).

A fourth point concerns the relationship between formal and informal flexibility tools – for example, whether they substitute for or complement each other. To understand this relationship, scholars must consider not only the design of flexibility clauses on paper but also the behavior of treaty parties in practice.[1] As the next section explains, scholars have made considerable progress in addressing the first issue but have given shorter shrift to the second.

II. THE STUDY OF FLEXIBILITY MECHANISMS: EXAMPLES FROM TREATY EXIT AND ESCAPE CLAUSES

Over the last decade, IL and IR scholars alike have devoted growing attention to formal flexibility mechanisms. In the legal literature, studies have analyzed reservations (Goodman 2002; Swaine 2006), membership and voting rules (Goodman and Jinks 2004; Helfer 2008*a*), framework conventions and protocols (Setear 1999), soft law (Guzman and Meyer 2010; Shaffer and Pollack 2010), delegation to international organizations (Alvarez 2005; Helfer 2006*b*; Guzman and Landsidle 2008) and to

[1] Gathii (2011), for example, provides an insightful recent analysis of the design and operation of flexibility mechanisms in African regional trade agreements.

TABLE 7. 1. *Flexibility mechanisms*

Treaty action or process	Formal flexibility mechanisms	Informal flexibility mechanisms
Entry into Force	**Unilateral:** • Reservations • Declarations • Interpretive statements • Territorial application	**Unilateral:** • Statements of future intent
	Collective: • Provisional application • Breaking into multiple treaties or parts • Phasing in treaty obligations • Ratifications requirements • Minimum number of states • Membership by specific states	**Collective:** • Modus vivendi • Practices based on unperfected legal acts (e.g., unratified treaties)
Treaty in Force	**Unilateral:** • Subsequent notifications • Escape • Escalator clauses • Self-judging exclusions	**Unilateral:** • Autointerpretation • Withholding funds for treaty activities • Noncompliance
	Collective: • Exceptions and limitations • Special and differential treatment (e.g., for developing countries) • Delegation to international courts or international organizations • Amendment and revision	**Collective:** • Interpretation through conduct • De facto delegation • Informal processes and practices (e.g., regarding consultations, appointments to treaty offices) • Unwritten supplementary accords
Cessation of Treaty Obligations	**Unilateral:** • Denunciation and withdrawal	**Unilateral:** • Nonparticipation in treaty activities
	Collective: • Limited duration • Formal suspension • Termination	**Collective:** • De facto suspension (e.g., during armed conflict) • Desuetude (e.g., treaty in force but moribund in practice)

international tribunals (Guzman 2002, 2008; Helfer and Slaughter 2005; Posner and Yoo 2005), escape clauses (Gross and Ní Aoláin 2006; see also Sykes 1991; Oraá 1992), exit provisions (Helfer 2005; Meyer 2010), and the relationship between treaty form and substance more generally (Guzman 2005; Hathaway 2005; Raustiala 2005).

Among political scientists, flexibility has figured prominently in the rational design literature, most notably in the 2001 special issue of *International Organization* (Koremenos *et al.* 2001). According to the authors of the special issue, flexibility determines how an institution's member states respond to different forms of uncertainty, such as "unanticipated circumstances or shocks," or "new demands from domestic coalitions or clusters of states wanting to change important rules or procedures" (Koremenos *et al.* 2001: 773). The authors posit three conjectures about flexibility: flexibility increases with uncertainty about the state of the world, flexibility increases with the severity of the distribution problem, and flexibility increases with number. Each of these conjectures takes account of the benefits and costs of flexibility. On the one hand, "the possibility of adjusting [an] agreement when adverse shocks occur allows states to gain from cooperation without tying themselves to an arrangement that may become undesirable as conditions change" (Koremenos *et al.* 2001: 793). But flexibility also has a downside: "Renegotiation of treaty terms, as well as dealing with unilateral invocations of flexibility such as escape clauses, is costly. Moreover, individual states have incentives to free ride on an agreement by developing self-serving interpretations" of flexibility clauses (Koremenos *et al.* 2001: 794).

