

# Response

## Not Fully Committed? Reservations, Risk, and Treaty Design

Laurence R. Helfer<sup>†</sup>

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### I. INTRODUCTION

Ed Swaine's Article, *Reserving*,<sup>1</sup> sheds new theoretical light on an old and vexing question in international law: what rules should govern the common practice of filing unilateral reservations to multilateral treaties? The regulation of these unilateral opt-out devices has been a longstanding irritant for international legal scholars. The default rules governing reservations in the Vienna Convention on the Law of Treaties are complex, ambiguous, and often counterintuitive. And the practice of states—both those that reserve and those that do not—is little better. States often bargain around the default rules by negotiating treaty-specific risk management provisions (but frequently do not). They sometimes object to plausibly treaty-incompatible reservations (but just as often do not). And they sometimes allow treaty bodies to review the validity of reservations (but they also challenge that authority, claiming for themselves the sole power to judge their treaty partners' unilateral statements).

In seeking to bring some order to this chaos, Swaine's *Reserving* makes three important contributions. First, the Article offers an informative primer on reservations-related lawmaking now underway in multiple venues. Swaine carefully documents the initiatives by states and international law experts that seek to optimize or at least marginally improve upon the existing rules governing reservations. And he illustrates his points by drawing upon a broad

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<sup>†</sup> Professor of Law and Director, International Legal Studies Program, Vanderbilt University Law School.

1. Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006).

array of treaty practice, including examples from human rights, the laws of war, arms control, cybercrime, environmental protection, transnational judicial procedure, diplomatic immunity, the law of the sea, and many others. International lawyers who read *Reserving* will come away with a much richer understanding of the many subtle legal issues embedded within the international reservations regime.

Second, and far more significantly, *Reserving* brings the insights of law and economics and rational choice to bear on the practice of unilateral reservations. In doing so, it casts doubt upon the conventional wisdom that reservations systematically benefit reserving states and disadvantage non-reserving states. Challenging this widely held view, Swaine develops a positive theory of non-reserving states' interests. He argues persuasively that the ability to reserve enhances the depth and breath of treaty commitments for all states and that the act of reserving reveals useful information about a state's reputation and its propensity to comply with international law. Seen from this perspective, reservations are not a necessary evil that states grudgingly tolerate to secure broader treaty participation. They are, instead, useful tools of treaty design that help to promote interstate cooperation.

Third, *Reserving's* focus on the law and practice of unilateral treaty opt-outs fills a gap in a growing body of writing by scholars who use interdisciplinary methods to analyze specific facets of the international legal system. Recent books and articles in this vein have analyzed intergovernmental organizations,<sup>2</sup> international courts and tribunals,<sup>3</sup> soft law, and a wide array of treaty "risk management tools,"<sup>4</sup> including exit clauses,<sup>5</sup> escape clauses,<sup>6</sup> membership rules,<sup>7</sup> renegotiation and amendment procedures,<sup>8</sup> use of framework conventions and protocols,<sup>9</sup> and the relationship between treaty form and substance.<sup>10</sup> Viewed collectively, these works provide a more precise account of state interests in shaping legal rules

2. See, e.g., JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005); Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. (forthcoming Apr. 2006); Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

3. See, e.g., Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005).

4. See RICHARD B. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT*, at ix-x (1981).

5. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005); Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

6. See Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001).

7. See SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING* (2003); Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

8. See Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549 (2005).

9. See John K. Setear, *Ozone, Iteration, and International Law*, 40 VA. J. INT'L L. 193 (1999).

10. See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

and institutions to achieve joint gains. With only a few exceptions,<sup>11</sup> however, scholars employing interdisciplinary approaches have largely ignored the issue of reservations.

In this Response, I offer three modest additions to Swaine's insightful contribution to this literature. First, I apply his theory of state interests and information to a dynamic model of reserving that takes account of temporal issues such as when states file reservations and how treaty commitments change over time. Second, I extend *Reserving's* analysis to the flexibility devices that states employ when they preclude reservations or bargain around the Vienna Convention's default rules. Third, I consider the relationships between reservations and other treaty flexibility tools and explore the consequences of those relationships for managing the risks of international agreement.

## II. A DYNAMIC MODEL OF TREATY RESERVATIONS

The theory of state interests and information proffered in *Reserving* is essentially static. It does not address when a state reserves relative to the date of a treaty's conclusion or to earlier ratifications by other treaty parties. Nor does the theory consider how reservations relate to treaties whose obligations evolve over time in response to rulings by international tribunals or to changes in the treaties' geostrategic environment. I explore these two aspects of a dynamic model of reservations in the sections below.

### A. A First Mover Disadvantage To Reserving?

First, it seems plausible that both the strategic benefits to reserving states and the informational benefits to non-reserving states will vary over the course of a treaty's life cycle. Consider the position of a reserving state that ratifies a treaty immediately after the conclusion of the diplomatic conference finalizing its text as compared to the position of a reserving state that ratifies many years after the treaty has entered into force.

