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The Justiciability of Paraguay's Claim of Treaty Violation

Lori Fisler Damrosch
Columbia Law School, damrosch@law.columbia.edu

should be revisited by the Court at the earliest opportunity. If followed even partly abroad, the opinion could have serious consequences for U.S. nationals detained in foreign countries.[33] In the meantime, state and federal judges should ensure that foreign accused are notified of their right to communicate with their consulate and that the consulate is properly notified of their arrest. As Professors Henkin and Vázquez note, the Executive can also be far more vigilant in seeking compliance with the Convention. Its claims before our courts[34] portend miserable representation of U.S. citizens abroad.

JORDAN J. PAUST*

THE JUSTICIABILITY OF PARAGUAY'S CLAIM OF TREATY VIOLATION

The U.S. Government's position asserting nonjusticiability of the treaty claims raised by Paraguay in the domestic and international lawsuits is disturbing. The Government's amicus filings at the court of appeals and the Supreme Court denied that Paraguay's claims belonged in federal court (or indeed in any court at all); at the International Court of Justice, the United States admitted a treaty violation but denied the competence of that tribunal to enter a judicial remedy. At one or another phase of these proceedings, the U.S. Government pressed a variety of arguments that (if accepted) would rule out virtually any judicial consideration of a treaty-based claim. The haste with which the Supreme Court denied a stay in Breard's case foreclosed adequate consideration of the justiciability of such claims in domestic courts and also effectively barred Paraguay from achieving the relief it sought on the international plane.

THE U.S. GOVERNMENT'S POSITION AGAINST JUSTICIABILITY OF TREATY-BASED CLAIMS

Against adjudication in federal courts, the U.S. Government argued expansively that "treaty disputes between governments are not justiciable in domestic courts."[1] This general heading subsumed several different points, including that a foreign state could not bring suit in U.S. courts on any treaty claim,[2] that a consular officer is not a "person" for purposes of suing to enforce treaty rights under federal law,[3] that the Vienna Convention on Consular Relations itself contemplates no judicial remedies of the sort de-

[33] *See, e.g.*, Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); *supra* note 29.

[34] For examples of such claims, see, e.g., Damrosch, *supra* note 2.

* Law Foundation Professor, University of Houston.

[1] Brief for the United States as Amicus Curiae at 11–27, Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770) [hereinafter 4th Cir. Amicus Brief].

[2] The Fourth Circuit amicus brief left open the possibility that an injured foreign national (in contrast to a foreign state) might himself be able to sue to enforce the treaty, *id.* at 12; but at the Supreme Court the Solicitor General contended that "the Convention does not provide a judicial cause of action, at the behest of either a foreign national or his sending state, to have a criminal conviction or sentence vacated, either on direct appeal or on a collateral proceeding." Brief for the United States as Amicus Curiae at 13–14, Republic of Paraguay v. Gilmore and Breard v. Greene, 118 S.Ct. 1352 (1998) (Nos. 97-1390 & 97-8214) [hereinafter S.Ct. Amicus Brief].

[3] 4th Cir. Amicus Brief, *supra* note 1, at 9–10, 27–30; S.Ct. Amicus Brief, *supra* note 2, at 30–33. The Supreme Court summarily endorsed the position that neither a foreign state nor its consul is a "person" within the meaning of 42 U.S.C. §1983 (1994), *see* 118 S.Ct. at 1356; see also Justice Souter's concurring statement noting "substantial doubt" that Paraguay or any Paraguayan official is a "person" within the meaning of §1983, *id.*

manded,[4] and that the case presented a "political question" that could be addressed only through diplomatic channels rather than the courts.[5]

The Government relied principally on the *Head Money Cases* for the proposition that enforcement of a treaty depends on the honor of the parties and diplomatic negotiations rather than judicial redress.[6] These and similar cases should have had little relevance to the Paraguayan matter, since they held only that the judiciary would not enforce a treaty in the face of inconsistent legislation subsequently enacted by Congress: no such legislation purported to countermand the Vienna Convention.[7] Similarly, the Government put misplaced reliance on cases concerning non-self-executing treaties, which were said to stand for the proposition that the political rather than the judicial department would have to address claims of breach of treaty:[8] as the Government acknowledged that the Vienna Convention was self-executing, these cases were not on point.

