No. 12-631

In the Supreme Court of the United States

ISLAMIC REPUBLIC OF IRAN, *PETITIONER*

v.

MCKESSON CORPORATION, ET AL., *RESPONDENTS*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

MARK N. BRAVIN*
GENE C. SCHAERR
ERIC M. GOLDSTEIN
CHRISTINE M. WARING
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
mbravin@winston.com

**Counsel of Record*

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether, when construed as Iranian law, the Treaty of Amity's "open courts" provision, which simply grants investors of one nation a non-exclusive right of access to courts of the other nation, bars a U.S. investor from suing Iran in a U.S. court for violating the Treaty's expropriation clause.

2. Whether the court of appeals abused its discretion by not deferring to Iran's interpretation of its domestic law, which the court determined—through the same fact-bound analysis used by other courts of appeals—was neither credible nor supported by any evidence.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed on page ii of the Petition.

Counsel for Respondents state that Respondent McKesson Corporation (formerly known as McKesson HBOC, Inc. and as Foremost McKesson, Inc.) is a publicly traded company organized under the laws of the State of Maryland with its principal place of business in San Francisco, California. Respondents Foremost Tehran, Inc., Foremost Shir, Inc., and Foremost Foods, Inc. are wholly owned subsidiaries of Respondent McKesson Corporation. They are no longer operating companies. No publicly held company has a 10% or greater ownership interest in McKesson Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS

FSIA	Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330(a), 1602 *et seq*., enacted October 1976
ICJ	International Court of Justice
McKesson I	*Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) (Pet. App. 297a)
McKesson II	*McKesson Corp.* v. *Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995) (Pet. App. 278a)
McKesson III	*McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001) (Pet. App. 127a)
McKesson IV	*McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 320 F.3d 280 (D.C. Cir. 2003) (Pet. App. 125a)
McKesson V	*McKesson Corp.* v. *Islamic Republic of Iran*, 539 F.3d 485 (D.C. Cir. 2008) (Pet. App. 76a)
McKesson VI	*McKesson Corp.* v. *Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012) (Pet. App. 2a)
McKesson 1989	*Foremost McKesson, Inc.* v. *Islamic Republic of Iran*, No. 82-0220, 1989 WL 44086 (D.D.C. Apr. 18, 1989) (Pet. App. 336a)
McKesson 1997	*McKesson Corp.* v. *Islamic Republic of Iran*, No. 82-0220, 1997 WL 361177 (D.D.C. June 23, 1997) (Pet. App. 236a)

McKesson 2000	*McKesson Corp.* v. *Islamic Republic of Iran*, 116 F. Supp. 2d 13 (D.D.C. 2000) (Pet. App. 165a)
McKesson 2007	*McKesson Corp.* v. *Islamic Republic of Iran*, 520 F. Supp. 2d 38 (D.D.C. 2007) (Pet. App. 88a)
McKesson 2009	*McKesson Corp.* v. *Islamic Republic of Iran*, No. 82-0220, 2009 WL 4250767 (D.D.C. Nov. 23, 2009) (Pet. App. 39a)
McKesson 2010	*McKesson Corp.* v. *Islamic Republic of Iran*, 752 F. Supp. 2d 12 (D.D.C. 2010) (Pet. App. 54a)
Treaty (of Amity)	Treaty of Amity, Economic Relations and Consular Rights Between the United States and Iran, signed Aug. 15, 1955, entered into force June 16, 1957, 8. U.S.T. 899
Tribunal Award	*Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 10 Iran-U.S.C.T.R. 228 (1986) (Pet. App. 357a)
U.S. *McKesson VI* Amicus Br.	Brief for the United States as *Amicus Curiae* in Support of Appellees, *McKesson VI*, 2011 WL 3209069 (D.C. Cir. July 27, 2011)
U.S. *McNab* Cert. Opp.	Brief for the United States in Opposition, *McNab* v. *United States*, 2003 WL 23119191 (U.S. Dec. 29, 2003), *cert. denied*, 540 U.S. 1177 (2004)

INTRODUCTION

Confronting this case for the sixth time, the court of appeals panel below observed that "McKesson filed its complaint in 1982, and the procedural nightmare that followed resembles the harshest caricature of the American litigation system as one in which justice can be continually delayed, if not denied." *McKesson VI*, Pet. App. 3a. Iran's current petition for certiorari, moreover, is its third in this long-running litigation, this Court having denied the first two. *Islamic Republic of Iran* v. *McKesson Corp.*, 516 U.S. 1045 (1996); *Islamic Republic of Iran* v. *McKesson HBOC, Inc.*, 537 U.S. 941 (2002). This latest attempt should fare no better: Iran's first question presented raises an issue impacting few, if any, other cases; its second reveals not a circuit split, but rather Iran's dissatisfaction with the consistent application of an inherently fact-bound analysis. And Iran's position on both questions is flatly wrong on the merits.

