interesting is the fact that the U.S. Assistant Secretary of State testified to Congress that a visit from him would provide a sufficiently important ceremony for the treaties to be ratified, but he was not implored by Congress promptly to do so.[11]

My recent research uses empirical methods to test my theory that the countries with which the United States has signed BITs can be better explained by political considerations than investment considerations. The early results of that analysis have consistently suggested that variables measuring political considerations are better predictors of U.S. BIT partners than variables measuring investment considerations. Of course, this does not mean that investment concerns have never influenced a U.S. decision to sign BITs. It is my contention, however, that a political theory of BIT formation fits both the qualitative and quantitative data better than an investment-centric account, and as a result, it is time for the narrative that BITs are signed to protect American investments to change.

## International Law in Domestic Legal Systems: An Empirical Perspective

*By Pierre-Hugues Verdier*[*] *and Mila Versteeg*[†]

The relationship between international law and domestic law has long been a central topic of international law scholarship. For decades, debates raged between partisans of monist and dualist theories.[1] More recently, scholars have turned away from theoretical conjectures to investigate the practical and policy implications of the rules and procedures that govern how states create international legal obligations and implement them domestically.[2]

It only takes a moment of reflection to realize that many of the questions raised by this scholarship lend themselves to empirical investigation. Is there a ''democratic deficit'' in international law-making? Is the traditional distinction between ''monist'' and ''dualist'' systems meaningful? Are some national legal systems generally more receptive to international law than others, and why? In addition to these more traditional questions, systematic empirical data on the status of international law in domestic systems allows us to explore the politics of international law. Depending on the question of interest, such rules can be regarded as an independent variables (e.g., does the fact that a legal system gives direct effect to treaties affect compliance with human rights obligations?) or as a dependent variable (e.g., how do various factors such as legal origins shape the regime for international law reception?)

Despite this need, the data currently available are limited. Scholars and organizations have conducted several qualitative surveys of state practice. However, such surveys usually cover a limited number of countries[3] or specific issues,[4] and provide merely a ''snapshot'' of state

[11] *Id.*

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[1] *See* J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 Brit. Y.B. Int'l L. 66 (1936); Edwin Borchard, *The Relation Between International Law and Municipal Law*, 27 Va. L. Rev. 137 (1940).

[2] *See, e.g.*, John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AJIL 310 (1992); International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion (Dinah Shelton ed., 2011).

[3] *See, e.g.*, Shelton, *supra* note 2.

[4] *See, e.g.,* Treaty Making: Expression of Consent by States to be Bound by a Treaty (Council of Europe ed., 2001); National Treaty Law and Practice (Duncan B. Hollis et al. eds., 2005); The Role of Domestic Courts in Treaty Enforcement (David Sloss ed., 2009).

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practice at a single point in time. More fundamentally, qualitative surveys do not lend themselves directly to quantitative analysis. Other initiatives document some aspects of international law reception as part of a broader database of constitutional provisions.[5] However, not all relevant aspects of a domestic legal system's relationship with international law are covered in the text of the constitution. To date, there exist no comprehensive quantitative data across countries and over time.

To fill this gap, we are currently constructing a dataset that will consist of quantitative information on such practices for the period 1815 to 2013. For each country-year, we are coding more than 30 variables, which fall into three main categories: (1) treaty-making, (2) the reception of treaties, and (3) the reception of customary international law (CIL). When completed, our dataset will cover a wider range of countries than existing initiatives; it will reflect changes over time; it will incorporate information not only from constitutional texts, but also from legislation, court decisions, and secondary sources; and it will be quantitative, so that the findings can be easily visualized and used in statistical analyses.

Today we will present some preliminary results based on the current version of our dataset, which consists of 54 countries.

