UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL WELFARE INSTITUTE, et al.,	)
Plaintiffs,	)
v.	) **Case No: 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	)
Defendant.	)

DEFENDANT FELD ENTERTAINMENT, INC.'S PETITION FOR ATTORNEYS' AND EXPERT WITNESS FEES

FEE PETITION

EXHIBIT 10

(Pet., Ex. 10)

FILED
2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

McKESSON CORPORATION; FOREMOST TEHRAN, INC.; FOREMOST SHIR, INC.; FOREMOST IRAN CORPORATION; and OVERSEAS PRIVATE INVESTMENT CORPORATION,

Plaintiffs,

v.

THE ISLAMIC REPUBLIC OF IRAN; FINANCIAL ORGANIZATION FOR THE EXPANSION OF OWNERSHIP OF PRODUCTIVE UNITS; NATIONAL INVESTMENT COMPANY OF IRAN; INDUSTRIES AND MINES BANK; FOUNDATION FOR THE OPPRESSED; and SHERKAT SAHAMI LABANIAT PASTEURIZE PAK,

Defendants.

Civil Action No. 82-00220 (TAF)

MEMORANDUM-OPINION

Previously, this Court awarded judgment to the Plaintiffs on their claim that the Defendant Islamic Republic of Iran ("Iran" or "Defendant"), acting through its co-Defendants, had expropriated Plaintiffs' 31% equity interest in an Iranian dairy, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy") in violation of customary international law and the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran ("Treaty of Amity"), 8 U.S.T. 899 (1957). Presently pending is Plaintiffs' motion for attorneys'

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fees and other non-taxable expenses. This Court heard argument on the motion on October 13, 2000 and reserved decision. Now, for the reasons discussed below, Plaintiffs' motion is granted.

I. Authority to award fees and expenses

Plaintiffs argue that the Court is authorized to award attorneys' fees to the prevailing parties in this action under both international law and the Treaty of Amity. Plaintiffs also argue that a certain portion of the fees may alternatively be awarded as sanctions against Iran for violation of this Court's discovery orders.

Defendant argues first that an award of fees is barred by the "American Rule" as explicated by the Supreme Court in Alyeska Pipeline Serv. v. Wilderness Society, 421 U.S. 240 (1975). Iran alternately disputes that international law provides any authority to award fees, and raises numerous other challenges to the propriety of all or part of Plaintiffs' request.

A. Whether Fees Are Barred By the "American Rule"

Under the "American Rule," with few exceptions, "each side must bear its own legal expenses." Unbelievable, Inc. v. N.L.R.B., 118 F.3d 795, 800 (D.C. Cir. 1997). In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), the Supreme Court reaffirmed the vitality of the "American Rule" as a principle in federal litigation. Specifically, the Court rejected the notion that federal courts had equitable power to award fees to a plaintiff prevailing on a federal claim based on a "private attorney general" theory. The Court held that a court had inherent power to award fees only in a few specific circumstances already well established in the common law. Beyond that, the Court held, "the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 262. Further, a court may not infer Congressional intent to

override the American Rule presumption and authorize fee-shifting; Congressional authorization of fee-shifting must be "express." Summit Valley Industries Inc. v. Local 112, 456 U.S. 717, 724 (1982). In sum, the American Rule acts as (1) a limitation on a federal court's inherent powers and (2) a rule of statutory interpretation.

However, the determination of whether Congress authorized courts to award fees to prevailing parties is applicable only where the substantive law giving rise to the action is governed by a Congressional enactment. The more general rule is that fees may be awarded, notwithstanding the American Rule, whenever "controlling substantive law permits recovery." Mercantile Nat. Bank at Dallas v. Bradford Trust Co., 850 F.2d 215, 216 (5th Cir. 1988). That controlling law "need not be federal law." Abrams v. Lightolier Inc., 50 F.3d 1204, 1223-24 (3d Cir. 1995). Thus, where a party's claim is governed by state law, as for example with state law claims brought under federal diversity or supplemental jurisdiction, the courts look not to whether Congress has authorized fees in a federal statute but to whether fees are authorized under the relevant state law. See All Underwriters v. Weisberg, 222 F.3d 1309, 1313 (11th Cir. 2000) ("Having held that state law controls the interpretation of marine insurance policies, it would defy both logic and sound policy were we to hold that the applicability of attorney's fees vel non must be determined by reference to uniform federal law.") (citation and internal quotations omitted); U.S. ex rel. Cal's A/C and Elec. v. Famous Const. Corp., 220 F.3d 326, 327-28 (5th Cir. 2000) (holding that attorney fees may be awarded pursuant to pendent state claim even where federal law claim on which plaintiff prevailed did not authorize fees); MRO Communications, Inc. v. American Tel. & Teleg. Co., 197 F.3d 1276, 1281 (9th Cir. 1999) (holding that attorney's fee question is governed by state law whenever "a district is exercising its subject matter jurisdiction

