Working Paper

The Domestication of International Commitments

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Preface

What happens to international environmental agreements once they are signed, and how does the implementation of such agreements influence their effectiveness? These are the questions that motivate the IIASA project "Implementation and Effectiveness of International Environmental Commitments (IEC)."

Virtually all international environmental commitments must be "domesticated," i.e., tranformed into domestic rules before they can affect the individuals, firms and organizations which international environmental agreements ultimately aim to influence. In this paper, Kal Raustiala describes and compares the legal and administrative processes by which six OECD countries (France, Germany, Italy, The Netherlands, the United Kingdom and the United States) transform their international obligations into domestic law. There are differences in the extent to which these countries include the exact text and terms of international obligations in the legal acts that give them force in domestic law. The countries vary enormously in their political philosophy toward international law: some give international commitments primacy over domestic law, while others protect legislation that implements international commitments from being overturned by later domestic legislation. The many differences lead to several hypotheses about expected levels of implementation and compliance in these six countries, which Raustiala explores.

Despite the differences, the behavior of the countries in practice appears to be more uniform. This may reflect the fact that all the countries insulate the making and implementing of foreign policy within the executive. The author explores the extent to which this discretion varies across the six countries, and how it interacts with the constitutional and political styles of implementing international commitments into domestic law.

Kal Raustiala began the paper while participating in IIASA's Young Scientists Summer Program in the summer of 1994. On the basis of his work he was awarded the Peccei Scholarship, which financed a return visit to the IEC project the following year.

THE DOMESTICATION OF INTERNATIONAL COMMITMENTS

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Abstract

International commitments generally become binding domestic law through a complex process of "domestication" or transformation. Without this process, international commitments frequently lack force or even meaning at the national level, where implementation actually takes place. This paper explores the legal process of implementation and examines how international commitments are transformed into domestic law in six OECD nations: the US, UK, Germany, France, Italy, and the Netherlands. To the degree that institutional design affects the output of complex organizations (e.g. governments), the variations in the process of domestication should affect compliance with and the implementation of international commitments. The rules of ratification, interpretation, judicial challenge, and the priority or ranking of treaty commitments *vis-a-vis* ordinary statutory law are all surveyed and found to vary widely. These factors appear to interact in complex ways. In addition to some simple hypotheses derived from the institutional variations uncovered, three main conclusions emerge: formal institutional rules appear in practice to be substantially modified and/or elaborated by informal rules and methods; the complexity of both formal rules and actual practice in the domestication of international agreements raises doubts about the importance--and the ascertainability--of legality regarding international commitments; and, these first two conclusions are likely to become less certain over time as the insulation of the executive in foreign affairs--which is a major underlying cause of these conclusions--decreases in response to changes in the nature and scope of international law.

I would like to acknowledge the helpful assistance and commentary of Dan Bodansky, Abram Chayes, Robert Keohane, Anne-Marie Slaughter, David Victor, and Jacob Werksman, as well as the financial support of the US NMO for IIASA.

To fulfil its task, international law has to turn continously to domestic law. Without the latter it is in many respects utterly impotent. It is like a field marshal who only issues his orders to the commanding officers of the army and cannot achieve his aims unless the generals, in keeping with his instructions, in turn issue orders to their subordinates. If the generals fail to do this, the field marshal will lose the battle. And just as the field marshal's order gives rise to further orders by his subordinates, similarly a single rule of international law brings about a number of rules of domestic law, all pursuing the same end: to implement international law within the domestic framework of States.

Heinrich Triepel
(from a lecture at the Hague Academy, 1923)[1]

I Introduction

This working paper explores the structure and process of "domesticating" international treaty commitments.[2] By domestication I refer to the process by which formal international commitments become legally binding on the relevant domestic actors; typically, through codification in national or "municipal" law. Specifically, this paper explores in six cases cross-national institutional variations in this process--and in the rules of interpretation and judicial review--in an attempt to unearth design features that may inhibit, enhance, or shape compliance and implementation. Its goal is to describe, in language that is accessible to the lay reader, the institutional variations that exist, to explore their relation to state behavior, and to assess the importance of this field of research to the issue of effectiveness and implementation of international commitments. While the focus is on environmental agreements the issues are discussed in a general way wherever possible.

Particular attention will be paid to:

- constitutional rules for ratification;
- requirements for action by the legislature; e.g. *which sorts of treaty commitments require special enabling legislation, and which take "direct effect"?;*
- the status of treaty commitments vis-a-vis normal statutory law or constitutional provisions; e.g. *which prevail in a conflict?;*
- rules concerning interpretation; e.g. *how are treaty commitments interpreted and who has the power to interpret them?;* and
- rules of standing and participation rights in challenging actions undertaken (or not undertaken) pursuant to a treaty commitment.

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[1] Cited in A. Cassese, "Modern Constitutions and International Law " *Recueil des Cours* 1985 III vol. 192; pg. 342.

[2] The scope of this paper is restricted to formal commitments, i.e. those embodied in written agreements between governments. Informal or tacit regimes are not addressed. See S Krasner, *Regimes* (Cornell U Press: 1982).

This study's focus on internal procedures for incorporating international commitments stems from a belief that such procedures have been systematically ignored or overlooked by much of the mainstream research on cooperation. International law and international relations--as research disciplines--have long been divided by their views on the sanctity, or binding force, of international commitments. While international lawyers have traditionally considered international commitments to be binding contracts, analogous to domestic contracts, international relations scholars--particularly Realists--have tended to view international commitments as loose promises which are often, to quote former German Chancellor von Bethman-Hollweg, little more than "scraps of paper."[3]

Despite this (perhaps overdrawn) fundamental difference, the two traditions share a perspective predicated on the primacy of states and of sovereignty. In this view, internally-undifferentiated[4] "states" enter into contracts or regimes and then comply--or do not. The general mechanisms which determine compliance--whether normative pressures or calculated benefits--are basically the same in all states. Yet this assumed homogeniety of states is false; much more importantly, this assumption may mask important variables which help determine the shape and scope of compliance and implementation. The task of this paper is to explore the differences in the way states transform international commitments into domestic law, and to attempt to discern some implications for implementation and compliance. Throughout, the analysis will move from international to national law and back, with the transistions clearly marked. Six major OECD countries are surveyed: the US, the UK, France, Germany, Italy, and the Netherlands. Given the complexity and broad scope of the project, the treatment is necessarily cursory and tentative.[5]

II Comparative Domestication

1. Treaties and executive agreements.

International agreements are by definition made and undertaken by states.[6] Once an international agreement is negotiated to closure and signed by the governmental delegations, a decision must be

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[3] This [in]famous remark is cited most recently in Abram and Antonia Chayes, "On Compliance" *International Organization* 47:2 (1993); pg. 186. There is a nascent rapproachment between the two positions, as the Chayes point out.

[4] For structural realists, this is explicit; see Waltz, *Theory of International Politics* (1979). Neo-liberal institutionalists accept this as well, and focus on the ways in which institutions structure incentives in powerful ways. The literature on democracies, e.g. the work of Michael Doyle, Steve Chan, and David Lake, does discriminate between differently-"constructed" states, but only in terms of war-proneness and aggression.

[5] Additionally, comprehensive and illuminating discussions of these issues (or at least their availability at IIASA) vary enormously, and as a result certain cases--most notably the US--receive more extensive attention than others (such as Italy).

[6] J.L. Brierly, *The Law of Nations* (Oxford: Clarendon, 1928). chap. VII. The European Union is a special case; see Martin Hession, "The Role of the EC in Implementation of International Environmental Law" *Review of European Community and International Environmental Law* (2,4 1993); and Nigel Haigh, "The European

made--at the domestic level--about what type of agreement it is. Depending on type, different things will occur domestically. These distinctions of type are not, however, meaningful in international law. The distinction is a purely domestic one; international treaty law recognizes only "treaties" and does not distinguish them on their status in national legal systems or by their mode of creation and/or incorporation.

Several types of international agreements exist:

- informal, "housekeeping," or executive agreements, which generally do not require ratification;
- formal treaties, which generally do; within formal treaties there is the further distinction of:
  * self-enacting treaties; and
  * non-self-enacting treaties.

The line between treaties and executive or informal agreements is not a bright one. Typically, more important agreements are accorded formal treaty status, and therefore subject to ratification. However, one of the most important agreements of the 20th century, the General Agreement on Tariffs and Trade (GATT), has never been accorded ratifiable treaty status and has instead operated under a "provisional protocol of application" for the past four decades.[7] There are many more executive agreements than treaties.[8] Most of the major environmental accords, however, have been treated as treaties or protocols to treaties: CITES, the Montreal Protocol, the climate and biodiversity conventions, etc.[9] All required ratification from the parties discussed here. As a result, I will focus on the formal treaty process in this paper.

2. Ratification.

Until ratification occurs, and the instrument of ratification (an official document) deposited with the relevant office, a state cannot be considered a party to the agreement, and the "contract" is

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Community and International Environmental Policy" *International Environmental Affairs* 3, 3 Summer 1991. Under US law, the states may undertake to enter into certain kinds of compacts, subject to approval by Congress, but not treaties. Similarly, the German Lander have concluded agreements of a specific nature with other nations (see below).

[7] For a discussion of this issue see John Jackson, *The World Trading System* (MIT Press: 1989); pgs. 34-7. The new World Trade Organization represents an explicit attempt to shore up the institutional and legal structure of the GATT regime.

[8] In the US, executive agreements can be further sub-divided into several categories: "Congressional-Executive agreements" which delegate power to the President ex ante via an authorizing statute; the same with an ex post approval statute; a purely presidential agreement; and some form of delegation mandated by a prior approved international agreement. For a discussion see John H. Jackson, "US Constitutional Principles, Foreign Trade Law and Policy" in Meinhard Hilf and E-U Petersmann, eds., *National Constitutions and International Economic Law* (Studies in Transnational Economic Law Volume 8: Kluwer Law and Taxation Publishers) 1993.

[9] In order: The Convention on Trade in Endangered Species (1973); the Montreal Protocol on Substances that Deplete the Ozone Layer (1987; to the Vienna Convention on the same); the Framework Convention on Climate Change (1992) and the Convention on Biological Diversity (1992).

incomplete.[10] At this stage, we concerned solely with international law; under international law, ratification binds a state under the doctrine of *pact sunt servanda*: ("treaties are to be obeyed"). If the accord is subject to ratification, initial signature means no more than that the delegates have agreed on the text and are willing to refer it to their governments for further action.[11]

Article 2 of the Vienna Convention on the Law of Treaties (hereafter Vienna Convention) defines ratification as "the international act...whereby a state establishes on the international plane its consent to be bound by a treaty." J.G. Starke elaborates 4 practical and philosophical bases for ratification[12]:

• States are entitled to have an opportunity to review instruments signed by their delegates before undertaking the obligations therein;

• by reason of sovereignty, a state should be able to withdraw from participation;

• Often a treaty calls for amendments or adjustments in municipal (domestic or national) law. The period between signature and ratification allows states time to pass the necessary enabling legislation.

• Democratic principles dictate that governments should consult representative legislative bodies (e.g. parliaments) before undertaking obligations.

The ratification process therefore allows for more effective oversight, discussion, and informational exchange between a government, writ broadly, its agent (the negotiating team or delegation), and interested third parties, such as effected societal actors and organizations. The government seeks to ensure that its delegates carry out its wishes, and societal actors seek the same vis-a-vis the government. Hence, ratification is especially important as a means of ensuring that delegations do not commit states to unwanted agreements and as a means of injecting elements of democratic procedure into the conduct of foreign affairs.[13]

3. "Acts of transformation."

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10 As a general rule; see the Vienna Convention on International Treaties, article 34.

11 JG Starke, *Introduction to International Law* (Buttersworths, 1989) chapter 16, passim. Some treaties are not subject to ratification, though these usually address less substantive matters. Executive agreements are an example; see Lipson, "Why are some international agreements informal?" *International Organization* (?)

12 Starke, pg. 454.

13 On this issue see also "Discretion and Legitimacy in International Regulation" (Comment) *Harvard Law Review* 107 (March 1994).