In the decade following publication of the rational design volume, social science studies of treaty flexibility have proliferated. One set of studies focuses on the design of individual flexibility clauses, including those relating to duration and renegotiation (Koremenos 2005), reservations (Parisi and Ševčenko 2003; Neumayer 2007; Miles and Posner 2008; Kearney and Powers 2011), dispute settlement (Koremenos 2007), escape (Rosendorff and Milner 2001; Neumayer 2011), and withdrawal (Koremenos and Nau 2010). A second, smaller body of scholarship considers how these clauses operate in different issue areas, with an emphasis on trade (Koremenos 2002; Kucik and Reinhardt 2008; Pelc 2009*a*, 2009*b*) and human rights agreements (Neumayer 2007, 2011; Cole 2009; Hafner-Burton, Helfer, and Fariss 2011; Koremenos 2013).

A comprehensive review of the burgeoning legal and social science scholarship on treaty flexibility is beyond the scope of this chapter. Favoring depth over breadth, the sections that follow analyze the design and operation of two formal flexibility tools – exit and escape. These mechanisms provide interesting case studies for exploring advances in the study of treaty flexibility. Exit and escape were long ignored by scholars, dismissed as mere boilerplate, or disparaged by those anxious to prove that nations habitually obey international law. Recent empirical work, however, has revealed wide variation in the design of these clauses and in the situations in which states invoke the clauses to suspend or terminate their treaty obligations. This variation suggests that preserving an exit or escape option is often a rational

response to a world plagued by uncertainty, an option that enhances the prospects for interstate cooperation *ex ante*, but that also engenders troubling possibilities for opportunistic behavior *ex post*. In addition, empirical analyses of exit and escape provide fresh evidence to evaluate the claims and conjectures about treaty flexibility advanced in the legal and social science literatures.

A. *The Design and Use of Treaty Exit Clauses*

The term "exit" describes a state's unilateral withdrawal from or denunciation of an international agreement that a state has previously ratified, an act that terminates the state's legal obligations under the agreement and ends the state's status as a treaty party. In the case of multilateral agreements, denunciation or withdrawal generally does not affect the treaty's continuation in force for the remaining states parties. For bilateral agreements, in contrast, denunciation or withdrawal by either party results in the termination of the treaty.

A state that seeks to disengage from a treaty in these ways usually invokes a denunciation or withdrawal clause set forth in the treaty itself. A treaty that does not contain such an express clause "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."[2]

Denunciation and withdrawal provisions reduce the uncertainty of international agreements. They do so by providing what is in effect an insurance policy – a low-cost option for states to end treaty-based cooperation if an agreement turns out badly. All other things being equal, such provisions encourage the ratification by a larger number of states than would join the treaty in the absence of such a clause. Exit clauses also enable the negotiation of deeper or broader commitments than could otherwise be attained (Tobin 1933: 202; Helfer 2005: 1599). Viewed in isolation, these benefits counsel government officials to include broad and permissive withdrawal and denunciation provisions in the treaties they negotiate.

Although the *ex ante* benefits of exit are considerable, treaties that permit easy withdrawal also create disincentives to future cooperation. One such disincentive is that states will invoke exit clauses opportunistically (or credibly threaten to do so) whenever economic, political, or other pressures make compliance costly or inconvenient. In addition, states that would prefer to cooperate but fear that their treaty partners may quit the agreement have less incentive to invest in treaty compliance. These deterrents to cooperation suggest that governments should make treaties more

[2] Vienna Convention on the Law of Treaties, 1153 U.N.T.S. 331 (1969), Article 56. Helfer (forthcoming) provides an overview of the history of the Vienna Convention on the Law of Treaties (1969), Article 56 and its application to situations in which a state attempts to exit from a treaty that lacks a denunciation or withdrawal clause.

durable by eliminating or restricting exit opportunities – a position directly contrary to the *ex ante* perspective that favors broad withdrawal rights.

