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Sanchez-Llamas v. Oregon: Stepping Back From the New World Court Order

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SANCHEZ-LLAMAS V. OREGON: STEPPING BACK FROM THE NEW WORLD COURT ORDER

by
Julian G. Ku*

Over the past few decades, international law scholars and advocates have widely supported the use of domestic United States courts to independently enforce and implement international tribunal judgments, even over the opposition of the President. The Supreme Court's decision in Sanchez-Llamas v. Oregon represents a potentially serious setback for this burgeoning movement. This contribution defends and elaborates the reasons for the Court's refusal in Sanchez-Llamas to give effect to judgments of an international tribunal absent a clear and explicit authorization by Congress or the Senate.

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I. INTRODUCTION

The post-Cold War era has witnessed renewed interest in the use of international tribunals¹ to resolve interstate conflicts and to develop broad

* Associate Professor of Law, Hofstra University School of Law. I would like to thank John Parry for organizing this symposium and inviting me to participate. Some of the ideas from this Article were developed in an amicus brief I signed in *Medellin v. Dretke* and *Sanchez-Llamas v. Oregon*, as well as in numerous posts at the author's weblog *Opinio Juris* (<http://opiniojuris.org>). All errors and omissions, of course, remain my own.

¹ For my purposes, the term "international tribunal" refers to any international institution holding the authority to impose binding obligations on nations arising out of a dispute over the requirements of international law. The term "international tribunal," which

principles of international law. This rise of international tribunals coincides with a broad movement among scholars and advocates supporting the use of domestic courts to enforce and implement international tribunal judgments. In this view, domestic courts should act independently to comply with international tribunal judgments with little or no interference by the legislative or executive branches of a nation's government. In prior work, I have described this view of the relationship between domestic courts and international tribunals as a "new world court order."²

This movement, which has achieved wide academic support, suffered a severe setback in the U.S. Supreme Court's 2006 decision *Sanchez-Llamas v. Oregon*.³ In that decision, the Court squarely considered the domestic status of binding international tribunal judgments for the first time. Indeed, not only did the petitioners in these cases ask the Court to defer to the interpretation of U.S. treaty obligations by the International Court of Justice (ICJ), but some of the leading academic proponents of the new world court order filed an amicus brief arguing that the Supreme Court was obligated to follow the ICJ's judgments, even if such judgments conflicted with prior Supreme Court precedents or the opinions of the U.S. Executive Branch.⁴

The Supreme Court rejected the petitioners' views on the proper interpretation of the treaty in question, the Vienna Convention on Consular Relations (VCCR).⁵ Chief Justice Roberts' majority opinion also went farther by specifically rejecting the treaty interpretations reached by the ICJ. The Court then went out of its way to dismiss the new world court order argument that judgments of the ICJ bound the Supreme Court's resolution of the case.⁶ Even the dissent failed to embrace this view and simply argued that the ICJ's opinion deserved more deference.⁷

Although the most aggressive conception of the new world court order was thus soundly rejected by the Court, the majority failed to offer a detailed explanation for its refusal to treat ICJ orders as binding. Nor did it offer a well-developed analytical framework for assessing the status of international

is the term used in federal statutory law, includes a variety of international adjudicatory bodies, some of which might call themselves "courts." See, e.g., 28 U.S.C. § 1782(a) (2000) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.").

² Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1 (2006) [hereinafter Ku, *International Delegations*].

³ 126 S. Ct. 2669 (2006).

⁴ See Reply Brief for Petitioner Sanchez-Llamas, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), 2006 WL 598180; Brief of International Court of Justice Experts As Amici Curiae in Support of Petitioners, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), 2005 WL 3597806.

⁵ Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

⁶ *Sanchez-Llamas*, 126 S. Ct. at 2680.

⁷ *Id.* at 2697 (Breyer, J., dissenting).

tribunal judgments. Such flaws are important because, although litigation over the ICJ's interpretations of the VCCR is largely at an end,⁸ the U.S. remains a party to dozens of similar treaties allocating jurisdiction to the ICJ and is also a party to numerous other international tribunal systems.⁹

This Essay attempts to fill in some of the analytical gaps left open by the *Sanchez-Llamas* Court. The Court's approach does represent a step in the right direction. By emphasizing the difference between an international tribunal judgment's international and domestic effect and its consideration of the views of the executive branch, the Court respected the constitutional allocation of foreign policy discretion to the executive branch while preserving its own final authority to determine the proper interpretation of treaties for the domestic system. Such an approach avoids potentially serious constitutional concerns about the excessive delegation of foreign policy authority to international tribunals. As I have argued previously, domestic U.S. courts should require a clear statement by either the treaty-makers or Congress prior to giving binding effect to the judgment of an international tribunal.¹⁰ The Court's majority opinion does not specify such a rule, but it does leave room for such a requirement.

