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DUBAI PETROLEUM CO. V. KAZI

LAWYER: The sole issue before this court is the interpretation of a Texas statute; specifically, whether India has equal treaty rights with the US on behalf of its citizens? There are two reasons why the dismissal for lack of subject matter jurisdiction was appropriate in this case. These are independent grounds. The first is that none of the treaties between the US and India guarantee a right of access to Indian citizens to the courts of the US or for that matter of Texas.

HANKINSON: In order for that to matter, then don't you have to define equal treaty rights in the statute as meaning a right of access?

LAWYER: Yes, that is part of why I think this court can elaborate on its footnote, that it cited in *Dow Chemical v. Alfaro*.

HANKINSON: What authority and where do we look besides *Alfaro* to the definition of equal treaty rights?

LAWYER: I think that we can look to the history of the statute and when that statute was actually enacted. In this case it was enacted back in 1913. The types of treaties that the US was engaging in at that time were treaties, such as, the Friendship, Commerce and Navigation treaty, such as the treaty that was involved with Costa Rica. In particular, there were no treaties such as the UN Charter or the International Covenant at that time, which were multilateral treaties, which I think are totally different animals from what was intended by the legislature to be covered by this issue.

HANKINSON: Were there specific treaties at that point in time that had access to American court provisions?

LAWYER: Yes

HANKINSON: And were there other kinds of treaties that did not?

LAWYER: Yes there were.

HANKINSON: So how do we know that at that point in time equal treaty rights specifically means a treaty that gives access to courts?

LAWYER: I think we can know that because if it didn't mean access, if it just meant general treaty rights, we would not have had to include this provision to our statute, we could have just left it as it was and not include a determinate that requires us to - what I think the legislature was trying to do there is they were trying to put some kind of a limit on what kinds of foreign cases that

Texas courts had to entertain. They said if you were a foreign citizen, you could bring that right of action. At first the statute said, only if where you're coming from they recognize that cause of action. Otherwise, Texas courts didn't have to entertain jurisdiction.

When the legislature did away with that provision, basically changing it so that you could sue if you had a statute under the law of this state as well. So it basically did away with that exception. The only issue which hadn't been addressed by the courts, because it always had been disposed of upon that first issue, was whether in the case of a foreign citizen only, whether your country had equal treaty rights. I think what the legislature was trying to do was they acknowledged that they could limit jurisdiction, but only as far as there wasn't a treaty - some supreme law of foreign nations out there that tells us we have to exercise jurisdiction at least to get them in the door and provide equal access.

I think the other reason why we can look at access as a key language is, as I was explaining to you, there were some treaties that provided access and others that don't. Even today when our congress is entering into treaties, some provide access and others specifically don't. In fact, as our amicus brief pointed out as supplied to us by *AVIATECA*, Nicaragua is one of those countries where we had an FCN treaty. It specifically provided for equal access. It was done away with by executive order in 1985 when there were various diplomatic relations that were going awry over there. And when the US entered into a new agreement with them it was a friendship and cooperation agreement which did not explicitly provide for equal access.

This issue of equal access has also been reviewed by *Murray v. British Broadcasting* in the 2nd circuit. And in that case, they discussed various treaties that had equal access clauses in them and various others which did not. And they used that as the key determination for whether the plaintiff would be accorded the same deference under the federal foreign non conveniens statute.

PHILLIPS: Do any of the modern multi-lateral treaties have provision on equal access to courts?

LAWYER: I have not seen any equal access provisions in any of the multi-lateral agreements. But I admit, I have not looked all of them that do not involve India, that India is not a signatory. So there may be one out there, but I very much doubt it.

PHILLIPS: What are the BIP treaties?

LAWYER: They are Bi-lateral investment treaties. And they are similar to an FCN type treaty, wherein they are a bi-lateral treaty like most FCN's are, where they are a very carefully negotiated treaty which contain explicit language on what rights are determined by that treaty, and there has never been a court that has said, that an FCN treaty is non self-executing. They assume that it is because it is such a carefully negotiated agreement and it's between two parties and everybody

knows who's affected by it, and how far the treaty goes.