over a state law claim" unless the law runs "counter to a valid federal statute or rule of court"), cert. denied, 120 S. Ct. 1995 (2000); Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 938 (8th Cir. 1995) (affirming award of fees pursuant to state law where plaintiff prevailed on pendent state claim); Peckham v. Continental Casualty Ins. Co., 895 F.2d 830, 841 (1st Cir. 1990) ("In a diversity case, state rather than federal law controls the question of attorneys' fees."); U.S. for Use of Argyle Cut Stone Co., Inc. v. Paschen Contractors, Inc., 664 F. Supp. 298, 301 (N.D. Ill. 1987) (holding that state law, rather than federal American Rule, applied to claims for attorney fees in connection with pendent state law claim); 10 James W. Moore, et al., Moore's Federal Practice § 54.17[5] (3d ed. 1999) (noting that "a plaintiff prevailing on pendent state claims may rely on a state fee-shifting provision, unless the state fee-shifting provision is preempted or is otherwise contrary to federal policy.").

Similarly, where claims are governed by the law of a foreign state, courts have applied the law of that state to determine whether to award fees to the prevailing party. See In re Sause Bros. Ocean Towing, 801 F. Supp. 378, 381 (D. Or. 1991) ("When foreign law governs a party's claim, admiralty courts will look to that law in determining the party's rights to attorney's fees. Thus, were Canadian law to govern the claims in this case, it may also be appropriately applied to award claimants attorneys' fees"); Vlachos v. M/V Proso, 637 F. Supp. 1354, 1366, 1374 (D. Md. 1986) (finding that Greek law governed maritime claim, including the prevailing plaintiff's claim for attorney's fees); DeRoburt v. Gannett Co., Inc., 558 F. Supp. 1223, 1226-27 (D. Haw. 1983) ("the same reasons that originally led this Court to favor application of Nauru law to the merits of the suit also support its application to the question of attorneys' fees."); Cutler v. Bank of America Nat. Trust and Sav. Ass'n, 441 F. Supp. 863, 866 (N.D. Cal. 1977)(where state law

claim was governed by English substantive law, court held English law controlled on availability of fees). In all of these cases involving claims governed by sources of law other than Congressional enactments, the determinative question was not whether Congress authorized attorney's fees, but whether the governing substantive law authorized such fees. Indeed, it would make little sense to ask whether Congress intended a law to provide for fees where Congress did not create the law in question.

Alyeska is not to the contrary. In that case, the Supreme Court reversed an award of fees to a party that had prevailed under federal statutory law. Given that the federal right in that case was created by Congress, it was appropriate to apply the presumption that courts may not shift fees unless Congress has expressly authorized it. The Alyeska Court itself noted that claims governed by state law would present a "very different situation." See Alyeska, 461 U.S. at 259 n.31. The Court held that in such a case, the state law would usually govern the question of fee-shifting. Id. ("in an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantive policy of the state, should be followed.") (emphasis added).

Iran also relies upon F.D. Rich Co., Inc. v. U.S. for the use of Industrial Lumber Co., Inc., 417 U.S. 116 (1974), which held that fees could not be awarded to the prevailing plaintiff in that case. However, as with the claim in Alyeska, the cause of action in F.D. Rich Co. was based on a federal statute, and thus the Supreme Court found that "the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law." Id. at 127. Again, since the remedies in that case were created by Congress, it was appropriate to ask whether

Congress indicated its intent that attorney's fees should be one of those remedies. In contrast, where a substantive claim is based on law not created by Congress, courts have resolved the fee-shifting question in accordance with that law, without asking whether Congress authorized fee-shifting.

Iran argues that fee-shifting is a procedural matter and thus governed by federal procedural law, not the controlling substantive law. It is true that in federal court, procedural issues are governed by federal law, even in diversity cases. See Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); Hershon v. Gibralter Building & Loan Assoc., Inc., 864 F.2d 848, 30 (D.C. Cir. 1989). However, Iran is incorrect in asserting that the fee-shifting question in this case is a procedural issue. Rather, it is well-established under the precedent discussed above that, in a case where fees are sought based on a party's success on a substantive claim, the question of whether to award fees is also substantive. See also Chambers v. NASCO, Inc., 501 U.S. 32, 34 (1991) (fee-shifting is a "substantive remedy" where a state statute "permits a prevailing party in certain classes of litigation to recover fees."). "Statutes providing for attorneys' fees impose a liability which one may enforce as a matter of right. Such fees are put in controversy in the suit and are a part of the substantive right." Lynch v. City of Boston, 989 F. Supp. 275, 300-01 (D. Mass 1997) (holding that where plaintiff was successful on supplemental state law claim, issue of award of fees was substantive and thus governed by state law), aff'd in part, rev'd in part, 180 F.3d 1 (1st Cir. 1999). Here, Plaintiffs seek fees as the prevailing parties. The question is therefore controlled by the substantive law governing Plaintiffs' claim.