These competing perspectives on the costs and benefits of exit suggest that a key challenge treaty negotiators face is to set optimal conditions on exit *ex ante*, so as to deter opportunistic exit *ex post*. Exit clauses that are too easy to satisfy will encourage self-serving denunciations and lead to a breakdown in cooperation. Exit provisions that are too onerous will discourage such behavior, but may either prevent the parties from reaching agreement in the first instance or trigger widespread treaty violations if the costs of compliance rise unexpectedly.

1. Variation in the Design of Exit Clauses

Treaty provisions that authorize unilateral exit are common, but they are not ubiquitous. The clauses are found in a wide array of multilateral and bilateral agreements in issue areas including human rights, arms control, trade, investment, and environmental protection. A recent study of a random sample of 142 treaties published in the United Nations Treaty Series finds that 60 percent of treaties surveyed contain an exit clause. The incidence of these clauses "varies by issue area, with human rights agreements almost always incorporating them but more than half of the security agreements in the sample failing to do so" (Koremenos and Nau 2010: 106).[3]

More intriguingly, denunciation clauses impose different types and degrees of restrictions on a state's ability to withdraw. Treaty handbooks and model rules illustrate the wide variation in exit provisions.

> A review of these [drafting] guides . . . reveals that denunciation and withdrawal clauses cluster around [five] 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 [particular] occasion, identified either by time period or upon the occurrence of a particular event; [and] (5) treaties whose denunciation occurs automatically upon the state's ratification of a [subsequent] agreement. (Helfer 2005: 1597)

Divergences also exist as to the procedures for providing notice of a denunciation, including the period of time that must elapse before a denunciation takes effect, to whom notice must be given, and whether the denouncing state's obligations continue after the withdrawal takes effect. For some categories of treaties, such as humanitarian law conventions, the effective date of withdrawal is contingent upon

[3] These findings may be influenced by the fact that most treaties in the random sample are bilateral. Anecdotal evidence suggests that exit clauses are more pervasive in multilateral treaties (Helfer 2005: 1596–98).

external events, such as the cessation of an existing armed conflict.[4] Others, most notably bilateral investment agreements, "contain a continuing effects clause that provides that investments made, acquired, or approved prior to the date of the termination of the treaty will be protected by the treaty's provisions for a further period of ten, fifteen, or twenty years" (Salacuse 2010: 472).

The most common unilateral exit clauses require advance notice (most often of twelve or six months) of a decision to withdraw, sometimes with the additional condition that the treaty has been in force for a specified number of years (Koremenos and Nau 2010: 106–07). The large majority of exit provisions do not, however, require a state to justify its decision to withdraw. To the contrary, notices of denunciation are generally short, stylized letters of two or three paragraphs that inform the treaty depository that a state is quitting a particular agreement on a specified future date. A few treaties – most notably arms-control agreements – require states to explain a decision to withdraw, although they generally allow the denouncing nation to decide whether the factual predicate for withdrawal has been satisfied (Chayes 1972; Perez 1994). In addition, states often provide explanations when denouncing international labor conventions, although the treaties do not require them to do so (Widdows 1982).

Koremenos and Nau (2010) offer a theory of exit clause design to explain the variation in the length of notice periods and waiting periods prior to withdrawal. They find empirical support for two propositions. First, treaties that address an underlying "enforcement problem" are more likely to include longer notice periods than other types of agreements; and second, treaties that address an underlying "commitment problem" are more likely to have longer waiting periods than treaties that do not have such a goal (Koremenos and Nau 2010: 108–10). These findings provide intriguing evidence that government negotiators tailor the details of exit provisions to the type of cooperation challenge they seek to overcome.

2. Variation in the Use of Exit Clauses

As compared to the design of denunciation and withdrawal clauses, scholars have devoted less attention to how often or in which circumstances states actually exit from treaties. To the limited extent that the topic is mentioned in the legal literature, the conventional wisdom holds that exit is a highly unusual act or one that merits international condemnation – assertions based on anecdotes of a few high-profile denunciations and withdrawals from international organizations (Jenks 1969: 180; Rudzinski 1977: 806; Schlesinger 2003: 26–27). Recent empirical studies, however, belie these claims.