OPINIONS BELOW

The Petition lists most but not all of the opinions below. In addition to those listed in the Petition, a prior order of the court of appeals is reported at 320 F.3d 280 (Pet. App. 125a-126a). This Court's two previous denials of Iran's petitions for certiorari are reported at 516 U.S. 1045 (1996) and 537 U.S. 941 (2002).

STATEMENT

Over thirty years ago, Iran expropriated McKesson's ownership interest in Pak Dairy, and it has gone to extraordinary lengths to avoid paying compensation to McKesson ever since. The Petition's assertion that each of the six D.C. Circuit decisions

"reversed a district court decision in substantial part[,]" Pet. 12, ignores the forest for a few trees. Bottom line: jurisdiction and liability have been resolved in McKesson's favor. *McKesson 2010*, Pet. App. 60a-72a.

1. A recurring theme in this saga has been the D.C. Circuit's need to spill ink in the Federal Reporter rejecting Iran's attempts to re-litigate settled issues. *McKesson II*, Pet. App. 286a-289a; *McKesson III*, Pet. App. 132a-136a; *McKesson V*, Pet. App. 79a; *McKesson VI*, Pet. App. 13a-14a, 31a-33a. Iran has routinely disregarded the law-of-the-case doctrine, much to the frustration of the district court, the court of appeals, and McKesson.

The Petition commits the same sin, asserting, for example, "that McKesson must follow certain procedures, including 'coming to the company' to obtain its dividends and claim its stake" in Pak Dairy. Pet. 12. The district court rejected this argument on summary judgment—as a matter of Iranian law—in 1997. *McKesson 1997*, Pet. App. 263a-264a. The court of appeals expressly affirmed that ruling in 2001. *McKesson III*, Pet. App. 140a.

Then, at trial in 2007, Iran failed to prove its factual defense that Pak had adopted such a requirement for its shareholders. *McKesson 2007*, Pet. App. 106a. Nevertheless, Iran pressed on, prompting the district court in 2010 to remark that "Iran's attempt to relitigate issues, such as its 'come to the company' defense that diverted this litigation for a number of years, is simply incredible." *McKesson 2010*, Pet. App. 58a. The court of appeals was similarly unimpressed by Iran's attempt to re-litigate this defense. *McKesson VI*, Pet. App. 32a. Such diversions go a long way toward explaining the hamster-wheel nature of this litigation.

2. The facts and procedural history of this dispute are set out exhaustively in the various appellate decisions. See *McKesson I*, Pet. App. 301a-305a; *McKesson II*, Pet. App. 280a-284a; *McKesson III*, Pet. App. 129a-132a; *McKesson VI*, Pet. App. 3a-9a. This recitation focuses on the facts relevant to the questions presented, correcting certain errors in the Petition.

At the time of the Islamic Revolution, McKesson had a thirty-one percent interest in Pak Dairy. Shortly thereafter, Iran's representatives on Pak's board shut out McKesson and withheld its dividend payments. Among other actions, Pak's board dismissed McKesson's representative, ruled invalid McKesson's voting proxies, and ordered that Pak's accounts and financial statements "should no longer be prepared in English, and that the company should not correspond with or send reports to U.S. citizens, including McKesson." *McKesson 1997*, Pet. App. 257a-258a. When McKesson's former board representative went to Pak Dairy and requested payment of McKesson's dividends, he was arrested and interrogated by Iranian government agents. *McKesson 2007*, Pet. App. 110a n.13.