Iran asserts that the substantive law on which this action is based is the Foreign Sovereign Immunities Act ("FSIA"), which governs the conditions under which a foreign state may be sued

in state or federal court. Iran argues that because the FSIA does not expressly authorize fee-shifting, the remedy is unavailable in this case. In Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), the Supreme Court found that the determination of whether a foreign state may assert the defense of sovereign immunity under the FSIA raised questions of substantive federal law. Id. at 490. A question of federal law was substantive, the Court noted, if the "right set up by the party, may be defeated by one construction of the constitution or law[s] of the United States, and sustained by the opposite construction." Id. at 492 (citation and internal quotations omitted). The FSIA raised such substantive questions because a determination that a foreign state was entitled to immunity would bar litigation against it in both federal and state court and thus completely defeat the asserted claim.

However, although the FSIA is substantive law giving rise to Iran's defense of immunity, it is not the substantive law which gives rise to Plaintiffs' claim. Indeed, the FSIA was in general "not intended to affect the substantive law determining the liability of a foreign state . . . ." First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 620 (1983). Rather, it simply operates as a "pass-through" to the otherwise applicable substantive law supporting the claim. See Pescatore v. Pan American World Airways, Inc., 97 F.3d 1, 12 (2d Cir. 1996). Thus, in determining whether a prevailing party is entitled to fees and expenses, a court looks not to the substance of the FSIA but to the substantive law on which the successful claim is based. See Fagot Rodriguez v. Republic of Costa Rica, 99 F. Supp. 2d 170, 174 (D. Puerto Rico 2000) (awarding fees against Costa Rica based on Puerto Rican law which governed Plaintiffs' successful claim for rent); Sales v. Republic of Uganda, 828 F. Supp. 1032, 1041, 1047 (S.D.N.Y. 1993) (awarding fees against Uganda pursuant to New York law which governed

Plaintiff's personal injury claim); cf. Van Gemert v. Boeing Co., 553 F.2d 812 (2d Cir. 1977) (holding that the "source of the right . . . determines the controlling law" on damages).[1]

In a previous decision, this Court concluded that the Treaty of Amity provided a substantive basis for Plaintiffs' expropriation claim. See McKesson Corp. v. Islamic Republic of Iran, No. Civ. A. 82-220, 1997 WL 361177, *12-14 (D.D.C. June 23, 1997). Iran notes that courts have applied the American Rule to treaties as they would to other Congressional enactments. For example, in Boehringer-Mannheim Diagnostics, Inc. v. Pan Am World, 737 F.2d 456 (5th Cir. 1984), the Fifth Circuit applying the American Rule concluded that a plaintiff prevailing on a cause of action under the Warsaw Convention was not entitled to an award of fees. Boehringer is distinguishable, however, because the treaty provisions in that case did not incorporate international law as a standard of recovery and thus did not require the court to determine whether fees and expenses are a remedy authorized by the international law. By contrast, the Treaty of Amity specifies that a party whose property has been expropriated shall receive a remedy which is "in no case less than that required by international law." Treaty of Amity, Art. IV, para. 2. If those international law remedies include the authority to award fees

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[1] If Iran's argument is that the FSIA does not abrogate sovereign immunity to an award of attorneys' fees, even where fees are authorized by the substantive law, that argument is also rejected. This Court previously found that under 28 U.S.C. § 1606, a foreign state is liable for costs under 28 U.S.C. § 1920 to the same extent that a private individual would be. There is no reason to conclude that Congress's elimination of immunity to liability encompasses costs but not fees. Indeed, where Congress intended an exception to the general elimination of immunity, it stated that exception expressly. See 28 U.S.C. § 1606 (providing, as an exception to the general rule of liability that "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages, except any action under section 1605(a)(7) or 1610(f)"). The FSIA provides for no such exception regarding liability for attorneys' fees. The Court concludes that under § 1606, foreign states are liable for attorneys' fees to the same extent as a private individual under the applicable substantive law.

and expenses, then the Treaty incorporates such authority.

Further, even if the Treaty of Amity does not fully incorporate remedies available for violations of international law, those remedies may still be granted. This Court previously found that Plaintiffs' claim was also supported by customary international law directly. McKesson Corp., 1997 WL 361177, *15. Under this alternate ground based directly on international law, it is clear that all remedies appropriate to violations of international law are available. Thus, the Court must determine whether legal fees are among those remedies.

Iran argues that international law is also federal law and is therefore subject to the American Rule. It is true that international law is considered to be a part of the federal law. See The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."). However, it is federal law that is not created by Congress; thus, it is inappropriate to look to Congressional intent to determine its substance. Instead, the Court must look directly to the rules and practice of international law to resolve the issue.

B. Awarding Legal Costs Under International Law

1. General Principles of Law

The Restatement (Third) of the Foreign Relations Law of the United States (1987) [hereinafter "Restatement"] provides that a rule of international law is one that has been accepted as such by the international community of states

(a) in the form of customary law;
(b) by international agreement; or
(c) by derivation from general principles of law common to the major legal systems of

the world.