An early reserver signals that it is willing to cooperate, but only on its own terms. This same message arguably attaches to any reservation. But early reservations are likely to be especially strong indicia of non-cooperation, inasmuch as they deviate from the final text that the parties have only just finished negotiating. The reputational cost to reserving early may therefore be considerable.<sup>12</sup>

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11. See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002) [hereinafter Goodman, *Human Rights Treaties*]; Francesco Parisi & Catherine Ševčenko, *Treaty Reservations and the Economics of Article 21(i) of the Vienna Convention*, 21 BERKELEY J. INT'L L. 1 (2002); Vincy Fon & Francesco Parisi, *The Hidden Bias of the Vienna Convention on the Law of Treaties* (George Mason Univ. Law and Economics Working Paper 03-20, 2003), available at <http://www.gmu.edu/faculty/papers/docs/03-20.pdf>.

12. This is so even if the reserving state has participated in drafting the treaty and revealed during the negotiations its propensity to reserve after the treaty's adoption. As Swaine correctly notes, future threats of reserving made during negotiations are "cheap talk" relative to the later decision to file a formal reservation. See Swaine, *supra* note 1, at 339-40.

Conversely, the benefits to reserving states are diminished by the disclosure of their position early in the ratification process. With each subsequent ratification, another treaty party will have a fresh opportunity to object to the reservation and, in extreme cases, to prevent the treaty from entering into force between itself and the reserving state. In this way, early reservations can remain legally at risk for many years, increasing uncertainty for the reserving state while providing non-reserving states as a group with greater latitude to manage the treaty's risks.<sup>13</sup>

By contrast, late-ratifying states that file reservations are in a more advantageous position relative to non-reserving states. They have at their disposal a wealth of information about the reactions of existing treaty members to previous reservations, including reservations that are similar or identical to those the late-ratifying state wishes to make. This information is likely to be particularly useful to the reserving state. It reveals whether one or more non-reserving states have objected to earlier reservations, the identity of the objecting states, the factual basis of their objections, and the strength of their opposition (as manifested, for example, by whether the non-reserving states deem that the treaty has not entered into force with respect to the reserving state). If, as Swaine argues, non-reserving states benefit from "rules that give them flexibility in reacting to reservations and . . . allow them to reserve judgment as to whether, how, and when reservations may be opposed,"<sup>14</sup> that benefit is considerably reduced if non-reserving states have already tipped their hand by responding (or failing to respond) to earlier reservations.

On the whole, therefore, there may be a first mover *disadvantage* to reserving. All other things being equal, in other words, the value of reservations to reserving states appears to be smaller (and the informational and strategic benefits to non-reserving states concomitantly greater) the closer a reservation is made to the date of the treaty's conclusion and the earlier it is made relative to the reservations of other states. This claim is consistent with the finding, noted in *Reserving*, that latecomers to a treaty make more reservations than early ratifiers.<sup>15</sup> But it also suggests a broader theoretical point—that Swaine's claims concerning the informational value of reservations can profitably be applied not only to non-reserving states, but also to interested non-member states that are considering whether (and if so, when) to ratify a treaty.

## B. *Changing Treaty Commitments and Post-Ratification Reservations*

A second set of issues that a dynamic model of reservations highlights is how states respond to changes in a treaty's obligations or shifts in the geostrategic context in which it is embedded. For example, an international

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13. These disadvantages of early reservations must be weighed against the possibility that early non-reserving states will be more likely to withhold their objections out of concern that doing so may cause the state to withdraw its ratification and thus prevent or delay the treaty's entry into force.

14. Swaine, *supra* note 1, at 345.

15. *Id.* at 342 n.210.

tribunal authorized to interpret the treaty may adopt an expansive interpretation of its terms. Or new and unexpected economic or political shocks may make adherence to existing treaty obligations more onerous.

Changes of this nature can significantly raise the cost of compliance for one or more treaty parties. States may respond to such increased costs multilaterally, for example by renegotiating the treaty, amending its provisions, or issuing an official interpretation to reverse a tribunal's expansive rulings. But increased compliance costs may also trigger a unilateral response in which a state denounces the treaty and then re-accedes to it with a reservation relating to the changed provisions.

This strategy is controversial and its validity under international law is unsettled.<sup>16</sup> In what is surely the most famous example, Trinidad and Tobago and Guyana denounced the First Optional Protocol to the International Covenant in 1998 and 1999, respectively. The two states then immediately re-acceded to the Protocol with reservations that precluded defendants on death row in those two countries from filing petitions with the United Nations Human Rights Committee. The states adopted this strategy in response to increasing constraints on their ability to impose capital sentences as a result of decisions by international tribunals in favor of death row defendants.<sup>17</sup>

The reactions of other states parties to this maneuver were overwhelmingly negative. Eleven European countries—all of which had abolished capital punishment—filed objections to the substance of the two reservations and to the procedure by which the two Caribbean nations had interposed them.<sup>18</sup> France's objection contained the most unequivocal condemnation, characterizing the denunciation and re-accession as an "abuse of process" and "a clear violation of the principle of good faith."<sup>19</sup> Other objections ranged from equally disapproving statements to more equivocal claims that the "correctness of the procedure" was "doubtful"<sup>20</sup> or that it "may set a bad precedent."<sup>21</sup>

In late 1999, as the European states were filing these objections, the Human Rights Committee received a petition from a death row inmate against

16. See Comm. of Legal Advisers on Pub. Int'l Law (CAHDI), *Practical Issues Regarding Reservations to International Treaties*, 19th mtg., CM (2000) 50, App. 4 (2000), available at <https://wcm.coe.int/ViewDoc.jsp?id=348409&Lang=en> ("Recently, there have been instances where States have denounced a treaty to which they had not made reservations with a view to re-acceding to the treaty with reservations. The [Vienna Convention] has no specific rules covering this situation. The validity of this action is controversial.").

