

Nos. 01-7041, 13-7070

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

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

v.

ISLAMIC REPUBLIC OF IRAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FINAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici. All parties, intervenors, and amici appearing in this court and the court below are listed in the Certificate previously filed by Appellant, except that the United States hereby participates as amicus curiae.

B. Rulings Under Review. References to the rulings at issue appear in the Certificate previously filed by Appellant.

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

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GLOSSARY

ICJ	International Court of Justice
<i>McKesson V:</i>	<i>McKesson Corp. v. Islamic Republic of Iran</i> , 539 F.3d 485 (D.C. Cir. 2008)
<i>McKesson VI:</i>	<i>McKesson Corp. v. Islamic Republic of Iran</i> , 672 F.3d 1066 (D.C. Cir. 2012)
Restatement:	<i>Restatement of the Law (Third) Foreign Relations Law of the United States</i> (1987)
Treaty of Amity:	Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, June 16, 1957, 8 U.S.T. 899

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INTEREST OF THE UNITED STATES

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

The United States has a substantial interest in the interpretation of international law concerning the award of attorneys' fees, an issue that could affect the foreign relations of the United States, including the interests of the United States before international tribunals. The United

States has participated in this litigation previously, filing Statements of Interest in the district court and participating as amicus curiae in earlier appeals. The government urges this Court to clarify that international law does not compel an award of attorneys' fees in this case.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether international law requires an award of attorneys' fees against Iran in this case.¹

STATEMENT OF THE CASE

This case has been pending for over 30 years, and has resulted in six published opinions by this Court. See *McKesson Corp. v. Iran*, 672 F.3d 1066, 1070-1072 (D.C. Cir. 2012) (*McKesson VI*), cert. denied, 133 S. Ct. 1582 (2013). In sum, McKesson – an American company whose predecessors invested in an Iranian company (Pak Dairy) during prerevolutionary times – sued Iran in federal district court for expropriation of McKesson's equity interest and for failure to pay dividends. The district court eventually

¹ The United States takes no position on whether any other source of authority supports an award of attorneys' fees in this case. Thus, pursuant to FRAP 29(e), this brief does not support either party.

found Iran liable for violating a treaty between the United States and Iran (the Treaty of Amity), as construed under Iranian law.

In two decisions now on appeal, the district court awarded attorneys' fees and costs to McKesson. See JA 234, 944. Although the district court ultimately held that the fee award was justified by Iranian law, JA 928, the opinions also included discussions of international law, which appear to be dicta.

Following the district court's determination that both customary international law and the Treaty of Amity provided a cause of action (which this Court subsequently reversed), the court concluded in 2000 that international law permits an award of attorneys' fees: "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." JA 220. The court cited academic commentary concerning the practices of other nations' legal systems, as applied to the decisions of arbitral tribunals. *Id.* at 220-222 (citing, *e.g.*, John Y. Gotanda, *Awarding Costs and Attorneys' Fees In International Commercial Arbitrations*, 21 Mich. J. Int'l L. 1,

34 (1999) (concluding that the notion that a prevailing party may be awarded fees is “so well-accepted that it may be viewed as a general principle of international law”)).

The court concluded that “there is a sufficiently ‘representative majority’ of nation-states following the practice to find that ‘costs follows [sic] the event’ is established as a general principle of law.” JA 222. “Accordingly, under this substantive rule, an award of fees and expenses may be granted to the prevailing party in this action.” *Id.* at 223. In the most recent opinion, the district court did not revisit the issue, but observed that its 2000 opinion had “concluded that this provision of the Treaty [of Amity] authorized fee shifting because the ‘loser pays’ principle is ‘so well-accepted that it may be viewed as a general principle of international law.’” JA 929. Iran has appealed from both the 2000 and 2013 decisions.

ARGUMENT

INTERNATIONAL LAW DOES NOT DICTATE WHETHER AN AWARD OF ATTORNEYS' FEES IS APPROPRIATE IN THIS CASE.

No rule of international law requires or prohibits an award of attorneys' fees where such an award is otherwise authorized or appropriate. The decisions below make clear that a fee award is not prohibited and not required as a matter of international law. See JA 930 ("this Court clearly has the authority to award attorneys' fees and expenses"); JA 223 ("under this substantive rule, an award of fees and expenses *may be granted* to the prevailing party in this action") (emphasis added). Indeed, the district court ultimately determined that Iranian law, not international law, provides the basis for the award of attorneys' fees here. See JA 928 ("the issue of whether attorneys' fees may be awarded to McKesson is also governed by Iranian law"). Thus, the court's discussion of international law was unnecessary to the fee award.