Helfer (2005) analyzes data on exit collected from several international organizations. He identifies 1,546 instances of denunciation and withdrawal from 5,416

[4] Common Article 63 of four Geneva Conventions of 1949.

multilateral agreements registered with the United Nations between 1945 and 2004.[5] His study finds that, although older treaties are denounced more frequently than recently adopted ones, the rate of exit "has held relatively constant or declined only slightly over the last fifty years, even after controlling for the large increase in . . . ratifications and the emergence of new nations in the 1960s and 1970s" (Helfer 2005: 1604–05). Based on these findings, the study concludes 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" (Helfer 2005: 1602).

Data from Helfer (2005), supplemented with the additional examples discussed below, suggest that the situations in which states denounce or withdraw from treaties can be grouped into four broad categories. These categories are not mutually exclusive. There may be more than one explanation for a state's decision to exit in a particular instance, and multiple states that exit the same treaty may have different reasons for doing so. Nevertheless, the four categories provide a basic framework for reviewing the empirical landscape of treaty denunciations and withdrawals.

The most high profile – and often the most controversial – of the four situations involves states that quit a treaty to challenge disfavored international legal rules or rebuke international institutions. In the late 1990s, for example, three Caribbean nations denounced human rights treaties and withdrew from the jurisdiction of international human rights bodies in response to treaty interpretations that resulted in the de facto abolition of the death penalty in those countries (Helfer 2002).[6] More recently, several Latin American nations denounced bilateral investment agreements (BITs) and their associated dispute settlement mechanisms, charging that the international investment regime "is not transparent, . . . does not account for the disparity in economic situation of regime members," is staffed by arbitrators who "have an investor bias[, and whose] decisions infringe on the legitimate exercise of sovereignty by host countries . . . " (Salacuse 2010: 469). These and other examples illustrate how states use unilateral exit to disengage from or radically reconfigure existing forms of international cooperation (Helfer 2002; Swaine 2003; Tzanakopoulos 2011).

Second, withdrawing from an agreement (or threatening to withdraw) can increase a denouncing nation's negotiating leverage with other states parties and its influence in international organizations. 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. In each instance, the United States used exit and threats of

[5] Of the 5,416 multilateral treaties in the study, 191, or 3.5 percent, have been denounced at least once. This small percentage suggests that a few treaties have resulted in withdrawals by multiple countries (Helfer 2005: 1606).

[6] Another example of exit precipitated by dissatisfaction with international human rights institutions involved North Korea's attempt to denounce the ICCPR, which does not contain an express provision for denunciation or withdrawal (Evatt 1999; Bates 2008).

exit – and the loss of organizational support and funding these entailed – to pressure the organizations' members to change their behavior, after which it rejoined the treaties. The Soviet Union and its allies pursued a similar approach in the 1950s, temporarily withdrawing from but later rejoining the World Health Organization, UNESCO, and the ILO. In the mid-1990s, 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 contained special provisions for developing countries – and then ratified the WTO Agreements as a "single undertaking," forcing developing nations to accept a broad package of obligations favorable to U.S. and European interests. These examples reveal how states use exit and threats of exit to increase their voice within treaty-based negotiating forums and to reshape treaty commitments to more accurately reflect their interests (Hirschman 1970).

A third circumstance concerns what might be termed "forced exit," which occurs when one state or group of states requires another nation to withdrawal from a treaty as a condition of joining or retaining membership in an international organization. The most striking example of forced exit occurred in the mid-2000s, when the European Union (EU) demanded that countries seeking EU membership denounce BITs with the United States that had been in force since the early 1990s. The EU "announced that the treaties, which broadly prohibited. . .discrimination against foreign investment, violated European (protectionist) laws that had governed the region's economic policies for nearly fifty years" (Brummer 2007: 1372).[7] Commentators have noted the possibilities of similar forced exits from bilateral trade and investment agreements between the United States and the members of Mercosur, South America's largest regional trading block (Brummer 2007: 1389). These examples illustrate that forced exits lie at the intersection of law and power in international relations.

