No. 20-684

In the Supreme Court of the United States

BENJAMIN TAGGER,

Petitioner,

v.

STRAUSS GROUP LTD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

BENJAMIN TAGGER
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PETITION FOR REHEARING

Petitioner Benjamin Tagger requests that this court reconsider its order dated January 11, 2021, denying a Petition for Writ of Certiorari. Supreme Court Rule 44 provides that the court will consider a Petition for Rehearing that brings forth "substantial grounds not previously presented." In accordance with Rule 44, Petitioner sets forth two important arguments hitherto not submitted.

I. PETITIONER WAS DENIED SUBSTANTIAL DUE PROCESS RIGHTS WHEN HIS INVOCATION OF THE ISRAEL FRIENDSHIP COMMERCE AND NAVIGATION TREATY WAS IGNORED BY THE DISTRICT COURT IN TOTALITY, AND INCORRECTLY REVIEWED BY THE SECOND CIRCUIT WHICH NEVER CONSIDERED THE TREATY'S SPECIFIC TEXT.

The Court has long held that the citizenship, for the purpose of int determining erst federal jurisdiction, is based on the place of domicile. In *Chicago & N.W. Ry. Co. v. Ohle*, 117 U.S. 837 (1886), the key to a trial was whether Mr. Ohle was a citizen of Illinois or Iowa. This court held that the issue of citizenship was connected to domicile and the intention of permanency, stating "In order to acquire a domicile and citizenship in Illinois the defendant must have gone there in November, 1883, with the intention of remaining there permanently . . . " By extension, the Petitioner, as a permanent resident of the state of New York must be held to be a citizen of that state as well, for the purpose of jurisdiction.

Even if this court were to construe the petitioner as a noncitizen, he is entitled to Due process rights, which ensure the equal protection under the law, in any proceeding involving personal liberty and property rights. These rights are guaranteed under the United States Constitution to all persons, regardless of their country of origin or citizenship status. The U.S. Const., amend. XIV, § 1 provides:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Court has repeatedly held that aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by Fourteenth Amendments. *Shaughnessy v. Mezei,* 345 U.S. 206, 345 U.S. 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 163 U.S. 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 118 U.S. 369 (1886). "[A]ll persons within the territory of the United States," including aliens unlawfully present, may invoke the Due Process protections, which is afforded to all people within the boundaries of a State. *Plyer v. Doe*, 457 U.S. 202 (1982).

The treatment of Petitioner's claims and briefs, in both the District and Appellate Court runs contrary to the Constitution's Due Process protections.

A. The District Court Completely Ignored the Petitioners Invocation of the Israel FCN Treaty.

The Petitioner, while plaintiff in the United States District Court for the Eastern District of New York, claimed jurisdiction by invoking the Treaty of Friend-

ship, Commerce and Navigation between the United States of America and Israel. In the section heading entitled "Jurisdiction" plaintiff wrote:

> The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(2). The amount in controversy in this diversity action exceeds $75,000 as per § 1332(a). The Defendant STRAUSS GROUP is not entitled to raise the procedural defense of sovereign immunity in this action because it meets two of the immunity exceptions under 28 U.S.C.A. § 1605(a): waiver and commercial activity. The first exception, waiver, applies because Israel has waived sovereign immunity under the Treaty of Friendship, Commerce and Navigation between the United States of America and Israel . . . .

Complaint, District Doc. 16.

The district court denied plaintiff jurisdiction on the grounds of *forum non conveniens*, suggesting that plaintiff might find a more beckoning forum in Israel. The District Court suggests that since Petitioner had previously appeared in an Israel court, to secure release from the illegal imprisonment, that "the [District] Court has no reason to think plaintiff cannot continue to litigate these issues in that forum." (App.18a) This curt advice ignored the originating harm in the case—that the Strauss Group, being a powerful multinational in Israel, had the power to compel Petitioner's imprisonment.