Restatement § 102. Plaintiffs argue that all three sources provide a basis for an award of fees and expenses. This Court is persuaded that the third source, general principles of law, does provide such authority.

The Restatement describes these principles as "[g]eneral principles common to systems of national law may be resorted to as an independent source of law." Restatement § 102, cmt. l. It offers as an example the passage of time as a defense to a claim, finding that this

> may not have had sufficient application in practice to be accepted as a rule of customary law. Nonetheless, it may be invoked as a rule in international law, at least in claims based on injury to persons, because it is a general principle common to the major legal systems of the world and is not inappropriate for international claims.

Restatement § 102, cmt. l.

The Court finds that the principle that the prevailing party may be awarded legal costs, including fees and expenses, is established as a general principle of law. As one commentator has found: "The vast majority of countries follow the principle that 'costs follow the event.' Under this principle, the prevailing party is entitled to all costs incurred in litigating the dispute or a portion of them." John Y. Gotanda, Supplemental Damages In Private International Law, 142 (1998). See also W. Kent Davis, The International View of Attorney Fees In Civil Suits: Why is the United States the "Odd Man Out" In How It Pays Its Lawyers, 16 Ariz. J. Int'l & Comp. L. 361, 398 (1999) (finding that America is "the only major nation that denies the winner of a lawsuit the right to collect legal fees from the loser."). Professor Gotanda further concluded that the principle is "so well-accepted that it may be viewed as a general principle of international law." John Y. Gotanda, "Awarding Costs and Attorneys' Fees In International Commercial

Arbitrations," 21 Mich. J. Int'l L. 1, 34 (1999)

Iran notes that Professor Gotanda also found that national practice varies in what specific kinds of costs are awarded. However, he did not find that this variance invalidates the general rule, and neither does this Court. The variance within the general principle indicates rather that there is discretion in its application. Professor Gotanda also noted that awarded costs "are generally those that were reasonable and necessary for the litigation, [which] typically include filing fees, witness fees, transportation expenses, and attorneys' fees." Id. at 6 & nn. 26-27. Awarding both fees and expenses is therefore a reasonable exercise of this discretion.

Iran argues that because the principle that "costs follow the event," known more colloquially as the "loser pays" or "English" rule, is not followed by the United States and a few other nations, it cannot be considered a general principle of law. However, a general principle need not be universal. Rather, if there is "evidence that it is applied by a representative majority [of nation-states] which includes 'the main forms of civilization and of the principal legal systems of the world.'" 7 Encyclopedia of Public Int'l Law, 95 (1984); see also John Y. Gotanda, Awarding Costs and Attorneys' Fees In International Commercial Arbitrations, 21 Mich. J. Int'l L. 1, 50 n. 160 (1999) ("While convergence is necessary, unanimous support is not required. In the case of costs and attorneys' fees, since an overwhelming majority of countries award costs and fees to the prevailing party, this convergence suggests that this practice constitutes a general principle of international law."). The departure of the United States from the rule does not therefore preclude a finding that it constitutes a general principle.

Further, even the United States, the major exception to the rule, has authorized fee shifting in a vast number of actions. See John Y. Gotanda, Awarding Costs and Attorneys' Fees

In International Commercial Arbitrations, 21 Mich. J. Int'l L. 1, 50 n.58 (1999) (noting some 200 federal statutes authorizing fee-shifting) (citing J. Gillis Wetter & Charl Priem, Costs and Their Allocation in International Commercial Arbitrations, 2 Am. Rev. Int'l Arb. 249, 284 n.15 (1991)). The range of subject matter where Congress has found fee-shifting appropriate is also striking, e.g., actions involving civil rights against state officers, see 42 U.S.C. § 1988, illegal discrimination, 42 U.S.C. § 2000e-5(k), the Clean Water Act, 33 U.S.C. § 1365(d), the Clean Air Act, 42 U.S.C. § 7604(d), the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g)(1), the Fair Labor Standards Act, 29 U.S.C. § 216(b); see also Fed. R. Civ. P. 54, Advisory Committee Notes (listing 35 fee-shifting statutes, including statutes governing patent, trade mark, telecommunications, anti-trust, false claims against the United States, mineral rights, securities and certain actions under customs law). The American Rule is fast becoming the exception rather than the rule.

Based on the practice of the "vast majority" of nations, which is becoming widespread even within the national law of the United States, and on the only available scholarly commentary on the issue, this Court concludes that there is a sufficiently "representative majority" of nation-states following the practice to find that "costs follows the event" is established as a general principle of law.

Iran argues that even if there is a general principle, it applies only in cases brought against private parties. With regard to sovereign nations, Iran asserts that sovereigns are often not subject to fee awards even in those nations that otherwise follow the "loser pays" rule. Iran submits evidence that Germany has gone even further and excluded itself from liability for expropriation entirely. Def. Ex. 1.

