



Panel: International Law in the U.S. Courts: Current Issues, Future Trends

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Summary and Reference Materials

Enforcement of Treaties

- I. The role of treaties in United States domestic law.
 - A. The Constitution makes treaties effective as domestic law.
 1. In international law, a treaty is a compact between nations, to which each nation is bound to give effect, through the mechanisms prescribed by its own constitution.
 2. In the United States, the Supremacy Clause incorporates treaties into domestic federal law and requires courts to give them effect: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and 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....”
U.S. Const., Art. VI.
 3. This represents a deliberate departure from the traditional British view that the legislature alone is responsible for implementing treaties in domestic law. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).
 - B. A self-executing treaty has the same effect as an Act of Congress.
 1. Courts have distinguished between “self-executing” treaties, which prescribe rules that can be given effect as

law, and “non-self-executing” treaties, which contemplate a legislative act by Congress. The distinction was first expressly drawn by Chief Justice John Marshall, writing for the Court in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

a) In *Foster*, the Court held that a treaty is “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.” *Id.* at 314.

b) But where the treaty calls on Congress to perform a legislative act, it works no change in domestic law that the courts can enforce until Congress “execute[s]” the treaty by enacting the required law. *Id.*

2. Where a treaty is self-executing, it “is as much to be regarded by the court as an act of congress.” *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Just as with an Act of Congress, a person may rely on a self-executing treaty in any case in which the law created by the treaty is in issue.

a) For example, in *United States v. Rauscher*, 119 U.S. 407 (1886), the Supreme Court held that a criminal defendant extradited for one crime could invoke the protection of an extradition treaty that barred his prosecution for a different crime. The court emphasized that where a treaty is self-executing, the judiciary has the obligation to “enforce in any appropriate proceeding the rights of persons growing out of that treaty.” *Id.* at 418-19.

b) And in *The Head Money Cases*, 112 U.S. 580 (1884), the Supreme Court again remarked on the difference between self-executing and non-self-executing treaties. The Court reiterated its established rule that a treaty “is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.” *Id.* at 598-99.

3. Whether or not a treaty is self-executing, Congress may by statute direct a court to apply the treaty. In the recent case of *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), for instance, the Supreme Court found that the Geneva Conventions were incorporated by statute and thereby enforceable in U.S. courts. *Id.* at 2794.

C. Domestic law usually provides the cause of action in cases where a self-executing treaty is at issue.

1. Most often a treaty comes up as a defense.

a) For example, in the *Rauscher* case, *supra*, a treaty right was interposed as a defense to a federal criminal prosecution. Looking to the treaty for the rule of decision, the Supreme Court ordered the indictment dismissed.

b) In a long line of cases, from as early as 1813 and as recent as 1961, the Supreme Court has applied treaty rights in property disputes, to preempt state statutes that were asserted to bar aliens from owning or inheriting property. See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Geofroy v. Riggs*, 133 U.S. 258 (1890); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603 (1813). Again, in each of those cases, the Court looked to the treaty, as it would to a federal statute, for the rule of decision.

c) And in cases involving aviation accidents, the Warsaw Convention on International Transportation by Air is routinely asserted and applied as a defense to or limitation of a common-law claim for damages. See, e.g., *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999); *Air France v. Saks*, 470 U.S. 392 (1985). Here, too, the Supreme Court has looked directly to the treaty as supplying the applicable rule of decision, at times examining the governing French text of the treaty to resolve uncertainties in the English translation.

2. At other times, Congress has created an express right to bring an action to enforce treaty rights.

a) For example, the habeas corpus statute authorizes federal courts to issue a writ of habeas corpus if an individual “is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3); see *Johnson v. Browne*, 205 U.S. 309,

320-22 (1907) (affirming habeas overturning a conviction in violation of a treaty).

b) Sometimes, the statute relates to a particular treaty. For example, Chapter 2 of the Federal Arbitration Act authorizes proceedings under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See 9 U.S.C. § 201 et seq. In those cases, courts routinely apply the provisions of the New York Convention much as they would apply a domestic statute.

3. In a few cases, a suit has invoked a court's equitable powers to enforce a treaty directly.

a) For example, in *Asakura v. Seattle*, 265 U.S. 332 (1924), a Washington state court entertained an action for an injunction to restrain the City of Seattle from enforcing an ordinance that violated a treaty guaranteeing equal treatment to Japanese nationals. The U.S. Supreme Court, reversing the Washington Supreme Court, upheld the trial court's injunction.

b) And in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), a group of insurance companies successfully sued in federal court to enjoin a state official from violating an executive agreement—which for some purposes is treated as preempting state law in the same manner as a ratified treaty.

D. Against the language of the Supremacy Clause and this long history of enforcement, we encounter some recent cases from state

courts, federal district courts and courts of appeals, stating that treaties are “presumed” not to create judicially enforceable individual rights. Where did this come from?