1. This Court should likewise recognize that international law is indifferent, and irrelevant, to an award of attorneys' fees that is otherwise authorized and appropriate under another governing source of legal

authority. That conclusion is particularly relevant here, both because (as explained below) no international law rule exists that compels the award of attorneys' fees in these circumstances, and because this Court previously held – in two decisions – that international law does not provide a cause of action against Iran. See *McKesson VI*, 672 F.3d at 1078-1080 (Iranian law provides cause of action); *id.* at 1075-1078 (customary international law does not provide a cause of action); *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-491 (D.C. Cir. 2008) (*McKesson V*) (Treaty of Amity, as construed under U.S. law, does not independently provide a cause of action). Where Iranian law and not international law provides a cause of action, it would be inappropriate to look to international law principles in determining whether to award attorneys' fees.²

² The district court in 2000 apparently considered international law concerning attorneys' fee awards in conjunction with its holding, which this Court subsequently overruled, that customary international law provides a cause of action. See JA 219 (concluding that “[u]nder this alternate ground based directly on international law, it is clear that all remedies appropriate to violations of international law are available”).

Nor would there be a basis to conclude that international law rules concerning an award of attorneys' fees – if there are any such rules – were applicable through the Treaty of Amity. Notably, the district court did not rely on such a theory. Instead, as discussed below, the court incorrectly assessed that general principles of law, as reflected in the domestic legal systems of other nations, support an award of attorneys' fees to a prevailing party.

This Court previously held that Article VI, paragraph 2 of the Treaty of Amity, as incorporated in Iranian law, provides the rule of decision in this case. The treaty there provides that property of a national of the other State Party “shall not be taken * * * without the prompt payment of just compensation,” which “shall represent the full equivalent of the property taken.” *McKesson VI*, 672 F.3d at 1080 (quoting treaty). That language is silent concerning attorneys' fees, including whether they can or should be included as a measure of damages or as an ancillary award.

The district court asserted, apparently in dicta, that the Treaty of Amity “authorizes awarding legal costs to a party prevailing on an

expropriation claim” because it “expressly provides that a party whose property has been expropriated shall receive a remedy which is ‘in no case less than that required by international law.’” JA 929 (quoting Treaty of Amity, art. IV, cl. 2). That misreads the language of the treaty, which provides that the requirements of international law govern the “protection and security” afforded to property of the other country’s nationals. See *McKesson VI*, 672 F.3d at 1080 (“Property * * * shall receive the most constant protection and security * * *, in no case less than that required by international law.”) (quoting treaty). The treaty does not define the standard of compensation by reference to international law.

The treaty’s silence is at most ambiguous about the availability of attorneys’ fees under international law, just as it was concerning the availability of interest. See *McKesson VI*, 672 F.3d at 1084 (holding that Iranian law, not international law, governs the award of interest: “the standard for ‘full compensation’ prescribed by the Treaty is ambiguous regarding the award of interest”).

2. At most, the district court concluded that an award of attorneys' fees is permissible, but not required, under international law. See *supra*, 3-4, 5 (quoting district court opinions). As we have explained, there is no occasion to reach even that question, in light of the court's reliance on Iranian law for the fee award. And there is no reason to conclude that any international law rule exists concerning attorneys' fee awards, even if it would be appropriate to invoke such a source of authority here.

The district court asserted that "the 'loser pays' principle is 'so well-accepted that it may be viewed as a general principle of international law.'" JA 929 (quoting JA 220-221). In reaching that conclusion, the district court relied principally on academic commentary addressing the award of attorneys' fees in private international commercial arbitration. JA 220 (discussing John Y. Gotanda, *Supplemental Damages in Private International Law* (1998); John Y. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 Mich. J. Int'l L. 1 (1999); 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)). The court recognized that the academic literature found "that national practice varies in what specific kinds of costs are awarded" but concluded from this that "there is discretion" in the application of the rule. JA 221. The court further suggested that an award of attorneys' fees generally is "a reasonable exercise of this discretion." *Ibid.*

An article cited in the 2000 opinion suggested that the awarding of costs and attorneys' fees to the prevailing party was so widely accepted among the domestic legal systems of other nations that "national laws converge on the issue" because "an overwhelming majority of countries award costs and fees to the prevailing party." Gotanda, 21 Mich. J. Int'l L. at 34 n.160. But the article observes that even countries that typically shift fees "do not employ a uniform method for awarding costs and fees." *Id.* at 13; see also *id.* at 8-10 (surveying inconsistent practice of awarding fees in various countries). And the article did not identify any common basis for fee awards in particular types of litigation. The domestic practice of some

countries' courts in some areas of the law cannot be generalized to support a claim that there is a rule of international law governing the award of attorneys' fees in expropriation claims or transnational litigation generally. Thus, the article's assertion that there is a convergence of international domestic practice is an overstatement. As explained below, no general practice can be found as a matter of international law.³

3. The absence of a consistent general practice concerning attorneys' fee awards is particularly evident in the area of investment disputes involving foreign governments, including expropriation claims.

³ The Gotanda article pointed to national rules concerning fee shifting as background for advocating that such a rule should be adopted in international commercial arbitration, in light of the existing inconsistent practice of commercial arbitrators regarding attorneys' fees. See 21 Mich. J. Int'l L. at 1-2, 4-5, 13-26. Subsequent scholarly discussions have confirmed that commercial arbitration practice in this area remains inconsistent. See, e.g., Robert H. Smit & Tyler B. Robinson, *Cost Awards In International Commercial Arbitration: Proposed Guidelines For Promoting Time And Cost Efficiency*, 20 Am. Rev. Int'l Arb. 267, 272 (2009) (pointing to "lack of consistency or predictability" and noting that "attorneys' fees and expenses are most often left to each party to pay on its own"); see also James H. Carter, *A KISS For Arbitration Costs Allocation*, 23 Am. Rev. Int'l Arb. 475 (2012) (defending American Rule in commercial arbitration).