Iran's argument rests on the assertion that a general principle of law applicable to private parties cannot be applied to sovereign nations. However, where foreign sovereign immunity is unavailable under the FSIA, foreign states become liable to the same extent and in the same manner as private parties. 28 U.S.C. § 1606. Since this Court has already determined that Iran does not possess immunity, the Court may apply the general principle of cost-shifting applicable to private parties. Accordingly, under this substantive rule, an award of fees and expenses may be granted to the prevailing party in this action.

2. International Law Remedies Under *Filartiga*

Assuming, however, that cost-shifting does not qualify as a general principle of law in the international context, this Court would still find an award of fees is authorized under the international law. As a general rule, "international law leaves it to the various states to devise the remedies they think are appropriate." Xuncax v. Gramajo, 886 F. Supp. 162, 180 (D. Mass. 1995); see also Filartiga v. Pena-Irala, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) ("[t]he international law . . . does not ordain detailed remedies but sets forth norms.") In fashioning remedies for an act of torture committed by a Paraguayan citizen, the court in Filartiga, using choice of law principles, first found it appropriate to look to the remedies for torture provided under the law of Paraguay. These remedies included "specific pecuniary damages, 'moral damage,' and court costs and attorney's fees." Filartiga, 577 F. Supp. at 864. Although a Magistrate Judge recommended that no legal costs be awarded, the court rejected this conclusion: "The court finds no reason to reject the opinion of the plaintiffs' expert that the expenses incurred by them in prosecuting this action are compensable under Paraguayan law." Id. at 865. The court thus awarded the full range of remedies provided for by Paraguayan law. In addition, the

court found it "essential and proper" to supplement these remedies with an award of punitive damages "to give effect to the manifest objectives of the international prohibition against torture." Id. at 865. See also In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, (9th Cir. 1992) (noting that in connection with international law claim for torture in Philippines, district court awarded inter alia $246,966.99 in costs and attorneys' fees pursuant to Philippine statutory law).

Applying either choice of law or the consideration of "manifest objectives" leads to the conclusion that an award of fees and expenses is authorized. With regard to choice of law, it is not necessary to determine which forum law is most appropriate because both United States and Iranian law provide for the award of legal costs as a part of the remedy for expropriation. Under the law of the United States, claims for the taking of property by the United States may be brought under the Tucker Act, 42 U.S.C. § 1491. See Transmission Access Policy Study Group v. F.E.R.C., 225 F.3d 667, 690 (D.C. Cir. 2000), petition for cert. filed, (Oct 12, 2000)(No. 00-568). Section 4654 of Title 42 provides in turn:

> The court rendering a judgment for the plaintiff in a proceeding brought under . . . 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

42 U.S.C. § 4654(c). Thus, the remedy for a taking by the United States includes fees and expenses.

The situation is similar in Iran, where a right to compensation for expropriation is provided for by the Law Concerning The Attraction and Protection of Foreign Investment In Iran.

See Def. Trial Exh. 5. This law provides, inter alia, for resolution of expropriation disputes in Iranian courts. See id., Article 3 ("[i]n case of dispute, investigation of claims for a fair compensation guaranteed by the government shall be undertaken by competent Iranian courts."). In Iranian courts, the losing party in civil litigation pays both the court costs and the attorneys' fees of the winning party. See John Y. Gotanda, Supplemental Damages in Private International Law, 171 (1998); Pl. Ex. N, Legal Opinion of Mahmoud Katirai, ¶ 3 ("Iranian law provides for payment of attorneys' fees, litigation expenses and court charges to the litigating party in whose favor judgment is issued in a civil law suit"). Thus, applying Iranian remedies also leads to the conclusion that Plaintiffs are entitled to an award of legal costs.

In addition to U.S. law and Iranian law, the remedies available for expropriations before the Iran-U.S. Claims Tribunal also offer useful guidance, as these have been agreed to by both Iran and the United States pursuant to the Algiers Accords as appropriate to resolve, inter alia, expropriation claims between either nation and the citizens of the other. See Abrahim-Youri v. U.S., 139 F.3d 1462, 1463-64 (Fed. Cir. 1997) (discussing creation of the Tribunal to resolve outstanding claims "against either country brought by nationals of the other, arising 'out of debts, contracts . . . , expropriations or other measures affecting property rights'") (citation omitted), cert. denied, Gurney v. U.S., 524 U.S. 951 (1998). It is undisputed that under the Algiers Accords, the Tribunal is to apply the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL") and that these rules provide the arbitrators with authority to award fees and expenses to the prevailing party. Indeed, Iran's evidence demonstrates that the Tribunal has exercised this authority on numerous occasions. Thus, consideration of all relevant forums indicate that legal costs, including fees and expenses, are an

appropriate remedy in this case.