This array of nonjusticiability arguments was pressed as an alternative to the ground for dismissal that the district court and court of appeals (and eventually the Supreme Court) found persuasive; namely, that the Eleventh Amendment bars a suit against a state officer to redress a past treaty violation.[9] Additionally, the Government argued—and the Supreme Court agreed—that a federal suit collaterally attacking a state conviction on grounds of a treaty violation would be barred if the prisoner had failed to raise the claim in a timely fashion in state courts (the "procedural default" argument).[10]

In support of its position that domestic courts could not entertain the claim, the U.S. Government noted the availability of adjudication on the international plane, under the Vienna Convention's Optional Protocol to which both the United States and Paraguay are parties.[11] Yet when Paraguay then invoked this treaty right to seek redress in the International Court of Justice, the United States considered that the claim could not be heard there, either. The United States asserted (among other things) that there was no "dispute" between the parties because the respondent had already acknowledged a

[4] 4th Cir. Amicus Brief, *supra* note 1, at 9, 23–25; S.Ct. Amicus Brief, *supra* note 2, at 15–28. The Government did not dispute that the Vienna Convention is self-executing but distinguished this point from the position that the Convention does not provide for a right of action to vacate a criminal conviction. *Id.* at 17–18 n.4.

[5] 4th Cir. Amicus Brief, *supra* note 1, at 3, 15–23; *cf.* Letter of Acting Legal Adviser Michael Matheson to Robert Brooks, Esq. (Aug. 20, 1997), *quoted in* 92 AJIL 90 (1998) ("We believe firmly that allegations that treaty obligations have been breached should be raised and resolved through diplomatic representations between governments.").

[6] Head Money Cases, 112 U.S. 580 (1884).

[7] The Supreme Court, 118 S.Ct. at 1355, and Curtis A. Bradley & Jack L. Goldsmith in the present *Agora, The Abiding Relevance of Federalism to U.S. Foreign Relations, supra* pp. 675, 678–79, treat the Antiterrorism and Effective Death Penalty Act of 1996 as the kind of statute that could have superseded the domestic effects of the Vienna Convention. This position would not be persuasive unless there were some evidence—and there is none—that Congress had focused on the possibility of a conflict with obligations under the Vienna Convention and had deliberately decided to require noncompliance. *See* Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

Bradley and Goldsmith, *supra* p. 679, also contend that resolution of trade-offs between federalism and foreign relations should be made by the federal political branches. This assertion ignores the long-standing role of the federal judiciary in undertaking an *independent* examination of the national interests implicated in state and local infringements on foreign commerce and foreign affairs.

[8] *See, e.g.*, Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

[9] The U.S. Government urged the courts to stay away from the 11th Amendment issues, noting their complexity especially in the international context. 4th Cir. Amicus Brief, *supra* note 1, at 2, 10, 30–32; *cf.* S.Ct. Amicus Brief, *supra* note 2, at 26 (arguing against grant of certiorari because the only other federal appellate decision had likewise dismissed the case on 11th Amendment grounds, *see* United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1517 (1998)). The Supreme Court accepted Virginia's 11th Amendment contentions in a few terse sentences. 118 S.Ct. at 1356.

[10] S.Ct. Amicus Brief, *supra* note 2, at 37–46; 118 S.Ct. at 1354–55.