## Domestic Constraints on Treaty-Making

Our first finding is that treaty-making is increasingly subject to a range of domestic constraints. While treaty-making has traditionally been seen as an executive prerogative, recent years have witnessed growing concerns over a ''democratic deficit,'' especially since treaties have proliferated and now cover many areas that used to be the exclusive realm of domestic law and policy.[6] In response to these concerns, many have insisted on a greater role for national legislatures in the treaty-making process. Our data allow us to explore empirically domestic responses to this alleged democratic deficit. Figure 1 shows that the absolute number of states that require legislative approval of at least some treaties has increased over time, although this practice has remained relatively stable as a proportion of all states in our data.

The trend towards legislative approval notwithstanding, there exists important cross-country variation in what types of treaties are subject to legislative approval. Traditionally, only a small set of treaties required such approval, including peace treaties, alliances, and cessions of territory. Since World War II, however, states have expanded this list to include treaties that fall within traditional legislative domains, such as treaties that modify domestic laws, trade treaties, or treaties that commit state spending. Figure 2 shows that treaties that modify domestic law now require legislative approval in 86% of countries in our dataset; treaties relating to international organizations, in 73%; and trade treaties, in 65%.

Another, often-overlooked domestic constraint is constitutional review of treaties prior to their conclusion. This practice has become more prevalent over the past decades, although it is largely confined to civil-law countries. While until recently, such review was often perfunctory, domestic courts have become increasingly active as guardians of the national constitutional order against what they see as overly intrusive international commitments.

[5] *See* Tom Ginsburg et al., *Commitment and Diffusion: Why Constitutions Incorporate International Law,* 2008 U. Ill. L. Rev. 201 (2008); Oona Hathaway, *Treaty's End: The Past, Present, and Future of International Lawmaking in the United States,* 117 Yale L.J. 1236 (2008).

[6] *See* Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 Eur. J. Int'l L. 907 (2004).

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**Figure 1**

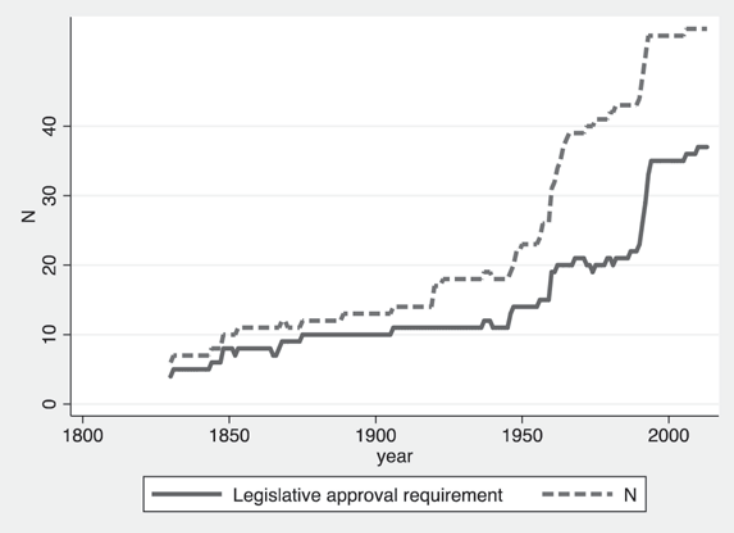
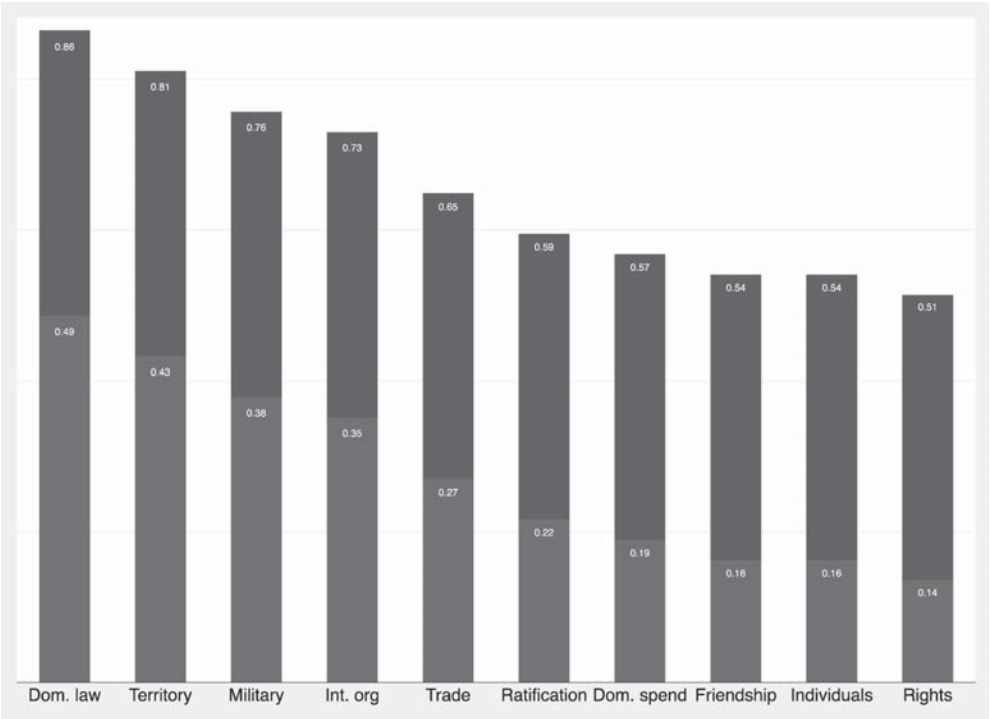