Legal costs are also justified under Filartiga's second "manifest objectives" approach, because they are also essential and proper to give effect to the objectives of the customary international law governing expropriation. Unlike human rights law, expropriation law does not seek to punish or deter but merely to insure that the party whose property has been expropriated is compensated for the loss. Restatement, § 712. In Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, 32 I.L.M. 933 (1993), where the claimant prevailed on a claim that its investment had been expropriated, the arbitration panel stated that "legal costs incurred in obtaining the indemnification must be considered part and parcel of the compensation, in order to make whole the party who suffered the loss and had to litigate to obtain compensation." Id at 977. The importance of an award of legal costs to insure complete compensation has also been recognized outside the expropriation context. See John Y. Gotanda, Awarding Costs and Attorneys' Fees In International Commercial Arbitrations, 21 Mich. J. Int'l L. 1, 5 & n.17 (1999) (noting that "the modern justification for the principle that costs follow the event 'is founded on the concept that if and to the extent that a claimant is entitled in law and justice to obtain a sum of money from another party, [a claimant] should not have to suffer any expense (beyond the cost of addressing a simple demand) for being awarded it'")(quoting J. Gillis Wetter & Charl Priem, Costs and Their Allocation in International Commercial Arbitrations, 2 Am. Rev. Int'l Arb. 249, 330 (1991))(alterations in original). Thus, consideration of the manifest objectives of expropriation law also lead this Court to conclude that fees and expenses should be awarded.

In sum, whether looking to general principles of law or applying the approach of Filartiga,

the Court finds that international law authorizes an award of legal fees and expenses to the party prevailing on a claim of expropriation under international law.

C. Further objections to award of fees

In addition to challenging the authority to award fees under international law, Iran raises a number of objections addressing the propriety of fees in this particular action.

1. Awarding fees against Iran in suit involving a sovereign plaintiff

Defendant notes that the Overseas Private Investment Corporation ("OPIC"), a party to this suit, is a federal agency. See McGill v. Munoz, 203 F.3d 843, 844 (D.C. Cir. 2000). Iran argues that an award of fees against it would be unfair if OPIC's sovereign immunity to such an award is not also waived in the event that Iran ultimately prevails after appeal.

Iran's argument is unpersuasive. First, such a waiver of immunity as Iran seeks already exists. The statute providing for OPIC's authority contains a clause providing that it may "sue or be sued." See Optiperu, S.A. v. Overseas Private Inv. Corp., 640 F. Supp. 420, 421 (D.D.C. 1986) (22 U.S.C. § 2199(d) authorizes OPIC to "sue or be sued" which "clearly represents a waiver of sovereign immunity as to OPIC"). It is well-established that, unlike most waivers of immunity, such a provision is intended to be construed broadly. See Federal Express Corp. v. U.S. Postal Service, 151 F.3d 536, 539 (6th Cir. 1998) ("sue or be sued" provision "effect[s] a general forfeiture of governmental immunity" which "creates a presumption of abandonment of public immunity" that may be rebutted only by "contrary statutory dictates or other compelling proof that Congress did not intend to renounce" immunity to the particular claim) (emphasis added). There is no indication that OPIC's wiaver does not extend to fee awards. In addition, a second independent waiver can be found in 28 U.S.C. § 2412(b), which provides that fees may be

awarded against the United States whenever "any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." Finally, even if OPIC were immune to an award of fees, the other Plaintiffs would not be. For all of these reasons, there is no unfairness to awarding fees and expenses to Plaintiffs as prevailing parties in this action.

2. Whether Plaintiffs are Prevailing Parties

Iran claims that Plaintiffs should not be considered prevailing parties because Iran may yet prevail if it obtains a reversal of the judgment on appeal. It also argues that Plaintiffs did not prevail on their original claim that their equity interest was taken as of May 1980 or their amended claim that the interest was taken as of October 1981, but only demonstrated that it was taken as of April 1982. Iran also argues that the damages awarded by the Court were only $20 million, much less than the roughly $120 million Plaintiffs sought at trial.

Iran's arguments are again unpersuasive. Plaintiffs sought damages based on an alleged expropriation of their 31% equity interest and for the withholding of their dividends. They prevailed on both claims and won a very substantial damage award. The fact that the date of expropriation was not the same as first alleged is not enough to establish the original claim as separate from the ultimately proven claim of expropriation.

Further, the fact that Iran might succeed later in obtaining a reversal of part or all of the Court's judgment in no way undermines the fact that as of the present, Plaintiffs have prevailed. Nor does the fact that Plaintiffs did not obtain all the damages that they sought at trial. The $20 million they obtained was certainly substantial enough to warrant a full award of fees in this case.

3. Comparison with Iran's Fees

It is conceded that, assuming any award is appropriate, the general standard of the award is one of reasonableness. Iran claims that the fee request of $2,981,448.93 is unreasonable because it is, as a whole, excessive. As evidence, Iran notes that its own attorneys have only charged it an approximate amount of $1,100,000, less than one-half of what Plaintiffs are seeking. However, the Court finds no precedent determining reasonableness of fees by looking to the opposing party's fees, as opposed to the standard above.