If one were to perform a word search on the District Court opinion (App.7a-20a) on the words "Treaty", "Friendship", "National Treatment," or "Access", this search would yield no results. Thus, even though the District Court dismissed the case on jurisdictional grounds, its opinion never addressed the core of the Petitioners invocation of jurisdiction—the Israel FCN Treaty.

B. The Circuit Court Made Its Determination Utilizing the Language of the Honduras FCN Treaty, and Did Not Consider the Unique Aspects of the Israel FCN Treaty.

The Second Circuit, in considering the jurisdictional question, completely shifted away from the District Court's dismissal based on *forum non conveniens*, perhaps a tacit understanding that this doctrine was not properly applicable to this case. Instead, the Second Circuit addressed the Petitioners claim for jurisdiction under the Israel FCN Treaty; however, the Appeals Court never analyzed the specific text of the Israel FCN Treaty, which stands against the principle that a treaty's interpretation must "begin with the language of the treaty itself. The clear import of the treaty language controls . . . " *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982). *See also The Amiable Isabella*, 19 U.S. 1 (1821) (" . . . this Court does not possess any treatymaking power. That power belongs by the Constitution to another department of the government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions . . . ")

Instead of citing specific provisions of the Israel FCN treaty, the Second Circuit grouped this treaty into a general class of friendship treaties, thus neutering the specific language of any given bilateral treaty in favor of an overarching treatment of all friendship treaties as more or less the same, and does not look to the specific language in each unique treaty. This would be equivalent to treating all contracts as exactly the same contract without any analysis of a given contract's terms. Specifically, the court relies upon its own precedent in *Blanco v. United States*, 775 F.2d 53, 62 (2d Cir. 1985), which involved the Honduras FCN Treaty, to define "access" to courts as trivial, procedural rights, instead of jurisdictional rights. The very language used in the opinion reveals that the Second Circuit did not analyze the text specific to the Israel FCN Treaty.

In Contrast to the Honduras Treaty, the Israel grants access to <u>all jurisdictions</u>. For Honduras, access is granted only to a jurisdiction "established by law." This is a vague provision, because it can be argued that for a treaty party to have jurisdiction in the Honduras court, there might be the need for a specifically established law granting said jurisdiction. In *Blanco v. United States*, 775 F.2d 53 (2d Cir. 1985), the Second Circuit stated that the very "language [of the Honduras FCN Treaty] (does not purport to define new jurisdictional relationships or broaden existing waivers of sovereign immunity. Indeed, access is expressly limited to such "degrees of jurisdiction established by law . . . "

In contrast, the Israel Treaty provides access "in all degrees of jurisdiction" Israel FCN Treaty, Section V, and thus places no limits on claims to

jurisdiction. The Second Circuit does not recite any text from the Israel FCN Treaty that it specifically identified as limiting access to the court—*i.e.* the jurisdiction of the court.

The treatment of the Petitioner's claims in both courts is doubtless a substantial deprivation of due process. The District Court declined to address the main jurisdictional provisions cited by the petitioner; and when finally addressed by the Second Circuit, the appellate court did not deal with the issue head on; instead relying on tangentially related treaties that contain meaningfully different provisions.

II. INTERNATIONAL COURTS HAVE HONORED TREATY TERMS AND PROVIDED NATIONAL TREATMENT, AND THE UNITED STATES COURTS NEED TO RECIPROCATE TO HONOR THE TERMS OF FCN TREATIES.

A. Treaties Are the Law of the Land, and an Irreplaceable Role in Harmonizing the Relations Between Nations.

A treaty is not only a law of the United States, is a compact between nations, and reciprocal execution and adherence are requisite for a treaty to function and fulfill its goal to harmonize relations between nations, promote commerce and friendship, and reduce hostility. Treaties occupy a special position in the legal world because of their ability to provide providential effects and enforcement outside of domestic borders.

> It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed

> that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found.