17. For a more detailed discussion of these events, see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

18. See Optional Protocol to the International Covenant on Civil and Political Rights, Ratifications and Reservations, available at <http://www.ohchr.org/english/countries/ratification/5.htm> [hereinafter *Optional Protocol Reservations*] (reproducing texts of objections by Denmark, France, Germany, Ireland, Italy, the Netherlands, Norway, Poland, Spain, Sweden). Curiously, though the reservations filed by Guyana and Trinidad and Tobago were virtually identical, only seven states (Finland, France, Germany, the Netherlands, Poland, Spain, and Sweden) objected to both reservations. *Id.*

19. *Id.*

20. *Id.* (objection of Spain).

21. *Id.* (objection of Germany).

Trinidad and Tobago. The state responded on procedural grounds, arguing that its reservation deprived the Committee of jurisdiction to review the petition.<sup>22</sup> Rejecting this claim, a majority of the Committee concluded that the substance of the reservation was incompatible with the object and purpose of the Optional Protocol. Far more controversially, it severed the reservation from Trinidad and Tobago's re-accession to the Protocol, binding the state to the entire treaty without the benefit of the reservation. Trinidad and Tobago promptly responded by denouncing the Optional Protocol.<sup>23</sup> To date, it has not rejoined the treaty.

Although European governments opposed the denunciation and re-accession maneuver by these two Caribbean countries, they have been more amenable to the procedure when their own treaty commitments are at stake.<sup>24</sup> In 2002, for example, Sweden denounced the Convention on the Reduction of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality and then re-acceded with a reservation limiting its obligations under Chapter II of that treaty.<sup>25</sup> In response to the increased risks of international terrorism, British Prime Minister Tony Blair issued a proposal in 2003 (which he later withdrew) to denounce the European Convention on Human Rights and then rejoin with a reservation exempting Britain from the obligation not to deport asylum seekers who pose a threat to national security to countries where they could face degrading treatment or punishment.<sup>26</sup> And Switzerland considered employing the same procedure in the early 1990s in the wake of an adverse ruling by the European Court of Human Rights striking its initial reservation to the Convention's fair trial provisions.<sup>27</sup>

Denunciation and re-accession presents a difficult issue for Swaine's theory of reservations. On the one hand, such a maneuver may be nothing more than a crass attempt to evade legal obligations just at the point when

22. *Kennedy v. Trin. & Tobago*, Communication No. 845/1999, U.N. Doc. CCPR/C/67/D/845/1999 (Nov. 2, 1999), reprinted in 2 Human Rights Comm., *Annual Report of the Human Rights Committee for 2000*, at 266, U.N. Doc. A/55/40 (2000).

23. See Glenn McGrory, *Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol*, 23 HUMAN RIGHTS Q. 769, 804-12 (2001).

In contrast to Trinidad and Tobago, Guyana has neither denounced the Optional Protocol nor withdrawn its reservation, notwithstanding repeated requests by the Human Rights Committee that it do so. It has, however, refused to comply with the Committee's recommendations in cases involving capital punishment. See Seventeenth Meeting of Chairpersons of the Human Rights Treaty Bodies, *The Practice of Human Rights Treaty Bodies with Respect to Reservations to International Human Rights Treaties*, HRI/MC/2005/5, at 36 (Jun. 13, 2005) [hereinafter *Treaty Bodies Reservations Practice*].

24. See Council of Europe, *Practical Issues Regarding Reservations to International Treaties*, 708th Mtg., May 3, 2000, available at <http://cm.coe.int/dec/2000/708/a4.htm> (recommending a ban on late reservations but noting that "a number of States have started to explore ways around this prohibition, by denouncing a treaty and re-ratifying the same treaty while formulating reservations").

25. See Convention on the Reduction of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, Chart of Signatures and Ratifications, Europ. T.S. No. 43 (1963), available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=043&CM=8&DF=2/19/05&CL=ENG>.

26. Joshua Rozenberg, *Should Britain Twist Human Rights Law To Meet Its Own Ends?*, DAILY TELEGRAPH, Jan. 30, 2003, at 21; Alan Travis, *Asylum in Britain—You Can't Quit Treaties, Blair Warned*, GUARDIAN, Feb. 6, 2003, at 11.