Ratification is only one part of the domestication process. The distinction made in section 1 between self-enacting and non-self-enacting treaties has important ramifications for domestication. The terminology is actually American, but the concept is more universal: does the treaty require some domestic legislation to gain force or does it "automatically" gain force? Does it have "direct effect?" Here we have left the realm of international law and returned to domestic, or municipal, law. The rules governing this decision in part reflect prevailing philosophies of the legal order: "dualists" posit a fundamental discontinuity between the international and national systems of law; "monists" see law as one unbroken fabric extending from the international to the domestic spheres. If, under constitutional rules, the legislature must act--must legislate in some fashion, as is often the case--that legislation constitutes the "act of transformation." It turns the international commitment into domestic law. Such an act is usually required when the international accord regulates the behavior of domestic actors other than the government.

It must be stressed that these concerns with transformation are wholly internal and domestic; back in the realm of international law, states present a smooth surface: once they have ratified, they are "legally" bound under international law.[14] What happens afterwards is an internal matter. Even if a commitment is later determined to violate a nation's constitution, and thereby (perhaps) made void at the national level, the international obligation continues to exist.[15] Domestic law, however--backed by concentrated violence and shared societal norms--at least in practice if not in theory exerts a greater shaping force on government (and societal) behavior than does international law. It is for this reason that this paper explores the domestication of international commitments; it is the domesticated commitments that really matter for compliance and implementation.

4. Ratification and transformation in cross-national perspective.

The significance of treaty ratification and the process of transformation varies across countries. The pathway from signature to ratification to transformation is briefly examined below in the six cases.

A. *The United States*

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[14] States are bound unless a fundamental change of circumstances occurs (the doctrine of "reb us stic stantibus") or, if the situations described in ft 11 below holds.

[15] The Vienna Convention on the Law of Treaties does allow for retreat from obligations due to internal inconsistencies, but only in extreme circumstances. Article 46 reads: "A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule ofits internal law of fundamental importance."

The US Constitution mentions treaties several times and in somewhat different ways.[16] Article II grants the President the power "by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." In such a case, the President may ratify, but does not have to.[17] In addition, agreements can be entered into through a majority vote of both houses of Congress, though the legality of this method is contested.[18] Article III extends the judicial power of the Supreme Court to all cases arising under national law as well as under treaties. Article VI, in the "supremacy clause," dictates that all treaties

made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Finally, the states themselves--in contrast to the German *Lander*--are restricted from entering into treaties, alliances, or confederations, though they do retain some degree of international personality.[19] In the US, as elsewhere, most international agreements are not Article II-type treaties but rather executive actions pursuant to ordinary statute legislation (the vast majority of cases) or executive agreements undertaken without congressional approval.[20]

One of the most important concepts in American treaty law--and elsewhere--is the distinction discussed above between "self-executing" and non-self-executing treaties. Originating in *Foster & Elam v. Neilson* (1829), Chief Justice John Marshall's opinion establishing this doctrine is worth quoting at length:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra--territorial; but it is carried into execution by the sovereign power of the respective parties to the instrument.

In the [US] a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a

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[16] And while the Constitution does not specifically discuss general international law, Supreme Court jurisprudence indicates that it may be part of our law as well. See *The Paquete Habana*, 175 US 20 S. Ct (1990): "International law is part of our law, and must be ascertained and administred by the courts of justice..." Quoted in Alfred T. Goodwin, "International Law in the Federal Courts" *California Western International Law Journal* 20 (1989-1990). But see also *Sei Fujii v. the State of California* (38 Cal. 2nd. 722: 1952).

[17] John Jackson, "United States," in FG Jacobs and S Roberts, *The Effect of Treaties in Domestic Law* volume 7 (Maxwell and Sweet: 1987) pg. 143

[18] On this issue see the exchange between Laurence Tribe and Bruce Ackerman: Tribe, "GATT Implementing Legislation: Hearings Before the Senate Comm. on commerce, Science, and Transportation, " 103rd Congress (1994), Ackerman and David Golove, "Is Nafta Constitutional?" 108 *Harvard Law Review* (1995); Tribe, "XX" *Harvard Law Review* (May 1995).

[19] In *Skirotes v. Florida* (313 US 69, 77: 1941), the Supreme Court held that "Save for the powers committed by the Constituttion to the Union, the State of Florida has retained the status of a sovereign."

[20] Janis, pg. 78; Lipson, passim; and Loch Johnson, *The Making of International Agreements* (New York: NYU Press, 1987).

particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[21]

Determining the self-executing nature of a treaty is a fine legalistic art (or act of sorcery), and "the substantial volume of scholarly writing on this issue has not resolved the confusion."[22] Where it is plain that the parties to an agreement contemplated future legislative action to achieve stated objectives, even if this is not explicitly stated, self-execution does not appear to apply.[23] Most important treaties are not-self-executing--and it would appear, nearly all environmental treaties--and they therefore require some form of legislative enactment.

Since, by the supremacy clause, treaties are equivalent to the law of the land, states within the Union must abide by them. This is tempered, however, by the Constitution itself, which grants extensive powers (by omission) to the states. Treaties cannot generally infringe upon the sovereignty of the states. The Court, however, in *Missouri v. Holland* (1920) suggested (and has not reasserted since) that infringement is possible, in relation to an environmental case involving the transboundary migration of birds.[24]

The supremacy clause by no means implies that international treaty commitments are superior to domestic statutes. In fact, there is virtual equivalence between the two. In the case of conflict where reconciliation is not possible, the general rule is the law later in time prevails.[25] We will see that this is a common, though not universal, rule of jurisprudence regarding foreign affairs. Thus in the US international commitments can be abrogated by unilateral domestic legislation occuring *ex post.* The Constitution trumps treaty commitments as well; the Supreme Court in *Reid v. Covert* held that

the prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or the Executive and the Senate combined.[26]

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[21] 27 US (2 Pet.) 314 (1829).

[22] Jackson 1987, pg. 149. The Court of Appeals for the 5th Circuit stated in *US v. Postal* that " the self-executing question is perhaps one of the most confounding in treaty law." Ibid. See also Friedrich Kratochwil, "The Role of Domestic Courts as Agencies of the International Legal Order"

[23] *Sei Fujii v. the State of California* (38 Cal. 2nd. 722: 1952)

[24] Though in Missouri v. Holland the Court ruled that it may be permissable for this to occur in some special circumstances involving, e.g. "a national interest of very nearly the first magnitude" which could be protected only through international cooperation. The cooperation in this case involved the protection of migratory birds. (252 US 416: 1920).

[25] This is only applicable, however, to self-executing treaties: otherwise, the domestic enabling legislation, being domestic law, is identical to any other statute.

[26] 354 US 1 (1957).

To complicate matters, although *US v Belmont* held that executive agreements are the legal equal of Senate-approved treaties,[27] it appears that executive agreements are not always the equal of treaties (or statutes) and can therefore be overturned more easily. In fact, it appears that even prior legislation may trump executive agreements. Robert Hudec's study[28] of GATT-related caselaw shows in 14 separate cases in which GATT obligations were argued to prevail over federal legislation, this claim was never once upheld by the courts. This line of jurisprudence suggests that environmental executive agreements which are contained within formal treaties, such as technical amendments and the like, may similarly fail to come under the protection of the supremacy clause.

A further distinction drawn explicitly in the US Constitution is between the power of the president to make treaties (Article II) and that of the Congress to "regulate commerce with foreign nations" as well as "lay and collect taxes, duties, imposts, and excises" (Article I). Trade agreements were traditionally the province of Congress.[29] The lingering global depression in the 1930's--exacerbated by congressional protectionism--led Congress to delegate to the president the power to conclude trade agreements.[30] Trade agreements increasingly regulate standards and "technical barriers to trade," areas that directly impinge upon environmental regulation. US environmental commitments that are enshrined in trade agreements (e.g. the North American Free Trade Agreement and its attendent side agreements) fall under this set of rules.

B. *The United Kingdom*

The UK is a constitutional monarchy. The power to conclude and ratify international treaties is invested in the Crown (in practice the Cabinet), without any need for participation by the Parliament. However, Parliament alone has the power to incorporate treaties into English law, achieved through the passage of enabling legislation. The significance of this separation of powers is attenuated by the fusion of executive and legislative functions which is the hallmark of the British political system.[31]

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[27] Friedrich Kratochwil, "The Role of Domestic Courts as Agencies of the International Legal Order"

[28] "The Legal Status of GATT in the Domestic Law of the United States," in Meinhard Hilf, Francis Jacobs, and E-U Petersmann, eds., *The European Community and GATT*, 187 1986).

[29] With often ill-fated results, such as the 1930 Smoot-Hawley Tariff.

[30] The Reciprocal Trade Agreements Act of 1934. This delegation, however, is carefully circumscribed: *inter alia*, the authority of the president to negotiate trade agreements is limited to 3 years, congressmembers are frequently part of the negotiations, and a formal institutional machinary was established by which industries could express their concerns over pending negotiations. See Stephan Haggard, "The Institutional Foundations of Hegemony: Explaining the [RTAA] of 1934," in GJ Ikenberry, et al, [eds.] *The State and American Foreign Economic Policy* (Cornell U Press, 1988) and Carolyn Rhodes, *Reciprocity, US Trade Policy, and the GATT Regime* (Cornell U Press: 1993) chap 3.

[31] See Lijphart, *Democracies* (1984) ; Simon James, *British Cabinet Government* (Routledge: 1992) and Gary Cox, *The Efficient Secret*

As a result, in all but the most unusual circumstances[32] the party in government, which by definition controls the Parliament, can pass the enabling legislation needed. Unlike the US, there is no prospect in Westminster-style democracy of divided government, e.g. control of the executive by one party and the legislature by another. Rather, a balance of power exists between the Cabinet--which is comprised of members of Parliament of the majority party--and the "back-benchers": those members of the majority party not in the Cabinet. The executive emerges from the legislature, and is dependent upon its confidence. The two are tightly bonded by the glue of party affiliation and power, allowing the government to be confident in most cases of securing whatever legislation is necessary. The result is the executive has an enormous amount of power in the treaty process, and rarely needs to worry about gaining the necessary implementing legislation.

In the UK, while treatymaking is a Royal prerogative,[33] any treaty which

- involves any modification of the common or statute law;
- cedes British territory;
- effects private rights;
- increases the power of the European Parliament;
- vests new powers in the Crown; or
- imposes new financial obligations

must receive parliamentary assent though an enabling Act of Parliament including, where necessary, the requisite changes in domestic law.[34] The apparent classic statement regarding this dichotomy of powers, and still apt today, is by Lord Atkin: "[w]ithin the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of existing domestic law, requires legislative action...Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law."[35] This view echoes that of the American Justice Marshall quoted above.

As is common, decisions regarding what type of treaty an agreement is--and therefore whether it is significant enough to justify legislative action--are taken by the executive; in this case, the Foreign and Commonwealth Office.[36] The treaty provisions themselves are not necessarily given the force of law in the implementing legislation. When a treaty has been thus implemented, it (e.g.

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[32] Britain has on occasion employed a grand coalition government (most notably during WW II) in which all the major parties take part. But typically, power is concentrated; to the victor go the spoils, and to the loser, opposition.

[33] Ian Sinclair and Susan Dickson, "National Treaty Law and Practice: United Kingdom" in Leigh and Blakeslee, 1995; pg. 223. In addition, Bermuda and Hong Kong have the power to enter into limited international agreements.

[34] Starke; pg. 82 and Sinclair and Dickson, 230.

[35] Ibid. 229-30.