A fourth and very different type of exit occurs when the denunciation of one treaty is linked to joining a subsequent agreement that relates to the same subject matter. In the ILO and the International Maritime Organization, for example, the ratification of certain revising conventions or protocols triggers the automatic or compulsory denunciation of earlier agreements (Helfer 2006*b*). Similarly, a few Council of Europe treaties that supersede earlier agreements on the same topic require ratifying nations to denounce the earlier agreements as a condition of membership (Polakiewicz 1999: 37). Such paired treaty actions update a state's international obligations without diminishing its overall level of commitment. Unlike the previous three circumstances, denunciations and withdrawals of this type are fundamentally cooperative in nature. They often occur in groups or waves, a pattern that suggests

[7] The EU later modified this position somewhat, declaring that all EU-incompatible BIT provisions would have to be removed from the treaties. The countries seeking accession to the EU complied with this demand.

a collective effort to shift to a new equilibrium point that benefits all or most states parties (Helfer 2005).

The four situations in which states invoke the option to exit from treaties also highlight the limitations of analyzing the design of denunciation and withdrawal clauses in isolation. For example, the hedge against uncertainty that exit clauses provide may be greater in some issue areas than in others, depending on such factors as the type of cooperation problem that states are seeking to resolve and power differentials among member nations. In addition, the incidence of exit may vary with the types of international institutions that a treaty establishes and the independent authority that those institutions exercise.

B. *The Design and Use of Escape Clauses*

The term "escape" describes a unilateral act by which a treaty party temporarily suspends or derogates from some or all of its obligations without, however, withdrawing from membership or violating the treaty. The authority to put treaty commitments on hold is provided by a suspension or derogation clause set forth in the agreement itself.[8] Such clauses authorize a state to deviate – generally for a limited period of time, under particular conditions, and in response to extraordinary circumstances – from otherwise applicable treaty commitments (Pelc 2009*b*).

According to recent studies, escape clauses provide a mechanism for responding to conditions of domestic political or economic uncertainty. "States may agree to particular terms of cooperation but then suffer domestic shocks that make these terms politically difficult. What they require is a temporary relief from their obligations" (Koremenos 2005: 561). Anticipating that shocks, emergencies, and other exceptional circumstances will generate domestic opposition to treaty compliance, states will be hesitant to commit to a treaty that may be subject to these events unless it includes an *opt out* clause (Sykes 1991: 279). Such a provision facilitates international agreement *ex ante* by authorizing a temporary deviation from compliance if the anticipated exigent circumstances later arise. *Ceteris paribus*, an escape option also encourages more states to ratify a treaty, and it enables the negotiation of deeper international obligations than would be possible without such a provision (Hafner-Burton *et al.* 2011: 674).

After a treaty enters into force, however, escape clauses may have deleterious consequences for international cooperation. The most basic concern is that escape mechanisms authorize deviant behavior precisely when treaty compliance is needed most. The risks of noncompliance are especially acute for capacious opt-out provisions, which are "prone to abuse by... members, to the point where [the treaty] loses its credibility and becomes irrelevant" (Pelc 2009*a*: 350). To obviate this possibility, many escape clauses impose costs on the states that invoke them, for

[8] Treaties may also be suspended due to the outbreak of armed conflict, although the circumstances in which such suspensions are lawful are disputed (Aust 2007: 308–11).

example, by requiring compensation to adversely affected actors, or by triggering disclosure to and scrutiny by international monitoring bodies. If properly calibrated, some scholars argue, these costs create a stable equilibrium in which treaties bend rather than break in response to domestic shocks that might otherwise cause international cooperation to unravel altogether (Rosendorff and Milner 2001: 831–32).

1. Variation in the Design of Escape Clauses

The incidence of escape clauses across issue areas is not well explored. Although there is some evidence that these mechanisms are less prevalent than other formal flexibility tools, escape clauses in trade and human rights agreements are quite common and have attracted considerable scholarly interest (Hoekman and Kostecki 1995: 303; Koremenos 2005: 561).