This short Essay proceeds as follows. In Part II, I outline the key premises undergirding the new world court order and describe how these premises manifested themselves in arguments to the Court in *Sanchez-Llamas*. I go on in Part III to consider the *Sanchez-Llamas* Court's treatment of these arguments for giving binding effect to judgments by the ICJ. I conclude in Part IV by offering a broader constitutional and functional rationale for the *Sanchez-Llamas* Court's rejection of the new world court order and a brief outline of an alternative analytical framework for incorporating international tribunal judgments into the domestic U.S. legal system.

⁸ The U.S. withdrew from the Optional Protocol to the Vienna Convention on Consular Relations in 2005. See Letter from Condoleezza Rice, Sec'y of State, to Kofi A. Annan, Sec'y-Gen. of the United Nations (March 7, 2005), cited in *Sanchez-Llamas*, 126 U.S. at 2675 (majority opinion).

⁹ See Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58 (Lori Fisler Damrosch ed., 1987); see also Ku, *International Delegations*, *supra* note 2, at 31-35 (describing U.S. participation in international dispute resolution).

¹⁰ Ku, *International Delegations*, *supra* note 2, at 65-69.

II. THE DOMESTIC STATUS OF INTERNATIONAL TRIBUNAL JUDGMENTS

A. *A New World Court Order*

By one count, there are over 100 international tribunals and institutions operating today.¹¹ The wide proliferation of international tribunals, however, has not resolved the difficult problem of winning enforcement of international tribunal judgments. Unlike domestic courts, an international tribunal's judgment is rarely backed by an executive body with enforcement power.¹²

One way to ensure compliance with international tribunal judgments is to seek enforcement by the domestic court of the state suffering the adverse judgment. This approach is favored by a number of leading scholars in the U.S. who advocate using the interaction between international tribunals and national courts to foster compliance by states with international law. Although these scholars approach the proper relationship between international tribunals and domestic courts in different ways, all share a number of important assumptions about the central and perhaps dominant role of domestic courts in the implementation of international tribunal judgments.¹³

First, such scholars generally believe that domestic courts have the authority and the obligation to conduct their own determination of the legal effect of international tribunal judgments even when they have been asked by the political branches not to do so.¹⁴ Second, domestic courts have the authority and the obligation to consider various factors, including international relations and the international rule of law, in making this determination.¹⁵ Third, domestic courts have a responsibility to encourage or even force state compliance with international legal rules as interpreted by international tribunals.¹⁶

These views are indicative of what I have called a "new world court order"¹⁷ where international relations becomes increasingly shaped by the

¹¹ See Project on Int'l Courts & Tribunals, *The International Judiciary in Context: A Synoptic Chart* (Nov. 2004), http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf (identifying 125 international bodies that have international dispute resolution features in common).

¹² The closest international analog to a domestic court's reliance on police and other executive officials to enforce its judgments is the U.N. Security Council, which is designated to "make recommendations or decide upon measures to be taken to give effect to" an ICJ judgment. U.N. Charter art. 94(2), June 26, 1945, 59 Stat. 1031, T.S. No. 993.

¹³ For an extended discussion of the scholarly movement along these lines, see Ku, *International Delegations*, *supra* note 2, at 35–41.

¹⁴ See, e.g., Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697, 703 (1998).

¹⁵ See, e.g., Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 DEN. J. INT'L L. & POL'Y 787, 791–92 (1998).

¹⁶ See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65–100 (2004).

¹⁷ Ku, *International Delegations*, *supra* note 2, at 2.

actions of independent international tribunals, and where domestic courts become the leading players in controlling a nation's relationship with such tribunals.

B. The New World Court Order Files an Amicus Brief

Sanchez-Llamas v. Oregon gave academic proponents of a new world court order an opportunity to present their views to the Supreme Court. Although the Court was presented with a variety of questions mostly related to the effect of the Vienna Convention on Consular Relations on state criminal justice, the Court also granted certiorari to consider the effect of the ICJ's decisions interpreting U.S. obligations under the VCCR. For this reason, a number of leading scholars, many of whom are also prominent academic proponents of the new world court order, filed an amicus brief focused exclusively on the legal effect of the ICJ's judgments.