**Figure 2**




This phenomenon is apparent in recent cases before the German Constitutional Court concerning the constitutionality of proposed Eurozone financial stability funds.[7] Several countries also had to amend their constitutions in order to join the International Criminal Court, as their constitutional courts might otherwise have blocked ratification of the Rome Statute.

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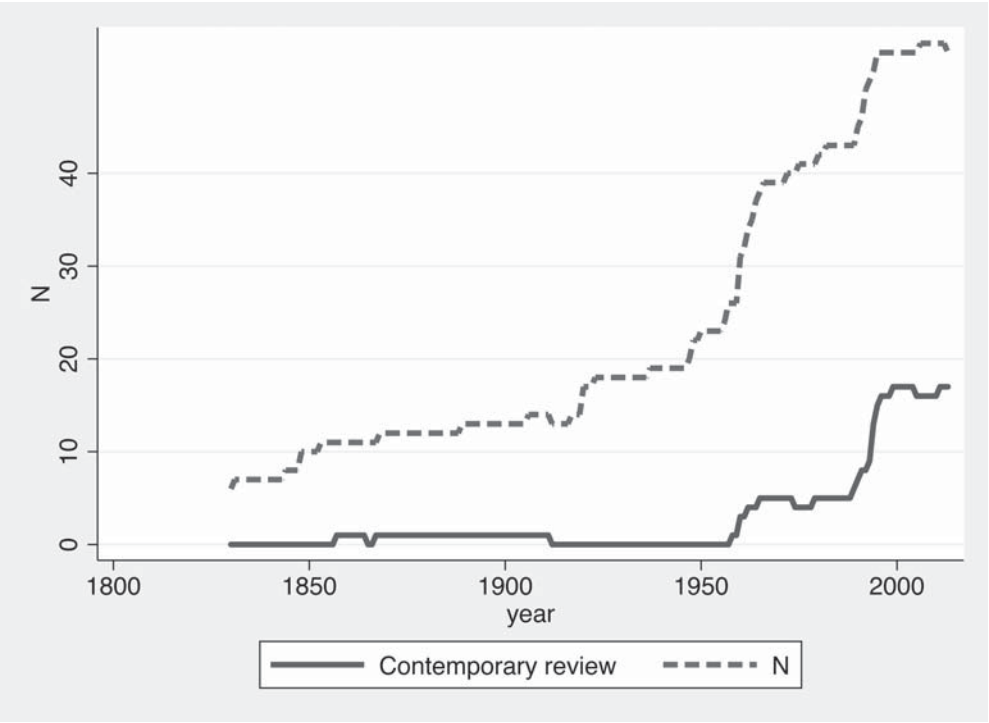
**Figure 3**




