

ORAL ARGUMENT NOT YET SCHEDULED

No. 07-7113

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

McKESSON CORP., et al.,
Plaintiffs-Appellees,

v.

ISLAMIC REPUBLIC OF IRAN,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. All parties, intervenors, and amici appearing in this court and the court below are listed in the Brief for Appellant, except that the United States hereby participates as amicus curiae.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief for Appellant.

(C) Related Cases. References to related cases, as defined in this Court's Rule 28(a)(1)(C), appear in the Brief For Appellant.

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GLOSSARY

FCN Treaty: Treaty of Friendship, Commerce, and Navigation

OPIC: Overseas Private Investment Corporation

Treaty of Amity: Treaty of Amity, Economic Relations, and
Consular Rights Between the United States
and Iran, June 16, 1957, 8 U.S.T. 899

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a), the United States files this brief as amicus curiae.

The United States has a substantial interest in the interpretation and effect that domestic courts give to international agreements to which our government is a party. The district court's treaty interpretation threatens the broad interests of the United States by disregarding the Executive's views on a treaty and by increasing the risk that our treaty partners will interpret similar language to authorize suits by foreign nationals in foreign courts against the United States.

The United States has participated in this litigation previously, filing a Statement Of Interest in the district court. The Overseas Private Investment Corporation (OPIC), a federal agency, was originally a named plaintiff, and filed a Brief In Opposition to Iran's 2001 petition for a writ of certiorari in the Supreme

Court, in which the Solicitor General emphasized that the treaty provisions here do not create a private right of action against Iran under federal law.¹

STATEMENT OF THE ISSUE PRESENTED

Whether the Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, June 16, 1957, 8 U.S.T. 899 (Treaty of Amity) creates a private right of action against Iran under the law of the United States.²

STATEMENT OF THE CASE

A. Nature of the Case

This Court earlier held that the Treaty of Amity provides a cause of action against Iran, but vacated that portion of its 2001 opinion and remanded for further proceedings, in light of the United States government's position (before the Supreme Court and this Court, and reiterated on remand in the district court) that the treaty does not create a federal cause of action. See McKesson v. Islamic Republic of Iran, 320 F.3d 280, 281 (D.C. Cir. 2003). On remand, the district court dismissed the government's explanation of the problems created by finding a private right of action

¹ OPIC has since been dismissed as a party.

² The United States takes no position on the other questions raised in this appeal. We note that, in addition to the Treaty of Amity, plaintiffs have also looked to Iranian law and to customary international law as sources for a cause of action. Plaintiffs should have an opportunity to identify the elements of a transitory cause of action under Iranian law. However, efforts to find a cause of action in customary international law, in the absence of an Act of Congress that codifies customary international law and thereby furnishes at least some statutory basis for a cause of action under federal law, would pose even more difficult questions than the treaty question presented here. Because the district court on remand did not address those alternative sources of a cause of action, this Court should not reach those questions.

in the treaty, and the court reiterated its conclusion that plaintiffs may rely on the Treaty of Amity for a right of action against Iran under the law of the United States.

B. Treaty Provisions At Issue

The Treaty of Amity is an example of a Treaty of Friendship, Commerce, and Navigation (FCN Treaty) negotiated between the United States and many of its trading partners over the first two centuries of our Nation's foreign relations. See Herman Walker, Jr., Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229, 231 (1956) (first FCN Treaty concluded in 1778 with France); Herman Walker, Jr., Modern Treaties of Friendship, Commerce and Navigation, 42 Minn. L. Rev. 805, 805 (1958).³

The district court relied on provisions of the treaty in which the governments of Iran and the United States agree to treat the other country's nationals equitably, and promise prompt payment of just compensation when property of one country's nationals is taken by the other government. Those provisions state:

1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.
2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High

³ The Supreme Court has cited Mr. Walker's views on FCN treaties, noting his extensive experience. See Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 181 n.6 (1982).

Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Treaty of Amity, Art. IV.

SUMMARY OF ARGUMENT

The Treaty of Amity does not create a private right of action against Iran under the law of the United States. Nothing in the text of the treaty explicitly provides that a United States national may sue Iran in the courts of the United States (or that an Iranian national may sue the United States in Iranian courts). In the absence of any explicit guarantee of such a cause of action, courts should be wary of inferring one.

The treaty is an agreement between the United States and Iran, in which each government promises (among other things) that it will allow the other's nationals to invest and undertake business relations on the same terms as its own nationals. Each government also agrees that it will compensate the other's nationals for any expropriation of property. Those key elements of the international agreement neither require nor imply any particular judicial remedy in the circumstances of this case.

The district court erred in concluding that the treaty's guarantee of a right to compensation necessarily implied a private judicial remedy against Iran under United States law. Even domestic principles of statutory interpretation contradict the court's assertion that every substantive right is necessarily accompanied by a privately enforceable judicial remedy. Indeed, the Supreme Court has cautioned against

judicial creation of private rights of action in the absence of a clearly expressed intent to create specific procedural mechanisms for enforcement. And the law of treaties is even clearer, recognizing that a treaty is primarily a contract between nations, not a source of private judicial remedies.

The district court has apparently receded from its earlier conclusion that the Treaty of Amity creates a cause of action merely because the treaty is self-executing. The court below was correct to avoid reliance on that simplistic conclusion, as the two inquiries are distinct. A non-self-executing treaty cannot create a cause of action, as it requires implementing legislation. But not all self-executing treaties create private rights of action, just as not all statutes do so.

The district court also gave short shrift to the views of the United States government, despite the deference due the Executive on questions of treaty interpretation. The Departments of State and Justice are uniquely positioned to provide meaningful guidance to the courts in the delicate inquiry into the meaning of international agreements. And the district court's interpretation here threatens the broad foreign policy interests of the United States. For those reasons as well, the district court's conclusion was incorrect.

ARGUMENT

THE TREATY OF AMITY DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST IRAN UNDER THE LAW OF THE UNITED STATES.

A. There is a “presumption against private rights of action under international treaties.” United States v. Li, 206 F.3d 56, 61 (1st Cir.) (en banc), cert.

denied, 531 U.S. 956 (2000); see also id. at 60-61 (“treaties do not generally create rights that are privately enforceable in the federal courts”). Because an international treaty “is in the nature of a contract between nations.” Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522, 533 (1987) (citation and internal quotation marks omitted), courts have long recognized that a treaty violation is typically “the subject of international negotiations and reclamation,” not judicial redress. Head Money Cases, 112 U.S. 580, 598 (1884). The Treaty of Amity was negotiated and adopted against this background principle, and nothing in the treaty provisions at issue indicates an intent to depart from this fundamental understanding in the circumstances of this case.⁴

This background principle applies even when a treaty benefits private individuals. See Garza v. Lappin, 253 F.3d 918, 924 (7th Cir.) (“as a general rule, international agreements, even those benefitting private parties, do not create private rights enforceable in domestic courts”), cert. denied, 533 U.S. 924 (2001); see also Restatement (Third) of Foreign Relations Law of United States, § 907 cmt. a (1987). Thus, the Supreme Court has observed that treaty language calling for

⁴ Congressional testimony addressing identical language in a contemporaneous FCN Treaty confirms that the Executive and the Senate understood this background principle. See Commercial Treaties with Iran, Nicaragua, and the Netherlands: Hearing Before the Senate Comm. on Foreign Relations, 84th Cong., 2d Sess. 11 (July 3, 1956) (in the event of expropriation, “the company would attempt * * * to exhaust remedies available to it in domestic courts, but if a government proceeded to nationalize, * * * the Government of the United States would have to intercede in behalf of its nationals”) (testimony of Thorsten V. Kalijarvi, Deputy Assistant Secretary of State for Economic Affairs, Department of State). There was no mention of the extraordinary notion that the treaty could create a private right of action in the law of the United States against a treaty partner.