A 2008 book surveying arbitration concerning such disputes concluded that “it is difficult to formulate any generally applicable rule or pattern to describe tribunals’ decisions with respect to the allocation of costs,” including fees. Christopher F. Dugan, et al., *Investor-State Arbitration* 614 (Oxford University Press 2008). A recent award noted that “[t]he traditional position in investment treaty arbitration, in contrast to commercial arbitration, has been to follow the normal practice under public international law * * * that the parties shall bear their own costs of legal representation and assistance.” *ICS Inspection and Control Services Ltd and Argentine Republic*, Award on Jurisdiction, at 112–113 (Feb. 10, 2012), available at <http://arbitration.org/award/arbr66>. And another survey of arbitral practice observed that “investment arbitration tribunals do not often refer to national legal systems in their assessment of costs, perhaps because international law * * * appears to offer no clear rule on cost allocation * * *.” Noah D. Rubins, *The Allocation of Costs and Attorney’s fees in Investor-State Arbitration*, 18 *ICSID Review* 109, 110 (2003).

The Iran-United States Claims Tribunal has broad discretion in awarding costs, and sometimes awards costs and attorneys' fees but does not follow any rule requiring such an award. See JA 225 ("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."). In some but by no means all cases, the Tribunal has awarded some measure of attorneys' fees. A former judge on the Tribunal has commented that the Tribunal's "practice [concerning allocation of costs, including fees] has been less than fully consistent." George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 479 (Oxford University Press 1996).

Thus, international arbitrators have recognized that they have discretion to award fees in particular cases, but they have not done so on the basis of any rule of international law requiring such an award. Indeed, there is no evidence of any such rule of international law. And any such

rule would undermine the arbitrators' discretionary authority to award fees or decide not to issue such an award.

4. Moreover, while the category of general principles of law common to multiple legal systems can provide a supplemental or secondary body of international legal doctrines in some circumstances, it does not provide a basis for compelling the award of attorneys' fees in this case. The Statute of the International Court of Justice (ICJ) identifies the traditionally recognized sources of international law, which include "the general principles of law recognized by civilized nations," in addition to treaties and customary international law. Statute of the International Court of Justice (June 26, 1945), art. 38, 59 Stat. 1055, 1060, 33 U.N.T.S. 993. Likewise, the Restatement of Foreign Relations Law recognizes that international law includes a category of rules "that ha[ve] been accepted as such by the international community of states * * * by derivation from general principles common to the major legal systems of the world." *Restatement of the Law (Third) Foreign Relations Law of the United States* (Restatement) § 102(1)(c) (1987); see also *id.* § 102(4) (describing general

principles as “supplementary rules of international law” that “may be invoked * * * where appropriate”); *id.* § 102, cmt. 1 (describing general principles as “a secondary source of international law, resorted to for developing international law interstitially in special circumstances”).

Not every legal rule common to a variety of domestic legal systems is necessarily a norm of international law, and there is no such norm of international law compelling an award of attorneys’ fees in this case. Courts and other tribunals rarely resort to the category of general principles of law. See, e.g., M. Cherif Bassiouni, *A Functional Approach To General Principles Of International Law*, 11 Mich. J. Int’l L. 768, 788 (1990) (noting that the ICJ and its predecessor “have, for the most part, been cautious in applying ‘General Principles’ and, as a result, the exact scope of article 38(1)(c) has remained, at least from a doctrinal perspective, somewhat undefined and uncertain”). The category has typically been limited to such fundamental and widely accepted general concepts as laches, res judicata, and estoppel. See, e.g., *Restatement* § 102, cmt. 1; Bin Cheng, *General Principles Of Law As Applied By International Courts And*

Tribunals 25 (1953, reprinted 2006) (noting examples of general principles of law cited in the *travaux préparatoires* of the ICJ Statute, including “the principle of *res judicata*, the principle of good faith, [and] certain principles relating to procedure,” among others); *id.* at 24 (suggesting that the category of general principles of law “does not consist * * * in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law”). A rule mandating an award of attorneys’ fees here does not fit well within that category, however it may be defined.

This case is not a proper vehicle for resolving the contours of general principles of law, as they might be applied by a United States court in a proper case. This Court should accordingly clarify only that no rule of international law mandates an award of attorneys’ fees in this case.

Respectfully submitted,

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JANUARY 2014

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,839 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ H. Thomas Byron III

H. THOMAS BYRON III

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2014, I electronically filed the foregoing Final Brief For The United States As Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause five paper copies of this initial brief (appendix deferred) to be filed with the Court within two business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ H. Thomas Byron III

H. THOMAS BYRON III