4. Comparison with Tribunal Awards

Iran argues that Plaintiffs' request is much higher than the amounts which have typically been awarded to prevailing parties by the Iran-U.S. Claims Tribunal. However, the reasonableness of an award before this Court cannot be compared with the reasonableness of an award before the Tribunal because there is no indication that the work necessary to obtain a judgment before the two forums is comparable. Indeed, the indication is clearly otherwise. Before the Tribunal, Plaintiffs' claim took only four years to resolve. Here, Plaintiffs have spent (since the Tribunal's ruling on Plaintiffs' arbitration claims in April 1986) more than 14 years litigating this action.

Further, the Tribunal has stated that it determines the appropriate amount of fee awards based in part on considerations unique to the forum:

> In applying the test of "reasonableness", it might be said that, unlike in ordinary litigation and arbitration, the successful party before the Tribunal, rather than having to enforce an Award in its favour, should the losing party not comply, will be paid the amount of the Award out of the Security Account established pursuant to the Algiers Declarations, without any further steps required from its side. The amount awarded as costs shares this additional and unusual security, and Article 38, paragraph 1(c), leaves room to take into account this particular circumstance.

Sylvania Technical Systems, Inc. v. Islamic Republic of Iran, Award No. 180-64-1 (June 27, 1985), reprinted at 8 Iran-U.S. Cl. Trib. R. 298, 324 (1987). As the instant case does present "ordinary litigation," where Plaintiffs have no guarantee that they will be able to collect on a judgment, the Tribunal's consideration is inapplicable.

5. Requested Expenses

Iran argues that Plaintiffs' request for non-taxable expenses should be rejected in its entirety on the grounds that 28 U.S.C. § 1920 provides the exclusive basis for taxable costs.

The Supreme Court held in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987) that a court, when awarding costs pursuant to Fed. R. Civ. P. 54(d)(1) (authorizing award of costs to prevailing party as a matter of course), may not exceed the costs specifically authorized by Congress in 28 U.S.C. § 1920. Id. at 441-42. However, Rule 54(d)(2), the companion provision to Rule 54(d)(1), recognizes that prevailing parties may in addition to taxable costs also receive "attorneys' fees and related non-taxable expenses" where the controlling substantive law provides for such recovery. Fed. R. Civ. P. 54(d)(2) (emphasis added). As noted earlier, this controlling law need not be federal law. See also Garcia v. Wal-Mart Stores, Inc., 209 F.3d 1170, (10th Cir. 2000) (holding that to extent "actual costs" under Colorado law were "related non-taxable expenses," costs could be awarded above federal amounts pursuant to state cost-shifting rule). Here, international law provides for the recovery of legal costs and thus Plaintiffs may receive "related non-taxable expenses" in this action.

The Court must therefore determine whether Plaintiffs' requested expenses qualify as "related non-taxable expenses." Plaintiffs argue that related non-taxable expenses essentially include all actual costs incurred by the party's counsel which have been charged to the party. Not

all circuits have adopted so broad an interpretation. See Abrams v. Lightolier Inc., 50 F.3d 1204, 1225 (3d Cir. 1995) (specifying four specific categories of expense as "non-taxable expenses). However, the D.C. Circuit interprets "non-taxable expenses" to authorize the award of all "reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 30 (D.C. Cir. 1984). The court in Laffey elaborated that a prevailing party could demonstrate entitlement to costs under this standard by showing "that such costs are of a type passed on by the firms involved to private clients." Id., 746 F.2d at 30.

The interpretation of Laffey does not contradict Crawford Fitting because it bases an award of expenses on controlling substantive law, not on the Federal Rules of Civil Procedure. It is also consistent with Butera v. District of Columbia, 83 F. Supp. 2d 25 (D.D.C. 1999), another case cited by Defendant. Although Butera rejected costs beyond those authorized in 28 U.S.C. § 1920, it did so because the award of costs was based on that provision. The Court did not hold that "non-taxable expenses" based on other substantive law are similarly limited by § 1920.

Accordingly, it must be determined whether the requested expenses are in fact "of a type passed on by the firms involved to private clients." Plaintiffs have established that all claimed expenses were in fact charged to and paid by the Plaintiffs. The Court finds that this is sufficient evidence to satisfy the Laffey standard. Plaintiffs will therefore be awarded requested non-taxable expenses.

6. Fees for work done in 1986 and 1987

Iran argues that, since Plaintiffs should not be entitled to fees and expenses incurred from the date after the Tribunal issued its decision in 1986 until the time when Plaintiffs filed a motion

for partial summary judgment in April 1988, asserting that this was a period of non-compensable dormancy. However, the mere fact that Plaintiffs did not file pleadings during a certain period does not suggest that they were not working on the case. Indeed, under Defendant's theory, Plaintiffs would not be entitled to receive any fees or expenses for the preparation of their 1988 summary judgment motion since this work necessarily occurred before the motion was filed. The Court finds that Plaintiffs' work during the period immediately after the Tribunal's decision is compensable as legal costs incurred in litigating this action.