## The Monist-Dualist Divide

Our second finding is that the difference between monist and dualist systems is less pronounced than traditionally thought. Indeed, as the longstanding theoretical debate between monism and dualism has abated, scholars have increasingly recognized that the differences between legal systems regarding the reception of international law are more nuanced in practice. Our data support this view. Figure 4 reveals that every single one of the monist countries in our sample (i.e., countries in which ratified treaties automatically become part of domestic law) requires legislative approval for ratification of at least some treaties. By contrast, such requirements are less frequent in dualist countries, although they have become more popular. To illustrate, the United Kingdom in 2010 introduced a procedure by which Parliament may reject treaties prior to ratification.

These findings suggest that the difference between the role of the legislature in monist and dualist systems may be overstated. Treaties that change domestic laws require either prior legislative approval (in monist systems) or subsequent implementing legislation (in dualist systems). In both cases, the legislature is involved in the treaty-making process. At the same time, whether legislative involvement happens *ex ante* or *ex post* may have real practical implications. Monist legislatures might be in a better position to require modifications or reservations prior to granting their approval. The U.S. Senate's frequent insistence on

[7] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 18, 2014, Docket No. 2 BvR 1390/12 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 28, 2012, Docket No. 2 BvE 8/11 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 7, 2011, Docket No. 2 BvR 987/10 (Ger.).

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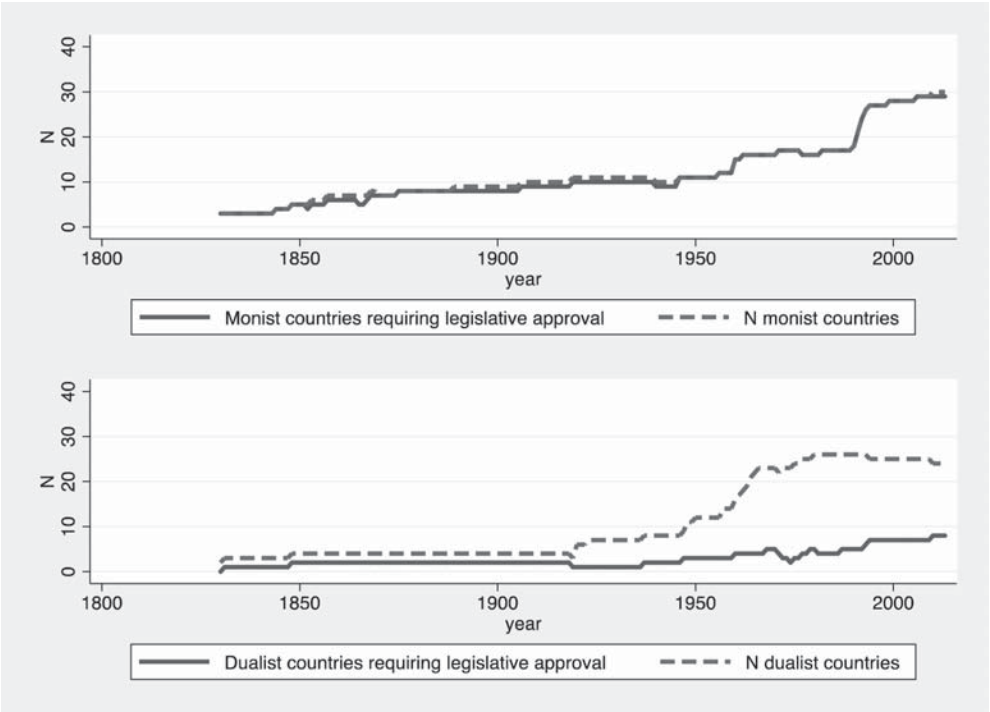
**Figure 4**




modifications and reservations illustrates this practice. Dualist legislatures, by contrast, have to take the treaty as it is, but might be in a better position to tailor implementing legislation to the domestic legal system.

