

1-1-1997

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Recommended Citation

Khaldoun A. Baghdadi, *Apples and Oranges--The Supremacy Clause and the Determination of Self-Executing Treaties: A Response to Professor Vazquez*, 20 HASTINGS INT'L & COMP. L. Rev. 701 (1997).

Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol20/iss3/11

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Apples and Oranges—The Supremacy Clause and the Determination of Self-Executing Treaties: A Response to Professor Vazquez

By KHALDOUN A. BAGHDADI*

I. Introduction

The doctrine of self-executing treaties is currently in a state of disarray.¹ Both courts and scholars have essentially “missed the boat” in attempting to determine whether or not a specific treaty provision is self-executing.² In his recent article entitled *The Four Doctrines of Self-Executing Treaties*,³ Professor Carlos Manuel Vazquez attempts to ease some of the confusion surrounding the determination of whether or not a treaty provision is self-executing.⁴ In assessing whether or not a specific treaty provision is self-executing, Professor Vazquez’s analysis rests on the Supremacy Clause of the United States Constitution.⁵ Respectfully, Professor Vazquez’s focus on the Supremacy Clause in making this analysis is essentially misplaced. Simply stated, the Supremacy Clause of the U.S. Constitution has nothing to do with whether or not a treaty provision is self-executing. Rather, the

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1. See Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?* 74 AM. J. INT’L L. 892 (1980).

2. See *id.* at 895.

3. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995).

4. *Id.* at 695.

5. *Id.* at 696. The Supremacy Clause of the U.S. Constitution mandates that: 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, any Thing in the Constitution or Laws of any State notwithstanding.

U.S. CONST. art. VI, § 2.

Supremacy Clause serves to ensure that federal law prevails over state law.⁶ The issue of whether a treaty entered into by the United States will override a conflicting codified state law, and potentially even a state policy, has been well settled by the courts.⁷ Moreover, there is no indication that a non-self-executing treaty provision will not also trump a state law or policy.⁸ As such, a Supremacy Clause analysis is immaterial to the determination of whether or not a particular treaty provision is self-executing.

One may ask why the distinction between self-executing and non-self-executing treaties is so important. As the United States is currently on the road to ratifying the Third United Nations Convention on the Law of the Sea (UNCLOS III),⁹ courts will inevitably be faced with the issue of whether specific provisions of UNCLOS III are self-executing. Looking towards the Supremacy Clause simply does not assist in that determination. Rather, incorporating the Supremacy Clause into the determination of the self-executive nature of a treaty adds to what is already a dysfunctional family of literature and case law.¹⁰

This Comment shall first provide a brief overview of the doctrine of self-executing treaties in international law. A more detailed discussion of Professor Vazquez's article as it relates to the Supremacy Clause will follow. In essence, there are three basic criticisms to Vazquez's analysis. First, Vazquez mistakenly assumes that the Supremacy Clause addresses the issue of self-executing treaties. Sec-

6. U.S. CONST. art. VI; *see also* Riesenfeld, *supra* note 1, at 900-01. Riesenfeld stressed that:

A treaty provision which by its terms and purpose is *meant* to stipulate the immediate and not merely progressive creation of rights, privileges, duties, and immunities cognizable in domestic courts and is *capable* of being applied by the courts without further concretization is self-executing by virtue of the constitutional mandate of Article VI of the U.S. Constitution.

Id.

7. *See, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187, 190 (1961); *Ware v. Hylton*, 3 U.S. (3 Dallas) 199, 236 (1795) (holding that in order for a treaty to be the Supreme law of the land, no state legislation can "stand in its way").

8. *See Kolovrat*, 366 U.S. at 190. Justice Black gave no indication that the self-executing or non-self-executing nature of the treaty between Serbia and the United States had any bearing on whether or not it overrode the Oregon state policy in question. *Id.*

9. Third United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 11th Sess., 183d-193d mtg. at 164, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261.