[11] 4th Cir. Amicus Brief, *supra* note 1, at 2, 20, 24 (foreign states' claims of treaty violations are properly resolved "through actions before appropriate international bodies"; disputes covered by the Vienna Convention's Optional Protocol should be brought to the ICJ rather than to domestic courts).

treaty violation, apologized for it, and taken appropriate steps to prevent repetition, and because diplomatic avenues for adjusting the claim had not been exhausted.[12] The United States also contended that a claim on the international plane on behalf of an injured national could not be brought unless properly preserved in domestic courts, and that this particular claim was barred by procedural default.[13]

For a brief period—from April 3 to April 14, 1998—the cases were simultaneously pending at the U.S. Supreme Court and the ICJ. The Supreme Court had invited the Solicitor General to present the views of the United States by April 13; Breard's execution was set for 9:00 P.M. on April 14. The ICJ's interim measures ruling of April 9 opened up a new set of issues of first impression, including the effects (if any) that such measures should have on pending domestic proceedings. The Solicitor General's submission renewed the points on unavailability of judicial relief to enforce the Vienna Convention by vacating a criminal conviction and further advised the Supreme Court that the ICJ ruling did not provide a basis for entering a stay of execution:[14] in the view of the United States, it was sufficient for the Secretary of State to write to the Governor of Virginia requesting a stay (which the Governor ultimately declined to grant).[15] The Supreme Court called the procedural posture "unfortunate,"[16] but perceived no ground for giving domestic effect to the ICJ's request to preserve the status quo pending an orderly adjudication on the international plane.[17]

A Foreign State as Plaintiff

Paraguay's decision to become a plaintiff in a federal suit to enforce a treaty against state officials raises novel issues. The Supreme Court has affirmed more than once that foreign states are in principle entitled to sue in U.S. courts;[18] whether a foreign state is a "person" entitled to invoke particular federal laws has been treated as a question of statutory interpretation.[19] Although no cases of a foreign state suing in its own name to rectify a state's breach of treaty were cited in the capable briefs presented to the court of appeals and the Supreme Court, some arguably analogous precedents were identified. On several occasions the courts have entertained suits brought by consular officers (in which treaty issues were sometimes intermingled with questions of private law);[20] infrequently, foreign states have become plaintiffs where their own legal interests (for example, in real property) had allegedly been infringed by some state or local action

[12] Case concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, paras. 28–29 (Order of Apr. 9, 1998) [hereinafter ICJ Order].

[13] Paraguay argued that the United States was under an international legal obligation not to apply the doctrine of "procedural default" so as to preclude the exercise of Vienna Convention rights. *See id.*, para. 5(3). The U.S. position was that treaty rights must be exercised in conformity with relevant procedural rules of internal law. *See* S.Ct. Amicus Brief, *supra* note 2, at 38–41.

[14] S.Ct. Amicus Brief, *supra* note 2, at 46–51.

[15] Letter from U.S. Secretary of State Madeleine Albright to Governor of Virginia James Gilmore (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *The Facts, supra* pp. 666, 671–72.

[16] 118 S.Ct. at 1356.

[17] The Supreme Court's per curiam order observed: "If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him." *Id.*

[18] Pfizer, Inc. v. India, 434 U.S. 308 (1978); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[19] E.g., in *Pfizer* the Supreme Court construed the Sherman Act to determine whether foreign states could sue as *parens patriae* on antitrust claims. As noted above, the Supreme Court held in *Breard* that a foreign state was not a "person" entitled to bring a claim under 42 U.S.C. §1983 (1994).

[20] Santovicenzo v. Egan, 284 U.S. 30 (1931) (suit by Italian consul involving property of Italian national who died intestate); Wildenhus's Case, 120 U.S. 1 (1887) (suit by Belgian consul alleging exclusive consular jurisdiction in relation to murder committed on a Belgian-flag vessel); Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794) (suit by French consul to determine rights in ship of French and Swedish parties).

implicating international legal concerns.[21] At an earlier stage in history (before the enactment of federal extradition laws), foreign states sometimes initiated extradition proceedings in their own name; now these proceedings are brought by the U.S. Department of Justice.[22] Rarely but significantly, the United States has brought suit at the request of an aggrieved foreign state in order to enforce a treaty or other international legal obligation against state or local actors.[23]