Thus, contrary to the Petition's supposition that "McKesson withdrew because it no longer wanted to do business in Iran[,]" Pet. 10, McKesson was forced out because it ***could*** no longer do business in Iran. See, e.g., *McKesson II*, Pet. App. 292a ("[Iran's] conduct * * * included rampant anti-American propaganda, expulsions of Americans and takings of American interests, which caused the government representatives on Pak Dairy's board to believe that Iran desired them to take these steps with regard to McKesson. And Iran's manifestation of assent to the denial of dividends to McKesson came from the

highest levels of the Iranian government[.]"). Iran's references to "war with Iraq and the strict price controls on dairy products," Pet. 11, are inapposite.

Proceedings initiated by McKesson at the Iran-U.S. Claims Tribunal resulted in a determination that Pak's acts were attributable to Iran, and in a damages award in McKesson's favor to compensate it for dividends Iran unlawfully withheld in 1979 and 1980. Tribunal Award, Pet. App. 393a-394a. The Tribunal's temporal jurisdiction extended only to claims outstanding as of January 1981, preventing it from concluding (as the district court later did) that Iran's continued "interference with McKesson's shareholder rights ripened into an expropriation * * * by April of 1982." *McKesson 1997*, Pet. App. 267a-268a.

McKesson (in 1988) then resumed its case in federal district court to recover dividends unlawfully withheld in 1981 and 1982, and the value of its expropriated equity investment. Litigation over the ensuing twenty-four years established that: subject-matter jurisdiction over McKesson's suit exists under the commercial-activity exception to the FSIA; the act of state doctrine does not bar McKesson's suit; Iran is liable for the wrongful withholding of McKesson's dividends and expropriation of McKesson's equity interest in Pak; the Treaty of Amity, construed as Iranian law, provides McKesson a right of action to recover its losses; the Treaty does not require McKesson to sue only in Iranian courts; McKesson's damages under Iranian law are those determined at the bench trial in January–February 2000; and McKesson is entitled to recover simple pre-judgment interest on the principal amounts owed by Iran. *McKesson VI*, Pet. App. 5a-9a. The Petition does not seek review of any of these holdings apart from

whether the Treaty requires McKesson to sue only in Iranian courts.

Regarding McKesson's cause of action under the Treaty as Iranian law, the court of appeals explained that its holding was entirely consistent with its earlier determination that under U.S. law the Treaty does not provide a private right of action. "The United States Supreme Court has long recognized a presumption against finding treaty-based causes of action[.]" *Id.* at 26a (citing *Medellin* v. *Texas*, 552 U.S. 491, 506 n.3 (2008)). But "Iranian law—by Iran's own explanation—operates differently. Iran has conceded that the Treaty of Amity creates a private right of action under Iranian law* * * * [Moreover,] Iran has produced no evidence indicating that its domestic law recognizes a similar presumption against implying causes of action under treaties." *Ibid.* Thus, contrary to the Petition's implication, Pet. 16, it was appropriate for the Treaty's silence on "home-country" suits to result in different conclusions as to the availability of a private right of action under Iranian law as opposed to U.S. law.

The court of appeals correctly brushed aside Iran's objection that no similar suit had been brought before 1957, when the Treaty was signed: "The reason for this is quite obvious—the Foreign Sovereign Immunities Act was not passed until 1976." *McKesson VI*, Pet. App. 25a. It similarly dispensed with Iran's argument that construing the Treaty's "open courts" provision to permit McKesson's suit to proceed in a U.S. court would lead to the "absurd result" of permitting an Iranian national to sue the United States in an Iranian court. The court of appeals found the purported "absurdity" to be neither illogical nor inappropriate in view of the Treaty's

purpose. See *McKesson VI*, Pet. App. 25a-26a ("We find it more reasonable to interpret the Treaty's silence on the forum selection issue as allowing nationals or corporations of either country to sue in their preferred forum, as such an interpretation benefits both contracting parties by ensuring that nationals of each country will have the fullest opportunity to recover their losses in the event of an unlawful expropriation."). As the court of appeals correctly noted, "[e]nsuring access to the courts of each contracting party is fundamentally different from ***mandating use*** of those courts." *Id*. at 23a.

The court of appeals found the other two Treaty provisions cited in the Petition to be red herrings. The investment protection provision invoked below and raised in the Petition, Article IV, clause 2, "simply establishes the property rights of nationals and companies of each of the parties * * * [and] is thus irrelevant to" Iran's "exclusive forum" argument. *Ibid*. The other Treaty provision Iran raises, Art. XXI, cl. 2, is inapposite because it refers to the availability of the International Court of Justice (ICJ) as a forum for disputes between the two governments, and "does not purport to affect the ***judicial*** rights of a national of one country[.]" *Id*. at 23a-24a.