“compensat[ion]” and indemnif[ication]” did not create a private right of action against a foreign government. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 n.10 (1989) (citations omitted). The Court explained that the treaties “only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs,” but do not “create private rights of action for foreign corporations to recover compensation from foreign states in United States courts.” Id. at 442. While that observation was not a holding, the Court’s analysis is instructive and consistent with precedent, which cautions against judicial interference in the inter-governmental treaty relationship. See, e.g., Whitney v. Robertson, 124 U.S. 190, 194-195 (1888) (questions whether foreign state breached treaty “were not judicial questions”); George E. Warren Corp. v. United States, 94 F.2d 597, 599 (2d Cir. 1938) (“It is not for a court to say whether a treaty has been broken or what remedy shall be given; this is a matter of international concern, which the two sovereign states must determine * * *.”).

The operative language of the Treaty of Amity is substantively identical to the treaty language construed by the Supreme Court in Amerada Hess. In the words of the district court in this case, the Treaty of Amity guaranteed “both a right to protection * * * and a remedy in the form of a prompt payment of * * * compensation.” Op. 29-30. Precisely the same can be said of the treaties at issue in Amerada Hess, as the Supreme Court explained. See 488 U.S. at 442 (summarizing treaty guarantees that “compensation shall be paid for certain wrongs”). For similar

reasons, the Treaty of Amity does not create a right of action for a United States person to sue Iran under federal law.

The Treaty of Amity, like any other international agreement, is an undertaking between sovereign governments, and represents the pledge of each nation to the other. Thus, each government promised that it would compensate the other's nationals for expropriation of their property.⁵ But the agreement between the two governments does not itself dictate any particular procedural vehicle for private enforcement. Because “[a] treaty is in its nature a contract between two nations,” Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), a court should not jump to the conclusion that a treaty obligation to pay compensation implies a private right of action.

The district court's conclusion – that the treaty provisions here create a private right of action against Iran under the law of the United States – would be error even if the court were interpreting a statute. The Supreme Court has long since “abandoned” the “understanding of private causes of action that held sway [more than] 40 years ago,” when the Court believed that it was ““the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose’ expressed by a statute.” Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)). Beginning with Cort v. Ash, 422 U.S. 66 (1975), the Court has “sworn off the habit of venturing beyond

⁵ The pre-existing remedy under the Constitution's Takings Clause comports with the United States government's reciprocal treaty obligation. See, e.g., Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931). Thus, there is no occasion to consider whether the Treaty of Amity creates a private right of action for Iranians to sue the United States under federal law.

Congress's intent" concerning implied private rights of action. Alexander v. Sandoval, 532 U.S. at 287.

The district court here was thus wrong to apply a discredited view of statutory interpretation to the Treaty of Amity. The Supreme Court has recently reiterated the particular need for caution in construing treaties to provide an implied private right of action: “[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.” Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2680 (2006).

The district court referred to the “plain language” of the treaty. Op. 32; see also Op. 29 (referring to “the clear language of the Treaty”). But there is no explicit reference in the Treaty of Amity to any private judicial action. And the district court misunderstood the treaty’s silence. The court assumed that it must find an implied right of action “absent a showing that the parties intended the Treaty to prevent an investor from suing under Article IV(2) in the Courts of his own country.” Op. 31-32. As Alexander v. Sandoval and Cort v. Ash (among other cases) make abundantly clear, that gets the question exactly backwards, even when interpreting domestic legislation. When applied to an agreement between two sovereign governments, the district court’s analysis is that much more inapt, in light of the “presumption against private rights of action under international treaties.” Li, 206 F.3d at 61.