That foreign states would generally have been reluctant to submit treaty questions to the domestic courts of another state party requires little explanation: it is fully understandable in terms of the doctrine of *par in parem non habet imperium,* which has long characterized relations between sovereign equals.[24] But that doctrine never precluded any foreign state from voluntarily initiating suit or waiving immunity; it merely gave foreign states a choice not to be made an involuntary party. U.S. law has never closed domestic courts to foreign states; on the contrary, with the disintegration of the doctrine of absolute state immunity over the course of the twentieth century, foreign states are now often sued in U.S. courts regardless of consent. It would thus seem anomalous to shut the door to a foreign state plaintiff that voluntarily invokes a domestic forum to sue to enforce treaty rights.[25]

There is no present reason why foreign states should not be able voluntarily to submit their treaty claims for adjudication by U.S. courts. Indeed, such litigation at the instance of a party in interest may well be preferable to the accepted alternative of having the United States initiate suit on behalf of a foreign state.[26] Already in the late 1970s, the U.S. Government addressed a circular diplomatic note to all embassies in Washington, D.C., pointing out that while foreign states had often asked the Department of State to present their positions in litigation in U.S. courts, henceforth they should not look for such assistance from the Department but, rather, should retain counsel to prepare court filings on their behalf.[27] Although this communication mainly concerned foreign government amicus briefs in private lawsuits rather than potential foreign state plaintiffs, its rationale should be equally applicable to suits brought to enforce treaty obligations, in which foreign states might formerly have called on the U.S. Government to be the initiating party against a subfederal actor to ensure compliance with a treaty.

Not every treaty would give rise to claims properly invocable by a foreign state plaintiff (indeed, such treaties are doubtless exceptional), but there is no reason to accept the maximum position advocated in the U.S. filings that a foreign state could *never* sue to enforce a treaty. Nor is the position persuasive that the affected foreign national, rather

[21] Argentina v. New York, 250 N.E.2d 698 (N.Y. 1969) (claim that customary international law required exemption of real property from taxation).

[22] *See In re* Kaine, 55 U.S. 103, 107 (1852); Castro v. De Uriarte, 16 F. 93 (S.D.N.Y. 1883), *cited in* 4th Cir. Amicus Brief, *supra* note 1, at 25; 18 U.S.C. §3184 (1994).

[23] United States v. Arlington County, 669 F.2d 925 (4th Cir.), *cert. denied,* 459 U.S. 801 (1982); United States v. City of Glen Cove, 322 F.Supp. 149 (E.D.N.Y.), *aff'd on opinion below,* 450 F.2d 884 (2d Cir. 1971) (suits brought by United States to enjoin assessment of local taxes on property owned by foreign governments). These lower-court cases are relatively recent applications of the doctrine established by the U.S. Supreme Court decades ago that the United States can initiate suits to bring about compliance with international law on the part of subfederal actors. *See* Sanitary Dist. v. United States, 262 U.S. 405 (1925); United States v. Minnesota, 270 U.S. 181 (1926).

[24] *See, e.g.,* The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812) ("One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another . . .").

[25] *Cf.* U.S. Foreign Sovereign Immunities Act, 28 U.S.C. §§1330(a), 1604, 1605(a)(1) (providing for suits against foreign states in specified circumstances, inter alia, where they have waived immunity by international agreement).

[26] See cases cited in note 23 *supra.*

[27] See correspondence *reprinted in* 73 AJIL 124–25 (1979).

than the foreign state itself, should litigate any claim of breach of treaty. Paraguay's suit under the Vienna Convention illustrates the point that a foreign state's rights under at least certain treaties may be distinguishable from the rights of its national. Both from the text of the Vienna Convention and the negotiating history of the relevant provisions, it is evident that the legal interests of the sending state are separate from—neither identical to nor necessarily derivative from—those of its nationals within the receiving state. If the respective interests are indeed distinct, then the foreign state should be able to sue as a proper party plaintiff when its own rights are alleged to be implicated.[28]