[36] Ibid; pgs. 227-8.

its enabling legislation) takes precedence over any conflicting earlier legislation.[37] However, where a statute contains provisions which are unambiguously inconsistent with an earlier treaty, the statute takes precedence. Thus--as in the US--treaty commitments can be abrogated by acts of parliament occurring later in time. These rules are subject to some exception under the EU treaties (see below). In general, while Parliament is sovereign, its legal authority in matters covered by EU law appears subject to compliance with the latter.[38] To date, all environmental agreements to which the EU has ratified as an entity have also been signed and ratified by the member states, though often at different times.[39]

As a final aside, it is important to bear in mind that in the UK there is no written constitution, as is found in most democratic states (and all the other cases examined in this paper). Rather, an unwritten constitution based on practice, tradition, and a series of key texts exists. As such, there is less specificity and more flexibility surrounding the process of treaty-making and implementation in the UK than in the other cases.

C. *France*

Unlike the US or UK, which are both common law countries, France adheres to the civil law tradition. In civil law countries, the authority for the incorporation of treaty rules into domestic law is usually to be found in explicit constitutional provisions.[40] Article 52 of the 1958 French Constitution empowers the President of the Republic to negotiate and ratify treaties. Article 55 establishes the relationship between international commitments and domestic law:

Treaties or international agreements regularly ratified or approved have, from the date of their publication, an authority superior to municipal [domestic] law on the basis of their reciprocity by the other state.

Thus constitutionally, treaty commitments trump domestic statutes in instances of conflict. This means that international treaty commitments take effect in France, and override domestic legislation, when "embodied in a decree signed by the French president and printed in the Official

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37 Ostime v. Australian Mutual Provident Society (AC 459 @ 476: 1960).

38 See McCarthys Ltd. v. Smith 3 AER 325 [1979] and R v. Secretary of State for Transport, ex parte Factortame & others, 3 WLR 818 [1990]. In Factortame, writes Kinley, "[t]he suspension of an Act of Parliament on the ground that it contrvened Community law enlightens us as to the true nature of the constitutional relations between the Parliament and courts of the United Kingdom and the legislative and judicial organs of the European Communty. There indeed exist prior examples of the introduction of legislation in response to adverse rulings of the Court of Justice, but never were they predicated on the revocation of domestic legislation." David Kinley, *The European Convention on Human Rights: Compliance Without Incorporation* (Dartmouth: 1993) pg. 5.

39 Richard Benedick discusses the [ill-fated] attempt of the EC nations to ratify together the Montreal Protocol; Benedick, *Ozone Diplomacy* (Harvard U Press: 1991)

40 Janis, pg. 81

Journal."[41] The treaty must therefore be published to be in effect, and most importantly the treaty obligations must be reciprocated by the other parties. Commitments are not enforceable domestically without being in force in other parties' domestic law: the "reciprocity clause." The reciprocity clause is the cause of significant consternation among some international lawyers (Cassese, for instance, terms it a "backward step").[42] It is particularly troublesome in a multilateral treaty, where even a single derogation by one of the many parties would seem to invoke it, and thereby relieve France of the domestic legal obligation to comply. Moreover, determining reciprocity is beyond the powers of a court, and therefore, as will be discussed below, even more power accrues to the foreign ministry which will make the determination.[43]

Article 53 circumscribes the scope of international commitments ratifiable without statutory enactment. Parliamentary approval is needed for those treaties that

- modify French domestic law;
- affect the financial commitments of the state; or
- affect matters of considerable importance, such as peace, commerce, or interactions with international organizations.[44]

In other words, nearly all international commitments of interest are subject to parliamentary approval; the interpretation of matters which require legislative approval has become more expansive over time.[45] But again, unlike the US or UK, in France treaties--if duly ratified--trump any earlier or later statutory law.[46] In a sense this provision of the French Constitution reflects the great power of the President granted in the 1958 Constitution; the executive can, via treaty law, introduce legislative changes of importance. Of course, these changes remain subject to Parliamentary approval. However, the final trump is again the executive's: "in practice, the Executive has total discretion" in determining which agreements are subject to legislative approval.[47]

Moreover, in practice, this constitutional provision guaranteeing treaty superiority has not always, or even often, been followed. In France the *juge adminitratif* is charged with reviewing the administration of law. Historically, the *juge administratif* has ignored Article 55 and set domestic law and treaty commitments at equal levels, employing the later-in-time rule to adjudicate between conflicting treaty commitments and domestic statutes. So while treaty law remains

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41 Ibid., pg. 82.
42 Cassese; pg. 403.
43 On this see ibid, pgs. 405-7.
44 Janis, pg. 82.
45 Pierre Eisemann and Catherine Kessedjian, "National Treaty Law and Practice: France" in Monroe Leigh and Merrit Blakeslee, *National Treaty Law and Practice* (Washington, DC: American Society of International Law, 1995); , pg. 6
46 Starke, pg. 86.
47 Eisemann and Kessedjian, pgs. 6-7.

superior over prior domestic law, it sometimes loses out to subsequent, overriding, domestic law. In the ruling of the *Conseil d'Etat* in *Syndicat general des fabricants de semoule de France,* of March 12 1968, the *Conseil*

exercised its power to interpret the law in such a way as to limit any conflict between legislation and treaty, but when it came to a conflict that could not be interpreted away it gave preference to the most recent rule and **took no account of the constitutional provisions giving treaties superiority.**[48] [emphasis added]

In 1989, however, a new ruling by the *Conseil d'Etat* acknowledged the prevalence of treaty law over subsequent statutory law.[49]

To further complicate matters, a completely different line of jurisprudence has been followed by the *juge judiciare.* When trying to reconcile treaty commitments and subsequent legislation, the judiciare has tried, as most courts try, to find some way to reconcile the two or to demonstrate that the treaty is not really applicable, or was never intended to be applicable, to the case at hand. But this is not always possible; and in the landmark *Jacques Vabre* case, the *Cour de Cassation* upheld an EU rule over conflicting national legislation, invoking in the process the constitutional guarantee of treaty superiority contained in Article 55. This ruling was completely at odds with the rulings of the *juge administratif.* Thus in the final analysis, the superiority of treaty commitments in France seems to rest primarily on the judicial venue in which it is tested.[50] And the reciprocity clause introduces a further somewhat stochastic element: a domestic statute may legitimately override an international commitments if reciprocity in full--which will change over time--does not exist.[51] Hence, Cassese notes that "no judicial body in France can actually pronounce upon the constitutionality of a law conflicting with a treaty..."[52] But conversely, Eisemann and Kessedjian assert flatly (and more recently) that "it is now also acknowledged that treaties and international agreements prevail over subsequent statutes."[53]

Treaty commitments cannot, however, violate the constitution itself. Article 54 states that if an "international commitment contains a clause contrary to the Constitution, the authorization to

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[48] J.D. de la Rochere, "France," in FG Jacobs and S Roberts, *The Effect of Treaties in Domestic Law* volume 7 (Maxwell and Sweet: 1987).

[49] Eisemann and Kessedjian, pg. 13

[50] More recently, it appears that the Conseil d'Etat has converged in its rulings with the rulings of the other courts; Elisabeth Zoller, "EEC Foreign Trade Law and French Foreign Trade Law" in Meinhard Hilf and E-U Petersmann, eds., *National Constitutions and International Economic Law* (Studies in Transnational Economic Law Volume 8: Kluwer Law and Taxation Publishers) 1993.

[51] The jurisprudence on this issue is somewhat confused. Cassese notes that French courts have very often ignored the reciprocity proviso, and have tended to place the burden of of invoking the clause on the parties. The presumption is generally in favor of reciprocity; e.g. a party must prove otherwise. Cassese describes the relevant cases; pgs. 407-8.

[52] Ibid, pg. 407.

[53] Eisemann and Kessedjian; pg. 13. They tend to take a formal view throughout, however.

ratify or approve the commitment may be given only after amendment of the Constitution." Clearly, this is not an insignificant undertaking. The Conseil Constitutionnel, which is quasi-judicial body, makes the determination as to unconstitutionality. The President, the Prime Minister, or the Presidents of either chamber of the legislature may request a ruling on a treaty commitments constitutionality, but only before their promulgation.[54] As a result, if a domestic statute is passed which would appear to mandate a derogation from an international commitment, *ex post* its constitutionality or unconstitutionality cannot be determined.[55]

D. *Italy*

Like the other domestic legal systems examined in this study, Italian law requires that ratification and acts of transformation occur before international treaty obligations become legally binding. Typically, a statute is enacted by the legislature which provides for the implementation of a treaty once it enters into force. Often this statute subsumes the act of ratification: in addition to providing for full implementation, it will authorize the president of the Italian Republic to ratify the treaty. The treaty itself appears in an appended schedule to the act.

As a result, there is typically no implementing legislation which "recasts" the treaty commitments domestically, as is often the case in other nations. Instead, the treaty provisions are directly applied. These provisions have the same force as ordinary statutes. And, as in France, the US, and the UK, treaties may repeal prior statutes but can in turn be repealed by subsequent statutes. The same sorts of judicial gymnastics are often performed to avoid the unilateral abrogation of treaty commitments: courts take pains to interpret later law consistently with treaties, or consider treaties provisions to be in some way special cases, in an attempt to circumvent the conflict altogether.

Italy also recognizes the distinction between self- and non-self-executing treaties. Here, as elsewhere, the line separating the two is not bright. The Court of Cassation found, for instance, that the

> norms of the European Convention on Human Rights--apart obviously from those provisions the content of which, after the use of habitual methods of interpretation, is to be considered so general that it does not express sufficiently specific rules--are directly applicable in Italy.[56]

One interesting aspect of the Italian system is the provision for repeal of statutes by referenda. Here a bright distinction is drawn between treaties and ordinary statutes: statutes which

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[54] Zoller, passim.

[55] Cassese, pg. 407.

[56] 69 Riviste di Diritto internationale 143, at 145 (1986); cited in Gaja, "Italy," in FG Jacobs and S Roberts, *The Effect of Treaties in Domestic Law* volume 7 (Maxwell and Sweet: 1987).

implement treaties are expressly forbidden to be repealed via referendum by the constitution (Article 75:2).

E. *The Netherlands*

The Netherlands, like the United Kingdom, is a constitutional monarchy. And, like the UK, treaties are a prerogative retained by the crown. In practice, all treaties are negotiated by the foreign minister, with the assistance of other ministers where relevant (e.g. the minister of the environment).

All international agreements are subject to parliamentary approval. Occasionally, parliamentary approval is omitted in cases which are simple government-to-government arrangements, such as understandings between customs officials. These arrangements are codified in Article 91 of the 1983 constitution, which also discusses the issue of conflict between international commitments and constitutional rules:

> Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the States General [the legislature] as long as at least two-thirds of the votes cast are in favor.

This constitutional provision is unusual, to say the least, and perhaps reflects and illustrates the importance of international law in the Netherlands--the home of both Hugo de Groot (Grotius) and the International Court of Justice. The parliament is the sole judge of the degree of constitutional conflict. A provision for tacit approval also exists: if neither chamber of the legislature issues a statement within 30 days of receiving an international agreement for review, the agreement is considered approved.

The Dutch constitution also stipulates that treaty obligations trump all national legislation, both prior and subsequent to the treaty's enactment. This includes the constitution itself, for if a treaty is approved it has either been deemed not in conflict with the constitution, or, it has been approved by the requisite two-thirds majority of the parliament--in the process trumping the constitution. Unlike French courts, Dutch courts have actually upheld this rule, overturning legislation which was deemed to violate an earlier treaty obligation (the cited case involved tax law and the Convention on Privileges and Immunities of the United Nations).[57] But the strength of this rule is, in the views of some analysts, diminished from its existence in the earlier, 1953/6 Dutch constitution.[58]

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[57] Court of Appeal, the Hague: Netherlands Yearbook of International Law 1971, pg. 226; (cited in Henry Schermers, "Netherlands," in FG Jacobs and S Roberts, *The Effect of Treaties in Domestic Law* volume 7 (Maxwell and Sweet: 1987) pg. 114. But see also Cassese, pgs. 409-11.

[58] Cassese, pg. 409-10.