The cases cited by the district court illustrate the court’s error. See Op. 30. Two of those cases recognized that the Warsaw Convention creates a private cause of action to sue an air carrier for damages (not to sue a state party to establish a treaty

breach). But the differences between the Warsaw Convention and the Treaty of Amity demonstrate precisely why there is no cause of action here. The Warsaw Convention refers not only to liability and a right to damages, but also specifically to an “action for liability” and a “right of action” against air carriers; moreover, that treaty includes a specific limitations period for filing such actions. See, e.g., In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 412-413 (9th Cir. 1983) (quoting Warsaw Convention), cited in Op. 30. The Treaty of Amity imposes reciprocal binding obligations on the governments of Iran and the United States, but it does not create a private judicial remedy against Iran under the law of the United States. The Treaty of Amity does not include any reference to such an action for damages and, unlike the Warsaw Convention, there is no language setting out the contours of such a judicial proceeding by specifying (for example) the limitations period for such a suit. In the absence of such language, courts should not infer that a treaty compels a particular judicial remedy.⁶

The district court also cited a 1970 case holding that a treaty between the United States and an Indian tribe created a cause of action for a tribal member to sue the United States in the Court of Claims. See Hebah v. United States, 428 F.2d 1334, (Ct. Cl. 1970), cited in Op. 30. But Indian treaties are subject to different interpretive rules, which explicitly informed the decision in Hebah. See 428 F.2d at 1338 (“This liberal interpretation, which serves to advance and protect the rights accorded by

⁶ Thus, it does not suffice to characterize as a “remedy,” Op. 30 (emphasis omitted), the treaty obligation to pay just compensation. More specific language is required to find a right of action under a treaty.

Article I, is supported by the established principle that Indian treaties should be read, where possible, generously in favor of the Indians.”). Hebah was also decided before the Supreme Court in Cort v. Ash rejected the prevailing liberal approach to implied rights of action under federal statutes, and the remedy in that case was a suit against the United States in its own courts, not a suit against another sovereign in our courts.

The district court’s analysis was also flawed by its anachronistic view of the intent of the United States and Iranian governments at the time they negotiated the Treaty of Amity. The court concluded that an implied right of action was necessary in light of current circumstances in Iran. Any other approach “would * * * render meaningless the plain language of the Treaty, particularly when that Treaty is with a foreign country that affords our citizens (and companies) no realistic legal process through which to vindicate this right.” Op. 30-31. But the relevant question is whether the governments of the United States and Iran intended at the time of the treaty’s negotiation and adoption that it would create such a private right of action, not whether subsequent events make such an action more desirable in hindsight.

B. The district court appears to have abandoned its earlier reasoning that equated all self-executing treaties with implied private rights of action. And rightly so. Prompted in part by the views of the United States government before the Supreme Court, this Court vacated its earlier decision affirming that view. See McKesson v. Islamic Republic of Iran, 320 F.3d 280, 281 (D.C. Cir. 2003). Although the district court has now reached the same conclusion (erroneously, as we have

explained), that court no longer relies on the incorrect view that a self-executing treaty necessarily entails an implied private right of action.

A treaty may establish rules and create rights without contemplating judicial enforcement of those provisions. Only a self-executing treaty can create a cause of action, but not every self-executing treaty does so. “While a treaty must be self-executing for it to create a private right of action enforceable in court without implementing domestic legislation, all self-executing treaties do not necessarily provide for the availability of such private actions.” Renkel v. United States, 456 F.3d 640, 643 n.3 (6th Cir. 2006) (citing Medellin v. Dretke, 544 U.S. 660, 687 (2005) (O'Connor, J., dissenting) (“the questions of whether a treaty is self-executing and whether it creates private rights and remedies are analytically distinct.”)); Restatement (Third) of the Foreign Relations Law of the United States § 111, cmt. h. (1987) (“Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.”).