Having laid to rest Iran's latest attempts to impugn the well-reasoned and fully supported findings of the district court (five opinions and two trials) and court of appeals (four opinions and one order prior to *McKesson VI*), the D.C. Circuit observed that "[i]n the interest of procedural fairness and judicial finality, we think this Sisyphean labor must come to an end." *Id*. at 9a. Iran, unsurprisingly, disagrees—but it has no viable basis to keep the litigation going in this Court.

REASONS FOR DENYING THE PETITION

Iran presents a narrow question of foreign law and asserts a non-existent circuit split about how much weight the court must give to the foreign sovereign's view about its law. The first question—whether the Treaty of Amity, construed as Iranian law, requires a U.S. corporation to sue Iran in an Iranian court for violating the Treaty's expropriation clause—is an issue of very limited significance beyond the confines of this dispute. The proper construction of Iranian law, as decided by the courts below, is unlikely to impact other cases. As to the second question presented by Iran's Petition, the courts of appeals use a common but inherently fact-bound approach to determine the deference owed a foreign sovereign's interpretation of its domestic law. For that reason, as the United States has shown in an earlier case, the question is not one on which this Court's guidance is needed.

I. An Extremely Narrow Question of Foreign Law Does Not Warrant This Court's Review.

Iran's lead argument for urging review—that the D.C. Circuit's decision on the Treaty of Amity issue "has broad implications concerning the scope of sovereign immunity for the United States and dozens of other countries[,]" Pet. 19—is simply wrong. The question of foreign law presented in this case is an extremely narrow one and is unlikely to arise again. Moreover, Iran's position—that the Treaty requires McKesson to first sue in Iran, then ask the U.S. Government to espouse its cause in the ICJ—is patently without merit.

1. As the district court noted, the doctrine of foreign sovereign immunity, combined with the unique facts of this case, make it highly ***unlikely***

that the decision below will impact future cases. See *McKesson 2007*, Pet. App. 123a-124a ("Undoubtedly, the doctrine of foreign sovereign immunity, and the unique facts in this case, have rendered illusory any threat of a significant increase in Treaty based foreign lawsuits [seeking damages for unlawful expropriation]. And there is no reason today[ ] to foresee anything different in the future.") (footnote omitted). The United States agreed with that view in its *amicus* submission to the court of appeals, observing that questions surrounding expropriations effected by "corporate—rather than sovereign—conduct" are "unlikely to arise in many cases[.]" Brief for the United States as *Amicus Curiae* in Support of Appellees, *McKesson VI*, 2011 WL 3209069, at *15 n.6 (D.C. Cir. July 27, 2011) ("U.S. *McKesson VI* Amicus Br.").

History supports this conclusion. In 1997 the district court held that under U.S. law, the Treaty provided McKesson a cause of action to sue in federal court. *McKesson 1997*, Pet. App. 272a-275a. The court rejected Iran's argument that such a holding would permit suits against the United States abroad, finding "such an outcome is hardly likely." *Id.* at 273a n.24; see also *ibid.* ("[F]or the United States to be subject to suit in a foreign court for violation of a FCN Treaty, the foreign court would need to assert personal jurisdiction over the United States—not an easy task under most circumstances, because nearly all expropriations involve sovereign acts rather than commercial acts."). Tellingly, Iran cites no instance in the past fifteen years in which any foreign court has invoked that ruling as a basis for enforcing a treaty right against the United States. McKesson knows of none.

Instead, Iran argues that "the historical context in which the Treaty was negotiated" counsels against permitting "home-country" suits because "no case has been found that was decided before the Treaty of Amity was signed in which an investor successfully brought an expropriation claim against a foreign sovereign in a U.S. court." Pet. 24-25. As we indicated above, however, the court of appeals properly rejected that justification out of hand. In cases decided before the Treaty was signed, a foreign state was answerable to a U.S. court only if it consented to be sued, or if the Executive Branch determined that denying immunity and allowing the case to proceed was consistent with the conduct of U.S. foreign relations in a particular case. See, e.g., *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-35 (1945); RESTATEMENT (THIRD) OF FOREIGN RELATIONS at 390-94 (1987).