10. *See, e.g.*, *Cook v. United States*, 288 U.S. 102 (1932); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986).

ond, even if the Framers did envision that the doctrine of self-executing treaties should be used as a tool for ensuring federal supremacy, there is no evidence of this in the Supremacy Clause, or anywhere else in the Constitution. Third, even if evidence did exist that the Founders sought to ensure federal supremacy through the doctrine of self-executing treaties, there is no reason why they would want to. This Comment will illustrate that Professor Vazquez's incorporation of the Supremacy Clause into the analysis of the self-executing nature of treaty provisions is unnecessary and erroneous.¹¹ A treaty provision can, and should, be assessed in terms of its self-executive nature without any reference to the Supremacy Clause. Professor Vazquez's import of yet another level of analysis to this already confusing field is therefore troublesome.

II. Self-Executing Treaties in International Law

A self-executing treaty is one that confers specific rights upon individuals that are enforceable in domestic courts in a state, without the need for specific enabling legislation.¹² As stated rather succinctly by Professor Riesenfeld: "Nevertheless, as a matter of precedent and practice the term self-executing should not be reserved to dispositive treaties but rather to international agreements that are meant, and are specific enough to be able, to establish rights and duties of individuals directly enforceable in domestic courts."¹³

Amidst the massive amounts of literature addressing the doctrine of self-executing treaties, no consensus exists as to the origins of the doctrine.¹⁴ Moreover, reasonable courts differ as to what constitutes a self-executing treaty.¹⁵ Although some scholars consider the doctrine

11. This is not to say that the Supremacy Clause has nothing to do with treaties. Rather, the Supremacy Clause is simply irrelevant to the determination of whether a treaty entered into by the United States is self-executing.

12. Individuals can therefore seek enforcement of the treaty in court, without the aid of a domestic statute. See Riesenfeld, *supra* note 1, at 895-96; *United States v. Postal*, 589 F.2d 862, 875 (5th Cir. 1979); *Cook*, 288 U.S. at 119; *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled by* *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833) (*Percheman* overruled *Foster*, but preserved the definition of a self-executing treaty provision for the purposes of U.S. law).

13. Stefan A. Riesenfeld, *Restatement: International Agreements*, 14 *YALE J. INT'L L.* 455, 463 (1989).

14. Compare Riesenfeld, *supra* note 1, with Jordan J. Paust, *Self-Executing Treaties*, 82 *AM. J. INT'L L.* 760 (1988).

15. In determining whether or not a treaty provision is self-executing, courts will usually pay deference to a determination by the U.S. Department of State. See *Caltagirone v. Grant*, 629 F.2d 739, 746 n.18 (2d Cir. 1980).

to be an American addition to international law,¹⁶ examples of a treaty affording rights to individuals within the state can be observed as far back as the Treaties of Westphalia.¹⁷ Moreover, although the notion that a treaty can afford rights to individuals without the need for enabling legislation seems clear enough, interpretation of whether or not a treaty provision is self-executing has led to troublesome and conflicting results.¹⁸

An example of such a result can be found in *United States v. Postal*.¹⁹ In *Postal*, the Fifth Circuit Court of Appeals held that Article 6 of the Convention on the High Seas²⁰ was not self-executing.²¹ In so holding, the court relied primarily on the "intent test,"²² despite the fact that the intent of the parties to a treaty is not dispositive in the determination of whether a specific treaty provision is self-executing.²³

To the contrary, the intent of the parties to a treaty applies "only to the question whether private individuals shall have the right of protection in domestic courts against violations of a treaty provision."²⁴ Moreover, the means by which this protection is to be afforded is a matter of "constitutional law and *not* within the purview of the intent either of all the parties to the treaty or of a particular ratifying power."²⁵ As such, deciding whether the United States *intended* a treaty provision to be self-executing when it was ratified does not end the inquiry.²⁶ Other factors must be taken into account, including the

16. See MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 85 (1993).

17. See Treaty of Westphalia, Jan. 11, 1649, Fr.-Holy Roman Empire, art. VI, 1 Con. T.S. 319. For a thorough discussion of the doctrine of self-executing treaties in other countries, see Riesenfeld, *supra* note 1, at 896 ("The doctrine of self-executing treaties is relevant not only in the law of the United States but also in many other legal systems, including that of the Federal Republic of Germany, Austria, Switzerland, the European Communities and, since the reform of the preliminary title to the Civil Code, Spain.") *Id.* (citations omitted).