In the trade context, attention has focused on the safeguards clause in GATT Article XIX, which, during nearly half a century between 1947 and 1994, permitted a GATT contracting party temporarily to suspend its obligation to not raise trade barriers when, "as a result of unforeseen developments," domestic producers suffer a "serious injury" from foreign imports.[9] This safeguards provision was subject to a compensation and retaliation clause, which allowed adversely affected GATT members to suspend "substantially equivalent concessions" if the escaping country did not voluntarily provide compensation. Infant industry and balance-of-payments provisions in GATT were similarly designed.[10]

The conventional wisdom among legal scholars and social scientists is that escape clauses in trade agreements are self-enforcing. "Escaping members themselves have the strongest incentive to offer compensation, since they are looking to make their future return to compliance credible" (Pelc 2009*a*: 352). As a result, states can avoid delegating broad enforcement authority to international institutions. Instead, such institutions need "only record and publicize instances of escape and compensation" to maintain an efficient equilibrium (Pelc 2009*a*: 352).

In the human rights context, the drafters of several key international conventions anticipated that states would come under enormous pressure to restrict civil and political liberties during national emergencies. Yet, the drafters also recognized that such crises provide a convenient justification to enhance executive power, dismantle democratic institutions, and repress political opponents. To balance these competing concerns, the treaties included derogations clauses that authorize states to suspend certain rights during emergencies but subject those temporary restrictions to a detailed international regime of limitations, notifications, and review procedures (Fitzpatrick 1994; Gross and Ní Aoláin 2006).

Notwithstanding these restrictions, most legal scholars are highly suspicious of derogations. They fear that states will invoke these opt-out clauses to justify

[9] General Agreement on Tariffs and Trade, 55 U.N.T.S. 194, Article XIX.

[10] Ibid., Articles XII and XVIII.

widespread human rights violations and impose so-called permanent emergencies (Gross and Ní Aoláin 2006). In response to these concerns, commentators have emphasized the "utmost importance" that derogations be "strictly monitored and do not operate as a shield for the destruction of rights" (Joseph, Schultz, and Castan 2005: 824). And they have argued for expansive interpretations of legal doctrines that restrict a state's power to opt out, such as the principle of exceptional threat, nonderogability of fundamental rights, proportionality, nondiscrimination, and consistency with other international rules (El Zeidy 2003; Lorz 2003).

2. Variation in the Use of Escape Clauses

As with studies of treaty exit clauses, recent empirical work that analyzes when states actually exercise the option to suspend or derogate from their treaty commitments challenges the conventional wisdom about escape clause design.

In the trade regime, commentators often highlight the popularity of GATT Article XIX, which member states invoked on 150 occasions between 1950 and 1994. But this escape clause did not function as the rational design literature predicts. "While the total number of Article XIX measures increased with time, the use of compensation and retaliation" – the linchpin for the self-enforcing equilibrium that rational design scholars find so appealing – declined precipitously until it "came to play a trivial role" in the operation of the safeguards regime (Pelc 2009*a*: 357). In its place, GATT/WTO members adopted "appeals to exception" – criteria that describe the specific domestic circumstances that a state must prove to justify a temporary deviation from normal free-trade rules. Self-serving claims of having met these criteria are deterred not by requiring the payment of compensation, but rather by the ability of other nations to challenge the escaping state's assertions before the WTO dispute settlement body – as occurred, for example, when the United States imposed emergency tariffs on steel imports in 2002 (Patterson 2002). The more general insight for treaty design scholarship is that compensation schemes and appeals to exception may function as "alternative institutional means of providing flexibility without leading to its abuse" (Pelc 2009*a*: 350).

A disconnect between the design and use of escape clauses also exists for human rights agreements. The legal literature emphasizes the danger that states will invoke derogations as an excuse to repress civil and political liberties. To avoid this highly problematic outcome, international courts and treaty bodies have imposed progressively more stringent restrictions and limitations over time on the use of derogations.[11]

Two recent studies reveal that the empirical picture is more complex. The first study, drawing on two new datasets of derogations and states of emergency around

[11] U.N. Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001); *A. and Others v. United Kingdom*, App. No. 3455/05, 2009-__ Eur. Ct. H.R. (Grand Chamber) (2009).