27. See JÖRG POLAKIEWICZ, TREATY-MAKING IN THE COUNCIL OF EUROPE 96 (1999); Konstantin Korkelia, *New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights*, 13 EUR. J. INT'L L. 437, 466 n.107 (2002).

they begin to impose real constraints. Even more disturbingly, the procedure sanctions the unilateral and selective rejection of only those treaty commitments that the denouncing state disfavors, while leaving the remaining treaty provisions intact. If widely followed, therefore, denunciation and re-accession with reservations would undermine the value of treaty bargains in general and would specifically prejudice non-reserving states that had relied on the terms of their treaty partners' initial ratification decisions.<sup>28</sup>

As I explain below, however, several reasons suggest that states will employ such a maneuver only infrequently. Moreover, in the rare instance when a state does resort to the procedure, the information about deviance and reputation that it conveys to non-ratifying states is likely to be different—and more consequential to non-reserving states—than the information disclosed by standard reservations.

As an initial matter, the frequency of denunciation and re-accession will be reduced by the filing of late reservations. Although legal commentators have frowned on this practice, it is sufficiently common that treaty depositories have developed different procedures for circulating late reservations to non-reserving states for their review.<sup>29</sup> The International Law Commission has recommended allowing late reservations, but only if no other treaty party objects within a specified period of time (usually twelve months).<sup>30</sup> According to the Commission's proposal, an objection by even one other state "destroys" the late reservation and returns the putative reserving state to its original treaty bargain.<sup>31</sup>

The Commission's restrictive proposal—which has the effect of giving every state a veto over post-ratification reservations—makes sense given the strategic benefits of reserving late.<sup>32</sup> But the underutilization of objections generally, and their limited use to block post-ratification reservations in particular, suggests that late reservations have become a regular, if infrequent, component of modern treaty practice.<sup>33</sup> Thus, a state that seeks to revise its treaty commitments unilaterally in response to changed circumstances has at its disposal a lawful, albeit constrained, mechanism for doing so.

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28. See Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Third Session*, at 481, U.N. Doc. A/56/10 (Apr. 23-June 1 & July 2-Aug. 10, 2001) [hereinafter *2001 ILC Report*] (stating that "the principle *pacta sunt servanda* itself . . . would be called into question [if] at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question"); POLAKIEWICZ, *supra* note 27, at 96 ("Denunciation followed by immediate re-ratification may even constitute an abuse of rights."). *But see* Mads Andenas & David Spivack, *The U.N. Drug Conventions Regime and Policy Reform* 6 (Legal Opinion Prepared by the British Inst. of Int'l and Comp. Law, 2003), available at [http://www.senlisCouncil.net/documents/BIICL\\_opinion](http://www.senlisCouncil.net/documents/BIICL_opinion) ("There is nothing to prevent a party from denouncing (withdrawing) and then reaccessing solely for the purpose of making a reservation which it did not make originally, and which it was then too late to make.").

29. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 129-30 (2000) (noting the phenomenon of late reservations and response by the U.N. Secretary General); *2001 ILC Report*, *supra* note 28, at 482-85 (discussing examples of the filing of late reservations and responses by treaty depositories).

30. See *2001 ILC Report*, *supra* note 28, at 477-95.

31. *Id.* at 494.

32. See *supra* Part II.A.

33. See *2001 ILC Report*, *supra* note 28, at 482-86 (discussing examples of late reservations to which no other state objected).

Where, however, a late reservation is blocked or an objection is anticipated, a state seeking to restrict its treaty obligations *ex post* must consider whether to adopt the legally and politically riskier strategy of formally leaving the treaty and rejoining it with a new reservation.<sup>34</sup> Surprisingly, the Commission's report does not address the legality of this procedure, although it quotes favorably from a commentator who accepts its validity.<sup>35</sup> However, even if the practice is lawful, it is unlikely to be utilized very frequently.

First, the reputational harm to a state that denounces and re-accedes to a treaty will be significant. The denunciations by Trinidad and Tobago and Guyana, for example, produced a rare instance of multiple common objections to a reservation. Reputational concerns also led Tony Blair to withdraw his proposal to denounce and re-ratify the European Convention on Human Rights.<sup>36</sup> Australia's Joint Standing Committee on Treaties reached a similar conclusion after holding hearings on the Convention on the Rights of the Child (CROC).<sup>37</sup> A majority of submissions favored denouncing the CROC to allow Australia to re-accede with reservations covering the "concept of the autonomous child."<sup>38</sup> The Committee rejected this approach on the grounds that it "would do significant harm to Australia's international reputation."<sup>39</sup>

Given these high reputational costs, those few withdrawals and re-accessions that do occur are likely to reflect fundamental clashes between the national interests of denouncing-reserving states and specific treaty provisions—often provisions that have evolved in unexpected ways or that create strong domestic frictions. Allowing states to interpose reservations to these clauses, even after ratification, generates valuable information about the nature of these conflicts. For example, in a dissenting statement to the report on the CROC, three members of the Joint Standing Committee on Treaties recommended that Australia denounce the CROC and re-accede with reservations. The purpose for doing so was to "alert the international community to the genuine concerns which the Australian people have with the CROC."<sup>40</sup> Such statements can also signal the state's propensity to violate the treaty if the reservation is not adopted, violations that might otherwise go unobserved, especially in treaty systems with weak monitoring and enforcement mechanisms.