2. According to Iran's view, "the United States should be reluctant to support a decision that opens the United States to suit in courts around the world." Pet. 26-27. But the United States already has made known ***its*** views on this issue—and those views support denial of Iran's Petition:

> Iran's argument is all the more extraordinary—and sweeping—to the extent it suggests that language found in multiple treaties with a wide range of foreign governments should be read to preclude suit against those governments in our courts. The United States has never taken such a position and any decision along those lines could cause serious harm to the foreign policy of the United States.

U.S. *McKesson VI* Amicus Br. at 23-24. As the United States informed the court of appeals even

more bluntly, "the United States has consistently refuted Iran's view of the Treaty of Amity, including in a related dispute between the governments of the United States and Iran before the Iran-U.S. Claims Tribunal." *Id.* at 25 (citing Statement of Defense of the United States, at 33-36 (No. A/24 Nov. 17, 1988)).

The United States further advised the court of appeals that the Treaty of Amity "does not purport to prohibit a United States company from bringing suit in a court in this country when jurisdiction and a cause of action exist." U.S. *McKesson VI* Amicus Br. at 20. Contrary to Iran's view, the Treaty's text contains no "exclusive forum" clause and "does not support [the] sweeping prohibition of litigation in the courts of the United States" that Iran urges. *Ibid.* Furthermore, as the court of appeals recognized, nothing in the Treaty mandates suit in Iran or prohibits suit in the United States. *McKesson VI*, Pet. App. 23a. And reading such a limitation into the "open courts" provision of the Treaty would severely limit the ability of U.S. investors to pursue claims, which is antithetical to the Treaty's purpose. See *McKesson III*, Pet. App. 138a (Iran's "limited interpretation, moreover, flatly conflicts with the treaty's purpose—protecting property of U.S. nationals—particularly because Iran's post-revolutionary courts cannot provide adequate remedies for U.S. claims.").

Iran's invitation to add to the Treaty's text a limitation prohibiting "home-country" litigation of expropriation claims also would run afoul of this Court's longstanding canon that courts should not add terms to a treaty. See *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be * * * a

usurpation of power, and not an exercise of judicial functions."). This Court remains reluctant today to imply a term of a treaty in the absence of federal legislation requiring that result. See *United States* v. *Alvarez-Machain*, 504 U.S. 655, 668-69 (1992) (declining to imply a term in the U.S.-Mexico extradition treaty that would preclude the prosecution of a Mexican defendant brought before our courts in a manner (abduction) about which the treaty was silent).

What is more, as the United States pointed out below, "[i]f Iran's interpretation of the Treaty of Amity were correct, it would have precluded virtually all litigation in United States courts against Iran, including widespread claims brought following the President's blocking of all Iranian property and interests following the seizure of the United States embassy in Tehran in 1979." U.S. *McKesson VI* Amicus Br. at 24 (citing *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981)). Like the United States, McKesson is "not aware of any other case suggesting that the Treaty of Amity would have such a sweeping effect. The passage of over half a century without judicial acceptance of Iran's interpretation of the Treaty of Amity is itself a reason to doubt its validity." *Ibid.*

3. Further, Iran's argument that the ICJ should be the ultimate arbiter of this dispute also is without merit. The United States rejected it explicitly, explaining to the court of appeals that the Treaty's "intergovernmental dispute-resolution procedure does not purport to restrict the rights of a national of one country to seek judicial redress against the other government in the courts of either country. Here too the language of the treaty does not support Iran's interpretation." *Id.* at 23. Indeed, as the court of

appeals recognized, the Treaty's reference to the ICJ "refers only to disputes among the governments themselves—and not to disputes among governments and nationals of the other contracting party—because the ICJ only arbitrates disputes between sovereigns." *McKesson VI*, Pet. App. 24a.

4. Iran's jurisdictional position, moreover, lacks any real support in ***Iranian*** law. There is no dispute over whether the Treaty, construed as Iranian law, provides McKesson a ***cause of action*** to bring its expropriation claim. Iran agrees that it does, disputing only the court of appeals' holding that McKesson can pursue that claim ***in a U.S. court***. See Pet. 16 ("The court [of appeals] thus embraced Iranian law insofar as Iran interprets the Treaty to provide a cause of action for expropriation, while refusing to apply Iranian law insofar as Iran interprets the Treaty to require suit in Iran."). See also *McKesson 2010*, Pet. App. 61a; *McKesson III*, Pet. App. 138a ("Iran does not dispute that the Treaty of Amity creates enforceable rights.").