Styled as a brief of "International Court of Justice Experts," the brief argued that the Supreme Court should follow the ICJ's interpretations of the VCCR despite prior inconsistent precedent from the Supreme Court as well as opposition from the executive branch. In support of this view, the brief focused on the legal status of the ICJ's judgments as a matter of domestic U.S. law.

The brief began by arguing that the ICJ's judgments "constitute the authoritative interpretation of the [VCCR] as regards nationals of treaty parties who have been sentenced to severe penalties without having been informed of their treaty rights."¹⁸ As an "authoritative interpretation" of the treaty, the ICJ's interpretations bound the United States even in the application of the treaty toward nationals of countries that did not participate in the ICJ proceedings.

The brief then emphasized that the ICJ judgments "resulted from a treaty-based dispute settlement process to which the United States fully consented, in which the United States fully participated, and which produced an interpretation of the Vienna Convention that removes any doubt about the obligations of the United States as a whole toward nationals of treaty parties."¹⁹

The fact that the U.S. government opposed the ICJ's interpretation of the VCCR obligations and continued to oppose it in briefs filed before the *Sanchez-Llamas* Court should not, the brief argued, affect the Court's disposition of the case. Although the executive's views on treaty interpretation are entitled to deference, the brief asserted that "this Court should endorse the Executive's views that are compatible with protecting foreign nationals in accordance with *Avena* but not follow Executive positions that would give foreign nationals a lesser level of protection than they are entitled to enjoy under *Avena*'s interpretation of the [VCCR]."²⁰

Thus, because the U.S. government had consented to have disputes under the VCCR resolved by the ICJ via an Optional Protocol to the VCCR, the U.S.

¹⁸ Brief of International Court of Justice Experts, *supra* note 4, at 2.

¹⁹ *Id.* at 2-3.

²⁰ *Id.* at 28.

government had in effect signed a "forum selection clause" selecting the ICJ as the forum. The selection of the ICJ to resolve all VCCR disputes means that "the United States is obligated to comply with the Convention, as interpreted by the ICJ."²¹

The brief's description of the Optional Protocol as a forum selection clause was a shrewd one, since the Supreme Court has consistently favored judicial resolution of such clauses in the context of private commercial disputes. The analogy is not exactly correct, however, because even if a domestic court enforces a forum selection clause, it may not necessarily enforce the judgment that results from the selected forum. That question of enforcement, which is more applicable to the situation in *Sanchez-Llamas*, is generally a separate question. Still, the analogy reflected the brief's assumption that an international tribunal judgment imposing a binding obligation on the U.S. government should be treated no differently than a binding obligation on a private party in a commercial dispute. In such an instance, as the brief argued, the ICJ's interpretation of the VCCR "provide[s] the basis for the rule of decision which [the] Court should instruct state courts to follow."²² Moreover, the decision is for the Court rather than any other branch of government.

In interpreting the legal obligations of the United States in the instant case, it would be no mark of disrespect to the Executive Branch, but a justified assertion of the role of this Court consistent with the principle of separation of powers, if the Court, as *Amici* urge, exercises its independent judgment to accept the interpretation embodied in *LaGrand* and *Avena*.²³

This statement encapsulates much of the new world court order's views about the proper role of domestic courts in the implementation and enforcement of international tribunal judgments. In this view, courts have an independent obligation to implement and enforce international legal obligations of the U.S. government. Indeed, such an obligation extends to a duty to follow and interpret legal obligations that the executive branch itself continues to reject.

III. THE ROBERTS COURT FACES THE NEW WORLD COURT ORDER

Writing for the Court, Chief Justice Roberts rejected the ICJ's interpretation of the VCCR. But he went further and squarely rejected the ICJ Experts' claim that the ICJ's judgment had some sort of binding effect on the Court. Although his opinion for the Court refused to endorse the tenets of the new world court order, it did not fully explain or justify its alternative approach to dealing with binding international tribunal judgments such as those promulgated by the ICJ.

²¹ *Id.* at 11.

²² *Id.* at 20.

²³ *Id.* at 30.