State of Missouri v. Holland, U.S. Game Warden, 252 U.S. 416 (1920).

It is imperative that the Court accept this petition in order to restore the legal force of treaties. The treaty is constitutional in nature, and requires even more scrutiny and agreement within Congress than a regular statute, since a treaty requires two-thirds approval in the Senate. U.S. Const., Art. II, § 2, cl. 2.

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.

Chief Justice Marshall, Federalist No. 75, *The Treaty Making Power of the Executive.*

If lower courts are permitted to ignore or capriciously treat parties who rely on the legal force of treaties, the force of law of these treaties will dissolve over time as appellate courts issue poorly reasoned decisions.

B. Foreign Courts and Arbitral Bodies Have Honored National Treatment Treaties and Provided Access to American Companies in Pursuit of Their Claims.

Contrary to the Second Circuit's view that National Treatment was limited to small procedural matters,

many foreign courts and arbitral bodies have correctly interpreted National Treatment to encompass fundamental due process and property rights, such as jurisdictional access, enforcement of judgments, tax treatment, equal treatment of regulations and tariffs, etc. Petitioner herein presents a compelling set of examples.

In *GAMI Investments Inc. v. The Government of United Mexican States*, UNCITRAL Tribunal (November 15, 2004), GAMI, a U.S. investment Corporation, to seek reversal of the expropriation of three sugar mills. Mexico sought to bar the case on jurisdictional grounds. GAMI requested National Treatment under the North American Free Trade Treaty (NAFTA) and asserted that "Mexico's maladministration resulted in both the denial of National Treatment and any breach of international minimum standards." *GAMI* at 19. The tribunal granted jurisdiction and cited the specific text from the treaty in the judgment:

> Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

NAFTA Art. 1102(2).

The tribunal then details a differential in treatment between GAMI and a similarly situated Mexican company, stating "[C]an there be any doubt that the two companies and thus the shareholders were treated differently? . . . It's shareholders were deprived not only

of their property but also the opportunity to benefit . . . " *GAMI* at 43.

In *Occidental Exploration and Production Co. (OPEC) v. The Republic of Ecuador*, LCIA, Final Award of July 1, 2004, OPEC, a U.S. company incorporated in California, raised claims for unfair tax treatment, which assessed OPEC taxes while not assessing the same to comparable Ecuadorian companies. Citing the National Treatment obligations under the WTO Treaty, Article II, General Agreement on Trade in Services, OPEC sought protection against discriminatory taxation. The arbitral court devoted several pages to analyzing the specific text of the treaty, before concluding that OPEC was entitled to a refund of its taxes:

> The Respondent (Ecuador) breached its obligations to accord the investor treatment no less favorable than that accorded to nationals and other companies under the standard of national treatment guaranteed in Article II(I) of the Treaty . . . The Respondent breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II(3)(a) of the Treaty and to an extent the guarantee against arbitrariness of Article II(3)(b).

OPEC at 73.

The Appeals Court of Ontario Canada, *Feldman v. Mexico*, No. C41169 (Ontario Ct. App. 2005), upheld the decision of the Superior Court and arbitral court holding that that the discriminatory enforcement of laws constituted a denial of National Treatment. The arbitration tribunal had held that Mexico discriminated

against Feldman contrary to Article 1102 of the NAFTA. Feldman, the claimant, alleged that Mexico's refusal to rebate excise taxes applied to cigarettes exported by his company constituted a breach of Mexico's obligations under Chapter Eleven, Section A of the NAFTA. In particular, Mr. Feldman alleged violations of the NAFTA Article 1102 (National Treatment). The Tribunal ordered Mexico to pay to Feldman, as damages, tax rebates that had been withheld from Mexico because of discrimination. The resulting award to Feldman was over $75 million.