F. *Germany*

Germany, like the US, is a federal system in which the sub-federal units have significant constitutionally-guaranteed powers. The German Constitution grants the power to conduct relations with foreign states to the federal government, specifically the President. The *Lander*, however, limited treaty-making powers in those realms in which they have competence to legislate.[59] In practice, however, this is exercised very rarely, and must have the approval of the Federal government. Often *Lander* treaties concern environmental issues; typically, water resources or river management involving adjacent states.[60]

While the executive is responsible for the negotiation of treaties, the legislature plays an important role and often members of the legislature attend major negotiations.[61] Any treaty which effects the relations between the federal government and the *Lander* or which require legislation of some kind must receive the consent of the national legislature. However, it up to the relevant department, in conjunction with the Foreign Office, the Ministries of Justice and Interior, to decide whether a treaty should be submitted to the legislature. By Article 59 of the German constitution, approval must be in the form of a domestic law. This law is subject to the same rules which apply in any act of law-making; most importantly, this means that the Federal Council, which represents the Lander, can cast a veto. [62] The domestic implementing law both enables the president to ratify the treaty and make it binding on the international level and transforms the international commitment[s] into domestic law. But where the treaty commitments fall within the competence of the *Lander*, it is up to the *Lander* to incorporate the terms into their respective law. This occurs most often in cultural matters, and apparently rarely in environmental matters.[63]

The federal legislation transforming an international commitment into domestic law has--by definition--the status of a federal statute and therefore takes precedence over all laws of the *Lander*. Like most of the other states examined in this study, later legislation prevails over treaty commitments, except in certain instances detailed below. Interestingly, "general rules" of public international law, by Article 25, have a higher status than domestic statutes. But treaties are clearly not general rules of public law, and have not been considered so by German courts.[64]

Precedence is given to treaty provisions under the German Constitution in the following issue-areas:

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[59] Hans Treviranus and Hubert Beemelmans, "National Treaty Law and Practice: Federal Republic of Germany" in Leigh and Blakeslee, 1995; pgs. 54-6.

[60] An example is the treaty between Switzerland, Austria, Bavaria, and Baden-Wurttemburg (1960) regulating the water quality of Lake Constance.

[61] Treviranus and Beemelmans; pg. 47. (Also describing the different roles of the President and the Chancellor in treaty negotiations).

[62] Though not on all treaties; see ibid, pg. 51.

[63] Jochen Frowein, "Germany," in FG Jacobs and S Roberts, *The Effect of Treaties in Domestic Law* volume 7 (Maxwell and Sweet: 1987) pg. 63.

[64] Ibid.

- tax law;
- treatment of aliens;
- extradition; and
- matters of cooperation in criminal justice.

In all other matters, the statute appearing later in time prevails. Of course, German courts attempt to avoid all instances of conflict through creative interpretation. The German legal system also recognizes the issue of self-execution.

G. The European Union.

All of the countries examined in this paper are part of the EU, except the US. As a result, it is important to explore the EU treaty-making powers, though they are in constant evolution and thus often quite murkily defined. Given this complexity, only the simplest treatment will be given here--and only of those issues which are (relatively) uncontentious.

To begin, the EU treaties themselves, by virtue of their constitutive character--they constitute or bring to legal life the entity of the EU--are quite special international instruments. The EU treaties as a result have been concluded under special provisions in the domestic laws of the member states.[65] Their implementation is governed by constitutional standards rather than the normal standards of international law. These treaties contain provisions for the EU to engage in international treaty-making with third party states; generally, it is the Council of Ministers which authorizes and concludes negotiations, though the Commission actually conducts them.

The original EEC treaty expressly granted Community competence to conclude international agreements only in commercial and trade matters, though early on the European Court ruled that the Community had such competence in any area governed by the Community internally (*Commission v. Council*, March 31 1971).[66] Eventually, this doctrine was extended into areas in which internal EU competence or jurisdiction existed but had not hitherto been used--in other words, in which no legislation had yet been promulgated.

In most instances of interest--and in nearly all important international environmental agreements--treaties with third party states are not concluded solely by the EU but rather by both the EU and the member states jointly: a "mixed agreement." Delimiting and describing this animal appears to be a subject of considerable controversy, and even EU officials themselves often present contradictory views on the scope of EU competence and jurisdiction in mixed negotiations.[67] Parts of

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[65] Judge Pierre Pescatore, "Treaty-making by the European Communities," in FG Jacobs and S Roberts, *The Effect of Treaties in Domestic Law* volume 7 (Maxwell and Sweet: 1987).

[66] Ibid, pg. 175.

[67] See Jackson, 1989, pg. 47; and Richard Benedick's account of this in the Montreal Protocol negotiations in Benedick,*Ozone Diplomacy* (Harvard University Press: 1991).

a given agreement may fall under different rules. For example, most GATT protocols are concluded by the Community alone, but certain specific protocols have used the mixed procedure.[68]

Yet another murky area of EU jurisprudence is the relation between international obligations of the Community and contradictory domestic law. The European Court has, unsurprisingly, usually taken the view that domestic law must yield to EU law and that international treaty obligations are a pertinent source of EU law--and therefore overriding.[69] But it is not clear that the member states--and particularly their legislatures--have promptly and completely abided by these rulings in all cases. In essence, this issue of priority is at the crux of the general EU debate, and it touches upon the critical issues of accountability, sovereignty, and subsidarity that so consume the Community and its members.

III Interpreting international commitments

1. Why interpretation matters.

As discussed in the introduction to this paper, international treaties are contracts of a sort: states assume certain obligations and pledge to take certain actions, given a particular set of circumstances which may or may not be explicitly delineated in advance. In an international legal sense, regardless of the pathways of domestication described above, the commitments taken--if duly ratified--are sacrosanct. The guiding Vienna Convention on the Law of Treaties does grant certain escape clauses: breach may be legal if there is a fundamental change in circumstances (the doctrine of *rebus sic stantibus*) or a fundamental dichotomy between the commitment and domestic law. But in the main commitments are to be kept: *pact sunt servanda* . Of course, the international legal environment is not the domestic one. States can and do breach contracts, and there is no organized coercive means to stop them, short of war or some sort of trade sanction.

States nevertheless try to avoid breach, but when they fail, they tend to do it ways that are legally justifiable.[70] Thus the US ignored the International Court of Justice in the Nicaragua harbor-mining case not by asserting its hegemonic power, but rather by claiming that the court lacked jurisdiction. Such claims may just be masking or legitimizing rhetoric, or they may be the product of foreign ministries staffed predominantly by lawyers. Alternatively, they may be meaningful expressions and manifestations of the force of international law. This question cannot be answered here.

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[68] Pescatore, pgs. 177-8.

[69] Pescatore provides a series of judgements along these lines, *inter alia*: *Haegeman* (1974), *Kupferberg* (1982); *Rapides Savoyards* (1984). See also Anne-Marie Burley (Slaughter) and Walter Mattli, "XX" International Organization (

[70] On this extended topic see Francis Boyle, *World Politics and International Law* (Durham: Duke University Press, 1985)

Instead, I will assume, for the purposes of this paper, that while rhetoric or lawyerly bureaucratic practice play a role in driving state behavior, international legal prescriptions have some non-trivial independent force. International law is not timeless theater; it constrains governments in meaningful ways, and governments as a result take issues of law seriously when choosing between alternate courses of action.

Interpretation thus matters because the commitments states take are often (sometimes purposely) vague or ambiguous, or are incomplete in the sense that they do not--and cannot--contain rules for all eventualities. All contracts are in this sense incomplete. If contracts were not, most attorneys would be superfluous: breach would be clear and recognizable to any arbiter. But breach of contract is rarely clear, because the world is constantly changing and new circumstances come into play which serve to alter the terms or referents of a contract. This same dynamic holds true for international commitments. Governments will interpret commitments in ways that are favorable for them (generally speaking) and when commitments prove or become onerous or when conflict ensues governments will seek ways to interpret the commitments in new ways--ways which lower the costs of compliance or allow them to renege altogether. Indeed, most international agreements are drafted to facilitate this process. Escape clauses, reservations, etc. are built in to treaties specifically to aid in (re) interpretation and breach, or to avoid the same. But interpretation often allows states to avoid something so dramatic as a reservation or withdrawal by redescribing the commitment in a particular fashion. The ambiguity of most international accords--often a result of compromise and contention--is thus perfectly suited to the artful interpretation and reinterpretation of commitments by governments.

2. Comparative interpretation.

The interpretation of international commitments occurs in different ways in the different countries examined here. Generally, the rules or norms of interpretation used in a particular nation build upon the mode of interpretation employed more generally--when reviewing domestic statutes, for example. Below, I will briefly survey the process of interpretation in the six cases.

A. *The US*

One of the pillars of the US political system is the separation of powers principle. This principle yields important effects in the execution and interpretation of US foreign relations law. In general, US courts have granted broad deference to the executive in international affairs, either explicitly or through the corollary "political questions doctrine." In the Court's view, political questions are those that are non-justiciable by their "political" nature; they would lead, were the

judiciary to engage them, to a violation of the separation of powers.[71] The Court found in *Curtiss -Wright v. US* (1936)[72] that the president held "plenary and exclusive power...as the sole organ of the federal government in the field of international relations." This finding, coupled with the political questions doctrine, has lead the judiciary in the US to recoil from extensive intervention into foreign affairs. American courts have learned, in the judgment of Louis Henkin,

> to carry out their normal functions with due--I think sometimes undue--deference to the political branches. Deference is not only avowed but is made a principal of decision. The reasons for deference are not often articulated and are rarely examined, but high among them appears to be some sense that the governmental act in question may implicate the national interest in relation to other nations, if not national security, and that in foreign affairs the United States must "speak with a single voice" and that voice must be that of the experts, usually the executive branch.[73]

This view of international affairs as turf upon which the judiciary may tread only carefully and in certain circumstances is balanced by the finding of *Reid v. Covert* that the Constitution is as valid in foreign affairs as it is in domestic affairs.[74] Judicial review of government actions pursuant to treaty commitments, however, is rarely invoked. There is furthermore no judicial protection against congressional action which violates an international commitment. While this reflects the dualist nature of American law--and the fact that US judges exist by virtue of the Constitution (and often Congress)[75] and not by virtue of the international system--in part this is a function of the established rules of standing, which demand an "injury in fact" to an identifiable plaintiff as well as causation by the action in question.[76] Furthermore, a host of other, lesser, criteria--redressability, "ripeness," etc.--must be satisfied as well for a judgement to be rendered. These criteria are often hard to demonstrate in a case involving an international commitment.

When the courts do engage in the interpretation of international commitments, US practice is somewhat distinctive. The ordinary meaning of the words used in a treaty is but one of the factors to be taken into account in interpretation. The prime objective of interpretation in US courts is to

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[71] The origin of the doctrine is *Baker v. Carr* (369 US 186) 1962. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial determination of a kind clearly for non-judicial discretion..." etc. etc.

[72] *United States v. Curtiss-Wright Export Corp.*; 299 US 304 (1936)

[73] Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (Columbia University Press, 1990) pg. 70.

[74] *Reid v. Covert*; 354 US (1) 1957.

[75] All US courts other than the Supreme Court are entirely the creatures of Congress: Article III empowers the Congress to "from time to time" create lesser courts as they see fit.

[76] On standing more generally see the excellent overview provided in Cass Sunstein, "What's Standing After Lujan: Of Citizen Suits, 'Injuries,' and Article III" *Michigan Law Review* (1992). "Lujan" refers to a recent Supreme Court ruling on the extraterritorial application of the Endangered Species Act, which--in the eyes of Sunstein and nearlyt all environmental organizations in the US--set a misguided and dangerous precedent for the right to attempt to enjoin the US from taking certain actions detrimental to the environment.

ascertain the meaning intended by the contracting parties. That "intent"--to be determined by examination of drafting history (*travaux preparatoires*), statements, and preambular goals--prevails over the precise language of the text has been repeatedly endorsed by the Supreme Court.[77] However, in recent years, led by Justice Scalia, the Court has moved away from broad readings of intent in purely domestic cases of statutory interpretation and favored an increasingly strict "four corners" approach. Thus, it may be the case that the Court will extend this shift to treaty interpretation as well.