But notwithstanding its reliance on "Iranian law," Iran never produced a law, regulation, agency or government pronouncement, or any other authoritative proclamation supporting its interpretation that the Treaty—interpreted as an Iranian law—requires suit to be brought only in an Iranian court. Rather, Iran expected the D.C. Circuit to agree simply because Iran said so. As we explain in Section II, the court of appeals was not required to take Iran's word for it, especially because Iran's interpretation of its law on this issue was implausible and unsupported by credible evidence.

5. Finally, Iran's first question presented does not warrant this Court's attention because the court of appeals had three alternative grounds for affirming

the district court's judgment under Iranian law. The district court entered judgment for McKesson independently based on each of three Iranian statutes, *McKesson 2010*, Pet. App. 64a-72a. One of them, the Civil Responsibility Act, establishes liability under Iranian law for the equivalent of a U.S. common law tort. See *id.* at 65a ("To establish a claim under the Civil Responsibility Act, a party must prove three elements: (1) damage, (2) fault, and (3) causation."). The district court's judgment turned on a straightforward application of this statute, applying established facts to satisfy each element. *Id*. at 65a-68a. The availability of this alternative ground for the judgment below as a matter of Iranian law, in addition to the two other alternative statutory grounds that would afford McKesson the same full relief as the Treaty claim, further militates against granting the Petition.

For these reasons, the first question presented in the Petition does not warrant this Court's review.

II. There Is No Circuit Split On The Proper Application of Deference Principles When Our Courts Are Confronted With A Foreign Sovereign's Submission On The Content Of Its Law.

Nor is there any good reason for this Court to address Iran's second question.

1. Contrary to Iran's contention, Pet. 20, 28-31, there is no conflict among the circuit courts with respect to whether, or how much, deference is due a foreign sovereign's assertions and interpretations of its domestic law when our courts are tasked with determining the applicable foreign law. The D.C. Circuit's decision in this case, and the decisions of other courts of appeals cited by Iran, evince a

consistent practice regarding the consideration of the foreign sovereign's views in determining and applying foreign law to resolve a dispute in our courts. Whether a lower court is persuaded to adopt the foreign sovereign's views in whole or in part, or instead to reject them, depends on case-specific factors.

Most importantly, our courts consider the plausibility of the proffered views, the presence or absence of objective evidence supporting or undermining those views, and the credibility of the evidence presented. Those fact-bound details vary from case to case. Our courts are not bound by a general rule or guidance from this Court prescribing a specific degree of deference, nor should they be.

2. On the last occasion in which this Court was asked to review an appellate court's deference to a foreign sovereign's views on its domestic laws, the United States opposed certiorari, observing that "[t]his Court's review is unlikely to provide significant guidance beyond the Court's prior observation in the domestic law context that courts must 'tailor deference to variety.'" Brief for the United States in Opposition, *McNab* v. *United States*, 2003 WL 23119191, at *25 (U.S. Dec. 29, 2003) ("U.S. *McNab* Cert. Opp."), *cert. denied*, 540 U.S. 1177 (2004) (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 236 (2001)).

Consistent with that guidance, the D.C. Circuit in this case assessed Iran's "exclusive forum" argument (that under Iranian law a U.S. investor seeking compensation for expropriation under the Treaty must bring suit in an Iranian court) based on the plausibility of the argument and the evidence Iran presented to support it.

Based on those factors, Iran's argument has consistently failed. When Iran first raised this argument in the district court, it was rejected because it was unsupported by language in the Treaty. *McKesson 1997*, Pet. App. 273a (Flannery, J., observing that "Iran ***offer[ed] no explanation*** found in the text of the Treaty as to why a foreign national, but not a United States national, should be able to assert its rights in a United States court") (emphasis added). The D.C. Circuit in *McKesson III* affirmed, adding that Iran's position was implausible in light of the Treaty's purpose. *McKesson III*, Pet. App. 138a (Tatel, J., stating that Iran's interpretation "***flatly conflicts*** with the treaty's purpose—protecting property of U.S. nationals") (emphasis added).