The Vienna Convention strikes a subtle balance among the different interests of the sending state, the receiving state, and nationals of the sending state in custody in the receiving state. Article 36 requires that a detained person be informed "without delay of *his* rights" to communicate with the consular post,[29] but also provides that "*consular officers shall have the right* to visit" and communicate with imprisoned nationals, although they are to refrain from taking action on behalf of a national "if he expressly opposes such action."[30] In the negotiations over what became Article 36, one may discern competing strands giving different weight to the respective interests of states and individuals. The point of view put forward in the draft articles prepared by the International Law Commission would have required notification to the consulate of the sending state whenever a national was detained, without the need for any action on the national's part.[31] From another point of view, the rights in question would be those of the affected national, which only he could claim or waive.[32] Since the final formulation—a nuanced compromise—acknowledges both the states' and the individual's interests, it would be unwarranted to rule out a priori the possibility of a suit brought by the sending state to vindicate its own rights.[33]

[28] Although Paraguay and Breard both sought a stay of Breard's execution in 1997–1998, this does not mean that their legal interests were the same. Paraguay also sought additional relief irrelevant to Breard's own case—for example, assurances that the breach of treaty would not be repeated in the case of any other incarcerated Paraguayan nationals.

Since the U.S. Government agreed with Paraguay that Virginian officials had violated the treaty, this case did not raise the difficult policy questions that might have arisen if the U.S. executive branch had contested the allegation of breach. In that event, it would have been up to the federal court, after giving "due weight" to the Executive's position, *see* Kolovrat v. Oregon, 366 U.S. 187 (1961); Perkins v. Elg, 307 U.S. 325 (1939), to construe the treaty authoritatively.

[29] Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36(1)(*b*) (emphasis added), 21 UST 77, 596 UNTS 261.

[30] *Id.*, Art. 36(1) (emphasis added).

[31] Report of the International Law Commission on the work of its thirteenth session, ch. II, [1961] 2 Y.B. Int'l L. Comm'n at 88, UN Doc. A/CN.4/SER.A/1961/Add.1; see also commentaries to draft Article 36 stressing "the right of the consular official" to communicate with its detained national, *id.* at 112.

[32] For example, the Australian delegate proposed an amendment to the ILC's text that would have added the words "subject to the wishes of the person concerned." He explained the amendment with reference to the "rights of the individual" to say whether or not he wished to be approached by consular officials. 1 UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS, OFFICIAL RECORDS 331–32, UN Doc. A/CONF.25/16 (1963).

[33] Arguably, such a suit would be precluded if the sending state's national "expressly opposed" the action within the meaning of Article 36(1)(*c*); but this would be a matter for the receiving state's court to decide by interpreting the Vienna Convention and applying it to the facts before it, rather than by ruling out any suit brought by the foreign state.

The issue of whether the foreign state could maintain a claim in the face of procedural default by its national should also be resolved by interpreting and applying the treaty, including Article 36(2):

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

The U.S. Government cited the opening phrase as a reason for summary dismissal of the claim, while Paraguay stressed the proviso in arguing that local law could not cut off its treaty rights. The Supreme Court construed this provision as requiring Breard to have first asserted his treaty rights in state court as a precondition for federal habeas relief. Breard v. Greene, 118 S.Ct. 1352, 1354 (1998).

A U.S. State (or Its Officers) as Defendant

Virginia's position was that Paraguay's claim should fail not only because Paraguay was disqualified as plaintiff, but also because of the Eleventh Amendment's barrier to an unconsented suit against the state. Paraguay contended that its suit fell within a recognized exception to the Eleventh Amendment for suits against state officers to remediate continuing consequences of violations of federal law. As noted above, the U.S. Government had urged the court of appeals and the Supreme Court to dismiss the cases on other grounds and to avoid the difficult constitutional questions involved in determining whether the Eleventh Amendment would bar a civil suit against state officers to enforce a treaty. Since the Solicitor General's amicus brief to the Supreme Court said little about the Eleventh Amendment (beyond noting the absence of a conflict between appellate decisions), the Supreme Court may not even have realized that the U.S. Government's amicus brief to the Fourth Circuit had intimated that Eleventh Amendment jurisprudence developed in domestic contexts might not govern cases involving international treaties or other exercises of the federal foreign affairs power.[34]