The Court's analysis began with the VCCR itself rather than with the ICJ's interpretation of the treaty. It refused to accept the petitioners' reading of the treaty, which sought the suppression of evidence as a remedy for VCCR violations and the exemption of VCCR claims for standard procedural default requirements in state courts. The Court had little trouble in its first holding and decided that the VCCR did not require the suppression of evidence seized in violation of the treaty.²⁴ The Court also had little difficulty finding against the petitioners in their second claim, holding that its prior 1998 decision in *Breard v. Greene*²⁵ should be followed, and that treaty claims, like all other federal claims, should be subject to the procedural default doctrine.²⁶

Having disposed of both petitioners' arguments, the Court paused to consider what it called a "less easily dismissed" reason for revisiting its holding in *Breard*; namely, the ICJ's subsequent judgments in *LaGrand* and *Avena*.²⁷ In those decisions, the ICJ interpreted the VCCR to preclude the application of procedural default rules against claims asserting VCCR violations.²⁸ The question for the Court, therefore, was whether these subsequent judgments required, or at least warranted, a reconsideration of its previous holding in *Breard*.

The Court thus directly focused on the effect of the ICJ's rulings rather than the treaty itself. It had not addressed these issues in its previous forays into the VCCR litigation. Having directly considered the issue, it then offered a straightforward conclusion. Although "the ICJ's interpretation deserves 'respectful consideration,' . . . it does not compel us to reconsider our understanding of the [VCCR] in *Breard*."²⁹

The Court offered three reasons for adhering to its prior holding in *Breard* and refusing to follow the ICJ's interpretation. First, it relied on its exclusive authority to interpret treaties as a matter of U.S. domestic law, citing Article III of the U.S. Constitution's extension of the "judicial power" to treaties. To the extent treaties are given effect as federal law, the Court suggested, the Constitution allocates the power to interpret those laws to the federal judiciary alone. The Court emphasized that the President's decision to sign, and the Senate's decision to give advice and consent to the VCCR took place in the background of this understanding of the federal courts' supreme and final authority over treaties.³⁰

Second, "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts."³¹ Per the ICJ's

²⁴ *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2678–82 (2006).

²⁵ 523 U.S. 371 (1998) (per curiam).

²⁶ *Sanchez-Llamas*, 126 S. Ct. at 2682–83.

²⁷ *Id.* at 2683.

²⁸ *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

²⁹ *Sanchez-Llamas*, 126 S.Ct. at 2683 (quoting *Breard*, 523 U.S. at 375).

³⁰ *Id.* at 2684.

³¹ *Id.*

own Statute, any interpretation of the ICJ is only binding on the parties in a particular case and has no binding precedential force on subsequent cases. The Court reasoned that it is therefore unlikely that such decisions “were intended to be controlling on our courts.”³² Further, while all parties to the ICJ Statute, including the U.S., are obligated to comply with decisions of the ICJ, the remedies for noncompliance consist of referral to the U.N. Security Council. Such referrals are “quintessentially international remedies.”³³

Finally, the Court emphasized that the executive branch did not accept the ICJ’s interpretations of the VCCR as binding on U.S. courts. This matters because “[w]hile courts interpret treaties for themselves, the meaning given them by departments of governments particularly charged with their negotiation and enforcement is given great weight.”³⁴ In other words, the contrary views of the executive branch weighed against giving the ICJ interpretations “decisive weight” in the manner sought by the petitioners and the amici.

The Court therefore concluded that the ICJ’s interpretations deserved only “respectful consideration” and further concluded that the ICJ’s interpretation of the VCCR could not “overcome the plain import of” the VCCR provision in question.³⁵ It was the Court’s application of the “respectful consideration” standard that divided it most sharply from Justice Breyer’s dissent. Interestingly, Justice Breyer had previously filed an unusually long dissent from denial of certiorari in similar VCCR/ICJ cases arguing, along the lines of the new world court order, that the ICJ’s interpretations were “authoritative.” Here, however, he did not even attempt to offer a defense of this view and contented himself with challenging the majority’s interpretation of the VCCR more than the lack of consideration the majority provided to the ICJ’s views. Perhaps for this reason, the majority opinion’s explanation for why it was not bound by the ICJ’s interpretations, while persuasive, was also relatively undeveloped.