A second factor that blurs the traditional monist-dualist divide is that in many monist countries, courts apply various doctrines that in fact prevent the direct application of many treaty provisions. In the United States, the best-known is the ''self-execution'' doctrine. Figure 5 shows that a large proportion of monist countries recognize similar exceptions to the direct effect of treaties, and that this proportion has remained largely constant over time. Thus, even in monist countries, many treaties are not directly applicable or require implementing legislation.

## International Law Friendliness

Our third finding is that domestic legal systems have become more receptive to ratified treaties, but that this development interacts in complex ways with the growing prevalence of domestic constraints on treaty-making. To capture whether some systems look more favorably upon international law, we are developing measures of international law ''friendliness'' along several dimensions:

- The *Domestic Constraints Index* (DCI) measures the constraints imposed by domestic law on treaty-making. For example, is legislative approval required for ratification? If so, for which treaties? Are special procedures required, such as supermajority votes, referenda, etc.? Is there constitutional review of treaties before their ratification?
- The *Treaty Receptiveness Index* (TRI) measures the reception of treaties in the domestic legal system. For example, do treaties become part of domestic law without

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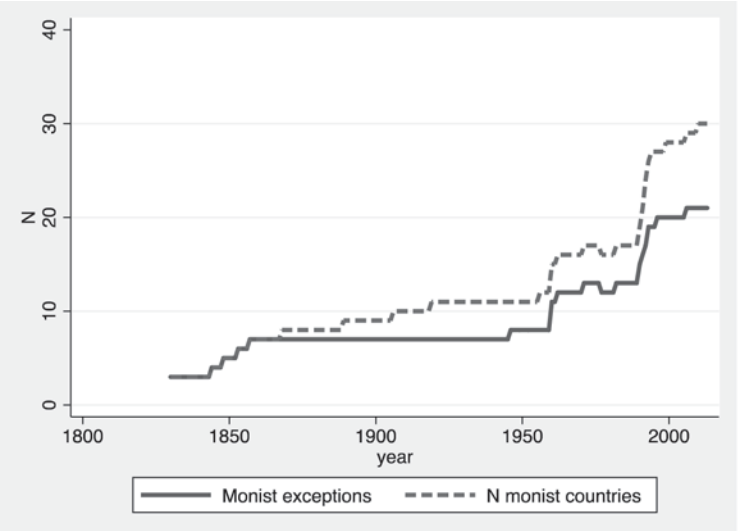
**Figure 5**




implementing legislation? If so, what is their hierarchical status relative to domestic statutes and the constitution? Do courts apply doctrines (such as non-self-executing treaties) that limit the legal effect of treaties?

- The *CIL Receptiveness Index* (CRI) measures the reception of CIL in the domestic legal system. For example, does CIL automatically become part of domestic law? If so, what is its hierarchical status?

Figure 6 shows the trajectory of each of the three indices since World War II. While CIL receptiveness (CRI) remained fairly stable, national attitudes towards treaties have changed in significant ways. In the 1960s and 1970s, both domestic treaty-making constraints (DCI) and treaty receptiveness (TRI) went down, possibly reflecting the rise of newly independent states with strong executives and limited inclination to constrain government by applying treaties directly. Then, both indices went up sharply with the wave of democratic constitution-making of the late 1980s and early 1990s, when many countries carved a more prominent place for international law in their new constitutional order.

Perhaps the most interesting finding here is the positive correlation between domestic constraints and treaty receptiveness. A priori, two plausible hypotheses could have been articulated. First, some countries could be friendlier than others towards international law, perhaps because of their legal tradition, political systems, or culture. In that case, we would expect these indices to be negatively correlated, so that such countries are both eager to conclude treaties and willing to give them direct effect. Alternatively, there may be a trade-off: the easier it is for the executive to make treaties, the more reluctant a country will be to give them direct effect. Figure 7 provides tentative evidence of the second hypothesis, by showing how countries rank on the domestic constraint and treaty receptiveness index. It indicates that the two are positively correlated. While further analysis with appropriate controls is needed to confirm this result, it begins to shed light on the policy choices involved.

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