the world from 1976 to 2007, finds that countries most likely to derogate are a subset of stable democracies in which domestic courts can exercise strong oversight of the executive, and voters can hold governments politically accountable for repressing rights. These countries also generally provide information about a derogation's duration and the rights being suspended. The study theorizes that these derogations are carried out with a specific goal in mind: to enable governments facing serious threats to buy time and legal breathing space from voters, courts, and interest groups to confront crises while signaling to these audiences that rights deviations are necessary, temporary, and lawful. Conversely, in countries where the judiciary is weak or voters cannot easily remove leaders from office, governments have little need to escape because they are unlikely to be held accountable for rights violations. When these insincere derogating countries do opt out, however, they generally do not provide information about the rights suspended, and they maintain derogations for multiple consecutive years (Hafner-Burton *et al.* 2011: 698–704).

The second study, based on similar empirical evidence, also concludes that the use of derogation clauses varies by regime type. In particular, the study finds that autocratic governments step up their violations of civil and political liberties during declared states of emergency, including some rights that the treaties designate as nonderogable. In contrast, the study finds no evidence of increased rights violations in either category when democracies derogate (Neumayer 2011).

The findings of these two studies are in tension with the expectations of the drafters of human rights treaties and of scholars of escape clause design. The drafters sought to limit repression during emergencies by creating international notification and monitoring procedures to review the legality of derogations and their associated rights restrictions. The studies suggest, however, that these flexibility mechanisms are influential not because they require states to disclose and justify derogations internationally, but rather because they enable democratic governments to signal to domestic audiences that rights suspensions are necessary, temporary, and lawful. In addition, whereas the literature on human rights escape clauses emphasizes the danger of abuse by all treaty parties, these studies suggest that these concerns are valid for autocracies but not for stable democracies – the countries that are the most likely to escape.[12] Stated more pointedly, derogation clauses appear to matter least where they are needed most.

III. STOCK TAKING ON THE STUDY OF TREATY FLEXIBILITY MECHANISMS AND AVENUES FOR FUTURE RESEARCH

The previous sections of this chapter have analyzed the variation in the design and use of exit and escape clauses in international agreements. Scholars have recently

[12] Neumayer (2007) and Bradley and Goldsmith (2000) reach a similar conclusion – that democracies are more likely than other types of states to file reservations to human rights treaties.

identified similar variation in other formal flexibility tools listed in Table 7.1, including devices that relate to a treaty's entry into force, its operation, and its termination. Taken together, these studies suggest a number of general conclusions about how flexibility tools promote or inhibit cooperation among nations, as well as avenues for future research.

A. *Stock Taking on the Study of Treaty Flexibility Mechanisms*

The studies reviewed in this chapter provide increasing evidence that formal flexibility mechanisms are not superfluous, boilerplate, or symbolic provisions that appear in the final clauses of treaties out of habit or happenstance. To the contrary, the studies support the central claim of rational design scholars – that governments manage the risks of international cooperation not only by adjusting a treaty's substantive standards and its membership rules, but also by selecting from among an array of flexibility devices. The studies also suggest a more specific finding – that states make tradeoffs among potentially available flexibility tools in an attempt to calculate an overall level of treaty risk.[13] To be clear, these conclusions do not rule out the possibility that certain categories of treaties or types of flexibility mechanisms are not in fact designed, or are not designed rationally. But they do suggest that rational design should be a baseline assumption for those who study treaty flexibility.

A second general conclusion that emerges from the literature reviewed in this chapter is that the use of flexibility mechanisms sometimes diverges from the expectations of a treaty's drafters and the conjectures of rational design scholars. In some instances, the unanticipated behavior relates to how frequently states invoke the flexibility tools available to them. In others, states with certain domestic characteristics – such as those with democratic or autocratic governments – are, contrary to predictions, the predominant users of particular flexibility tools. And, in still other cases, there are unanticipated interaction or substitution effects among formal and informal flexibility mechanisms, some of which may impose fewer costs or offer greater benefits.[14]

[13] The nearly 200 conventions negotiated under the auspices of the ILO provide an example. None of these treaties permit reservations, which would be inconsistent with the organization's tripartite membership structure of governments, workers, and employers (McMahon 1965–66). However, the conventions include other flexibility tools that enable states to customize their legal obligations in much the same way as reservations. Some conventions contain standards that apply only to designated countries. Others set forth general principles and relegate more detailed rules to nonbinding recommendations on the same topic. And still others allow ratification in parts or exclude designated industries or types of workers (Servais 1986).

