

'Medellin' ruling may hurt business

Treaties could be without force of law.

By Marcia Coyle
Staff Reporter

Washington—The International Environment for American business is difficult today and the recent U.S. Supreme Court decision on the unenforceability of World Court judgments doesn't make it any easier, according to at least one veteran international litigator.

A 6-3 high court on March 25 held that the so-called *Avena* decision by the International Court of Justice (ICJ) was not directly enforceable federal law that overrode state limits on the filing of habeas corpus petitions by 51 Mexican death row inmates.

The United States had agreed to comply with the ICJ as its obligation under an international treaty.

The majority essentially held that the treaties in which the *Avena* judgment was grounded were not "self executing" and required implementing legislation by Congress to be enforceable as domestic law.

And the president, acting alone and through a presidential memorandum, it also ruled, did not have the authority to order compliance with the judgment by the states. *Medellin v. Texas*, No. 06-984.

Avena held that the United States violated its treaty obligation to notify Mexican nationals arrested within its borders that they had a right to consult with their diplomats. *Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12.

The law is a "seamless web in some ways," noted Jeffrey Pryce, of counsel to Washington's Steptoe & Johnson LLP, who represents American companies in international arbitrations and cross-border litigation.

Pryce said he has cited *Avena* and other ICJ decisions involving the United States in defense of U.S. business rights under international investment treaties.

"The principles in these cases apply more generally," said Pryce. "The ICJ doesn't have the best following in the United States, but it does have force for U.S. investors overseas. It's a source of law that can be helpful in the international environment."

But it is not helpful for the United States to be seen as unable to comply with a treaty obligation that it freely acknowledged and willingly entered, he said, particularly at a time when the U.S. faces skepticism and detractors in a number of international forums.

Pryce and others expect the ruling to increase skepticism among some negotiating partners, and they think it will be used as "ammunition" by others.

In weeks to come, lawyers in the U.S. Department of State and on the relevant U.S. Senate committees should look at current treaties that they had always presumed to be self-executing but which, as a result of the *Medellin* decision, now may be without the force of U.S. law, said international law scholar Duncan Hollis of Temple University James E. Beasley School of Law.

"They may want to do something to get them that force of law," he said.

Clarity and questions

The *Medellin* decision, he said, brought "clarity" to a question that has long plagued international lawyers: how to tell the difference between self-executing and nonself-executing treaties. A majority of scholars took the position that, given the Constitution's supremacy clause, treaties were presumed self-executing unless their text or action by Congress and the president reversed that presumption.

But the *Medellin* decision took the opposite position: A treaty is generally nonself-executing unless the text or a statute says otherwise, according to Hollis.

"If you look at some of our treaties on investment, maritime and armament issues, their texts say nothing about them being self-executing, so presumably they now are not and have no force as domestic law," he said. "What does that mean now for the ability of the executive to comply or walk away?"

In his dissent, Justice Stephen G. Breyer noted that the United States has ratified 70 treaties with ICJ dispute resolution provisions similar to those in the treaty in *Avena*. None, he wrote, contains stronger language about self-execution than the language at issue in *Avena*.

Wide-ranging treaties

Those treaties cover a wide range of subject matter, including very substantial economic interests of private parties, noted Lori Fisler Damrosch of Columbia Law School, who authored an amicus brief for ICJ scholars supporting *Medellin*.

"Since in essence the Supreme Court has said



JEFFREY PRYCE: *The ICJ is a source of law that "can be helpful in the international environment."*

an ICJ judgment has no legal force here, that could make our partners in other treaties inclined to say exactly the same thing in cases where we are seeking to hold them to obligations," she suggested. She added that the United States is the single most active litigant in the ICJ, where it generally prevails.

There is much speculation about whether the self-executing test is harder now than it was before *Medellin*, and that will take some time to digest, said international law scholar Roger Alford of Pepperdine University School of Law.

Alford said his "general sense" is that the United States does not have many self-executing treaties, and those it has—such as in the tax and investment areas—are fairly well understood to be self-executing.

But, he added, "There is at least going to be some serious second-guessing about whether some treaties are self-executing because there's not a whole lot of language in treaties that say they are."

There will be no speculation, however, when federal law dictates the domestic effects of decisions by certain international tribunals, according to Alford and others.

The *Medellin* majority, said Alford, explicitly "blessed" the legal force of decisions by such forums as the International Centre for Settlement of Investment Disputes and the so-called New York Convention—the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

ICJ judgments now appear to have the same status as decisions under the World Trade Organization's appellate body and the North American Free Trade Agreement: They require implementing federal legislation, agreed many scholars and litigators.

But will Congress act, particularly when a judgment is controversial or unsympathetic, as with death row inmates in *Avena*?

"Most realistic treaty participants are going to take Justice Breyer's view and say, 'We don't want a treaty that is going to require congressional action on a situation-by-situation basis to implement,'" said Steptoe's Pryce.

"It's just impractical." **NLJ**