Probably more so than the judiciary, the body most involved in foreign affairs, aside from the executive, is the Senate. The Senate's role of "advice and consent" means that the President can only make a treaty as the Senate understood it and agreed to it. The Senate has on occasion explicitly declared its understanding of ambiguous treaty provisions by an express "understanding" in its resolution of consent.[78] The Senate's understanding is then the US' understanding. While the President can later terminate a treaty that the Senate accepted, without its consent,[79] the President is bound to uphold the original Senate interpretation while the treaty remains valid.

In most cases of interest, however, the international commitments in question are not deemed self-executing and as a result have been incorporated into domestic law via an enabling statute (the "act of transformation"). This is true of nearly all major environmental agreements. The enabling statute is treated thereafter as ordinary law in all respects, though the inspiring treaty language usually has relevance for subsequent interpretation.[80] The keeping of the international commitment becomes ancillary to the proper execution of the law; but in general judges appear to avoid controversy by interpreting the law in ways that do not violate the treaty language. In fact, this doctrine is incorporated into the most recent restatement of US foreign relations law.[81]

Thus the separation of powers doctrine creates unique complexity in American foreign relations law. To summarize, I can only again quote Henkin:

The President does not have to make a treaty even after the Senate gives its consent, and the President can terminate a treaty that has been made...But if a treaty has been made and has not been terminated, the Senate is entitled to resist a presidential interpretation of a treaty that renders it effectively a treaty other than the one to which the Senate had consented...Once a treaty is made, the Senate has no special authority in relation to it. The President later interprets the treaty for purposes of executing it. Congress--both houses--interprets the treaty for legislative purposes. Courts may interpret it for their purposes. The Supreme Court's interpretation of a treaty

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[77] Jackson, 1987, pg. 165. See *Air France v. Saks* 3 Pet. 242 (1830), and the draft revised restatement of US foreign relations law, cited in ibid.

[78] Ibid. This discussion draws on that offered in pgs. 51-54 .

[79] According to the *Restatement (Third) Foreign Relations Law of the United States*. The issue arose in the 1970's when President Carter terminated a defense treaty with Taiwan in order to establish full relations with the PRC. Though several senators took this issue to the Court (*Goldwater v. Carter*, 444 US 996 (1979)) the Court did not resolve it.

[80] Jackson, 1992; pg. 315.

[81] Restatement (third) of the Foreign Relations Law of the US ; cited in Jackson, 1992.

made in deciding a case or controversy is authoritative for purposes of [US] law and is binding on all courts as well as on the political branches.

To preview the other cases examined here, the most salient point in comparative terms is in fact this complexity. Many of the issues of deference to the executive in foreign affairs explored above are found (and even heightened) in the other states. In some, like the UK, this is not deference but the fact that international commitments are a Crown prerogative. In France, the reciprocity clause (see section II:4:D above) effectively removes French courts from an examination of French compliance with any international commitment. The US is thus marked by both greater complexity and less executive discretion in the making, keeping, and interpreting of international commitments.

B. *The UK*

Unlike the US, there is no real separation of powers in the UK. Indeed, the British political system is based upon the untrammeled--and untrammelable--sovereignty of Parliament in all legislative affairs, and, similarly, of the Crown in all foreign affairs:

Parliament...has, under the English constitution, the right to make or unmake any law whatever; and further, no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.[82]

As a result, English courts "recognize Parliament as being omnipotent in all save the power to destroy its own omnipotence."[83] While the Crown--in reality the government of the day--makes all treaties and regulates all foreign affairs, treaties have no power or legal meaning domestically unless Parliament incorporates them into national law. Unlike in Italy, where treaties are often included verbatim in the implementing legislation, the British Parliament frequently recasts the language of an international commitment when domesticating it via an implementing statute. British courts in turn tend to look to the domestic legal instrument, rather than the inspiring treaty, whenever possible.[84] The connection of these three principles and practices--the omnipotence of Parliament, the need for Parliamentary enabling legislation, and the frequenting recasting of international commitments in that legislation--creates a legal potential for non-compliance and unorthodox implementation greater than that found in the other cases.

These specific practices also pose some difficulties in the interpretation of commitments. To begin with, the scope of judicial review in the UK is limited (see section IV below), generally to

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[82] AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed 1959) pgs. 39-40.
[83] Megarry V-C in Manuel v. A-G [1983] i ch 77 at 89, [1982] 3 AER 786, 795, cited in Friedl Weiss, "Constitutional Law and Foreign Trade Law in the United Kingdom," in Meinhard Hilf and E-U Petersmann, eds., *National Constitutions and International Economic Law* (Studies in Transnational Economic Law Volume 8: Kluwer Law and Taxation Publishers) 1993.
[84] Higgins, pg. 137.

ultra vires--beyond the powers--cases.[85] If the differences in language between the enabling statute and the inspiring treaty text become meaningful--as has happened[86]--the courts will of course try to reconcile them. What happens if they cannot is not completely clear, but it appears that the domestic language will prevail. As Parliament is supreme, and there is no constitutional control of the Parliament, courts have no choice but to follow properly enacted statutes regardless of their adherence or lack thereof to international treaty commitments. The exception appears to be in the context of the EU; the *Factortame* case of 1990 in a limited sense placed EU law above UK law, though the extent of this ruling is also not clear.

In general, then, acts of the government pursuant to foreign relations are not justiciable in Britain. The courts have stated that they will not "adjudicate upon acts done abroad by virtue of sovereign authority...sit in judgment upon...inquire into...," or "entertain questions concerning such acts."[87] While review exists in terms of domestic law, this review is limited, however, by a focus on specific cases and the lack of any broad-based codification of administrative law analogous to the American Administrative Procedures Act.[88] Review tends to only address whether an agency acted within its delegated powers, and to ensure that certain common law rights are observed. Treaties, by virtue of being acts of state, are not a source of legal rights. Only the enabling legislation can play this role.

C. *France*

The French constitution makes little mention of sources of international law other than formal treaty conventions.[89] As a result, interpretation of treaty obligations is oriented firmly around the text in question. The *Counseil d'Etat*, the *juge administratif* and the *juge judiciaire* in theory have the power to interpret. The *Conseil Constitutionnel* does not: its "control is reserved to acts of

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[85] On British administrative law see Susan Sterett, "Legality in Administration in Britain and the United States" *Comparative Political Studies* 25, 2 (July 1992) and "Judicial Review in Britain" *Comparative Political Studies* 26,4 (January 1994); Patrick Atiyah and Richard Summers, *Form and Substance in Anglo-American Law* (NY: Oxford University, 1987); Bernard Schwartz, *Lions Over the Throne: The Judicial Revolution in English Administrative Law* (New York: NYU Press, 1987), discusses the recent transformation in UK administrative law. Much of the "revolution" is in areas tangentially related at best to environmental regulation--in part because regulation is seen as something distinct from law. And in the key area of mandamus the revolution has barely taken hold; Schwartz, pgs. 103-4.

[86] Higgins gives an example concerning the International Tin Commission (headquartered in the UK), in which the commission owed money to English creditors and tried to invoke immunity via the original Headquarters agreement. The terms of the enabling legislation were slightly different, and the courts avoided by the question of whether the original treaty language or the enabling legislation prevails by interpreting the enabling legislation itself as providing immunity. pgs. 138-9.

[87] *Buttes Gas and Oil Co. v. Hammer*, [1982] AC 888 at 932E, 933A, cited in Weiss, 1993, pg. 258.

[88] The closest analog is the Tribunals and Inquiries Act of 1958.

[89] The one place is the preamble. But it does distinguish between treaty, which are negotiated and ratified by the President, and "accords internationaux" which are negotiated by the government. In practice the significance of the distinction is unclear; see Eisemann and Kessedjian, pg. 2.

Parliament. Executive and administrative regulations are outside the Conseil's control."[90] Nor, apparently, does the *Cour de Cassation.*[91] In practice, French judges frequently refer to the Minister of Foreign Affairs or to the European Court, if the case involves EU law. Originally, the administrative courts declared that they were not empowered to interpret treaties; in 1990 this view was overturned by the *Conseil d'Etat* and the court is no longer bound by the interpretation offered by the Ministry of Foreign Affairs.[92] As a general rule, or philosophical orientation, the French political system does not look favorably on judicial review; indeed, there is a "French rejection of judicial review and binding precedent."[93] As in the UK, it is seen as an undemocratic imposition on the will of the people, as expressed in the output of their elected representatives.

This view notwithstanding, interpretation does occur. An important distinction is drawn by French courts between cases or clauses addressing private interests, and those addressing the rules of international public order.[94] Treaties addressing private interests can be interpreted by the courts directly. Treaties addressing public interests cannot, and are instead interpreted by the government itself (in practice the executive). Examples of public interests include the territorial extent of jurisdiction, issues of the international monetary system, and the power to make war (or peace). Treaties addressing private interests would include, among others, those regulating private economic activities or the status of aliens. It would appear from this that many--thought not all--environmental agreements would, by their regulatory nature, involve some private interests. Those treaties would be interpretable by the courts. Of course, determining the "publicness" of an international obligations is not always a simple undertaking.

The *Cour de Cassation* also subscribes to this public-private distinction. Overall, the interpretive role of the judiciary is seen as limited; in one case, the *Cour de Cassation* stated that

international conventions are high-level administrative acts which can only be interpreted, when the occasion arises, by the authorities and powers between which they were concluded.[95]

In general, French courts appear to avoid any controversial interpretive rulings. If the issue is deemed clear and unambiguous (an*acte clair*) then rulings without (formal) governmental consultation occur. If not, the relevant government ministry is asked to provide an interpretation of the treaty obligation or clause in question, which is then binding on the judge. This procedure

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[90] J. Tallon, "The Constitution and the Courts in France" *American Journal of Comparative Law* 27 1979, pg. 567.

[91] Eisemann and Kessedjian, pg. 14.

[92] Ibid.

[93] Michael H Davis, "The Law-Politics Distinction, the French Conseil Constitutionnel, and the US Supreme Court" *American J ournal of Comparative Law* vol 34, 1 winter 1986, pg. 47

[94] de la Rochere, pgs. 49-50.

[95] Cass.crim. December 4 1975, Gaz Pal 1976 I 286, cited in de la Rochere, pg. 51.

clearly grants the governing administration an enormous amount of freedom in interpreting treaty commitments to its liking. Thus, the government can impose its own interpretation of a treaty on the judiciary; this has occured in several instances.[96] The result is that in any conflict between French national interests and an international commitment, national interest can legally prevail.

French courts have refused to rule on violations of treaty commitments due to legislative action (e.g. contradictory domestic statutes). The logic of this refusal turns on the issue (discussed in section II:4:C above) of reciprocity. The French constitution clearly states that the superiority of international obligations vis-a-vis domestic statutes only obtains when the obligation is reciprocated. The courts have argued that the determination of reciprocity is not theirs to make:

...if the government takes no steps to denounce a convention of suspend its application, it is not up to the judges to determine whether the condition of reciprocity in relations between states is being respected...[97]

Additionally, there are two doctrines in France which further insulate the executive from judicial review of its actions. The first is termed "the theory of exceptional circumstances" and allows the executive and administrative authorities to disregard the law, and therefore treaties, when national security is believed to be at stake. The second doctrine relates to "acts of governments"which are viewed to be beyond review. Though this doctrine is controversial,

it still applies whenever the application of the government measure involves relations with a foreign power. In particular, the diplomatic activity of the government is generally regarded as beyond judicial control since it concerns the external relations of the State.[98]

Thus in France both actions by the executive and by the legislature seem in most cases to be safe from detrimental scrutiny by the judiciary. The result is a greater degree of executive freedom in both the making and the keeping of international commitments than is found in the US or almost any other Western power. The power of the executive to redescribe commitments to its liking is seemingly limitless.[99] This is counterbalanced by constitutional guarantees of the primacy of international commitments--guarantees that are, however, irregularly invoked. Were these to be invoked more regularly, even more power would accrue to the executive via its treaty-making powers.