IV. TOWARD A CLEAR STATEMENT RULE FOR IMPLEMENTING INTERNATIONAL TRIBUNAL JUDGMENTS

The Court’s opinion plainly rejected the most aggressive view of the ICJ’s authority endorsed by leading academic proponents of the new world court order. The Court even quoted from the Brief of the ICJ Experts in order to make clear that it was disagreeing with their views in particular.³⁶ But the brevity of the Court’s analysis of the status of ICJ judgments leaves much to be desired for those seeking to develop a fuller analytical framework for

³² *Id.*

³³ *Id.* at 2685 (italics removed).

³⁴ *Id.* (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

³⁵ *Id.* (quoting *Breard*, 523 U.S. at 375).

³⁶ *Id.* at 2683.

understanding the domestic effect of international tribunal judgments in the U.S.

A. *Explaining Sanchez-Llamas*

Most importantly, the Court's opinion did not offer a clear constitutional or functional rationale for rejecting the binding effect of ICJ judgments. For instance, the Court's citation to Article III's allocation of judicial power to the courts suggests, but does not establish, a constitutional obstacle to treating international tribunal judgments as binding. After all, courts in the U.S. have regularly enforced judgments of foreign courts without finding an Article III problem.³⁷

The Court's subsequent explanation that the treaty-makers (the President and the Senate) acted with the understanding that the courts held final interpretive authority for the domestic effect of the VCCR offers a possible explanation. To the extent that the President and Senate are understood to have delegated some authority to the ICJ to interpret the VCCR, the President and Senate also acted with the understanding that U.S. courts would have the final word with respect to the domestic effect of the same treaties. Treating ICJ judgments as binding would not honor this basic understanding that prevailed at the time the treaty was entered into.

The Court's analysis of the limited precedential effect of ICJ judgments, while accurate, also only hinted at the proper way to analyze the domestic effect of other international tribunal judgments. The ICJ, the Court emphasized, is only empowered to decide disputes between particular parties and its decisions have no precedential effect.³⁸ But does that mean that in cases where the ICJ's decision is directly applicable—such as the petitions filed the previous term by a Mexican national named Jose Medellin that were the subject of the ICJ's decision in *Avena*—the ICJ's decision *is* binding?

This seems doubtful because the Court highlighted the non-judicial mechanisms for enforcement of ICJ judgments in the U.N. Charter.³⁹ Here, the Court's analysis provides some guidance for future cases because the existence of such political enforcement mechanisms, the Court's decision strongly suggests, precludes a domestic court from reaching out to give domestic judicial effect to ICJ judgments. Such political enforcement mechanisms, indeed, might make it improper for the Court to interfere by enforcing a judgment that its own government has chosen to enforce in a different way or not at all.

³⁷ See, e.g., *Hilton v. Guyot*, 159 U.S. 113 (1895).

³⁸ See, e.g., Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (stating that ICJ decisions have "no binding force except between the parties and in respect of that particular case").

³⁹ See U.N. Charter, *supra* note 12, art. 94(2) (providing for referral to Security Council in cases of noncompliance).

It may seem shocking that a nation may choose not to comply with an otherwise valid international legal obligation. But the power of the U.S. political branches to violate or refuse to comply with international legal obligations, even treaty obligations, is well established. That congressional statutes superseding treaties will be given effect by the last-in-time rule and the President's power to supersede a rule of customary international law have both been long recognized by the Supreme Court.⁴⁰

But even if a country does not choose to violate international legal obligations interpreted by an international tribunal, it may still want to use non-judicial domestic mechanisms for complying with such obligations. In the case of the ICJ's decision in *Avena*, the U.S. executive issued a memorandum declaring that U.S. policy would seek enforcement of that decision through state rather than federal courts.⁴¹ In many other circumstances, such as U.S. compliance with decisions of the World Trade Organization's dispute settlement bodies, only the executive and the legislature has the authority to decide how and whether to bring the U.S. into compliance.⁴²

This last observation fits nicely into the Court's final rationale for refusing to treat the ICJ's judgment as binding: the contrary views of the executive branch. The Court did not treat the executive's views of the ICJ interpretations as binding, but it cited the longstanding doctrinal obligation to give executive interpretations "great weight." Given this traditional deference to executive branch interpretations, the Court rightly refused to ignore this doctrine by instead giving decisive weight to an international tribunal *over* that of the executive branch. Given the long tradition of non-judicial enforcement of international tribunal judgments and the actual non-judicial mechanisms for enforcement contained in the ICJ system itself, the Court wisely gave greater weight to the executive branch.