7. Objection to fees for work before the Tribunal

Plaintiffs request fees and expenses for work done before the Tribunal opposing Defendant's attempt in 1993 to obtain a stay of this action. Defendant argues that this work was not performed as part of the instant litigation and is therefore not recoverable. Plaintiffs assert that the work before the Tribunal is recoverable because it was necessary to protect their rights in this forum.

Guided by Webb v. Board of Educ. of Dyer County, Tenn., 471 U.S. 234 (1985), the Court finds that fees incurred in a separate proceeding may be awarded if the work was reasonably expended to advance the litigation for which the fees are sought. Since the Defendant's motion before the Tribunal sought to stay this action, the necessary connection is readily apparent, and fees therefore appropriate.

8. Fees For Work By Non-legal Personnel

Iran objects to fee requests for work done by law clerks, paralegals and summer associates. It asserts that any award of fees must be restricted to fees charged by persons admitted to practice law. However, the Supreme Court has found that such fees may be charged

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as reasonable attorney's fees where billing separately for such services is the prevailing practice in a given community, with the goal that counsel receive "the same level of compensation that would be available from the market." Missouri v. Jenkins By Agyei, 491 U.S. 274, 287 (1989). Here, since Plaintiffs have actually paid separately for the services of clerks and paralegals, such payment is demonstrably what counsel would receive from the market and may therefore be awarded.

9. Fees For Work Done Preparing Fee Application

Iran asserts that fees and expenses incurred in preparing Plaintiffs' motion for fees is not compensable. However, it is well-settled that hours reasonably devoted to litigating a substantive fee award are compensable. See Copeland v. Marshall, 641 F.2d 880, 896, n. 29 (D.C. Cir. 1980) (en banc).

D. Assessment of Reasonableness

Plaintiffs have provided sufficient evidence to establish that the rates that counsel charged over the years for work done were comparable to the market rates at the time.[2] Plaintiffs have also provided contemporaneously kept records sufficiently detailing the work performed. The

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[2] It is worth noting that because Plaintiffs seek only the nominal amount of fees and expenses which they have actually paid over the years, their request is somewhat less in real terms than the amount paid both because inflation has devalued the dollars they expended in the past and because of the loss of the time value of their money. Thus, payment of $1000 today will not fully recompense them for a $1000 bill they paid many years ago. In recognition of this fact, courts often award fees at counsel's current rates instead of their historical rates. Cf. Palmer v. Barry, CV-87-1304, 1993 WL 655175, *1 (D.D.C. Feb. 1, 1993) ("It is an accepted practice in Title VII cases, however, to compensate attorneys at their current rates, rather than historical rates, in recognition of the delay in payment between when work was performed and fees paid.) (citing Missouri v. Jenkins, 491 U.S. 274, 283-84 (1989)). Nevertheless, Plaintiffs have not requested or received all fees at counsel's current rates, nor have they received any adjustment for the differential. This factor further reinforces the conclusion that the fees and expenses are reasonable.

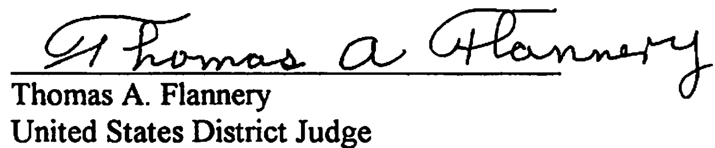
fact that the fees and expenses have already been actually charged to and paid for by Plaintiffs is itself evidence of reasonableness. Further, based on the submitted documents, and an assessment of the work justified overall by the length of this case, its legal novelty and complexity and the numerous substantive and procedural issues to which Plaintiffs were required to address, the Court finds that both the expenses and the fees requested were reasonably expended in this litigation. Iran objects to Plaintiffs' use of two attorneys at hearings rather than one. This practice might be unjustified in a typical case; however, this case involved an unusual degree of legal novelty and difficulty in the issues raised, and having the resources of two attorneys to address these issues before the Court was not unreasonable. Finally, there are no special circumstances present which argue for a reduction of the amount claimed. Therefore, the Court finds that Plaintiffs should receive their full request of $2,981,448.93 in fees and expenses.

To some extent, Plaintiffs' requested expenses have been awarded as taxable costs pursuant to 28 U.S.C. § 1920. After deducting amounts already awarded, the Court finds that Plaintiffs should be awarded $2,945,803.73 in fees and non-taxable expenses.

Plaintiffs seek an additional award of expenses as sanctions for Iran's violations of this Court's discovery orders. However, given that Plaintiffs have been fully compensated for their fees and expenses and in light of the evidentiary sanctions already imposed, the Court concludes that no further sanctions are appropriate.

An appropriate judgment will accompany this Memorandum-Opinion.

Date: November 30, 2000



Thomas A. Flannery
United States District Judge