1. A determination of whether or not a treaty affects the rights of an individual is largely a matter of treaty interpretation. The rules of treaty interpretation are codified in the Vienna Convention on the Law of Treaties (“VCLT”). Although the United States has not ratified the VCLT, it has recognized and applied the VCLT as a codification of customary international law. Under the VCLT, a treaty is to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Art. 31(1). As a practical matter, the principles of treaty interpretation set forth in the VCLT do not differ significantly from domestic rules of statutory interpretation. See, e.g., *Trans World Airlines Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (general canons of statutory and contractual interpretation useful in construing treaties).
2. The supposed “presumption” against conferral of individual rights seems to originate from a misreading of language quoted out of context from Justice Marshall’s early decision in *Foster v. Neilson*:
 - a) In particular, some courts and litigants quote language from *Foster* recounting the traditional view that “[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 . . . but

is carried into execution by the sovereign power of the respective parties to the instrument.” 27 U.S. at 314.

- b) However, they overlook the very next paragraph of Foster: “In the United States 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.” Id.
 - c) In other words, the language from Foster that courts and litigants have relied on for a “presumption” against treaty enforceability is describing what Foster says is not the law of the United States.
3. Language from The Head Money Cases, which cites and follows Foster, also has been misread in the same way:
- a) The language that is sometimes quoted from The Head Money Cases is that “[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.” 112 U.S. at 598.
 - b) Again, the very next sentences are overlooked: “But a treaty may also contain provisions which confer

certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.... A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.” *Id.* at 598-99.

c) The question in *Head Money* was whether a court could prevent Congress from abrogating a treaty right. The answer was no. See *id.* at 599. If a treaty violation is commanded by Act of Congress, the sole remedies would be international ones, such as “negotiations,” “reclamations,” or even “war,” in which domestic courts will not meddle. But in the absence of an abrogating statute, the Court in *Head Money* did not question that it must “resort to the treaty for a rule of decision . . . as it would to a statute.”

4. The Court confirmed this in *Rauscher*, which was written by the same justice (Justice Miller) who had written the *Head Money* opinion two years earlier. In *Rauscher*, the Court quoted the language from *Head Money*, noting that that language explained the “effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations.” *Rauscher*, 119 U.S.

at 418. The conclusion that the Rauscher Court drew from this language was that a treaty is “the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty.” *Id.* at 419.

II. The role of international adjudications in U.S. law.

- A. Sovereign nations have long resorted to adjudication before international arbitral tribunals or international judicial bodies to resolve differences between them.
- B. Use of international adjudications to resolve questions affecting private parties’ rights and interests is far from new. For example, the 1783 treaty with Great Britain ending the Revolutionary War provided for international tribunals to resolve British subjects’ expropriation claims. But resort to such adjudications appears to have become more frequent in recent years. The United States has actively promoted this process, for example through the Bilateral Investment Treaty program protecting foreign investors from expropriation or inequitable treatment.
- C. If such an international adjudication results in a judgment determining a private party’s rights, and the rights adjudicated in the judgment are at issue in a domestic case, what effect does the judgment have?

This question has come up in the context of the judgment of the International Court of Justice in the *Avena* case, which held that the United States is obligated to give “review and reconsideration” to the sentences of Mexican nationals who were not advised of their rights to contact the Mexican Consulate under the Vienna Convention on Consular Relations

(VCCR). The Supreme Court granted certiorari in the case of José Ernesto Medellín, one of the affected Mexican nationals on death row in Texas, relating to his efforts to enforce his rights under the Avena judgment, but later dismissed the petition to allow the Texas courts to consider the issues in the first instance. See *Medellín v. Dretke*, 544 U.S. 660 (2005).

1. Medellín argued that the judgment has direct effect in state and federal courts in the United States. Such a judgment is, by treaty, an authoritative interpretation and application of the treaty's terms. Thus, rights created by the award are rights arising under the treaty, and they should be enforceable in the same manner where the treaty (like the VCCR) is self-executing.
 - a) This past term in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), the Supreme Court disagreed, in part, with the ICJ's interpretation of the VCCR set forth in the Avena judgment. The Court, however, left unresolved the issue in Medellín with respect to the enforceability of the Avena judgment itself.
2. A contrary argument has been made that the obligation of the United States to abide by an international court's judgment is, by its nature, non-self-executing. On this view, an Act of Congress would be required to give the judgment domestic effect. But this view is hard to square with the established principle that courts must give effect to treaty obligations, without awaiting an Act of Congress, whenever they create rules by which a private person's rights can be judged.

3. Even if an international court's judgment were not directly effective in U.S. court as a matter of treaty enforcement, it could still be given effect under principles of comity, in the same way as a judgment by a court of a foreign country. Under this view, a U.S. court would recognize and enforce an international court's judgment unless fraud or other established grounds for denying recognition were present. On this view, the judgment of an international court, which is authoritative by a United States treaty, would be entitled to at least the same respect that courts routinely give to the judgment of a foreign country's courts in the absence of a treaty.
 4. An additional possibility is the one asserted by the United States Government with regard to the Avena judgment. See *Medellín v. Dretke*, 544 U.S. 660 (2005). The Government's position is that it is up to the President, in the exercise of his constitutional foreign affairs authority, to determine how the United States should implement the judgment of an international court. In that case, President Bush determined that state courts must give effect to the Avena judgment by giving review and reconsideration to the sentences of the affected Mexican nationals.
- D. Mr. Medellín has sought to enforce in the Texas courts his rights under the Avena judgment and the Presidential determination. The State of Texas has opposed enforcement. The case was argued in September 2005 and remains pending before the Texas Court of Criminal Appeal.

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