PHILLIPS: Do any of the BIP's have access to court provisions that you know about?

LAWYER: Yes, I believe some of them do. The one's that I've looked at, I've looked at several and there are several with other nations that contain some kind of access language. I don't know if they would particularly qualify under our treaty statute, because some of those are very specifically related to like personal property, or some specific right that the bi-lateral investment treaty is.

PHILLIPS: Isn't the essence of your argument, that Texas courts will allow foreign nationals to bring a suit in our court if they are from a country that was in existence at the turn of the century at the time that we were drafting a certain type of treat, but if these people are unfortunate enough to be from a newly emerging country, they are out of luck?

LAWYER: No, that's not my argument. In fact, there have been several treaties that guarantee access that have been entered into in 1993. Congress still uses equal access as a term that they negotiate with. And I think for this court to determine that a treaty that does not explicitly provide for equal access, that somehow it can be implied from that language, I think would be an invasion of the congressional prerogative whether to negotiate that as part of the treaty. For instance, our amicus pointed out that Nicaragua and some others, Iraq and Lybia, diplomatic ties have been severed, and to say that this general multi-lateral treaty which is merely aspirational and promises future action, future congressional implementation to make it the laws of the various nation states that are parties to it, would say that Nicaragua, for example, has equal access when the executive order in 1985 specifically revoked it and it's not been explicitly granted again. There are several nations to the ICCPR, the International Covenant that we don't have that type of relationship with, we don't have any other treaties that provide equal access. And to write-in this additional explicit term, which congress avoid doing especially in a multi-lateral agreement, I think is over-stepping what the judiciary is here to interpret.

OWEN: You mentioned treaties that were executed in 1993 that have equal access terms. Can you identify those for us?

LAWYER: There was one that we cited in our brief, and that was the Lafia(?) treaty. Again it was one of these newly formed countries that we had decided to extend various equal access rights and other rights to. And one that was cited in the amicus brief was *Ubekastan(?)*. That one specifically provides for equal access as well. The particular language that provides that equal access are cited in the briefs.

ENOCH: In those equal access treaties could Texas exercise forum non conveniens and throw the case out?

LAWYER: Yes. I think depending on whether once they get in the court under this jurisdictional statute, then we can apply our various analysis that's provided for...

ENOCH: So an equal access treaty executed by the US gov't can create jurisdiction in Texas state courts?

LAWYER: If it were a valid treaty and it provided specifically for equal access, I think that Texas would have to exercise at least subject matter jurisdiction. Whether it could on its discretion dismiss for forum non conveniens or for some other reason, is another issue.

PHILLIPS: You made a reference earlier in your argument to the 1913 law in an attempt to keep Texas courts from being flooded. Do you know what the evil was that the legislature was trying to remedy at that time? Is there any evidence they were trying to limit foreign national lawsuits in Texas by passing this act?

LAWYER: All that we can tell from that statute are the cases that were determined after it. There is no tape recordings or anything like that of the legislative history. But there were cases such as Mexican nationals trying to bring suit or even at that point Texas citizens trying to bring suit for an accident that happened in a foreign state, such as Mexico. And those cases would find that since there wasn't cause of action available in Mexico, Texas courts did not have to exercise jurisdiction over the case.

ENOCH: A lot of these treaties could have simply been some sort of recognition if our citizens were allowed access to their courts, their citizens would be allowed access to our courts. And you wouldn't use that language. You would just simply say: if they afford our citizens their citizenship rights, we will afford their citizens our citizenship rights. And that would, of course, encompass the right to defend yourself in court or perhaps even to bring a claim in court. So why does it have to be an explicit access to courts to produce this result?