⁴⁰ See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194–95 (1888) (applying last in time rule); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that customary international law rule may be superseded by a controlling executive act). For a fuller discussion of the last-in-time rule, see Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

⁴¹ Brief for United States as Amicus Curiae Supporting Respondent at 41–42, *Medellin v. Dretke*, 540 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490 (citing Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005)).

⁴² See, e.g., 19 U.S.C. § 3538(b) (2000) (delegating to the Commerce Department the power to comply with WTO tribunal decisions). See also Uruguay Round Agreements Act, 19 U.S.C. § 3512(b)(2)(A) (2000) (barring anyone other than the United States from challenging U.S. or state action or inaction based on its consistency with the Uruguay Round Agreements); URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 675–77, 1043–44 (1994), as reprinted in 1994 U.S.C.C.A.N. 4040, 4054–56, 4327. For a fuller discussion, see Ku, *International Delegations*, *supra* note 2, at 46–47.

B. *Toward a Clear Statement Rule*

The Court's refusal to treat the ICJ's judgments as binding thus has a solid constitutional and functional basis. The constitutional framework ensures that the domestic effect of all laws, including treaties, is a question over which U.S. courts have the final say. Departing from this understanding would result in treaty-makers delegating final authority over domestic U.S. law to international tribunals, *without realizing that they had done so*. Such a mindless delegation seems especially implausible here, where the structure of the ICJ system seems to rely on case-specific dispute resolution and political enforcement through the Security Council. In any event, the views of the executive branch, the institution charged with the negotiation and ratification of treaties as well as the management of overall foreign policy, deserve at least as much weight, if not more, than that of an international tribunal.

But does the Court's holding foreclose *any* judicial role in the enforcement of international tribunal judgments? Such a drastic view could severely limit the ability of the U.S. to participate in certain international dispute resolution systems. For instance, the International Convention for the Settlement of Investment Disputes ("ICSID") requires member states to enforce judgments of international arbitral tribunals convened under the treaty.⁴³ Indeed, Congress has passed a federal statute specifically requiring U.S. courts to give full faith and credit to such judgments.⁴⁴ Similarly, Congress has transferred appellate authority over certain decisions of the International Trade Commission to binational panels convened pursuant to the North American Free Trade Agreement.⁴⁵ Such statutes plainly remove any question about the views of the legislative branch as to the role of domestic courts in this process. For this reason, as I have argued elsewhere, such clear statements should be honored by courts as an expression of the combined political judgment of the legislative and executive branches about the proper method for ensuring domestic

⁴³ International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>:

"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."

⁴⁴ See, e.g., 22 U.S.C. § 1650a(a) (2000):

"An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."

⁴⁵ See 19 U.S.C. § 1516a(g)(7)(A) (2000) (authorizing binational panels to direct U.S. agencies to "take action not inconsistent with the decision of the panel").

enforcement of international tribunal judgments.⁴⁶ Requiring a clear statement will also usefully encourage the political branches to specify when and how such international judgments should be implemented, as they did in the case of the ICSID Convention.

A robust reading of Article III that may be gleaned from the Court's opinion in *Sanchez-Llamas*, however, would prevent a court from giving effect to such a clear statement of congressional intent. To be sure, the Court in *Sanchez-Llamas* was hardly faced with a clear statement of either legislative or executive intent in favor of direct enforcement of ICJ judgments. Indeed, it was faced with silence on the part of the legislature and strong opposition on the part of the executive. There is little reason to believe, therefore, that the Court's opinion has affected the viability of such clear statements.

V. CONCLUSION

The most extreme form of the new world court order has suffered a substantial setback. Not one justice endorsed or adopted the view that the ICJ's judgments have binding effect on U.S. courts. Moreover, a solid majority of justices appear to have adopted a skeptical view of the more moderate efforts to encourage judicial comity and deference to international court decisions.

Sanchez-Llamas does not, however, mean that the U.S. must turn its back on greater judicial cooperation with international courts. Rather, *Sanchez-Llamas* may signal a return to the old world court order of political control over compliance with most international institutions. In the modern era of increased interaction with international tribunals, political control over compliance will likely take the form of a clear statement rule indicating the political branches' acceptance of judicial deference or enforcement of international court judgments. Although rare, such clear statements do indeed exist. And requiring such a statement is the most sensible and modest approach to the challenges posed by the rise of international tribunals.

⁴⁶ See Ku, *International Delegations*, *supra* note 2, at 65–69.