18. See Riesenfeld, *supra* note 1, at 896 ("From the survey of the copious literature it emerges that the doctrine of self-executing treaties is in need of clarification.")

19. 589 F.2d 862 (5th Cir. 1979).

20. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82. For a more detailed discussion of the Fifth Circuit's decision, see generally Riesenfeld, *supra* note 1.

21. *Postal*, 589 F.2d at 884.

22. *Id.* ("In sum, we do not believe that the United States intended to limit its traditionally asserted jurisdiction over foreign vessels on the high seas by adopting Article 6 of the High Seas Convention.")

23. See Riesenfeld, *supra* note 1, at 895-96.

24. *Id.*

25. *Id.* at 896 (emphasis added).

26. See *id.*

language of the treaty itself.²⁷ As such, the Fifth Circuit relied too heavily on the intent of the signatories in determining self-execution.

Despite some troubling results, not every instance involving the determination of whether a treaty provision is self-executing results in a "missed boat." In *Saipan v. United States Department of Interior*,²⁸ the Ninth Circuit Court of Appeals set forth a workable set of criteria for determining whether or not a treaty provision was self-executing.²⁹ The *Saipan* court was faced with the determination of whether the Trusteeship Agreement for the Trust Territory of the Pacific Islands (Micronesia) was self-executing.³⁰ The court held that the Trusteeship Agreement was self-executing in that it afforded rights and duties to individuals that were specifically enforceable.³¹ In so holding, the court adopted a contextual analysis for the determination of self-execution, without focusing solely on the intent of the signatories.

The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self-execution and non-self-execution.³²

Thus, in *Saipan*, the Ninth Circuit was able to formulate an acceptable set of criteria for the determination of whether a treaty was self-executing without any reference to the Supremacy Clause.³³ However, Professor Vazquez does not share this author's support for the analysis of the *Saipan* court.³⁴ Specifically, Vazquez characterized the *Saipan* test to "resemble the ad hoc, quasi-discretionary absten-

27. The United Nations Convention on the Rights of the Child is an example of a treaty that contains provisions that specifically mandate non-self-execution. *Convention on the Rights of the Child*, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989), reprinted in 28 I.L.M. 1448.

28. 502 F.2d 90, 97 (9th Cir. 1974).

29. *Id.* at 97.

30. *Id.* at 96.

31. *Id.* at 97-98.

32. *Id.* at 97 (citing MYRES S. McDOUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER; PRINCIPLES OF CONTENT AND PROCEDURE passim* (1967)).

33. *Id.*

34. See Vazquez, *supra* note 3, at 714.

tion doctrine that some consider the political question doctrine to be."³⁵ Professor Vazquez goes further to claim that:

Like this understanding of the political question doctrine, this version of the self-execution doctrine can be criticized as incompatible with our society's conceptions about what it means for a norm to have the status of "law," and, in particular, about the judiciary's role in enforcing the norms of such status.³⁶

Thus, according to Vazquez, the main problem with the *Saipan* case appears to be the courts' lack of emphasis on the Supremacy Clause. However, it is this authors' contention that the reasoning of *Saipan* is completely sound, because of the exact same reason. The text of the Supremacy Clause would give the Ninth Circuit absolutely no guidance in determining whether the Trusteeship agreement provision was indeed self-executing. In sum, the fact that the Ninth Circuit did not turn to the text of the Supremacy Clause does not transform the court's application of the doctrine into "an ad hoc, quasi-abstention doctrine."³⁷

When international treaties are concerned, the Supremacy Clause operates solely to incorporate them as a part of federal law.³⁸ As such, determining whether something is in fact a treaty should essentially be the extent of the Supremacy Clause analysis on this issue. Apart from that initial inquiry, the Supremacy Clause simply does not assist courts or scholars in the determination of whether a treaty provision is indeed self-executing.