34. This assumes, of course, that the treaty expressly or implicitly authorizes denunciation or withdrawal. *See* Helfer, *supra* note 5, at 1592-95 (discussing treaties that foreclose exit options).

35. 2001 ILC Report, *supra* note 28, at 482 ("A party remains always at liberty to accede anew to the same treaty, this time by proposing certain reservations.") (quoting FRANK HORN, RESERVATIONS AND INTERPRETIVE DECLARATIONS TO MULTILATERAL TREATIES 43 (1988)).

36. *See* Liberty, *Joint Opinion in the Matter of Denunciation of the European Convention on Human Rights* 2-3 (Jan. 2003), <http://www.liberty-human-rights.org.uk/issues/pdfs/pannick-opinion-art-3.pdf>; Rozenberg, *supra* note 26, at 21; Travis, *supra* note 26, at 11.

37. THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, JOINT STANDING COMM. ON TREATIES, U.N. CONVENTION ON THE RIGHTS OF THE CHILD, EXECUTIVE SUMMARY, 17TH REPORT (1998), available at <http://www.aph.gov.au/house/committee/jsct/reports/report17/rept17ex.pdf>.

38. *Id.* at 6; *see also id.* at 65.

39. *Id.* at 66.

40. *Id.* at 71.

Once made aware of these problems, other treaty parties may respond in a variety of ways. They may renegotiate the agreement.<sup>41</sup> They may employ intra-treaty or extra-treaty influence mechanisms—such as side payments or sanctions—to induce or coerce the state to adhere to its initial treaty bargain. And in extreme cases, non-reserving states may exercise the “nuclear option” of preventing the re-ratified treaty from entering into force between themselves and the reserving state.<sup>42</sup>

For all of these reasons, Swaine’s information-based theory of reservations suggests that a categorical ban on denunciation and re-accession with reservations would be unwise. Such a ban would, as in the case of Trinidad and Tobago, force states with strongly held objections to specific treaty rules to quit a treaty even when all states (and perhaps nonstate actors as well) would be better off had the withdrawing state remained as a party.<sup>43</sup> It would also remove a mechanism for reserving states to convey valuable and credible information to other parties regarding the nature and intensity of their objections to changed treaty commitments or changes in the state of the world that have rendered existing treaty rules problematic or inapposite.

### III. BARGAINING AROUND THE VIENNA CONVENTION’S DEFAULT RULES

*Reserving* focuses its analytical lens on the reservations rules in the Vienna Convention on the Law of Treaties. As Swaine makes clear, however, states are free to negotiate around these default rules. The alternatives they choose range from a prohibition on reservations to affirmatively permitting reservations, either to the entire treaty or to a select number of its provisions. States can also bargain around the “object and purpose” test for assessing the validity of reservations, for example by specifying a different substantive standard or providing that reservations will be reviewed by an international tribunal. Whether or not a treaty departs from the Vienna Convention’s default rules on reservations, its drafters can also employ other flexibility devices—such as declarations, phase-in provisions, derogations, optional clauses, and amendment procedures—to manage the risks of international agreement.<sup>44</sup> Given this broad freedom of international contract, it is useful to consider how Swaine’s information-based theory applies to these tailored reservations rules and other risk management provisions.

Swaine considers the alternatives to reservations in his discussion of “package deal” treaties such as the United Nations Convention on the Law of the Sea (UNCLOS), the Rome Statute establishing the International Criminal

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41. *Id.* at 72 (advocating, in connection with denunciation and re-accession, that Australia “agitate for substantial amendments to the CROC to clearly spell out the pre-eminent role of the family and the rejection of the ‘autonomous child’ concept”).

42. In the case of Guyana and Trinidad and Tobago, however, none of the objecting countries chose this option. *See* Optional Protocol Reservations, *supra* note 18.

43. *See* McGrory, *supra* note 23, at 815 n.215 (criticizing Human Rights Committee’s rejection of Trinidad and Tobago’s re-accession reservation on the ground that “it is difficult to justify an ‘all or nothing’ policy, which in practice eliminates the right of appeal for citizens of Trinidad and Tobago who are not under sentence of death”).

44. For a comprehensive list of these risk management rules, see BILDER, *supra* note 4, at ix-x.

Court (ICC), and the WTO Agreement, each of which precludes reservations.<sup>45</sup> His plausible supposition is that such agreements—in which states “horse trade” their preferred legal rules into a unified package of obligations—may enhance treaty depth without the need for reservations. Yet Swaine is ultimately dubious of the utility of such omnibus agreements, using examples from UNCLOS to suggest that that the treaty’s no reservations rule may have prolonged negotiations, watered down obligations, and ultimately proved ineffective, inasmuch as the convention did not bar states from filing interpretive declarations.<sup>46</sup> He is similarly skeptical of treaty-specific modifications to the Vienna Convention’s default rules and of alternatives to reservations in general, opining that “[s]uch workarounds are not explored at the rate one would expect if states were intent on protecting negotiated treaty terms, and their form is often even more disappointing.”<sup>47</sup>

The empirical accuracy of these assertions is uncertain, however. Swaine cites considerable anecdotal evidence to support his claims. But there is equally persuasive evidence to the contrary.