Although these earlier decisions in the case interpreted the Treaty's "open courts" provision under U.S. law, in its latest decision the D.C. Circuit found nothing in Iran's arguments under Iranian law to warrant a difference in either the analysis or outcome. To the contrary, the court of appeals concluded that Iran's "exclusive forum" argument failed to withstand close scrutiny, noting that it was unsupported by credible evidence of applicable Iranian law, contradicted by the Treaty's text, and based on an implausible explanation of the context and future application of the Treaty's relevant provisions. *McKesson VI*, Pet. App. 22a-27a (Iran "argues that the Treaty requires McKesson to bring its suit in an Iranian court. Specifically, Iran claims that the text, context, and practical implications of the Treaty of Amity preclude McKesson from bringing its suit in a U.S. court. All three elements of Iran's argument fail to withstand scrutiny."). Indeed, when it considered the "open courts" provision under

Iranian law, the district court found it "curious[ ]" that Iran continued to press forum exclusivity while "***proffer[ing] no reason*** to reconsider [prior] rulings." *McKesson 2010*, Pet. App. 61a (emphasis added).

3. The Petition nevertheless argues that a foreign sovereign party's views have ***always*** been, and should ***always*** be, accorded some degree of deference by the courts of appeals. Pet. 29. That clearly is incorrect; other Circuits do not simply defer to the foreign sovereign's views regardless of their implausibility, the extent of their inconsistency with the text of the applicable law, or the absence of credible supporting evidence. Courts may "consider any relevant material or source, including testimony" to determine foreign law, FED. R. CIV. P. 44.1, and thus may—but need not—defer to a foreign sovereign's interpretation. See, e.g., *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (citing a variety of reasons before concluding, "we do not feel compelled to credit the [foreign agency's] determinations without analysis").[1]

---

[1] Iran points to *United States* v. *Pink*, 315 U.S. 203, 220 (1942), in which this Court found "conclusive" an official Russian Government declaration interpreting the intended extraterritorial effect of a particular decree. Pet. 29. *Pink*, however, was decided more than twenty years before Rule 44.1 was adopted in 1966. As at least one court has explained, Rule 44.1 counsels a "softer view toward the submissions of foreign governments" than *Pink* might suggest. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 557 (E.D.N.Y. 2008). Furthermore, the Court in *Pink* noted that the Russian government's interpretation of its decree was buttressed by expert testimony tendered by the United States which "gave great credence" to that interpretation, 315 U.S. at 218, and by views of the United States as set forth in letters exchanged by the United States and Russia, *id.* at 224 & n.7. By contrast, the view expressed by Iran concerning its interpretation of the

It is for good reason, then—as Iran acknowledges—that "[t]he courts of appeals * * * have ***not*** found foreign sovereigns' interpretation of their domestic law [to be] 'conclusive.'" Pet. 29 (emphasis added).

For example, in *McNab*—a case not cited in the Petition despite its obvious relevance to the question presented for review—the Eleventh Circuit determined that the Honduran Government's interpretation of its domestic law conflicted with the text of three separate Honduran statutes, and for that reason declined to defer to the arguments Honduras put before the court. 331 F.3d 1228, 1241-45 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004). Defending the court of appeals' decision while opposing certiorari, the United States pointed out that "the court gave due consideration to the Government of Honduras's position * * * but the court ultimately and appropriately determined the substance of foreign law based on all the information before it." U.S. *McNab* Cert. Opp. at 14. This Court denied certiorari in that case, and the same considerations expressed by the United States there militate against granting Iran's Petition here.

4. Analogous fact-driven determinations of the weight to be given to a foreign state's statements concerning the content of its laws underlie each of the

---

Treaty is not based on any official declaration by an organ of the Iranian government, nor is it supported by the United States. See, e.g., Statement of Defense of the United States at 33-36 (No. A/24 Nov. 17, 1988) (explaining, *inter alia*, that "the interpretive dispute provision in the Treaty of Amity does not apply to private parties like [McKesson]" and that the Treaty does not "provide[ ] that the forum set forth for resolution of disputes is the ***exclusive*** forum"); U.S. *McKesson VI* Amicus Br. at 25 ("Here, the United States has consistently refuted Iran's view of the Treaty of Amity[.]").

cases cited in Iran's Petition. In *Access Telecom*, as noted above, the Fifth Circuit refused to credit the foreign state agency's determinations of its domestic law "without analysis." 197 F.3d at 714. After completing its analysis, the court determined that no deference was due the Mexican Government agency's interpretation of Mexican law because the agency proffered no credible evidence to support its view. *Id*.