D. *Italy*

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96 Cassese; pg. 408.
97 Cass civ. 1st civ. ch. March 6, 1984 RCDIP 1985, 108, cited in de la Rochere pg. 46.
98 Zoller, 1993; pg. 268.
99 Cassese, pg. 408.

The typical way international commitments are domesticated in Italy is by an ordinary statute which states that full implementation of the treaty is to occur from a particular date. The treaty itself is then attached in a schedule to the statute. This system of transformation poses some problems in interpretation. Should, and does, the judiciary apply the treaty provisions directly? The Italian courts generally does apply the treaty provisions directly, though there is some controversy over this practice.[100]

In Italy treaties are given the same status as ordinary statutes. The ordinary courts make determinations relating to conflicts with ordinary legislation. They generally seek--as is common in all systems--to avoid conflict through creative interpretation. However, Italian courts can also define legislation implementing treaties, as well as the treaties themselves, as "special provisions in order that they may be considered as remaining in force in spite of the enactment of subsequent statutes."[101] This bit of judicial gymanastics allow the Italian courts to avoid, in some instances, unilateral abrogation of a commitment.

E. *the Netherlands*

In the Netherlands, as in the UK, all treaties are concluded by the Crown. Typically, the foreign minister and other relevant ministers conduct negotiations, and the Dutch Parliament (the States-General) gives or withholds approval, after the treaty has been translated into Dutch. As noted above, the Netherlands is unique among the cases in the privileged status granted international commitments, which overrule national law or even the constitution itself. Perhaps because of this strength accorded international law, Parliamentary control is tight. Dutch courts, following a separation of powers doctrine, are not empowered to question the validity of treaties (or ordinary legislation). Nor can they make determinations about conflicts between treaties and the constitution; conflicts mean that the treaty must pass with a 2/3 majority rather than a simple one. That decision is solely for the Parliament to make.

The courts are also not empowered to determine whether a particular treaty is self-executing or not. That issue is a question of treaty law rather than Dutch law.[102] For example, if the treaty appoints a certain body, e.g the ICJ, to make interpretive rulings, those rulings are deemed determinative. Only if the treaty contains no provisions for its interpretation can the courts make such rulings. At this stage, the powers of the Parliament appear minimal. Where the international treaty contains no express rules about interpretation, the courts have full interpretive powers, and need not--as in France, for example--refer to or consult with the Ministry of Foreign Affairs or any other governmental body.

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[100] Gaja; pg. 90.
[101] Ibid.; pg. 99.
[102] Schermers; pg. 115.

When interpreting, the Dutch judicial system pays attention to working drafts (*travaux preparatoires*) and negotiating history, as well as the effect of the treaty commitment. Unlike Britain, where the judiciary will interpret a treaty as written even if the resulting effect appears to violate the intent of the treaty, Dutch courts take account of effects and preambular goals. The negotiating history plays an important role in determining the guiding intent of the treaty's drafters, as do interpretations of foreign and international courts. But the role of interpretation remains formally in the hands of the judiciary and not the in other branches of governments. There is no indication that the doctines of "acts of state," "political questions," or generalized judicial deference in foreign affairs--found in all the other cases examined in this study--exist in any substantial way in the Netherlands.

F. *Germany*

In Germany the executive has the vast majority of powers in foreign affairs. The Federal Executive has the exclusive power to negotiate, sign, ratify, and terminate treaties. The Bundestag and--in rare instances--the Bundesrat have consent power only. At times the Bundestag has given its consent to international commitments along with an interpretive statement. But as in many of the other parliamentary systems examined in this paper, the executive and the parliament are often linked by party, and as the government (typically)[103] emerges from a majority coalition in the parliament dissent is muted. So the foreign relations powers of the executive are again very strong in Germany.

Despite this strength, the German Constitution (the Basic Law) requires that even international relations be conducted under constitutional principles. The Federal Constitutional Court makes all judgements about constitutionality. Any purely domestic statute appearing later in time can overturn a treaty commitment, except in certain well specified issue-areas (see section II:4:F above). Any act of the executive is in theory reviewable by the courts, and the judge "applies treaties and interprets them without, in the event of doubt, having to consult the Federal Government on the meaning and implication of the wording."[104] But the concept of deference to the executive in foreign affairs is also powerful in Germany; Hilf refers to it as a "'margin of appreciation'." An analog to the political questions doctrine, however, does not exist. Moreover, unlike Britain and France, the German judiciary cannot request binding advisory opinions from the relevant ministries. But the expressed opinions of the government and of individual ministers do carry weight.[105]

When interpreting treaty commitments, German courts rely upon the negotiating history as well as the wording of the treaty itself. When an international commitment is sent to the legislature for

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[103] Minority governments are more common than generally thought. Grand coalitions occur when all parties are involved in the government.

[104] Treviranus and Beemelmans; pg. 53.

[105] Frowein; pg. 85.

approval, it is accompanied by a detailed description of the treaty, its history, and its aims. Courts generally refer to this description when passing judgements. German courts also, as is the practice in the Netherlands, refer to interpretations made by foreign and international courts.

IV Standing and Access to Challenge Government Action

The comparisons undertaken above all concern elements of constitutional design relating to the actions of governments and to the balance of duties and power between branches of government in the process of domesticating treaty commitments. This final category of comparison is different, in that it involves private or societal actors. Specifically, the question at hand in this section is: to what degree can private actors challenge or force government action pursuant to an international commitment? What are the rules of standing for such challenges in each of the cases--in other words, who can challenge government action pursuant to a treaty commitment--or, more often, who can challenge government action pursuant to a statute incorporating a treaty commitment? As we will discover, most foreign relations actions are deemed non-justiciable by courts, and are insulated, to varying degrees, from review. But implementing statutes--where they occur--are typically ordinary statutory law, and subject to standard review procedures.

"Standing" refers in practice to a legal right to take action in a court. To have standing is to have "a sufficient stake in an otherwise justiciable controversy to obtain judical resolution of that controversy."[106] In the words of US Supreme Court Justice Scalia, to grant standing is to ask "what's it to you?"[107]

Issues of standing in relation to treaty commitments are but a tiny part of the standing rules of any judicial system. Frequently, and in particular when treaties are deemed self-executing, there is no standing to sue the government for a failure to adhere to international commitments. In keeping with the deference of judges in matters of foreign affairs, judicial oversight is less common in these areas than in almost any others. Courts have developed a panoply of "avoidance techniques"[108] in dealing with international affairs. But when commitments have been transformed into domestic enabling legislation, that legislation typically falls under the general rules of administrative law. In these cases challenge becomes more possible.

Standing rules are therefore important factors in the making and keeping of international commitments in that they may, by empowering private actors to take legal action against governments, shape compliance and implementation. Broader rules of standing would presumably yield greater compliance with international commitments. This is particularly so if the rules allow standing for "generalized"and difficult to quantify and cost injuries, such as the loss of

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[106] US Supreme Court, *Sierra Club v. Morton*, 405 US 727, 731 (1972).
[107] Cited in Christopher Sprigman, "Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis," *University of Chicago Law Review* 59 (1992)
[108] Kratochwil; passim.

environmental amenities. Standing rules are also important for another reason. Where domestic legislation addressing a particular environmental concern exists *ex ante*, and generous standing rules make it likely that organizations can successfully force governmental enforcement of that legislation, governments may seek to "internationalize" that legislation in any effort to avoid any competitive advantages which may accrue to other states.[109] In this way--by in essence strengthening compliance with national law--broad rules of standing may encourage certain states to pursue international agreements, but only if stricter (than average) domestic legislation already exists or is expected in the near term.

1. Cross-national rules of standing

The countries examined here vary in both their rules of standing--e.g. who can bring challenge?--and in their judicial structure--what is the venue for the challenge? In the English and American systems review has been mainly entrusted to the regular courts system. In the American system, most administrative law challenges occur at the circuit level in the Washington, DC Circuit court. France and Germany, with a civil law tradition, have a separate system of courts dedicated to administrative matters.[110] In France, these courts are actually part of the administration itself, and not part of the judiciary. So while these courts are in many ways separate from the active administrative apparatus, they are still part of the administration and therefore "judicial review" a bit of a misnomer.

A. *The US*

The US has arguably the broadest and most inclusive rules of standing among the cases examined here in the field of administrative law, though recent changes in the British system have substantially expanded standing doctrine in certain classes of cases.[111] In the US, a traditional test of standing was whether a litigant's personal stake in a case or controversy ensured "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[112] Later court decisions[113] further refined the standing test: at a minimum, a plaintiff must demonstrate a personal injury or threatened injury, a link between the alleged injury and the action in question, and redressability: the ability of judicial

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109 This dynamic was at work in the US push for a CFC accord in the 1980s. Prior legislation (the Clean Air Act) mandated that the EPA administrator was to regulate CFCs if a "reasonable anticipation of harm" existed. This standard, coupled with broad rules of standing, encourage the US to seek a strict multilateral accord which would mimic the domestic rules already present in the US.

110 For a discussion of the differences the common law and civil law traditions have wrought in the area of administrative law, see Gerd-Michael Hellstern, "When Courts Intervene: Judicial Control in a Comparative Institutional Perspective"

111 The following builds upon that offered in Cass Sunstein, "Whats Left Standing after Lujan? Of Citizen-suits, 'Injuries,' and Article III" *Michigan Law Review* 91 (1992).

112 *Flast v. Cohen*, 392 US 83, 99(1968), quoting *Baker v. Carr*, 369 US 186, 204 (1962).

113 *Valley Forge Christian College v. Americans for Separation of Church and State*, 454 US 464 (1982).

action to actually do something positive about the injury. It is important to note that injury is "creatable" by Congress: if Congress, through statutory language, deems a particular state of being (e.g., a given level of ambient pollution) or action to be injurious, the courts will accept that and not attempt to actually discern a physical injury. Injuries can thus be concrete, in the sense of physical and obvious to a reasonable observer, or they can be non-concrete but a product of legislation.

Congressional actions are therefore crucial to understanding standing doctrine in the US. Two important aspects of the Congressional influence on standing and participation stand out: the Administrative Procedures Act of 1946, which governs administrative actions in the US, and the existence and creation of citizen-suit provisions, or "private attorneys general" clauses.[114] The APA codified standing rules in administrative challenges. The APA also guaranteed that citizen-suit provisions, which allow private individuals or groups to bring suit against agencies (and other private actors) for failing to comply or enforce the law as written, were legitimate grants of standing. These sorts of provisions are particularly common in areas--like the environment--where Congress does not trust the executive branch to execute or enforce the law to its liking.

In most cases administrative remedies must first be exhausted before judicial remedies are attempted.[115] When such remedies fail, the lenient rules of standing have allowed for many challenges to agency actions in the US during the last several decades--and thereby frequently greater compliance with the law.[116] In the last two years, however, standing doctrine has been rocked by new thinking on the Court. In 1992, in a major case bemoaned by many environmental NGOs (and others), the Court significantly diminished standing for plaintiffs who only claim a generalized injury from an action which is indistinguishable from the public's interest in the proper administration of the law.[117] *Lujan v. Defenders of Wildlife* concerned the extraterritorial reach of the Endangered Species Act, an act that contains citizen-suit provisions. The plaintiffs claimed that a new regulation, by limiting the need for federal agencies to adhere to the ESA in overseas projects, would compromise their interests in returning to sites of endangered species (in this case, Sri Lanka and Egypt) in order to view them. To compress greatly, the*Lujan* decision argued first that the simple assertion of a desire to see particular species in the wild was too vague to qualify as

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114 On the APA and administrative law more generally see Richard Stewart, "The Reformation of American Administrative Law" *Harvard Law Review* 88 (1975); Keith Werhan, "The NeoClassical Revival in Administrative Law" *Administrative Law Review* 44 (Summer 1992); Robert Glicksman and Christopher Schroeder, "EPA and the Courts: Twenty Years of Law Politics" *Law and Contemporary Problems* 54 (1991).

115 P. van Dijk, *Judicial Review of Governmental Action and the Requirement of an Interest to Sue* (Sijthoff and Noordhoff: 1980); chap. 3.