With respect to treaty-specific reservations rules, a leading study of European treaty-making states that “the drafting practice within the Council of Europe clearly favours a system of ‘negotiated reservations’” in which treaties “exhaustively enumerate the provisions” to which a state may reserve and on what terms.<sup>48</sup> Consider as well the *Final Clauses of Multilateral Treaties Handbook*,<sup>49</sup> a reference tool published by the United Nations Office of Legal Affairs to assist governments in drafting multilateral agreements.<sup>50</sup> The Handbook’s section on reservations reviews the full spectrum of alternatives to the Vienna Convention’s default rules, illustrates them with citations to existing treaties in force, and discusses the frequency of their use.<sup>51</sup>

There is also compelling evidence that states eschew reservations altogether in certain issue areas. For example the *Handbook* states that “[t]reaties in the environmental field often prohibit reservations,” and that a similar ban applies to all 185 conventions adopted by the International Labor Organization (ILO).<sup>52</sup> The ILO Secretariat—which plays an active role in treaty-making within the organization—has consistently taken the position that reservations are inconsistent with the ILO’s tripartite membership

45. See Swaine, *supra* note 1, at 333 & n.151.

46. See *id.* at 332-33.

47. See *id.* at 325 (footnote omitted).

48. POLAKIEWICZ, *supra* note 27, at 85.

49. U.N. OFFICE OF LEGAL AFFAIRS, FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK, U.N. Sales No. E.04.V.3 (2003).

50. The *Handbook* describes final clauses as encompassing “articles on 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.” Such clauses also include provisions that “address the relationship of the treaty to other treaties, its duration, provisional application, territorial application, and registration.” *Id.* at 1.

51. *Id.* at 44-50.

52. *Id.* at 47.

structure that includes not only governments, but also workers and employers.<sup>53</sup>

In place of reservations, multilateral agreements in the environment and labor fields offer a rich array of flexibility devices and risk management tools. For treaties that protect the global environment, a principal concern is enticing developing countries to ratify and incur the often substantial costs associated with reducing environmental harms. To encourage ratification by these states, many environmental agreements adopt “differential treatment” rules that take account of disparities in resource endowments and capacities in allocating the distribution of treaty burdens and treaty benefits.<sup>54</sup> Agreements as diverse as the Montreal Protocol on Substances that Deplete the Ozone Layer, the Framework Convention on Climate Change, the Kyoto Protocol, and the Convention to Combat Desertification all contain provisions that “discriminate among states with regard to core obligations, giving developing countries less stringent commitments . . . postponing their obligations,” or absolving them legal responsibilities altogether.<sup>55</sup> Recent scholarship has emphasized that these differential treatment rules function as multilateral alternatives to unilateral reservations, cabining developing countries’ discretion to cherry-pick which treaty provisions to accept.<sup>56</sup>

In the international labor regime, the ILO Secretariat has promoted a broad array of flexibility mechanisms to customize treaties to economically and geographically disparate workplace conditions and to the needs of countries at different stages of development. Some ILO conventions, for example, identify standards that apply only to specifically designated states. Others contain general principles and relegate more detailed rules to nonbinding recommendations on the same topic. Still other labor treaties permit ratification in parts (with or without “escalator clauses” that require acceptance of additional commitments over time) or allow states to exclude designated industries or specific categories of workers.<sup>57</sup> These diverse mechanisms help states to manage risk and tailor their legal obligations in much the same way as do unilateral reservations.

These examples from environmental protection and labor treaties are merely illustrative. A more complete picture of when and how treaty negotiators bargain around the Vienna Convention’s reservations default rules requires a comprehensive empirical analysis.<sup>58</sup> But the examples discussed

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53. See J.F. McMahon, *The Legislative Technique of the International Labour Organization*, 41 BRIT. Y.B. INT’L L. 1, 77-85 (1965-66) (discussing history of and rationales for ban on reservations).

54. See PHILIPPE CULLET, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* (2003); ANITA MARGRETHE HALVORSSSEN, *EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW: DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES* (1999); LAVANYA RAJAMANI, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* (2006).

55. HALVORSSSEN, *supra* note 54, at 87; see also *id.* at 87-98 (reviewing differential treatment provisions in international environmental agreements).

56. See RAJAMANI, *supra* note 54, at 7.

57. See NICOLAS VALTICOS & GERALD W. VON POTOBOSKY, *INTERNATIONAL LABOUR LAW* 55-60 (1995); J.M. Servais, *Flexibility and Rigidity in International Labour Standards*, 125 INT’L LAB. REV. 193 (1986).

58. Barbara Koremenos has created a new data set, the Continent of International Law (COIL), to undertake such a comprehensive analysis. See Koremenos, *supra* note 8, at 554.

above do suggest some intriguing extensions of Swaine's theory of how both reserving and non-reserving states benefit from reservations.