Thus, it does not suffice to point out that the Treaty of Amity is self-executing. A self-executing treaty “operates of itself without the aid of any legislative provision,” and such a treaty is “regarded in courts of justice as equivalent to an act of the legislature.” Foster, 27 U.S. (2 Pet.) at 314; see also, e.g., Whitney, 124 U.S. at 194 (“If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.”). Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of

action. As the Supreme Court has repeatedly explained (for example, in Cort v. Ash, Alexander v. Sandoval, and Sanchez-Llamas), courts should be wary of efforts to find implied private rights of action.

C. The district court also erred in failing to credit sufficiently the views of the United States government concerning the meaning of the Treaty of Amity and its effect on the foreign relations of the United States. See, e.g., Sanchez-Llamas, 126 S. Ct. at 2685 (“While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”) (quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)). In particular, the views of the State Department – which we present in this brief – “carry substantial weight” in matters of treaty interpretation. United States v. Postal, 589 F.2d 862, 883 (5th Cir.), cert. denied, 444 U.S. 832 (1979). Not only does the State Department negotiate treaties, but “when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice. That voice is the voice of the State Department, which in such matters speaks for and on behalf of the President.” Li, 206 F.3d at 67 (Selya and Boudin, JJ., concurring).

This is not a case in which the government’s views can be lightly disregarded, and the district court’s minimization of the Executive’s role was error. The court concluded that “the issue of whether a particular Treaty gives rise to a cause of action is one particularly reserved for the Federal Courts.” Op. 29. But the authorities cited for that proposition do not support the district court’s conclusion. The question

whether an international treaty creates an implied private right of action raises special foreign-relations concerns that are not present when a court interprets a statute or a treaty with an Indian tribe.⁷

Here, the government explained to the district court (as we had previously stated in the Supreme Court) that interpreting the treaty to create a cause of action in a case such as this one could threaten the foreign policy interests of the United States, potentially subjecting our government to suit in the foreign courts of a variety of our treaty partners because of the common language of FCN Treaties in place with other nations. This is a serious foreign policy concern, and should not be disregarded.

The district court's cursory response that no such suit has yet been identified, see Op. 32, does not answer this concern, which is based on the fundamental principle of reciprocity. See, e.g., Factor v. Laubenheimer, 290 U.S. 276, 293 (1933) ("Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that [treaty] obligations should be liberally construed [on behalf of the respective governments] so as to effect the apparent intention of the parties to secure equality and reciprocity between them."). Indeed, the district court's observation supports the government's position here. The dearth

⁷ The court also apparently discounted the government's view because of "the United States' change in interpretation of Article IV(2) of the Treaty – over twenty years into this litigation." Op. 29. There has been no improper change of position here. As we explained to the Supreme Court in 2002, OPIC (an independent federal agency) was previously represented by private counsel, as authorized by statute for proceedings in lower federal courts. When the Department of Justice became involved, in responding to Iran's petition for a writ of certiorari, the Solicitor General, in consultation with the State Department Legal Adviser, concluded that the earlier position of private counsel did not accurately represent the views of the United States.

of judicial decisions in our own courts or those of our treaty partners concluding that FCN treaties contemplate an implied right of action of the type suggested here refutes the district court's view that the plain language of the treaty must be read to create such a private right of action.⁸

CONCLUSION

For the foregoing reasons, the Court should hold that the Treaty of Amity does not create a private right of action against Iran under the law of the United States.

Respectfully submitted,

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⁸ To be sure, this case arises in unusual posture. Iran's expropriation of McKesson's investment took place in the boardroom, not the halls of government. And existing remedies (including proceedings before the Iran-United States Claims Tribunal) offered limited relief. Presumably, such claims against the United States in foreign courts would not be plentiful even if the treaty were read by other nations to authorize private suits. But the notion of reciprocity underlies principles of treaty interpretation, and should not be discounted.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 1st day of February, 2008, served two copies of the foregoing Brief For The United States As Amicus Curiae by sending them by United States mail to the counsel listed below. The Brief will be filed by hand.

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