

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ICSID)**

LSF-KEB Holdings SCA, LSF SLF Holdings SCA, HL Holdings SCA, Kukdong Holdings I SCA, Kukdong Holdings II SCA, Star Holdings SCA, Lone Star Capital Management SPRL, Lone Star Capital Investments S.à.r.l.

Claimants

v.

Republic of Korea

Respondent

ICSID CASE NO. ARB/12/37

**CONCURRING OPINION OF JUDGE CHARLES N. BROWER
30 August 2022**

I. INTRODUCTION

1. I join the distinguished President of the Tribunal in declaring that the Respondent has breached the 2011 BIT by failing to provide Claimants Fair and Equitable Treatment, including not upholding its obligation to act in good faith. I also join in the decision that Respondent's breach caused Claimants' loss of USD 433 million, and that Lone Star materially and significantly contributed to that loss by putting itself in jeopardy of a sale order. Therefore, apportionment of the damage is warranted.¹ In order to form the required majority, I have joined as well in the decision that 50 percent of the damage be apportioned to Claimants.² In commenting below, however, on the Award's reasoning for that apportionment of the loss I echo the first paragraph of Sir Gerald Fitzmaurice's Separate Opinion in *The American Independent Oil Company v. The Government of the State of Kuwait*:

I am in entire agreement with the Operational Part (Dispositif) of the Award, which is unanimous, - and except on one cardinal question, I am in substantial agreement with much of the reasoning on which the Award is based. Moreover my difference of view on this particular question, though involving some important points of principle, does not affect my concurrence in the Award as such.³

II. APPORTIONMENT

2. The Majority correctly states in paragraph 812 of the Award that

Generally, investment cases in which some of the damages are attributed to the claimant can be divided into cases in which the claimant has committed an unlawful act, [footnote omitted] and cases in which the claimant is denied damages to the extent it was

¹ Award ¶¶ 809-810.

² Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, entered into force 14 October 1966 (the "ICSID Convention"), Article 48(1): "The Tribunal shall decide questions by a majority of the votes of all its members." Award ¶¶ 895-896.

³ *The American Independent Oil Company v. The Government of the State of Kuwait*, Separate Opinion of Sir G. Fitzmaurice, 24 March 1982, ¶ 1. The effect is the same notwithstanding that the present Award is by majority rather than being unanimous. I wish to emphasize further that "this does not affect my concurrence in the Award as such" by designating this Opinion a Concurring Opinion rather than a Separate Opinion.

found to have exercised poor judgment in the process of making its investment, e.g., failed to perform due diligence, simply overpaid for its investment, or otherwise contributed to its investment loss by acting unwisely. [Footnote omitted] The cases in which the claimant engaged in some unlawful act are the ones that are relevant here.

3. When determining the final apportionment of the damages between the Parties, however, the Award, contrary to paragraph 812, relies not on the cases in which the claimant engaged in some civil or criminal unlawful act, but instead on those cases in which the claimant “exercised poor judgment in the process of making its investment” in that it “failed to perform due diligence, simply overpaid for its investment, or otherwise contributed to its investment loss by acting unwisely.” Had the Award relied on the former category of cases, an apportionment to Claimants of less than 50 percent of the loss would have emerged.
4. It is correct that the Tribunal enjoys a wide margin of discretion in apportioning fault⁴, but without exception all other cases apportioning to claimants a percentage of the damages caused to them by States’ treaty breaches to which the claimants have contributed materially and significantly by themselves having committed criminally or civilly unlawful acts have resulted in apportionments to those claimants of percentages significantly below 50 percent.
5. In both of the two cases in this category that were considered by the Parties, *Occidental Petroleum* and *Yukos*, the Tribunals apportioned 25 percent of the damages to Claimant and 75 percent to the Respondent.⁵
6. In *Occidental Petroleum* the Claimants had breached their participation contract with Ecuador by unlawfully seeking to transfer their rights thereunder without the contractually

⁴ Exhibit CA-742, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014 (“*Yukos*”), ¶ 1600; Exhibit CA-045, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID, ARB/06/111, Award, 5 October 2012 (“*Occidental Petroleum*”), ¶ 670.

⁵ Exhibit CA-742, *Yukos*, ¶ 1637; Exhibit CA-045, *Occidental Petroleum*, ¶ 687. In two other cases, not addressed by the Parties to this arbitration, which also involved a State’s treaty breach causing a loss to the claimant to which that claimant had contributed materially and significantly by itself committing an unlawful act the percentage of the loss apportioned to the claimant was, respectively, one-third and 30 percent. See *Antoine Goetz & Consorts et S.A. Affinage des Metaux v. Republique du Burundi*, ICSID, ARB/01/2, Award, 21 June 2012, ¶ 258; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016, ¶¶ 6.102, 11.04.

required authorization, which resulted in Ecuador issuing a "Caducidad Decree".⁶ The Tribunal concluded that the issuance of the "Caducidad Decree" was a disproportionate sanction tantamount to expropriation of the Claimants' investment in Ecuador. The facts of the present case also are similar to the *Yukos* case (summarized at length in paragraphs 813-821 of the Award). Like *Yukos*, Lone Star, by committing a criminal act that materially and significantly contributed to its loss resulting from the unlawful acts of the FSC became lawfully subject to the FSC's sale order.