First, treaty negotiators can use tailored reservations rules and other flexibility devices to enhance treaty breadth and depth. As with the Vienna Convention's off-the-rack reservation regime, the relationship to breadth of membership is easier to identify. By indicating which treaty clauses are reservable, by specifying the types of reservations that are permitted, or by substituting or supplementing reservations with other flexibility tools, negotiators can make treaties politically palatable to a larger number of countries.

These flexibility devices can also deepen treaty commitments, although the effect likely varies with the specific design tool that negotiators choose. For example, treaty clauses that permit temporary derogations act as an insurance policy that reduces uncertainty by providing a regulated procedure for deviation if certain exceptional conditions later arise. With the risks of future cooperation reduced, states can commit to more expansive treaty obligations than they would have accepted without these "escape clauses."<sup>59</sup> Permissive denunciation clauses, finite duration provisions, mandatory renegotiation clauses, and treaty-specific reservations rules may have similar depth-enhancing effects.<sup>60</sup>

Unlike the default rule for reservations, however, these risk management tools may have very different consequences for the disclosure of information to other states. Consider first treaties that adopt distinctive standards or procedures for formulating or evaluating reservations. These particularized rules may not only narrow options for reserving states; they may also reduce the discretion of non-reserving states to choose how to respond to reservations. Tailored reservations rules—particularly those relating to objections—may thus limit the power of non-reserving states to shift the control of treaty risks away from reserving states, undermining the principal benefit to those states that Swaine identifies.<sup>61</sup>

Other flexibility devices may have different information effects. Devices that require states to make an affirmative statement—such as declarations, derogations, and optional clauses or protocols—will generate useful information for other treaty parties. For example, a state that files a declaration recognizing a treaty body's competence to receive individual petitions signals a more serious commitment to protecting human rights than a state that eschews this optional review mechanism.<sup>62</sup> By contrast, flexibility provisions that apply automatically to all treaty parties or to predetermined categories of states—such as differential treatment rules, finite duration

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59. See 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).

60. See, e.g., Helfer, *supra* note 5, at 1637; Koremenos, *supra* note 8, at 549; Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. 289, 289-92 (2001).

61. See Swaine, *supra* note 1, at 362-63.

62. See Oona A. Hathway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1845 (2003) (analyzing compliance records of states that accept optional complaint mechanisms in human rights treaties).

provisions, and ratification in parts—will generate little or no country-specific information, even if they are highly effective in increasing membership or enhancing the depth of treaty commitments generally.

The foregoing discussion suggests the need for more rigorous analysis of the relationships among reservations and other flexibility provisions, and in particular, of how different design choices affect the production of information. I consider one such relationship below. But the broader and underappreciated theoretical point is that negotiators may be able to improve treaty design (and perhaps even treaty performance) by selecting flexibility devices that are roughly equivalent in their effects on breadth or depth, but that have very different informational effects.

#### IV. LINKING TREATY ENTRY AND EXIT: THE RELATIONSHIP OF RESERVATIONS TO DENUNCIATIONS

Treaty provisions that permit reservations do not exist in a vacuum. Rather, they operate in tandem with other flexibility devices that treaty makers use to address the pervasive risks and uncertainties of international affairs. Those who seek to reform the rules and institutions that comprise the international reservations regime need to take into account this broader design context. They must recognize, for example, that selecting rules to police the unilateral conditions states impose when they enter into treaties cannot be dissociated from the rules governing whether states may later leave those treaties. Considering the link between conditional acceptance of treaty obligations *ex ante* and restrictions on withdrawal from those obligations *ex post* helps to resolve a contentious and unsettled question of reservations law—the consequences for a state that ratifies a treaty with a reservation later determined to be invalid.

*Reserving* considers these consequences when reviewing the practice of treaty bodies and international tribunals that claim the power to decide whether reservations are compatible with the treaties they supervise.<sup>63</sup> Where international jurists or review bodies conclude that a reservation is invalid, three alternatives are possible. First, the state's ratification may be nullified (and its treaty membership terminated) absent a clear indication of its intent to adhere to the treaty without the reservation. Second, the state may be considered a party to the treaty except for the clauses to which its invalid reservation applied. Third and most controversially, the reservation may be severed. Under this approach, the state is deemed a party to the treaty in its entirety, including the provisions covered by its now stricken reservation.<sup>64</sup>

Swaine portrays an unsettled legal landscape regarding these alternatives. He relates the U.N. Human Rights Committee's position that invalid reservations are presumptively severable, and the strident opposition to that approach by several powerful nations, including the United States. As a result of these divergences, Swaine identifies a "lack of specificity as to when

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63. See Swaine, *supra* note 1, at 321-23.