LAWYER: One of the reasons is because the legislature did not say simply that we would have equal rights in both courts. And I think it could be under some interpretations meant to be also reciprocal rights in the other courts, but they said equal treaty rights. That's why it has to occur in a treaty. So we have to ask ourselves: Well what has to occur in a treaty? We have treaties with various nations. Is just having a treaty that allows fishing in the US, is that enough to allow access to our courts? I don't think so. I think you would have to have something that overcomes our jurisdictional bar in Texas, which was that you have to have equal treaty rights on behalf of the citizens of India that guarantees them access to our courts. That's the only thing that would overcome our ability in Texas to -

ENOCH: So equal treaty rights for you means that our treaty has to guarantee Indian nationals access to our courts?

LAWYER: Yes.

ENOCH: So equal treaty somehow doesn't mean that India would afford the same rights that we would afford here, or we afford the same rights India does. It means specifically, we have been directed by our own government to open our courts.

LAWYER: Yes, that's my argument. I think that there are ways to interpret this to say it also has to be reciprocal but the treaties that provide for equal access to courts, I can't imagine one that wouldn't provide it reciprocally.

HANKINSON: Do you dispute - I think that representations were made in the briefs that India does allow American citizens access to their courts?

LAWYER: Both sides talked to people who were knowledgeable about India law. And during that discussion there was some discussion that in fact the people who were suing in this case could bring an action in India, and possibly even someone outside of India could bring an action in India. But it wasn't pursuant to a treaty. It was just pursuant to their own domestic laws, which could change tomorrow, because there's no treaty guaranteeing that.

HANKINSON: But at the present time India does allow American citizens to sue in their courts?

LAWYER: I believe that's true.

HANKINSON: Not pursuant to any particular treaty?

LAWYER: Correct. There is no treaty that's forcing India to do that. So for all we know they could change tomorrow and write some jurisdictional statute like we have that says: unless there are equal access rights or equal treaty rights with the US, we don't have to exercise jurisdiction over this case.

OWEN: One thing that you mentioned that I wanted to ask you about. You said that on behalf of its citizens that language or that phrase in the statute modifies the foreign country as opposed to the US. Am I correct?

LAWYER: Yes. I believe it does. It doesn't make sense to me that the legislature would say that India had to have guarantees on behalf of US citizens, because foreign countries do not enter into treaties on behalf of other country's citizens. Only US can now _____ its citizens. I've heard it being interpreted that way. And I really don't think it makes much difference.

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RESPONDENT

PAUST: There are two issues I want to hit first, and the second one pertains to the interpretation of the Texas statute. And that happens to be the first three issues that we raised for affirmance of the decision below. That's all we have to do today is affirm the decision below.

The first argument of petitioners has come up again as the floodgates argument. And it is really an unreal fantasy. Let me explain why. This statute is 85 years old. It's been reenacted several times, and there are very few cases that have occurred throughout the history of the state of Texas since the statute was enacted. There has been no flood of litigation in the courts in Texas. There are very few cases that are still pending after the 1993 change of the statute, and this is only the second case that has come up before this court.

Importantly also, in 1993, at the suggestion of 3 of the justices who appear before me, the Texas legislature closed the door and slammed it shut on noninquiry into forum non conveniens. It happens that this lawsuit was filed 2-weeks before that statute took effect. For the future there will be no flood of litigation. There hasn't been for 85 years. For the future there will be no flood, because forum non conveniens is the gatekeeper, as we explain in the respondent's brief, pages 24-25.

In terms of the so-called *Alfaro* 4-part test, I would like you to shift your attention to Tab 1 of respondent's bench brief that is before you today. In Tab 1, we have outlined for you - provided actually an extract from the Texas statute and Justice Ray's footnote, Justice Ray's dicta in note 2 in the *Alfaro* case. If you look at the express language chosen by the legislature, not only in 1913, but through constant reenactment and also in 1993, even though Justice Hightower suggested that the legislature amend the treaty to add more limiting words, really the legislature chose not to add any further limiting words with respect to the equal treaty rights phrase. It kept that phrase intact. It did accept the Gonzalez, Chief Justice, Hecht approach and adopted forum non conveniens as the break. However, it kept the equal treaty rights phrase intact.