The Supreme Court's summary treatment of the Eleventh Amendment issues in its per curiam dismissal does not do justice to the complexity of the matter as reflected in the decisions of the courts below and the briefs of the parties. For the Supreme Court, it was enough to cite *Principality of Monaco v. Mississippi* for the "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State."[35] *Monaco,* however, was an ordinary contract suit seeking monetary relief: it involved no treaty or other federal foreign relations interest whose violation by a state official would implicate national responsibility. Neither *Monaco* nor any other case had involved a contention (comparable to Paraguay's) that a suit to enjoin state officers from perpetuating the continuing consequences of a treaty violation is compatible with the Eleventh Amendment.

It is unfortunate that the Supreme Court gave such short shrift to issues of the application of the Eleventh Amendment in treaty cases. Rather than concluding that federal courts lack authority to entertain suits of this sort, the amendment should be construed as providing a federal forum for enforcing federal treaty obligations against state officials.

Judicial Authority to Give Effect to ICJ Provisional Measures

Paraguay asserted that the ICJ's Order was binding; the United States acknowledged "substantial disagreement among jurists" on this question but told the Supreme Court that the "better reasoned position is that such an order is not binding."[36] Regardless of whether such measures would be technically "binding" under international law, the Supreme Court should have entered a stay to preserve the important federal interest in ensuring compliance with the measures.[37]

[34] The Government had reminded the Fourth Circuit of cases such as United States v. Pink, 315 U.S. 203, 234 (1942), which had opined that "in respect of our foreign relations generally, state lines disappear," and had also noted that in a full-scale consideration of 11th Amendment issues the court would have to address the doctrine of United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–18 (1936), that the foreign relations power does not depend upon surrender of state powers to the federal Government. *See* 4th Cir. Amicus Brief, *supra* note 1, at 31.

[35] 292 U.S. 313, 329–30 (1934), *quoted in* 118 S.Ct. at 1356.

[36] S.Ct. Amicus Brief, *supra* note 2, at 49.

[37] This was the position advocated by a group of a dozen professors of international law, for whom the undersigned served as counsel of record, in an amicus filing made with the Supreme Court on April 13, 1998, in Republic of Paraguay v. Gilmore, 118 S.Ct. 1352 (1998) (No. 97-1390). This section draws in part on that amicus brief.

Whether or not a provisional measures order is "binding," noncompliance can have adverse consequences for the respondent state. As one author has explained, "A government that does not respect [a provisional measures ruling] may risk the following consequences, among others":

> — unfavorable inferences on jurisdictional or substantive issues that may arise in subsequent proceedings in that case (for example where either party alleges a breach of a duty to negotiate in good faith);
>
> — losing the sympathy of the judges when they deal with other issues in the same case or other cases of interest to that government;
>
> — weakening the credibility of its respect for law, including its ability to encourage respect for law by foreign states as well as its own citizens;
>
> — increasing the likelihood of criticism from foreign states directly or in the form of U.N. action; . . .
>
> — weakening the legitimacy of its bargaining posture and deepening its dispute with the other party; . . .
>
> — weakening the fabric of international relations on which it, along with other states, relies to maintain international order.[38]

Because the United States has been a frequent litigant at the ICJ (both as applicant and as respondent) and is currently before the Court in several other cases, such potential consequences should not be ignored. When the United States requested and was granted provisional measures in the *Tehran Hostages* case,[39] the U.S. Government repeatedly insisted on Iranian compliance with the ICJ's decision and referred to it when issues concerning the international dispute arose in U.S. and foreign tribunals.

The ICJ's entry of interim measures decisively changed the legal situation with regard to the pending domestic proceeding. Among other things, it dramatically highlighted the *national* interest in ensuring *federal* adjudication of questions of treaty observance and compliance with international commitments. The interests of *the United States* at the ICJ should not have been made to depend on how the Governor of Virginia would respond to a request from the Secretary of State to give effect to the ICJ ruling. The pendency of Breard's and Paraguay's petitions for certiorari afforded an opportunity for the Supreme Court to enter a stay in aid of its own jurisdiction and then to consider, in due course, whether to grant the petitions to deal with the important federal questions.