In proceedings before the Israel Committee on Fiscal Policy Concerning Oil and Natural Gas in Israel,[1] August, 23, 2010, pertaining to Noble Energy Mediterranean, Ltd. (now Chevron Inc.), Abraham D. Sofaer, a scholar of the Hoover Institute of Stanford University, presented his review of Israel FCN Treaty caselaw. The hearings involved the interests of a U.S. company, Noble, seeking to protect its property rights in Israel. Sofaer was formerly a legal adviser to the U.S. State Department where he negotiated or presented to the Senate several bilateral investment treaties, and was involved in litigation involving the scope of FCN Treaties such as a case filed against Italy in support of Raytheon, Inc.

Sofaer noted that due process lies at the core of the Israel FCN Treaty, stating that a host country must "behave in an even-handed, nondiscriminatory, transparent, and consistent fashion, and will respect

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[1] *The Legality of Increases in Royalty Rates and/or Taxes Applicable to Existing Oil and Natural Gas Rights in Israel Under the U.S.-Israel FCN Treaty*, Opinion and Memorandum of Law, Abraham D. Sofaer, August 23, 2010.

the principles of due process." Sofaer at 52, which behavior should be in the spirit of the "highest good faith and due process." Sofaer at 6. Sofaer notes at 8 that the Israel FCN treaty guarantees National Treatment which "assures non-discrimination." He detailed the important difference between treaties offering "Most Favored Nation" status and the highest level of protection–"National Treatment." Accordingly, noting the opinions in Occidental and in Feldman, Sofaer concluded that Israel is obligated to treat Noble on equal terms with an Israeli company. Thus Israel should not be allowed to raise royalty rates and taxes on Noble.

Each of the above examples demonstrates international courts and tribunals holding that National Treatment provides significant property right and jurisdictional protections. In order to maintain comity and reciprocity, this Court should provide the same protection for the property claims of Petitioner, who claimed his rights under the Israel FCN Treaty to be treated equal to a U.S. national.

C. Reciprocity and Comity Are Essential to Effective Functioning of Treaties.

In a *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978), the Second Circuit acknowledged the importance of reciprocity in treatment between treaty nations. As such, a foreign national filing a suit in federal court in the United States should not be disadvantaged relative to a domestic corporation. "... [A] treaty between the United States and the foreign plaintiff's country allows nationals of both countries access to each country's courts on terms no

less favorable than those applicable to nationals of the court's country." *Farmanfarmaian* at 882.

Previously, the Second Circuit had also recognized a broader view of access to courts in *Alcoa Steamship Corporation v. M-V Nordic Regent*, 654 F.2d 147 (1978), stating, "Obviously, the protocol does not limit the meaning of access to entitlement to legal aid or privileges relating to security (which themselves are not unrelated to the typical *forum non conveniens* issue). Nor is such a provision a constant in the treaties mentioned above." The dismissal of Petitioner in this case represents a regression in the international norms of reciprocity and comity.

Because the Israel FCN Treaty and other similar treaties have the words "Friendship," "Commerce" and "Navigation", they are inherently intended to be reciprocal in nature. Friendship stands for mutual support, commerce stands for free and fair exchange, and navigation refers to fair use and access to waterways and other navigable medium.

As the Court noted in *Hilton v. Guyot*:

> . . . (Comity is) neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. . . . [I]t is the recognition which one nation allows within its territory to the legislative, the executive or the judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113 (1895).

With the granting of certiorari to this petition, this Court has the opportunity to restore the values of Friendship, Commerce, and Navigation to the original intent when these treaties were signed.

CONCLUSION

For the reasons articulated above, and in the Petition for Writ of Certiorari, Petitioner respectfully requests this petition be granted.

Respectfully submitted,

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FEBRUARY 5, 2021

RULE 44 CERTIFICATE

I, Benjamin Tagger, petitioner pro se, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the following is true and correct:

1. This petition for rehearing is presented in good faith and not for delay.

2. The grounds of this petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

/s/ Benjamin Tagger

February 5, 2021