Now normally a court does not have the power to add limiting words that the legislature expressly has not chosen, or at least has not chosen to add to the statute. And as I look at the statute, the test is clear: All that we have to have is that India has, not even an Indian national, but we can live with that alternatively that India have equal treaty rights with the US on behalf of its nationals.

GONZALEZ: What does that mean?

PAUST: That the treaty doesn't have to be self-executing for example. That India has these rights itself, but they do not have to be the rights of Indian nationals. But in any event, we can explore the question alternatively.

GONZALEZ: Where do we look to for a definition of equal treaty rights?

PAUST: Of course, we look to the treaty law of the US under the supremacy clause. We are bound to do that. All treaties are supreme law of the land under art. 6.2. And we look at the approach to interpretation of treaties that have been adopted by the SC, because of course, that raises a federal question for review.

GONZALEZ: You cite a 2nd circuit case about liberal interpretation whether you have a restrictive interpretation or a more broad interpretation, we are to favor the broad interpretation.

PAUST: The courts in the US..

GONZALEZ: Has the US SC spoken on that issue?

PAUST: Yes. If you will turn to Tab 2, interpretation of treaties, we have guidance from article 31 of the Vienna convention on the law of treaties, which itself is authoritative and customary. You can see the restatement and the Paust treatise on pages 286-287, for example. A treaty is to be interpreted, not merely with respect to its terms, not a strict construction as interpretation approach at all with respect to treaty law under international law. But you're supposed to look at the context of the treaty, and you can see in article 31.1, and in light of the object and purpose of the treaty. And that allows for supplementation of content by reference to object and purpose.

If you look a little further down in article 31.3, we see that also in addition to the text in the preamble which obviously can evidence object and purpose as well as other articles, we look at subsequent practice in the application of the treaty. And in this circumstance there is some very informed practice. There is an authoritative committee setup by the covenant, for example, which is the focus of the court opinion below, the primary focus from the court, the international covenant on civil and political rights. And the comments of that committee, comments 13 and 15, that we have prepared for you in two places, in two Tabs in this bench brief for you. And we've given you actually now the UN document itself with the full comments nos. 13 and 15. The comments supplement, the meaning of article 14 of the covenant and article 2 and article 50, because this is subsequent practice setup through the treaty process. In fact, the committee has the authority to clarify the meaning of the treaty as states file a report with this committee, and as the committee responds and creates general comments that are not state specific but that are subjects specific.

If you look a little farther down at article 31, paragraph 3, in Tab 2, we also see the relevant rules of international law are utilized both at the international level under international law, and in the US SC as supplemental interpretative devices to provide additional content. For example, in *Wilson* in our brief, cited also in their brief, *Wilson* documented that for a major part of our history over half of our treaties - FCN and commercial treaties - did not have equal treaty rights of access expressly in the instruments. Nevertheless, it's important to look at pages 21 to 24 and his conclusion at page 47 in the *Wilson* article that, nevertheless, we imply customary rights of access in any such treaty that the US ratifies. This is a matter of supreme federal

law.

HECHT: You say any such treaty.

PAUST: Any commercial treaty. Now, *Wilson* also did reference the universal declaration of human rights in his article and he said it is an authoritative interpretive guide. He was writing very early in our history too in the '50s.

HECHT: To use petitioner's example, if they had a treaty that regards fishing rights, that would imply equal access to courts?

PAUST: Not necessarily.

HECHT: It would be commercial?

PAUST: We would be looking at things like a counselor convention, where the counselor has an express right of representation, as we document in our brief. There is a counselor convention in the circumstance, that counselor conventions were also addressed by *Wilson* as being relevant. And you find these implied rights of access to courts, because it makes sense that the counselor be able to effectively represent the nationals from his or her state as they deal with US.