64. For a comprehensive discussion of these alternatives, see Goodman, *supra* note 11.

a reservation will be deemed severable, and [an] ambiguity concerning a treaty body's final authority in any such determination."<sup>65</sup> He concludes on a cautionary note, arguing that giving treaty bodies the authority to sever incompatible reservations "risk[s] weakening treaty terms, driving reservations underground without increasing compliance, and diminishing the willingness of states to ratify."<sup>66</sup>

Swaine's concerns about the ancillary effects of severability on other aspects of treaty design are well taken. The rules that govern the validity of reservations do not operate in isolation. They function in tandem with a treaty's substantive provisions and its risk management tools to create an overall level of commitment for states parties.<sup>67</sup> To answer the question of whether a particular incompatible reservation should be severed, for example, it is also necessary to consider the provisions that control whether a reserving state can "exit" from the treaty.<sup>68</sup>

Analyzing reservations together with denunciations helps to clarify whether the remedy of severance is appropriate. In the case of treaties that prohibit denunciation,<sup>69</sup> the costs of making the wrong severability decision are quite high. If a treaty body's decision to sever is erroneous—that is, 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. Such an outcome is not only harmful to the reserving nation. It also harms non-reserving states, since the treaty system as a whole may see higher rates of noncompliance by states that are now at least partially unwilling members. By contrast, where a treaty permits denunciation, the error costs of an erroneous severability decision are lower and a presumption of severability is far more defensible. If a stricken reservation is in fact essential to a state's ratification, the state can correct the tribunal's mistaken decision to sever by invoking the treaty's denunciation clause, as

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65. Swaine, *supra* note 1, at 322-23. Commentators also dispute the relative merits of the three approaches. Until recently, most observers favored either the first or second test. Scholars advocating the third approach have argued, however, that because states have an incentive to over-reserve, an invalid reservation should be presumed to be severable, leaving the state bound to the entire treaty. See Goodman, *supra* note 11, at 537 (identifying the incentives for a state to "include more reservations than required to obtain its consent").

66. Swaine, *supra* note 1, at 363-64.

67. See Raustiala, *supra* note 10, at 582 ("We cannot understand the form or substance of an international accord in isolation because the connections between the various elements shape empirical outcomes.").

68. See Helfer, *supra* note 5, at 1640-42.

69. Four major human rights agreements do not contain denunciation or withdrawal clauses. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, 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, states are precluded from withdrawing from these treaties. See U.N. Human Rights Comm., 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), available at [http://sim.law.uu.nl/SIM/CaseLaw/Gen\\_Com.nsf/3b4ae2c98fe8b54dc12568870055fbbd/3a83e429348190f2c125688700532c38?OpenDocument](http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/3b4ae2c98fe8b54dc12568870055fbbd/3a83e429348190f2c125688700532c38?OpenDocument) (concluding that it is not possible to denounce the ICCPR).

Trinidad and Tobago did after the U.N. Human Rights Committee severed its death penalty reservation to the First Optional Protocol.<sup>70</sup>

This insight also has implications for the disclosure of information. In treaty regimes that follow a presumptive severability rule but in which no possibility of withdrawal exists, states may seek to ward off severance by asserting that each and every clause in their reservations is an essential condition of their ratification. Such overclaiming as to the strength of a state's preference for reserving may distort whether and in what form non-reserving states object to their reservations, diminishing their discretion to decide "whether, how, and when reservations may be opposed."<sup>71</sup> By contrast, tribunals or treaty bodies that sever invalid reservations to treaties from which exit is possible may trigger an increase in denunciations, perhaps followed by re-accession with a new reservation that is expressly conditional.<sup>72</sup> Or, seeking to avoid either of these outcomes, treaty bodies may initiate a new form of "reservations dialogue"<sup>73</sup> with government officials to determine whether a particular reservation—perhaps one filed many years earlier—is in fact a condition of the state's consent to be bound by the treaty.<sup>74</sup>

## V. CONCLUSION

The positive theory of state interests developed in *Reserving* helps to answer many doctrinal questions that have long preoccupied legal scholars and policymakers. It also provides a useful metric against which to assess proposals to reform existing reservations rules. Contrary to the conventional wisdom, Swaine argues that those rules serve the interests of non-reserving states in generating useful information about reserving states' reputation and propensity to comply with treaties. Reform proposals that limit or distort this information-forcing function should therefore be viewed with skepticism.

In this Response, I have used Swaine's insightful contribution to the interdisciplinary literature on treaty design to make three points. First, I have applied his theory of state interests and information to a dynamic model that considers the timing of reservations and the evolution of treaty obligations. Second, I have discussed how treaty breadth, treaty depth, and information vary when states bargain around the Vienna Convention's reservations default rules to select alternative flexibility devices. Third and finally, I have considered the link between reservations and denunciations and its consequences for deciding whether an invalid reservation should be severed from a state's ratification. Extending *Reserving* to these three issues suggests fruitful areas of future research for scholars interested in how states use legal

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70. See Helfer, *supra* note 17, at 1881.

71. Swaine, *supra* note 1, at 345.

72. See *supra* Part II.B.

73. Swaine, *supra* note 1, at 360.

74. See *Treaty Bodies Reservations Practice*, *supra* note 23, at 18 (discussing proposal that treaty bodies ask governments, during their review of state reports, "what their choice would be between remaining a party to the treaty without each reservation and denouncing it") (internal quotations omitted).

rules and institutions to generate information and to optimize the benefits of international cooperation.