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INTRODUCTION TO SYMPOSIUM ON TREATY EXIT AT THE INTERFACE OF DOMESTIC AND INTERNATIONAL LAW

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This symposium analyzes the relationship between international and domestic legal rules governing treaty exit. Any attempt by a state to withdraw from or denounce a treaty implicates both sets of legal norms: Domestic law determines which branch of government decides whether to exit, and international law determines whether that act is effective in ending the state's treaty obligations. These two bodies of law intersect in interesting and under-explored ways. For example, the domestic authority to withdraw may (or may not) be subject to international law constraints; conversely, the international effect of a purported treaty withdrawal may (or may not) depend on whether domestic constitutional and statutory requirements have been satisfied.

Treaty exit has recently emerged as an important topic in both public international law and comparative foreign relations law. The seven essays in this symposium offer a rich and diverse analysis of treaty withdrawals. Some of these actions have generated litigation and made headlines in newspapers around the world; others are less well known but no less significant for the countries involved and for understanding how treaty exit operates at the interface of domestic and international law.

The symposium begins with an essay by Curtis Bradley and me that compares treaty exit in the United States, the United Kingdom, and South Africa.[1] After examining the longstanding practice of unilateral presidential withdrawals in the United States and the refusal (thus far) of U.S. courts to review the constitutionality of that practice, the essay summarizes recent judicial decisions in the United Kingdom and South Africa which held that parliamentary approval was required before these states could withdraw from, respectively, the European Union and the International Criminal Court (ICC). We conclude that these decisions—while important and interesting in their own right—offer limited insights for debates in the United States over whether the President has unilateral treaty withdrawal authority and how such withdrawals affect international agreements implemented by statute.

The next four contributions to the symposium offer deeper explorations of the evolving legal landscape in these three countries. The essays by Alison Young and Michael Waibel focus on different aspects of the U.K.'s "Brexit" from the European Union. Young provides a detailed and thoughtful examination of *R (Miller) v. Secretary of State for Exiting the European Union*, the U.K. Supreme Court's momentous 2017 judgment holding that the government does not have the prerogative power to withdraw from the European Union.[2] She reviews the judgment and

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[1] *See* Curtis A. Bradley & Laurence R. Helfer, *Treaty Exit in the United States: Insights from the United Kingdom or South Africa?*, 111 AJIL Unbound 428 (2017).

[2] *See* Alison L. Young, *Brexit,* Miller, *and the Regulation of Treaty Withdrawal: One Step Forward, Two Steps Back?*, 111 AJIL Unbound 434 (2017).

identifies narrower and broader interpretations of the majority's ambiguous reasoning. Young concludes by considering the implications of these alternatives for whether the executive can unilaterally withdraw from other international agreements to which the U.K. is a party, in particular the European Convention on Human Rights and the Belfast Agreement.

Waibel considers the public international law implications of Brexit.[3] He first analyzes the relationship between the bespoke withdrawal clause in Article 50 of the Treaty on European Union and the customary international law of treaty withdrawal codified in Article 70 of the Vienna Convention on the Law of Treaties. Waibel concludes that although Article 50 identifies a specific procedure for exit from the European Union, it does not displace other customary rules governing withdrawal, most notably the financial obligations that the United Kingdom incurred to the European Union prior to its departure. In the second half of the essay, Waibel considers whether the doctrine of acquired rights protects the preexisting legal entitlements enjoyed by nationals of other EU member states. He concludes that EU citizens who are permanent residents of the United Kingdom are entitled, under this doctrine, to retain that status even after Brexit.

Jean Galbraith analyzes treaty exit by the United States, unpacking the conventional wisdom that presidents have unilateral constitutional authority to withdraw the United States from most international agreements.[4] Galbraith explains how this seemingly straightforward rule masks a domestic legal landscape that is "messy, convoluted, and pocketed with uncertainty."[5] Her essay then considers the interesting and important questions of how actual and threatened exits by the Trump Administration may affect this landscape, and how other government institutions might attempt to limit executive discretion with respect to treaty withdrawal. Galbraith concludes that the most plausible way to impose such constraints is by incorporating them into international agreements, legislation, or administrative procedures.

South Africa's aborted withdrawal from the Rome Statute establishing the ICC is the starting point for Hannah Woolaver's thought-provoking essay.[6] Woolaver begins by reviewing *Democratic Alliance v. Minister of International Relations and Cooperation*, a recent High Court decision invalidating the executive's purported withdrawal from the ICC. *Democratic Alliance* rejected the unilateral withdrawal on procedural grounds—that the South African Constitution required parliament to approve the exit and repeal the legislation implementing the Rome Statute before the executive could file a notice of withdrawal. Woolaver then considers substantive constitutional arguments for challenging treaty withdrawals, in particular those that diminish the protection of fundamental rights, and she explores the implications of international law's refusal to consider whether a state's purported withdrawal violates its own domestic legal requirements.

Alexandra Huneeus and René Fernando Urueña offer a fascinating study of how constitutional courts in Latin America have provoked or facilitated treaty withdrawals.[7] Their essay explores three recent cases in which courts joined or led efforts to escape treaty obligations in response to adverse judgments of an international court—a Venezuelan Supreme Court decision urging President Hugo Chávez to denounce the American Convention on Human Rights; a petition by the executive in Colombia to have that country's acceptance of the jurisdiction of the International Court of Justice declared unconstitutional; and a judgment of the Dominican Republic Constitutional Tribunal holding unconstitutional the executive's unilateral acceptance of the jurisdiction of the

[3] *See* Michael Waibel, *Brexit and Acquired Rights*, 111 AJIL UNBOUND 440 (2017).

[4] *See* Jean Galbraith, *The President's Power to Withdraw the United States from International Agreements at Present and in the Future*, 111 AJIL UNBOUND 445 (2017).

[5] *Id.* at 445.

[6] *See* Hannah Woolaver, *Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court*, 111 AJIL UNBOUND 450 (2017).

[7] *See* Alexandra Hunneus & Renè Ureña, *Treaty Exit and Latin America's Constitutional Courts*, 111 AJIL UNBOUND 456 (2017).

Inter-American Court of Human Rights. Huneeus and Urueña analyze each of these episodes, which together illustrate that the region's constitutional courts are taking on a surprisingly prominent role in foreign relations.

Tania Voon and Andrew Mitchell conclude the symposium with a fascinating case study of the Russian Federation and the Energy Charter Treaty (ECT).[8] Russia signed the ECT in 1994 but never ratified it. Nevertheless, Russia was required to give effect to the treaty—including its chapter on investor-state dispute settlement—under the ECT's provisional application provision. Moreover, pursuant to a survival clause in the ECT, Russia's obligations remain in effect for twenty years after it formally notified the depository in 2009 that it would not ratify the treaty. Relying on the ECT's provisional status and the survival clause, the Yukos Oil Company filed multiple claims against Russia that resulted in several arbitral rulings in the company's favor, including a staggering U.S. $50 billion award. Russia has contested these rulings before several national courts, and those challenges are currently pending. The case study thus offers a cautionary tale about the lingering legacy of international investment agreements even after exit has been accomplished.

[8] *See* Tania Voon & Andrew D. Mitchell, *Ending International Investment Agreements: Russia's Withdrawal from the Energy Charter Treaty,* 111 AJIL Unbound 461 (2017).