OWEN: In the petitioner's reply brief they've got a footnote 2, and they list a number of authorities with parentheticals that virtually all say that India does not have equal treaty rights with the US. Could you address those authorities?

PAUST: First, if you check those so-called authorities there are two student works and two works by professors. Secondly, we will accept the works by the two professors. In any event, none of these works thoroughly investigated the very treaty before the slip opinion that was referenced to in that one case. Secondly, none of the expositions were very thorough in any event in terms of inquiry into whether or not there are treaty rights that are equal treaty rights between India and the US. Third, Professor Stein, for example, addressed merely express treaty rights. He did not have any inquiry really into implied treaty rights. And moreover, in this case, it's very informing that all of those articles were written before 1992 when the US ratified the international covenant on civil and political rights. To the extent that those alleged authorities are different than our approach, we disagree with those terse statements, conclusory statements of the professors and the student works.

HECHT: Is it your position that we have equal treaty rights with all signatories to the international covenant?

PAUST: Yes. And if you will consider also in Tab 2, the US case law, how we interpret the treaty. It's very important, because the court opinion below quoted *Asakkura v. City of Seattle*. We've laid that out for you again in Tab 2 at the bottom of Tab 2. And we've identified

many SC cases that inform us that we must interpret treaties in a broad manner in favor of rights that may be claimed under the treaty.

I'd like to also quote *Owens v. Norwoods Lessee*. It's an 1809 case that supplements this approach by CJ Marshall. And he stated: Whenever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the states, and whoever may have this right it is to be protected. This is how we interpreted treaties even at the time of the *Amiable Isabella*. And the *Amiable Isabella* quoted partly in the petitioner's brief was really a case that only addressed the need to follow appropriate rules of interpretation. Tab 2, are the appropriate rules of interpretation.

GONZALEZ: I know you don't want to be here, you won in the CA, and we granted writ much to your _____. But since the legislature has changed the law based on our *Alfaro* decision, is whatever we write here except for the parties be dead letter?

PAUST: There are a few cases pending. They are so rare. Whatever you write here has to be with reference to the land, which was chosen by the Texas legislature, but it's not quite dead letter.

If we turn to Tab 3, and we look at the covenant, I disagree very much with the broad statement of the petitioners, that as we look at art. 14, it does not relate to an express set of language that relates to, if not, provide directly a right to a hearing before our courts, and that it does not expressly provide this right "to all persons" and "to everyone," which includes alien persons. In fact, it's quite clear that article 14, paragraph 1 applies to all persons and everyone. And then in the determination of their rights and obligations in a suit at law "they shall be entitled to a hearing." That's clear enough. In any event, we can supplement that as *Wilson* suggest and the restatement and my treatise on international law of the US. Please see Ch. 1 and ch. 9, by customary international law. For example, the general customary right of access that *Wilson* identifies, first. Secondly, the customary right to freedom from denial of justice, which is always read into a treaty. Denial of justice is a customary precept that is directly binding on this court as it is binding on the US.

We have a quote in our Tab to the restatement of foreign relations law, section 115, where the restatement recognizes the customary international law that's also binding on the supremacy clause.

HECHT: Back to my other question. So any treaty will do?

PAUST: No, I would say we have to look at the treaty in light of its object and purpose.

HECHT: You said, that treaties always imports no denial of justice?

PAUST: No. I would not say that. We have 8 treaties that provide equal access to courts, and the lower opinion did rely heavily on the covenant, but also recognized that the other treaties support their conclusion. They didn't rely only on the covenant. Secondly, they refer to the Professor Body's affidavit, and he referred to several treaties as well.

To answer your earlier question more specifically. Also in Tab 3, we have the authoritative general comments 13 and 15 prepared in a easy form for you. They were quoted in our brief and we have the comments in another tab at the end of this brief. A set of documents that we've provided today.

HECHT: I read the CA opinion to say the other three treaties are not broad enough.