III. The Supremacy Clause and the Determination of Self-Executing Treaties

Professor Vazquez characterizes the Supremacy Clause as a central factor in the determination of whether or not a treaty provision is self-executing.³⁹ There are three major problems with this analysis. First, it assumes that the Supremacy Clause addresses the issue of self-executing treaties. Second, even if the Framers did envision the doctrine of self-executing treaties as a tool for ensuring federal

35. *Id.*

36. *Id.*

37. *Id.*

38. In turn, the Supremacy Clause makes treaties supreme over state law, without any mention of whether or not the treaty in question is self-executing. *See* U.S. CONST. art. VI.

39. *See, e.g.,* Vazquez, *supra* note 3, at 699 (suggesting that the main means by which the Framers sought to ensure federal supremacy of treaties was to make them self-executing).

supremacy, there is no evidence in the Supremacy Clause, or anywhere else in the Constitution, that this was the case. Third, even if evidence did exist that the Founders wanted to ensure federal supremacy through the doctrine of self-executing treaties, there is no reason why the Framers would want to.

The first criticism of Vazquez's assertion is based on a plain meaning interpretation of the Constitution. Though the Supremacy Clause on its face does ensure that treaties are to be supreme against state law,⁴⁰ it does not mandate that only self-executing treaties are supreme, nor does it mandate that non-self-executing treaties are not. Simply put, the validity of a treaty determines whether it is supreme over state law, irrespective of the whether certain provisions of the treaty are indeed self-executing.⁴¹ Despite this, Vazquez characterizes the Supremacy Clause as a constitutional provision that specifically deals with the issue of self-executing treaties, claiming that it "addressed the treaty violations problem by altering the British rule: it declared treaties to be the 'the Supreme Law of the Land' and *directed the courts to give them effect without awaiting action by the legislatures of either the states or the federal government.*"⁴² This characterization imports the doctrine of self-executing treaties into an area of the law where it simply does not exist. The text of the Supremacy Clause mandates that treaties are to be supreme over state laws, and nothing more. Nonetheless, Professor Vazquez asserts that:

The Supremacy Clause does not eliminate every possible obstacle a litigant relying on a treaty might face, but it does eliminate one: without the clause, the nation's treaties would merely have possessed the status of international law enforceable only by states and only in international fora; the Supremacy Clause gives treaties the character of municipal law enforceable in domestic courts at the behest of private individuals.⁴³

Again, there is no mention of the doctrine of self-executing treaties in the Supremacy Clause. It is simply false to claim otherwise. Had the Framers of the Constitution intended that the Supremacy Clause operate through the doctrine of self-executing treaties, they would have drafted the clause accordingly. Otherwise, the Supremacy Clause, as well as the Constitution, are silent on this issue.

40. See U.S. CONST. art. VI.

41. Of course, it is possible that a treaty may be invalid for a number of reasons, and in turn affect its supremacy over state law. Cf. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

42. Vazquez, *supra* note 3, at 699 (emphasis added).

43. *Id.* (citations omitted).