In accordance with its precedents, the Supreme Court should have undertaken a "searching scrutiny" of state actions affecting U.S. foreign relations that may provoke consequences for the nation as a whole.[40] Such scrutiny should have extended both to the issues under the Vienna Convention and to the new considerations deriving from the ICJ's ruling on provisional measures. Moreover, the Court should have undertaken its own scrutiny notwithstanding the executive branch's submission that the petitions were not well-founded. On a number of occasions, the Court has declined to accept as definitive the Executive's assessment of a federal foreign relations interest and has per-

[38] Bernard H. Oxman, *Jurisdiction and the Power to Indicate Provisional Measures, in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 323, 332–33 (Lori F. Damrosch ed., 1987).

[39] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Provisional Measures, 1979 ICJ REP. 7 (Order of Dec. 15).

[40] Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Zschernig v. Miller, 389 U.S. 429 (1968).

formed an independent judicial evaluation of the relevant considerations.[41] This should have been done here.

On the only previous instance when a controversy was simultaneously pending before the Supreme Court of the United States and the ICJ, the Supreme Court granted certiorari and the ICJ thereafter dismissed the international proceeding.[42] Paraguay's case equally deserved plenary treatment, at which the Supreme Court should, in its own words, have given "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret" the same.[43]

CONCLUSION

The U.S. Government's basic litigating position—that no court should entertain a foreign state's claim for redress of a treaty violation—is disappointing.[44] When Paraguay's efforts to obtain relief from the U.S. judiciary encountered opposition from the executive branch on the ground (inter alia) that the proper avenues for relief were diplomatic channels or international litigation, Paraguay's initiation of the ICJ proceeding on the eve of Breard's execution deserved a response from the United States that would have enabled these serious issues to receive a full airing (where the U.S. position might well have ultimately prevailed).[45] When the two judicial tracks were simultaneously in operation, instead of arguing that the claim was in principle nonjusticiable in either forum, the United States could have encouraged the two courts to accord due respect to each other's treatment of matters falling within their respective spheres of competence. If the U.S. Government had suggested this approach, the dual litigation might have proceeded toward a resolution that would have left both sides, and both courts—as well as the world community—satisfied that the rule of law had been honored.

LORI FISLER DAMROSCH*

ZSCHERNIG V. MILLER AND THE *BREARD* MATTER

In 1968 the United States Supreme Court decided *Zschernig v. Miller*,[1] a foreign relations case that has been characterized as unique.[2] An Oregon probate statute provided for escheat of a decedent's property in preference to a nonresident alien's claim to

[41] *Cf. Barclays Bank*, 512 U.S. at 328–32 (upholding a state tax alleged to burden foreign commerce, after performing independent examination of significance of Executive's statements bearing on foreign policy considerations).

[42] Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958); Interhandel (Switz. v. U.S.), 1957 ICJ REP. 105 (Order of Oct. 24); and Preliminary Objections, 1959 ICJ REP. 6 (Mar. 21).

[43] 118 S.Ct. at 1354.

[44] For criticism of the Government's typical reliance on nonjusticiability arguments in foreign affairs cases, see THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS (1992); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION, ch. 6 (1990).

[45] As the ICJ viewed the matter, the issue of whether a criminal conviction could be set aside as a remedy for breach of the Vienna Convention "can only be determined at the stage of the merits." ICJ Order, *supra* note 12, para. 33. U.S. lawyers might well expect that such an issue should be decided at the outset: in federal courts, it could be resolved on a motion to dismiss for failure to state a claim on which relief may be granted. FED. R. CIV. P. 12(b)(6).

* Of the Board of Editors. I am grateful to Lara Ballard (Columbia Law School, J.D. 1998, and a member of my class on the Constitution and Foreign Affairs in spring 1998) for her research paper on the Vienna Convention on Consular Relations and its potential applications in domestic courts.

[1] 389 U.S. 429 (1968).

[2] *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AJIL 821, 825 (1989).