PAUST: If you will look at the page just following the exposition of the rights under the covenant, where they conclude that they are similar to. Even using the *Alfaro* footnote, really Justice Ray's footnote in *Alfaro, e*ven if he used that test as the test, and we can live with that test alternatively, either the express language of the statute or the *Alfaro* footnote similar treaty provisions, not exact treaty provisions, not express treaty provisions, not the same treaty provisions, not FCN treaties as such, but a number of other treaty provisions could comply.

HECHT: I understood you to say, that the CA said there were more than one treaty and the 3 treaties they reject with these words "they are not broad enough to guarantee access generally to the courts of each country on the basis of equality."

PAUST: Generally. And I see in the section of the opinion on the other 3 treaties, there might be a slight inconsistently in the opinion below. And I stress the word generally, but look at the language in the 3rd paragraph...

HECHT: How can that be read to say that those treaties do support equal treaty rights?

PAUST: Well we read the opinion of course in its entirety in the 4th paragraph in the section on the other three treaties. Our main focus must be on the first treaty discussed. As I turn the page, I see a paragraph after a quote starting: "In our opinion this treaty does provide." And then a sentence that states, "the 3 other treaties discussed above are consistent with such an interpretation." Further the affidavit of Professor Body supports their conclusion. So there is some possible ambiguity in one section of the court's opinion, but if you put them together the court is not throwing out necessarily all the other treaties. And in any event, we have provided in appendix 2, the 8 treaties and why they actually comply even with the so-called fantasy test of the 4 part *Dow v. Alfaro* dictum in footnote 2, which is only Justice Ray's test.

The test again, does not include express rights even under the similar treaty provisions. That's the language in footnote 2: similar treaty provisions. It does not require express treaty provisions. It does not require express access to courts.

If we turn back to Tab 2, we have express treaty provisions in the covenant, which was the primary focus in the court below. For that reason alone, alternatively, you can support the decision below. We have an authoritative supplementation in Tab 3 in the general comments nos. 13 and 15 in this case. And we have a further supplementation in accordance with Tab 2, that the interconvention(?) of the law of treaties, article 31.3(c) with customary international law. The prime example of a denial of justice is the denial to alien persons of access to courts.

Justice Gonzalez or the Chief asked whether or not forum non conveniens can also apply even if there is access to courts. And if the question wasn't to ask straight out that way, I think it's a useful question. And I recall the petitioner said: "Yes, we agree forum non conveniens is consistent with comity as well as principles concerning conflict of laws: balancing of different interests; looking at this contextual in terms of legal policies of the state.

PHILLIPS: Is the amicus correct that if your client had been a citizen of Iraq or Libya, you can make this same argument you're making here today on the basis of the international covenant?

PAUST: That's a rabbit trail that's full of bug-a-boos that implicate foreign affairs and political questions. And if I can cite you a case. It's a case involving a question of whether a federal court should look at such a question. And the US SC ruled that they cannot. In any event it's *Charleton v. Kelly*.

PHILLIPS: Your answer is, yes. The argument would be the same if the plaintiff in this case were a citizen of Iraq or Libya?

PAUST: Yes. Libyan nationals have access to our courts under the customary precept of denial of justice. That's the supreme law of the land, period. This court cannot interpret the Texas statute inconsistently with that customary law under the supremacy clause. It is the president of the US who determines one of three options or to exercise none of these against Libya or Iraq. It is the President of the US who can suspend a treaty, who can terminate a treaty, or who can exercise the right of the US under our the covenant under article 4, to engage in a derogation of the right of access to courts under article 14, even though article 15 mandates that this treaty apply in all circumstances. And the Bush administration made no reservation to article 50. This is a party self-executing treaty.

GONZALEZ: I understand there was some criticism as to how the SC journal summarized your case. Were there some factual errors in the way the SC journal summarized the case? The clerk informed us that you or your co-counsel were in disagreement with this summary. Are there any factual errors in this summary?

PAUST: There are legal errors in the summary, yes.