Due to the fact that the Supremacy Clause is silent on the doctrine, the self-executing nature of a treaty should not affect the priority of the treaty in terms of its authoritative rank in the U.S. constitutional hierarchy.⁴⁴ An example of this principle may be found in *Kolovrat v. Oregon*,⁴⁵ where the U.S. Supreme Court reviewed an Oregon state policy that conflicted with an 1881 Treaty of Friendship between the United States and Serbia.⁴⁶ The Court held that the Oregon state policy was subordinate to the treaty, due to the fact that the treaty was a part of the federal law.⁴⁷

The issue of whether the Treaty of Friendship was self-executing was wholly immaterial to the holding of the *Kolovrat* Court, as evidenced by the fact that it was not even mentioned.⁴⁸ Thus, if a state policy must yield to a treaty, there cannot be serious doubt that the Supremacy Clause would not also mandate the same result in a case where the treaty was self-executing.⁴⁹ In sum, the Supremacy Clause makes no mention of self-execution, and operates irrespective of the self-executing nature of a treaty provision.

The second criticism of Vazquez's assertion involves the Framers's intent. There is ample evidence that the Framers of the Constitution were concerned with federal law being supreme over state law.⁵⁰ Moreover, the plain language of the Supremacy Clause indicates an intent on the part of the Framers to include treaties as a part of the

44. See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 197 (1961); *Doe v. Plyler*, 628 F.2d 448, 453-544 (5th Cir. 1980) (holding that the Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires), Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324 was not self-executing). The Plyler court's determination of whether the Protocol was self-executing was not based upon the wholly separate and distinct determination of whether the Protocol was supreme over the Texas statute. See also *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) ("The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation." (emphasis added)). As such, the Court's language in *Alvarez-Machain* conveys the notion that the force of the treaty does not depend upon whether or not the treaty is self-executing.

45. 366 U.S. 187 (1961).

46. *Id.* at 190.

47. *Id.* at 198.

48. See generally *id.*

49. *Id.*

50. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 226-27 (2d. ed. 1988). "Under the supremacy clause, it is indisputable that a valid treaty overrides any conflicting state law, even on matters otherwise within state control." *Id.* (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)). It should follow that whether or not the treaty is self-executing does not affect its supremacy.

federal law, thus allowing them to trump state law.⁵¹ Even if the Framers were concerned over treaty violations on the part of the states, placing treaties within the ambit of federal law would certainly remedy this problem.⁵² However, the notion that self-executing treaties was somehow imported into this rationale, as a vehicle for ensuring federal supremacy, is simply counterintuitive. Vazquez notes:

The history of the Supremacy Clause thus shows that its purpose was to avert violations of treaties attributable to the United States, and that the Founders *sought to accomplish this goal by making treaties enforceable in the courts at the behest of affected individuals without the need for additional legislative action, either state or federal.*⁵³

In the above passage, the first characterization of the purpose of the Supremacy Clause is settled law. However, it is the second contention that is troublesome. There is no evidence that the Framers wished to use the doctrine of self-executing treaties as a means for accomplishing the goal of federal supremacy. Without any such evidence, a logical inference that imports an entirely new doctrine into constitutional jurisprudence simply cannot be made. Professor Vazquez further claims that because they "are not cognizable in the courts, it is often said that non-self-executing treaties do not have the force of domestic law."⁵⁴ Though Vazquez reserves judgment on the merit of this assertion, he should point out that it contradicts the plain language of the Supremacy Clause.⁵⁵ Following the plain language of the Constitution, a self-executing treaty should have just as much force of law as a non-self-executing treaty.⁵⁶

The third criticism deals with the motivations of the Framers. Even if the Framers wished to use the doctrine of self-executing treaties as means of effectuating federal supremacy, there is no reason why they would want to. There is no indication that federal supremacy could be ensured if individuals were able to bring suit to

51. See Vazquez, *supra* note 3, at 698.

52. Under the Supremacy Clause, a treaty controls over conflicting state law regardless of whether it was enacted before or after the state law. *TRIBE, supra* note 50, at 226 (citing *Nielsen v. Johnson*, 279 U.S. 47 (1929)).

53. Vazquez, *supra* note 3, at 699 (emphasis added).

54. *Id.* at 702-03 (citations omitted).