116 Laura Bulatao, "Citizen-suits under the United States' Clean Water Act," in Martin Fuhr and Gerhard Roller, eds., *Participation and Litigation Rights of Environmental Associations in Europe* (XX)

117 Sprigman, 1992 pg. 7 (lexis-nexis file).

an injury, and second that while Congress can empower private actors to commence suit on their own behalf,

> vindicating the public interest...is the function of Congress and the Chief Executive...to permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, "to take Care that the Laws be faithfully implemented."

Thus *Lujan*--in addition to overturning perhaps hundreds of statutes containing such broad grants of standing[118]--severely restricted standing to challenge executive actions by invoking the separation of powers doctrine. The court's claim was that the President was constitutionally-empowered to "faithfully" execute the law, and therefore Congress could not grant standing to individuals merely to ensure such faithful execution. Standing is to be restricted to more concrete and specific sorts of injuries.

This somewhat long digression on the *Lujan* case is justified by two insights it yields. The first is general: standing rules in the US, as elsewhere, are rarely "rules" in the sense of codified law (though sometimes, as in the APA, they in part are), and moreover when they are codified they are still subject to extensive interpretation by the courts. Standing tends to evolve over time, unlike ratification rules which tend to be constitutionally-mandated and thereby relatively fixed. More specifically, while the US has long been famous for its depth and breadth of participation rights and standing doctrines, *Lujan* has severely limited standing in many cases with environmental content. It has done so by demanding more strictly than in the past an "injury-in-fact," something hard to demonstrate in many instances where the preservation of environmental quality, or diversity, is at issue, and it has done so by restricting the use of citizen-suits in instances where private claims of injury approximate the public interest in compliance and faithful execution. This would appear to apply both to instances where the executive is challenged and to instances where private actors, such as firms, are sued for failure to adhere to the law.

As a final note, US courts have been quite willing to extend their reach extra-territorially, in the process often granting standing to foreign nationals under US statutes.[119]

B. *The UK*

While judicial review of administrative action is certainly known in the UK, rules of standing are not generally as broad as those of the US, particularly in relation to the pre-*Lujan* US--though

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118 Sunstein, 1992.

119 Michael McCloskey, "Extra-territorial adjudication: a means to an end," in Simone Bilderbeek, ed., *Biodiversity and International Law* (IOS Press: 1992) pg. 151.

standing doctrine has evolved substantially in recent years.[120] In the UK, "it cannot be said that any form of judicial review may be exercised in relation to any adminstrative agency...there are considerable restrictions specifically with regard to the Crown and its officials."[121] These restrictions, perhaps unsurprisingly, revolve around issues of foreign relations. As noted above, foreign relations and intercourse with other sovereign nations has always been among the prerogative powers of the Crown, and therefore somewhat removed from popular control and access. The restrictions on judicial challenge include, among others, "acts of state," which are basically all foreign relations acts including the making of treaties. Moreover, all acts of Parliament, due to the doctrine of parliamentary sovereignty, are in principle unreviewable.

While Parliamentary acts themselves are unreviewable, if Parliament delegates legislative powers--which includes the making of rules, regulations, and the like--this delegated legislation is reviewable to determine if the delegatee acted within its powers, i.e. within the terms of the delegation.[122] The drawback to this form of administrative review is that delegated powers in the UK are frequently vague and broad, making a claim of *ultra vires* action--action beyond the delegated powers--quite difficult to sustain. The Parliament can moreover bar judicial review when it wants to (via statute). But unlike the US, when review does occur, there is no demand that all administrative remedies be vainly tried before coming to the courts.

Thus judicial review in the UK is generally limited to determinations of whether administrative bodies have acted within their powers. When making such determinations, the courts may also--to some degree--test whether the acts concerned are in conformity with customary laws of "natural justice"[123] such as the weighing of legally-protected interests, impartial decision-making, and opportunities for effected interests to plead on their behalf prior to decision-making. The discretion of the courts to award or not to award standing--and a remedy--is very broad. There is no analog in the British system to the American APA, keeping with the British penchant for unwritten rules.

The British judicial system responds differently to challenges based on governmental action rather than inaction. In cases where the courts are asked to prohibit some action, both "persons aggrieved" and "strangers"--persons unaffected by the action but interested solely out of concern with the observance of the law by the government--can be granted standing. Discretion to grant standing is much greater in the latter than in the former, but it may be granted. This is quite distinct from the view taken by the US Supreme Court in *Lujan* (see above); indeed, it espouses the

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120 For an analysis of recent changes in British administrative law see Bernard Schwartz, *Lions Over the Throne: The Judicial Revolution in English Administrative Law* (New York: NYU Press, 1987). Much of the "revolution" is in areas tangentially related at best to environmental regulation--in part because regulation is seen as something distinct from law. And in the key area of mandamus the revolution has barely taken hold; Schwartz, pgs. 103-4.

121 van Dijk, pg. 39. See also ibid.

122 Ibid., 38.

123 Ibid.

very opposite position. Those with a general pubic interest and no specific, "individualized" private interests are still eligible for standing. Of course, the basis of the decision in *Lujan* was the constitutional separation of powers, a basis wholly lacking in the UK.

In cases where the court is asked to force some action to occur, standing rules are quite tight. In the opinion of one analyst, in Great Britain"the non-performance of a public duty seems to be regarded as less of an offence than against public order than the unlawful exercise of power."[124] Here a special, individualized interest must be shown.

When organizations bring challenge--as is more typically the case than individuals bringing challenge--the requirement that an injury or interest be individualized is not very strong. As a result, it is relatively easy for organizations to stand up for the interests of some or all of their members.

C. *France*

In France the administrative courts are under the aegis of the administration itself. However, they are argued to remain fairly independent, though this is hard to prove.[125] The most important body for challenges arising under treaty commitments is the *Conseil d'Etat.* The *Conseil* has jurisdiction over all disputes arising outside French territory in addition to those where the act in question applies beyond any one prefect in France. These conditions would appear to apply to all international environmental commitments.

However, in France all "acts of government"--in a similar fashion to the British doctrine of acts of state--are deemed unreviewable. Acts of government include administrative acts which affect foreign relations and relations with international organizations, and further include the conclusion, ratification, and interpretation of treaties.[126] In Britain, the insulation from challenge that the acts of state doctrine produces is attentuated somewhat by the practice of rewriting each treaty as an Act of Parliament when domesticating it. The treaty commitment therefore becomes statutory domestic law, and, if it has some form of delegation inherent, should in principle be reviewable. In France, however, while the legislature approves most major international commitments, "there is no room...for the 'reception' of international law into domestic law. To become applicable, an international agreement needs only one formality, publication."[127] Treaty commitments do not become acts of the French legislature, but rather gain effect through publication once they have received legislative approval, if necessary. Thus the acts of government doctrine in France--because of the nature of French treaty domestication--appears to effectively shield administrative acts relating to treaty commitments from review.

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124 HWR Wade, *Administrative Law* (3rd Edition) (Oxford Press: 1971) pg. 159.
125 van Dijk, pg. 117.
126 Ibid., pg. 129.
127 de la Rochere, pg. 42.

D. *Italy*

I was unable to obtain reliable data at IIASA on Italian standing rules.

E. *The Netherlands*

Data (available at IIASA) on the Netherlands was limited, but it terms of ease of standing regarding citizen organizations it appears that Dutch NGOs which are legally incorporated can gain standing to challenge government actions, as long as the action in question impacts a declared aim or interest of the organization as reflected in its charter.[128] In this sense Dutch courts do not seem to demand the sort of well-focussed, individualized harm characteristic of American courts.

F. *Germany*

Data on German standing doctrine was similarly limited. Unlike in the Netherlands, German organizations cannot simply gain standing based on the proclamation of an interest in a particular goal or subject in their charters.[129] German law demands a more well-focussed, individualized harm, similar to that of demanded by American courts. At the *Lander* level, however, standing rules *vis-a-vis* organizations are often more relaxed, but while the *Lander* do have the power to engage in certain limited types of international commitments these commitments tend to be relatively unimportant.

V Conclusions: Institutional Variations and State Behavior

The goal of this working paper has been to examine the processes by which international commitments are domesticated in different nations--how they are transformed from international to domestic law--and to explore how rules of ratification, interpretation, and standing might systematically affect implementation and compliance with international commitments. I have identified a number of interesting variations in the domestication process across the cases surveyed. In this final section, I will briefly survey the most salient differences, and then discuss the possible implications of these differences for implementation and compliance.

1. Major Variations in Domestication

One danger in all comparative analysis is an undue focus on distinctions rather than similarities. The first thing one notices in surveying cross-national domestication of international commitments is that despite many variations in detail the general characteristics of the process remain constant

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128 "NGOs and Legal Standing," in Simone Bilderbeek, ed. *Biodiversity and International Law* (IOS Press: 1992); pg. 179

129 Ibid., pg. 181

across the cases. No nation (in the sample) seems to have devised a radically different method of incorporating international law than that used by the others. The basic outline of the process is:

i. executive [occasionally in conjunction with elements of the legislature] negotiates--->
ii. if the treaty has direct effect, it automatically becomes domestic law. if not--->
iii. the legislature, or some subset of it, votes on the treaty and/or writes implementing legislation which transforms the commitments into domestic law.

Variations occur primarily in the nature of the implementing legislation--e.g., does it alter the language of the treaty commitment?--and in the status of the resulting law--does it have priority over ordinary legislation?--with status being particularly important.

Issues of interpretation and standing, while not aspects of domestication *per se*, were examined because they effect both the meaning and the control of international commitments once they have entered the realm of domestic law. Hence, they may be expected to affect compliance and implementation. Here variations revolved primarily around the degree of insulation of the executive from review and the degree to which treaty-related harms must be well-focussed to justify legal challenge.

A. *The Nature of Implementing Legislation and its Status*

The priority accorded treaty commitments *vis-a-vis* ordinary legislation was found to vary widely in the cases examined.[130] The modal position, shared by the US, the UK, and Italy, is that once domesticated or transformed a treaty commitment is accorded the same status as any other piece of legislation emerging from the political process. As a result, in these nations treaty commitments enshrined in domestic law can be easily overturned by a contrary statute enacted at a later date. As the (US) D.C Circuit Court held in *Diggs v. Shultz*, "Under our constitutional scheme, Congress can denounce treaties if it sees fit...and there is nothing the other branches can do about it."[131] The same can be said of the British and Italian parliaments.

A strikingly different position on status is found in Dutch law. Here treaty commitments are accorded a higher status than ordinary legislation, and can even have a higher status than the Dutch constitution itself if 2/3 of the States-General (the legislature) approves. It is noteworthy that in the US this is precisely the proportion of the Senate that is required to merely ratify a

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[130] This may in part be an artifact of the sample; Cassese, employing a much broader sample with more limited detail, argues that "one result of my enquiry is of a primarily negative character: most of the States (about 160) which currently make up the workd community do not accord primacy to international rules in their legal systems."(emp. in original). Cassese, pg. 435.

[131] Cited in Chayes and Chayes, 1993; pg. 187.

treaty. Yet in the Netherlands, the very basis of the political system--the constitution itself--can be altered via treaty approval by 2/3 of the representatives.

Germany and France occupy a middle ground. In Germany treaties which address tax law, treatment of aliens, extradition, or police cooperation do recieve a higher status than ordinary law. But all others do not, and clearly the most important international commitments fall outside the limited categories enumerated above. In France, the 1958 constitution accords treaties a higher status than ordinary statute law, similar to that found in the Netherlands though without the "constitution-trumping" provision. But in practice, the evidence indicates that French courts for a long period--and possibly still today--failed to uniformly apply this doctrine, and as a result later ordinary legislation often does take priority over international commitments, particularly under the jurisdiction of the*Conseil d'Etat.* While some analysts indicate that French courts are moving in the direction of enforcing the constitution on this issue, and granting a higher status to international commitments in the event of a conflict, it is not clear that this view is absolutely correct. It is also important to note that the French constitution privileges international commitments only if they are reciprocated by the other parties. This clause provides one pathway of "escape" from onerous commitments.