Iran acknowledges that the *Access Telecom* court "did not defer[,]" Pet. 30, but attempts to distinguish the case on the ground that the Mexican agency was not before the court. To be sure, the Fifth Circuit noted that the agency was not before it—but it was the lack of supporting evidence that drove the court's decision not to defer. *Access Telecom*, 197 F.3d at 714.

The same is true of cases such as *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992), in which the sovereign was before the court. There, the Seventh Circuit undertook an extensive examination of the laws at issue and only deferred after France demonstrated to the court that the relevant Convention provision was expressly incorporated into French statutory law, and that the statute, subsequently enacted, gave credibility to its interpretation. *Id*. at 1312.

Moreover, this Court's precedents direct lower courts to pay the same level of consideration to a foreign state, whether it submits its views as litigant or as *amicus*. See, e.g., *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987) (same comity considerations are applicable in suits involving foreign states "either as parties or as sovereigns with a coordinate interest in the litigation") (citing *Hilton* v. *Guyot*, 159 U.S. 113 (1895)).

Consequently, it is inappropriate to "presum[e]," as Iran does, Pet. 31, that the result in *Access Telecom* would have been different had the Mexican agency been before the court.

Indeed, Iran's "distinction" based on whether the foreign sovereign is before the court as a litigant is belied by another of the cases on which it relies, *Karaha Bodas Co., L.L.C.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 90-92 (2d Cir. 2002). There, the parties' experts presented two different "finely balanced" interpretations of ambiguous Indonesian law. The appellate court resolved the "interpretive dilemma" by relying on the submission of the Republic of Indonesia, a non-party appellant, which demonstrated that appellee Pertamina's interpretation was more internally consistent with the surrounding statutory text and therefore would be adopted as the correct interpretation of Indonesian law.

5. As both the Eleventh Circuit's decision in *McNab* and the D.C. Circuit's decision in this case demonstrate, a foreign sovereign before the court can fail to present a credible, supported interpretation of its domestic law, which will lead the court in its exercise of discretion under the circumstances of the case to conclude that the foreign sovereign's interpretation is not entitled to deference. The United States made this very point in its brief in opposition to certiorari in *McNab*, explaining that "the application of deference principles depends on a variety of factors and therefore inevitably leads to results that vary with the circumstances." U.S. *McNab* Cert. Opp. at 20.

Thus, it is unsurprising that the Petition cites two cases in which appellate courts deferred to a foreign

sovereign's interpretation of its domestic law after undertaking the same type of fact-bound analysis that, depending on the facts and circumstances presented, could have supported the opposite result. Pet. 29-30 (citing *Karaha Bodas* and *Amoco Cadiz*).

These cases cited by Iran make plain that, to warrant any deference, a foreign sovereign must at least present a credible interpretation of its domestic law, supported by objective evidence. This analytical framework is applied uniformly by the courts of appeals, including the D.C. Circuit below. Just like the Second, Fifth, Seventh and Eleventh Circuits, the D.C. Circuit reviewed Iran's interpretation of the Treaty, construed as Iranian law, to determine whether it was plausible and whether any credible evidence supported it. See *McKesson VI*, Pet. App. 22a-27a (analyzing Iran's arguments in support of its exclusive-forum contention, and concluding that they "fail to withstand scrutiny").

Accordingly, the D.C. Circuit's decision not to defer to Iran's interpretation does not reflect a conflict with other courts of appeals, but rather an approach that is entirely consistent with them. After a case-specific analysis revealed that Iran's interpretation was neither credible nor supported by any evidence, the court of appeals determined that no deference was warranted. Each of the other Circuits cited in the Petition would have made the same determination.

Because Iran has failed to demonstrate that this Court's review is necessary and likely to provide additional guidance to lower courts, the second question presented does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

MARK N. BRAVIN*
GENE C. SCHAERR
ERIC M. GOLDSTEIN
CHRISTINE M. WARING
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000
mbravin@winston.com

**Counsel of Record*

Counsel for Respondents

FEBRUARY 15, 2013