55. See U.S. CONST. art. VI.

56. Or, at least, the Supreme Court has given no indication that a self-executing treaty does not have as much force of law. See discussion of *Kolovrat* and accompanying cases, *supra* notes 44-49.

enforce treaty provisions in either state or federal courts.⁵⁷ Further, there is no indication that a treaty is “more supreme” if it is self-executing. Nor is there any indication that allowing for individuals to bring causes of action without enabling legislation somehow ensures that federal law, including treaties, will be supreme over state law. Rather than addressing this issue directly, Vazquez engages in a discussion of the purported self-executing or non-self-executing nature of the federal courts, stressing “the lower federal courts derive their jurisdiction entirely from federal statutes—because, in other words, the Article III jurisdiction of the lower federal courts is not ‘self-executing’—no treaty may be enforced in these courts without some authorizing legislation.”⁵⁸

However, the authorizing legislation that affords individuals the right to enforce a treaty is not the legislation that delineates the jurisdiction of the federal district courts.⁵⁹ Rather, “enabling legislation” is the legislation that is passed in concurrence or subsequent to the ratification of the treaty. As such, there is a significant difference between “enabling legislation” of a treaty, and a statute that creates the court where one would bring the cause of action. Though some legislation may be required for an individual to enforce a self-executing treaty in a federal district court,⁶⁰ that does not mean that “no law is wholly ‘self-executing.’”⁶¹ Moreover, it still sheds no light on why the

57. This is because a treaty is part of the federal law under the Supremacy Clause, and will remain so irrespective of who happens to enforce the treaty provision. The decision of the Framers to include treaties in the Supremacy Clause is in conformity with this notion.

58. Vazquez, *supra* note 3, at 699 n.20.

59. See 28 U.S.C. § 1331 (affording original jurisdiction to the federal district courts). According to Vazquez, this statute would basically be the enabling legislation for the federal district courts, though no treaty was signed creating the courts. This interplay between a potentially self-executing domestic right (e.g., the Fifth Amendment), and a potentially self-executing international treaty, is logically unsound. There are distinct differences between the international study of self-executing treaties, and the U.S. Constitutional study of self-executing constitutional rights. These differences are significant enough to warrant separate analysis on the part of Professor Vazquez.

60. Namely, the statute that creates the court in question. In other words, simply because a court is created by a statute, or has its own enabling legislation, it cannot follow that any treaty enforced in that court loses its self-executing nature. Such a result would yield the whole doctrine meaningless—a risk that is run by importing a Supremacy Clause analysis into the determination of self-execution.

61. Vazquez, *supra* note 3, at 699 n.20. This does not foreclose the possibility that there can be a non-self-executing treaty for which Congress refuses to enact legislation. See *TRIBE*, *supra* note 50, at 226 (“[W]hether Congress can properly decline to take action necessary to implement a non-self-executing treaty is unresolved.”). Nonetheless, this unique situation still would not implicate the Supremacy Clause, because once the validity

Framers would want to use self-executing treaties to ensure federal supremacy.

IV. Conclusion

For Professor Vazquez's analysis to be sound, three assumptions must be made. First, despite its plain language to the contrary, one must assume that the Supremacy Clause of the Constitution distinguishes between self-executing and non-self-executing treaties. Second, one must assume that the Framers intended self-executing treaties to be used as a means of ensuring federal supremacy. Third, even if the Framers did intend to use self-execution as a means of ensuring federal supremacy, one has to assume that they had a reason to do so.

The Supremacy Clause sheds no light on the determination of whether or not a treaty provision is self-executing. In his article, Professor Vazquez has basically intertwined two separate and distinct areas of the law, without the proper logical or evidentiary foundation. This practice simply does not ease the confusion surrounding the study and identification of self-executing treaties. Unfortunately, Professor Vazquez has added to it.

of the treaty is determined, the Supremacy Clause would presumably attach, superseding any prior or subsequent state law.