Only Italy appears to incorporate treaty language directly into its domesticating legislation as a matter of practice. In all the other cases (except possibly the Netherlands, where the evidence is ambiguous) the treaty language tends to undergo some, occasionally extensive, revision in the process of transformation. The implications of such a revision-process are discussed below.

Finally, it should be noted that Cassese, in a broader study, categorizes the Western states, in contrast to developing and Socialist states, as having a greater preponderance of constitutions "markedly geared to the international community." Thus the degree to which international treaty law is given a constitutionally-guaranteed privileged status--which as indicated by the preceding survey is often substantially undermined by counter-clauses, loopholes, and actual practice--appears strongly influenced the by the nature of the sample of nations chosen. This study, looking at OECD states only , as a result may paint a relatively bright picture for the domestic legal force of international commitments that should not be casually generalized to the world at large. The present system of international law is a creature of the West and therefore western states are likely to be especially deferential and conscientious in their treatment of international obligations. To give but one cautionary example, albeit of great and growing import, China's 1982 Constitution barely addresses international law at all. No mention is made of treaties, customary law, or international organizations of any kind.[132]

B. *Interpretation*

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[132] Cassese, pg. 437.

The variance within the cases regarding the interpretation of commitments is more limited. It occurs mainly on two dimensions: the degree to which interpretation is concentrated in or primarily influenced by the executive, and the degree to which the treaty itself, vs. the language of implementing legislation, guides interpretation.

In general, in all the cases surveyed foreign relations and treaty-making are considered somewhat special areas in which the executive has a substantial degree of expertise and control. All of the judicial systems surveyed have a relatively strong tradition of deference to the executive branch in international affairs. This deference appears to be a residue of the overwhelming security focus of international relations in the pre-World War II period. One can speculate, but not with assurance, that this deference will erode in the future as non-security concerns grow in importance within international affairs.

In the US, deference to the executive is attenuated somewhat by the constitutionally-guaranteed power of the Senate in foreign relations. The Senate's interpretation of a treaty is important because under American law it is that interpretation that actually matters: the Senate's understanding, when granting consent, is the US' understanding. Once an international treaty commitment becomes domestic law, however, it is the Supreme Court which is the ultimate arbiter. The executive in the US, as a result, has less control over interpretation than executives in the other cases. In the UK, the courts grant substantial deference to the executive (formally to the Crown, but in actuality to the Cabinet, the Crown's ministers).

In France the executive has perhaps the greatest power. In the past French courts routinely relied upon interpretations provided by relevant ministries, and these still have great weight today. Under the French constitution commitments are binding only if they are reciprocated. The courts have resisted ruling on unilateral abrogations of treaty commitments, on the grounds that they are in no position to determine whether the treaty is in fact being reciprocated. Since only the executive is well-positioned to determine whether other parties to an international commitment are actually reciprocating fully the executive's power to interpret is further enhanced by this constitutional provision.

Another important distinction can be drawn between Italy and the other cases. In Italy, treaty commitments are typically domesticated via a special statute stating that "the following treaty shall be implemented" with the treaty itself contained in an appendix. In the other cases, the treaty commitments are generally rewritten when the implementing legislation is drafted. This practice of rewriting can cause problems of interpretation when the wording of an international commitment is altered, or even when the actual commitments themselves are altered, as has recently happened in the US with the implementing legislation for the newly-created World Trade Organization.[133] While judges will generally attempt to reconcile domestic and

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133 Editorial, *International Herald Tribune* August 20-21 1994.

international language, in a controversy domestic courts will almost always follow the domestic and not the international language, which can result in a failure to comply with a treaty commitment.

C. *Standing*

The brief review of standing rules demonstrated that the US has the broadest access and the strongest tradition of judicial review in the cases examined. While the *Lujan* case has tightened standing rules, there are still ample and well-formalized modes of access for individuals and groups seeking to challenge government actions pursuant to a treaty commitment. The chief effect of *Lujan* has been to require that alleged harms be more well-focussed in the sense that an individual has suffered a real and individuated harm and is not just seeking that the law be properly executed. In the UK, while judical review is in some respects more limited, there is conversely no demand that standing be based on an individualized harm; indeed, there is a long tradition of granting standing to "strangers." In France, the doctrine of "acts of state"--referring to government acts which are deemed non-justiciable--makes challenge exceedingly difficult and again serves to insulate the executive. The power of the French executive in international affairs is perhaps the result of the confluence of two powerful traditions in French politics: the democratic, as embodied in the early Revolution, and the dictatorial, or "Bonapartist." The democratic ensures a suspicion of elitist judical review, and the Bonapartist--as embodied in the Gaullist constitution of 1958--grants substantial powers to the President, especially in foreign affairs. The result is that judical challenge of government action pursuant to a treaty commitment, by citizens or citizen groups, is extremely difficult to mount.

Regarding standing for organizations, the US and Germany require fairly well-focussed harm to individual members of an organization for that organization to obtain standing. Conversely, the Netherlands allows any group which can show an interest reflected in its charter of principles and goals to bring challenge. The UK also is quite open to groups seek to vindicate fairly diffuse interests.

2. Implications and hypotheses

Some basic hypotheses can be generated linking the institutional variations summarized above with state behavior relating to compliance and implementation. One barrier to effective hypothesis-generation is that the sample of cases in this paper was necessarily limited, institutional design features varied along many dimensions, and a number of the variables of interest appear to work at cross-purposes. Hypotheses therefore have to be carefully drawn. Nevertheless, the following very simple hypotheses may serve as fruitful starting points for future research on compliance, implementation, and international commitments.

Based on the status of the environmental treaty commitments in the Netherlands, vs. their status in the US, UK, Germany and Italy, we should expect that compliance (with the same treaties) will be tend to be higher in the Netherlands than in the other cases. This is because later legislation cannot legally overturn international commitments in the Netherlands, whereas it can in other countries. As a result, in the Netherlands it is more difficult to legally breach an international commitment. The first hypothesis is therefore:

i. *The Netherlands should exhibit a higher level of compliance with shared international commitments than the US, the UK, Germany, or Italy.*

A corollary hypothesis is that other states which grant priority to international commitments should also exhibit relatively high levels of compliance.

A second hypothesis relates to the nature of the implementing legislation. Since Italy is the only state in the sample to uniformly incorporate the treaty text directly into its "act of transformation," we should expect Italy to exhibit greater levels of compliance than the UK, US, or Germany for the same international commitments. Because the other states often rewrite commitments when domesticating them, there is more room for advertant or inadvertant alterations which may result in breaches and therefore challenges by other parties. While variations in compliance levels may be difficult to capture due to the perturbing effects of other variables, such as standing rules, we should expect that:

ii. *Italy should be the object of dispute proceedings, or challenges by other parties, less frequently than the US, UK, or Germany in situations where commitments are shared among these states.*

We can make a dyadic comparison between the two most avowedly dualist countries: the UK and the US. Both nations strongly favor the primacy of national law, and legislative action, over international law. But the US has broader rules of standing and a clear and constitutionally-guaranteed disperation of power. As a result, we may expect it to be easier for the British government to breach an international commitment without internal challenge than for the American government:

iii. *Given shared international commitments, the US should exhibit higher levels of compliance than the UK, ceteris paribus.*

Finally, though France and Netherlands share similar constitutional provisions regarding the primacy of international commitments, the French executive, responsible for carrying out these commitments, is much more insulated. Thus we should expect:

iv. *France should more frequently (than the Netherlands) renege or fail to properly implement those commitments shared with the Netherlands*

These hypotheses are clearly limited and difficult to subject to rigorous testing. While they may provide subjects for futher research, as is discussed below they also point to the difficulties and pitfalls associated with an overly legalistic approach to compliance and implementation.

3. General conclusions and findings

This study's survey of the domestication of international commitments in six advanced industrial nations has uncovered a number of institutional variations of interest to scholars of international cooperation, and should prove useful to those performing case studies of implementation and compliance in any of the countries surveyed.

While I have generated several hypotheses linking institutional legal factors with compliance (see above), it is not clear that many useful systematic conclusions along these lines can be drawn. A major hindrance is a lack of degrees of freedom in the statistical sense: I have uncovered many variables within few cases, and it would be futile to attempt to discern any clear relations because the probability of omitted variable bias--of overlooking the truly important causal factors--would be very high. Indeed, one result of this study is to affirm the complexity of the nexus of law, politics, and treaty-making. There are so many factors at work, often in ways that are probably unknowable to the researcher (in any reasonable sense) that few meaningful generalizations relating institutional design to behavioral outcomes are possible.

As a result, one major conclusion is to reaffirm the poverty of a purely formal analysis of institutions. While formal rules--or written rules--undoubtedly matter, they differ from informal rules only in their clarity and the degree to which they can be assumed "common knowledge." The have no other differentiating power beyond this. Yet informal rules abound, and as the analysis has shown (France being a paradigmatic example), in practice informal rules can often effectively trump or at least swamp formal rules. Informal rules, as well as understandings and reading of formal rules, are moreover constantly in evolution. What this means is that there are no easy ways to understand state legal practice towards international commitments; a careful and intensive study of case law, actual practice, and field research is necessary. This will be difficult and costly--especially if done comparatively--and may not be worth the effort in many cases of interest. The studies that do exist, on which this paper relied heavily, are quite cursory, often contradictory, are

written by legal scholars for a legal audience, and typically ignore informal rules and procedures except where they have major, unavoidable effects.

A second major, and related, conclusion is that one must question the importance of formal *legality*when evaluating implementation and effectiveness at the domestic level. This issue is the heart of a number of major debates about international law and behavior.[134] Beginning with the assumption that international law mattered--a contested assumption in some quarters--this study sought to look at the modes and methods that transformed international into domestic law. This move was based on a second (safer) assumption that domestic law matters more, or is more powerful, than international law. Yet the complexity of both formal rules and actual practice in the creation and implementation of international agreements raises doubts about the importance--and even the ascertainability--of legality regarding national behavior pursuant to international commitments. What governments actually do regarding commitments they have undertaken appears to depend on a number factors of which the legality or illegality of the action is but one. Legality--and here I refer to legality under domestic or constitutional law and procedure regarding international commitments--is not completely irrelevant but it is not decisive or unambiguous either.

Thirdly, many of the variations uncovered in this study appear to reflect variations in the fundamental organizing principles of politics held by each society; they are the institutional sediment of differing political philosphies. That the wide array of institutional variations in domestication do not facially appear to result in equally wide behavioral variations is in large part due to the uniform insulation of the conduct of foreign affairs within the executive. This insulation attentuates the effects of institutional differences, especially in the implementation stage. To speculate somewhat, we may expect to see these institutional variations play a more important role in the future. As international affairs increasingly encroach upon policymaking provinces which traditionally fell solely within the ambit of domestic decisionmaking, the need for greater constitutional checks upon foreign affairs--and less insulation--will become more apparent. The warrant for insulation--national security--is less and less the major goal of foreign relations, and commitments of a military or alliance nature, which once were the dominant form of international commitment, are now only a small part of the panoply of commitments undertaken by nations. As such, and as the effects of international commitments impinge more upon our lives and lifestyles, we may expect a greater demand that the making, keeping and carrying out of commitments no longer be so sheltered under the twin doctrines of judicial and legislative deference. Such a "de-sheltering" should enhance the role of the institutional differences which this paper has described.

In sum, the chief utility of this study will likely lay in its

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[134] See for example Robert Francis Boyle, *World Politics and International Law* (Durham: Duke University Press, 1985); and Stanley Hoffman, ed, XX

- overview of the domestication process in six major states;
- indication of the diversity, complexity, and the functional similarity of national systems for making and incorporating international commitments;
- reaffirmation of the poverty of a purely formal analysis of institutions; and
- questioning of the importance of legality as a factor in state behavior regarding international commitments.

Given the possibility (perhaps probability) that domestication procedures will matter more in the future than presently, the best prescription for this avenue of research is "hold and wait." While futher work in this vein is not justified at the moment, as the nature of agreements and their implementation grow more complex the significance of these factors may and most likely will need to be re-explored.