7. Instead of following these cases, the Award instead concentrates on cases that do not involve a claimant that has contributed materially and significantly by commission of a criminally or civilly unlawful act to the loss resulting from a treaty breach by its host State. To the contrary, it relies in its apportionment decision on cases in which the claimant, by its bad judgment in the process of making its investment, suffers from self-inflicted damage. For example, in *MTD*⁷ the Tribunal held that Respondent had violated its obligation to provide fair and equitable treatment, but apportioned 50 percent of the damages to the Claimant in light of it having overpaid for its investment.⁸ The *MTD* Tribunal concluded:

The Tribunal decided earlier that the Claimants incurred costs that were related to their business judgment irrespective of the breach of fair and equitable treatment under the BIT. As already noted, the Claimants, at the time of their contract with Mr. Fontaine, had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants. They accepted to pay a price for the land with the Project without appropriate legal protection. A wise investor would not have paid full price up-front for land valued on the assumption of the realization of the Project; he would at least have staged future payments to project progress, including the issuance of the required development permits.

The Tribunal considers therefore that the Claimants should bear part of the damages suffered and the Tribunal estimates that share to be

⁶ Exhibit CA-045, *Occidental Petroleum*, ¶ 452.

⁷ Exhibit CA-042, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 ("*MTD*").

⁸ Exhibit CA-042, *MTD* ¶¶ 242-243.

50% after deduction of the residual value of their investment calculated on the basis of the following considerations.⁹

8. The Award's reliance on the *Bogdanov* Award is equally misplaced as that Tribunal's decision on apportionment was based on a business risk that Claimants had accepted when making the initial investment. Claimants argued that Respondent had breached its obligations of non-retroactivity under the Moldova-Russia BIT. Claimants had entered into a privatization contract with Respondent which prescribed that certain assets of the privatized company would be transferred to Respondent in exchange for compensation in the form of "Compensation Shares" in other companies. The Privatization Contract did not specify which companies were eligible. After Claimants' claim to compensation had arisen, Respondent (unilaterally) restricted which companies were to be included in the list of possible "Compensation Shares". However, the Privatization Contract had not specified how the compensation shares were to be chosen, and the regulation applicable at the time the Parties entered into the privatization contract merely stated that "the identity of the Compensation Shares shall be agreed upon between the Ministry of Finance, the Department of Privatization and the creditor".¹⁰ The sole arbitrator concluded, in the absence of Respondent in the proceeding, that Respondent had breached its obligations to provide FET because

Respondent, by establishing a system for compensation of the Transferred Assets that permitted an abusive application and by its subsequent application, is in violation of the fair and equitable treatment standard contained in article 3 of the BIT.¹¹

However, the sole arbitrator also concluded that Claimant had accepted a risk that it would not receive full compensation, because the provisions in the contract did not specify how compensation was to be calculated. Therefore, the sole arbitrator concluded,

⁹ Exhibit CA-042, MTD ¶¶ 242-243.

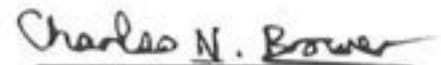
¹⁰ Exhibit RA-119, *Iurii Bogdanov, Agurdino-Invest Ltd. And Agurdino-Chimia JSC v. Republic of Moldova, SCC*, Award, 22 September 2005 ("*Bogdanov*"), Section 4.1.

¹¹ Exhibit RA-119, *Bogdanov*, Section 4.2.4.

[Claimant] must be deemed partially responsible for the loss because it did not ensure that the Privatization Contract contained an appropriately precise regulation of the compensation.¹²

III. CONCLUSION

9. In light of the precedents, and considering that Korea's FSC, in clearly breaching the Fair and Equitable Treatment provision of the applicable BIT, did so intentionally in order to avoid purely political criticism rather than act in accordance with its statutory mandate, an apportionment to the Claimants of less than 50 percent of its loss might have been appropriate. In closing I reemphasize that this view has not prevented me from forming the majority with the Tribunal's distinguished President to issue this Award and thereby to concur in it, to sign it and to declare that "I am in entire agreement with the Operational Part (Dispositif)" of it.


Charles N. Brower

¹² **Exhibit RA-119, Bogdanov**, Section 5.2. Claimant had made a claim for the nominal value of the transferred assets, valued at 621,021.00 lei. Ultimately, the sole Arbitrator awarded Claimant 310,000.00 lei in compensation for the assets. Thus, the Arbitrator apportioned approximately 50.1 % of the damages to Claimant, and 49.9 % of the damages to Respondent. (310,000.00/621,021.00=0.4991779666) (**Exhibit RA-119, Bogdanov**, Sections 1.3, 5.2-5.3.).