GONZALEZ: Legal errors, but not factual errors.

PAUST: The statement in issue 3, as I recall, is entirely false as it is claimed.

OWEN: You do understand that our court had absolutely nothing to do with that summary, that it's prepared by the folks that do the journal, which were totally unrelated to the court?

LAWYER: Yes.

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REBUTTAL

GONZALEZ: Since the legislature has changed the law, why is this case important to the jurisprudence of Texas?

LAWYER: It's very important and this court's analysis will not be dead letter. The first issue that every TC has to address is whether it has subject matter jurisdiction. If it doesn't, then all rulings after that are void. The court has to have subject matter jurisdiction, that issue can be raised at any time. So it's very important that the courts do this part of it right before they go onto forum non conveniens or any other issue.

ENOCH: This raised a question on this regard. Earlier we talked about the access to courts. Under the treaty was really a direction of the US government to Texas to open its courts. If we interpret this equal treaty's rights to be that specific and to mean exactly that, then under what basis would our courts be able to exercise forum non conveniens to shut the courts to inconvenient cases?

LAWYER: I think that once they get in the door and Texas has to exercise jurisdiction over them under the subject matter jurisdiction statute, then we go into an analysis whether they are treated fairly under our forum non conveniens law. I haven't done that analysis to find out which way it would come out in our case right now. I suppose they would have to be treated equally under that clause and whether our statute provides for due process for equal protection for that kind of thing now that they are in our courts and we have to exercise jurisdiction over them. Whether our courts can dismiss it would be a matter, for instance in the *Murray* case, in that case it was determined that at least the plaintiff's choice of forum has to be given the same deference if he's a foreign citizen, but they can still exercise their forum non conveniens discretion over them and dismiss the case if other legitimate state interests - legitimate in that case national interests...

ENOCH: We somehow had this discussion yesterday in a case that was argued. And the discussion really is, we could use that as simply a factor in forum non conveniens, but if we use that as the determining factor, then we might violate the treaty?

LAWYER: That's exactly right. And for example, in our jurisdictional statute, we have other issues. It's not necessarily citizenship we are talking about. First, we are talking about foreign

actions brought by noncitizens. If it's not a foreign action we aren't going to discriminate against any foreign citizens. And then also it's not the fact that they are a foreign citizen, but that their country has not guaranteed them access to our courts. And again, that could change tomorrow. Our federal government could enter into a treaty with India and it could provide specifically for access and we wouldn't be here today.

On the non-self execution, the two main documents they are relying upon are the international covenant and the United Nations charter. Both of these are non-self executing. The restatement tells us that non-self executing agreements will not be given effect as law in the absence of necessary congressional _____.

OWEN: But they do not effect the US's international obligations under the treaty. It's still binding on the US to the extent that congress specifies in what way.

LAWYER: Exactly. It means the actual provisions do not create private rights. But I think that pertains to our action, because what this citizen is trying to do is he's trying to say this treaty provides me, a private citizen, equal access to your courts and you have to entertain jurisdiction.

OWEN: Or else it provides an obligation upon the US to make sure that that person is treated the same as other people.

LAWYER: Yes. However, our congress specifically in the ICCPR told us that those particular sections, articles 1 - 27 are non self-executing. Very few international agreements contain a declaration of that nature. But there is more than just that declaration that we look to determine that it's non-self executing. The fact that it's an aspirational type treaty, the same way the united nations treaty is, they are both aspirational, they are rights that we hope that in one day in generations to come that all the US and all the united nations can all agree on what all their laws will be. But right now, all the domestic laws are different. It's a very complicated matter to assert certain rights throughout the nation.

The customary international law that Professor Paust refers to, that has never been determined to create or define civil actions. There is a case *Tellaran v. Libyan Arab Republic*, which is much discussed by the commentators on this section. And this customary international law covers things that have been universally accepted by all the nations. And there have been a couple of cases where they have found in fact there is customary international law that we have to abide by. Those cases are things that involve international crimes.