[14] One example of a substitution effect is the finding, discussed above, that states have used the escape clause in Article XIX and appeals to exception as alternative flexibility tools in the GATT. An illustration of how Article XIX did not function as expected concerns so-called gray area measures in which one GATT member convinces another to "voluntarily" restrain exports or agree to other forms of managed trade. These gray area measures have often been more pervasive than invocations of Article XIX's formal escape clause (Dunoff 2010).

B. *Avenues for Future Research*

The importance of flexibility tools to treaty negotiators, as well as the divergences between flexibility tools as they appear on paper and as they are applied in practice, suggests several lines of inquiry that scholars might pursue in future studies.

First, although much can be learned from analyzing individual flexibility mechanisms in isolation, a deeper understanding of how nations cooperate requires considering the relationship among different flexibility tools. A study of treaty duration by Koremenos (2005) is a pioneer in this regard. It considers whether exit and escape clauses and delegation to international institutions are substitutes for finite duration provisions. Koremenos finds that exit and escape clauses "seem to resolve different problems than finite duration," but that the delegation of decision-making authority may be a viable alternative to limiting a treaty's life span (Koremenos 2005: 561). Other studies might consider whether certain flexibility tools are complements or substitutes. This research would be especially welcome for issue areas – such as environment and national security – for which treaty flexibility tools have thus far received less attention.

A second promising avenue for research involves going beyond the analysis of treaty texts and institutional design features to consider when and how states actually exercise the formal and informal flexibility mechanisms available to them. Failure to address how flexibility tools actually function in practice risks two types of errors. On the one hand, treaties with few flexibility mechanisms (i.e., agreements that are highly sovereignty-restrictive on paper) may turn out to be far less constraining in fact, for example, due to informal flexibility practices not reflected in treaty texts (Helfer 2008*b*). Conversely, factors such as reputational concerns, asymmetric distributions of power, or entrenched behavioral norms may deter states from invoking flexibility clauses, with the result that those clauses exist only in principle (Guzman and Landsidle 2008). Examining the use of flexibility provisions also helps to guard against the *post hoc ergo propter hoc* errors to which rational design conjectures are sometimes prone.

Third, future research could investigate how flexibility tools interact with the form and substance of international agreements more generally (Raustiala 2005). For example, scholars might consider how the number, type, scope, and combination of flexibility devices are influenced by four overarching constraints that treaty negotiators face: (a) a "participation constraint" that results from a desire to induce all states affected by a particular cooperation problem to join an agreement (Downs, Rocke, and Barsoom 1998; Barrett 2003; Helfer 2008*a*); (b) a "sovereignty constraint," characterized by an aversion to delegating authority to international institutions, even where doing so provides an effective way to resolve transborder collaboration problems (Bradley and Kelley 2008); (c) an "information constraint" caused by pervasive uncertainties relating to future events and the preferences of other states (Koremenos *et al.* 2001); and (d) a "problem structure constraint" that is

a function of the externally determined features of a substantive issue area, such as its public goods or club goods character (Sandler 2004; Mitchell 2006).

A fourth line of inquiry might probe whether flexibility mechanisms are especially appealing to – and most likely to be used by – particular types of domestic regimes. As noted previously, several recent studies of human rights treaties find that democracies reserve and derogate more frequently than do other states. Scholars might consider whether the design and use of flexibility tools in other issue areas exhibit similar patterns and, if they do, develop and test hypotheses to explain these findings. These hypotheses should take into account the four constraints on treaty negotiators listed in the previous paragraph, each of which relates to factors external to states. But they should also consider whether domestic politics and domestic institutions explain the observed correlations between regime type and the design and use of particular flexibility tools.

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