

DISSENTING OPINION

1. In writing this Dissenting Opinion, my thoughts first go to the late Johnny Veeder, former President in this case, and to the considerable work he performed during almost 7 years, from the constitution of the Tribunal in May 2013 to his untimely passing in March 2020, which prevented him from finalizing his task. This mandate has been taken over by Ian Binnie.
2. In spite of my great esteem for and friendship with my present co-arbitrators, I feel the necessity to write this Dissenting Opinion. As will be developed, I will concentrate my dissent on substantive issues relating to the core concepts of international responsibility of States.
3. However, I cannot refrain from expressing my profound concern regarding the form of the Award, *i.e.*, the structure and developments of the Tribunal's analysis, which mixes the Parties' positions with the Tribunal's statements and "Tribunal's Ruling[s],"¹ in a manner that does not appear orderly and could lead to misinterpretations, thus making it often difficult to follow the Tribunal's reasonings in the Award from point A to point B.²
4. This being said, my main concern is that I consider that the majority **has not applied the proper international law on State responsibility to the facts of the case, neither relating to attribution, nor to causation.** Moreover, our perception and qualification of the facts are entirely opposite. My dissent is deemed to explain these legal and factual points of disagreement.
- I. **THE GENERAL PRINCIPLES OF STATE RESPONSIBILITY**
 1. **The substantive rules for the establishment of international responsibility**
5. The ILC Articles on the Responsibility of States for Internationally Wrongful Acts³ ("ILC Articles") provide the following:

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an **action** or **omission**:

- (a) is **attributable** to the State under international law; and

¹ There are 34 such "Tribunal's Ruling[s]."

² In spite of my strong reservations with the general presentation and structure of the Award, I decided to sign it, subject to my Dissenting Opinion, as I am in agreement with the decisions which were adopted unanimously.

³ Exhibits CA-029/RA-002, International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts* [emphasis added in the quoted Articles].

- (b) constitutes a **breach** of an international obligation of the State.⁴

Article 34

Forms of reparation

Full reparation for the injury **caused** by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 39

Contribution to the injury

In the determination of reparation, account shall be taken of the **contribution to the injury by wilful or negligent action or omission** of the injured State or any person **or entity** in relation to whom reparation is sought.

6. It is common ground that for a State to be internationally responsible, there must exist an act or an omission contrary to international law attributable to that State, damages claimed by an injured party and a link of causality between the violation and the damage.

2. An overview of the application of the substantive rules in the case

7. As mentioned above, in order for an international tribunal to find a State responsible for an international wrong, an international tribunal has to verify successively the following elements:
- Existence of an act attributable to the State;
 - If such an attributable act is found, existence of a violation of international law; and
 - If such a violation is found, existence of a causal link with an alleged damage.
8. For the majority, an illegal pressure amounting to a violation of international law has been exercised by the FSC in order to force Lone Star to reduce the price of its sale of the shares of KEB to Hana, and this pressure caused, along with the serious financial crime committed by Lone Star, the loss of an amount corresponding to the price reduction.
9. On all of these points, my analysis differs from that of the majority of the Tribunal. To summarize my own analysis, I consider: first, that no relevant pressure can be attributed to the FSC; second, that even if attribution of some pressure were to be found, as decided by the majority, the pressure exercised by the FSC would not be a violation of international law; and third, that even if attribution and violation would exist, as decided by the majority, there is no causal link between the behavior of the FSC and the loss supported by Lone Star.

⁴ It can be noted that this important Article has not been cited in the Award.

3. The procedural rules for the establishment of international responsibility: The burden and standard of proof

10. At the outset, it must be recalled that, according to Rule 34(1) of the ICSID Arbitration Rules:

The Tribunal shall be the judge of the admissibility of any evidence adduced and of **its probative value**.⁵

11. As far as the **burden of proof** is concerned, it is not disputed that a party which alleges something has to prove it to the satisfaction of the Tribunal. I agree here with the statement found in the Award, in paragraph 667, according to which “[a]s a general principle of law, the burden of proof rests with the party bringing forth a proposition (*onus probandi incumbit actori*).”
12. A consequence of this statement is that, if there is divided evidence, contradictory testimonies whose value seem equivalent in the eyes of a tribunal, it must be concluded that the party alleging a fact based on such divided evidence, has not fulfilled its burden of proof. This has been aptly explained by the *Plama v. Bulgaria* tribunal concerning one of the claims of the investor:

Given this conflicting evidence, the Arbitral Tribunal is unable to form any firm view as to what really transpired. The burden of proof being on Claimant, the Tribunal cannot, therefore, rule in its favor [...].⁶

13. I agree also with the presentation in the Award of the **standard of proof**, according to which the generally-required standard of proof is the “balance of probabilities” or “preponderance of the evidence.” The standard requires a showing that the factual allegation is “more likely than not” true.
14. This implies that, in order to reach a conclusion, an international tribunal will necessarily have to take a view on the **credibility** of the different witnesses. Another important parameter is the **inherent value of the different elements of evidence** presented: it does not seem contested that media articles have less probative value than, for example, decisions of a Minister; in the same manner, a document contemporaneous with the facts of the dispute has more probative value than a document prepared in the course of the proceedings before an international tribunal.
15. A last element to be mentioned is that an international tribunal should be very careful in the examination of evidence and only **rely on proven facts and not on presumptions**. As stated in *Hamester v. Ghana*, a tribunal “can only decide on substantiated facts, and cannot

⁵ Emphasis added.

⁶ Exhibit CA-766, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 249.

base itself on inferences.”⁷ In the same vein, the tribunal stated in *Unión Fenosa v. Egypt*, that “[s]uspicion is not equivalent to proof.”⁸

4. An overview of the application of the procedural rules in the case

16. As mentioned, a tribunal being entrusted to assess the probative value of the evidence presented to it, necessarily has to decide first on the **credibility** of the evidence.
17. In this regard, I want to indicate that, for me, it is of utmost importance to note, on the one hand, that Lone Star did not have the same discourse before the ICSID Tribunal and the ICC tribunal, in the case brought by Lone Star against Hana. On the other hand, the Hana representatives always presented the same analysis, saying in both the ICC proceedings and in the ICSID proceedings, that **they were the ones pressuring Lone Star for the price reduction, without any compelling interference of the FSC**. This was aptly summarized by the ICC tribunal:

The Tribunal has to decide between three different factual narratives. **The first, as pleaded by Lone Star** in the ICC proceedings, is that Hana’s representatives pursued a strategy of securing a price reduction from Lone Star by using the FSC’s delay in approving Hana’s Application as a pretext in circumstances where the FSC was not actually insisting upon a price reduction to approve Hana’s Application. Hana’s representatives, according to Lone Star, deliberately misled Lone Star’s representatives into believing that it was the FSC who required the price reduction. **The second narrative, as pleaded by Hana** in the ICC proceedings, is the same as the first narrative save that Hana’s representatives did not, according to Hana, ever mislead Lone Star’s representatives about the FSC’s position. In other words, in accordance with this second narrative, Hana never actually conveyed to Lone Star that the FSC was insisting on a price reduction. **The third narrative, which was not pleaded by either party in the ICC proceedings**, is that Hana’s representatives correctly represented to Lone Star’s representatives that a price reduction was necessary to secure the FSC’s approval of Hana’s Application because this was the FSC’s actual position. It is this third narrative that Lone Star is relying upon in the ICSID proceedings against the Republic of Korea.⁹

⁷ *Gustav F. W. Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 134 (available at: <https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf>).

⁸ *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 7.113 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10061.pdf>).

⁹ **Exhibit C-949, LSF-KEB Holdings SCA v. Hana Financial Group, Inc.**, ICC Case No. 22221/CYK/PTA, Final Award, 13 May 2019 (“**ICC Award**”), para. 223 [emphasis added]. Surprisingly, the ICC tribunal adopted, in the absence of the FSC as a party, through its own interpretations, a narrative which was not presented by either party with evidence before it.

18. The position Lone Star adopted in the present case is actually quite incoherent with the position of Lone Star in the ICC case. While in the ICC case, Lone Star pleaded that it was Hana that wanted a price reduction and improperly used an alleged FSC pressure to obtain it, Lone Star argues the complete opposite in the present case, in which it is pleading precisely that the price reduction was compelled by the FSC and not suggested by Hana.
19. It is striking that Lone Star pleaded two contradictory versions of the story, adapted to their opponent, which is not, at first sight, an example of a good faith behavior. As stated by the tribunal in *Chevron v. Ecuador (II)*:

[D]uty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can 'have it both ways' or 'blow hot and cold', to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment.¹⁰
20. Although this is not determinative to the outcome of the case, it casts a dark shadow on Lone Star, which is ready to plead whatever it considers best in its view to obtain damages from an international tribunal, even if doing so results in it adopting entirely contradictory positions. This at least invites one to exercise some caution in relation to the evidence and testimony presented by Lone Star.¹¹
21. To the contrary, Hana maintained the same position in the ICC case and in the ICSID case, indicating that **it was Hana which requested the price reduction**,¹² a position which is the more so remarkable as it was **against Hana's interests** in the ICC case.¹³ This, of course, increases the reliability of Hana's evidence and testimony.
22. As far as **the inherent value of the elements of evidence** presented is concerned, it can be indicated here that very different types of evidence have been submitted to the Tribunal, whose value will be discussed in the framework of this Dissenting Opinion. The same case-

¹⁰ *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, para. 7.106 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9934.pdf>).

¹¹ The behavior of Lone Star in secretly recording two important meetings should also be mentioned here. In this respect, the Award declares that "the recording of business confidences certainly breached what the Korean participants considered ethical business behaviour." (Award, para. 878).

¹² In Section XIX of the Award "Majority Clarification ...", in para. 931, the majority refers to an alleged "change in position of Hana", but relies to support this on the analysis of the ICC tribunal and not on the submissions of Hana. This means that there is a failed attempt to put into question my statement to the effect that Hana adopted in its pleadings the exact same position in the ICC case and in this ICSID case, by an irrelevant reference to the ICC tribunal analysis which was pleaded by neither party.

¹³ In Section XIX of the Award "Majority Clarification ..." it is stated that "in the view of this Tribunal's majority, it is not surprising that Hana is willing to take responsibility for the price reduction and downplay the role of the FSC (Hana's past, current and future financial regulator) in a case where Hana itself faces no claim." But there is no mention of the fact that in the ICC case, Hana was precisely facing a claim. I therefore disagree with the suggestion in para. 932 of the Award that Hana has made inconsistent statements.

by-case analysis will be performed in order to evaluate whether the conclusions reached by the majority **rely on proven facts and not on presumptions**.

II. ATTRIBUTION: THERE IS NO ACT OR OMISSION ATTRIBUTABLE TO THE FSC IN ACCORDANCE WITH ARTICLE 2 OF THE ILC ARTICLES

1. An act attributable to Korea?

23. For an act to be attributed to a State, it must have a close connection to that State. As explained in *Jan de Nul v. Egypt*:

In order for an act to be attributed to a State, **it must have a close link to the State**. Such a link can result from the fact that the person performing the act is part of the State's organic structure (Article 4 of the ILC Articles), or exercises governmental powers specific to the State in relation with this act, even if it is a separate entity (Article 5 of the ILC Articles), or if it acts under the direct control (on the instructions of, or under the direction or control) of the State, even if being a private party (Article 8 of the ILC Articles).¹⁴

24. The three members of the Tribunal are in agreement that **the acts of the FSC are attributable to Korea**, in spite of different reasonings among the members of the Tribunal in order to arrive at such a conclusion, as elaborated in paragraph 676 of the Award:

The FSC as a regulatory body entrusted with supervision of Korea's financial markets, and acting in that capacity, is in the opinion of one member of the Tribunal, an "organ of the State" within the scope of Article 4 and, in the view of a Tribunal majority, an entity empowered to exercise sovereign powers within the scope of Article 5. There is therefore **no doubt that the acts or omissions of the FSC engage the responsibility of the Respondent**.¹⁵

25. Of course, in order to find that an act or omission of the FSC engages Korea's international responsibility, there must be clear evidence of the existence of such an act or omission. So, the core question is to determine what act or omission can be attributed to the FSC.

2. An act attributable to the FSC? A summary of the diverging positions on evidence

26. It is, I think, useful, to recall the main contentions of the Parties relating to the responsibility/non-responsibility of Korea, based on the attribution/non-attribution of the price reduction to the FSC, as clearly summarized in paragraphs 572-573 of the Award:

¹⁴ Exhibit CA-320, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 157 [emphasis added]. This passage is also cited in footnote 952 of the Award.

¹⁵ Emphasis added. There is no question, in my view, that the FSC is an entity under Article 5 and that it has used its governmental authority in dealing with the sale to Hana.

The Claimants contend that as part of the FSC strategy to placate hostile public opinion, the FSC delayed its approval of the Hana application and then made approval conditional on Lone Star accepting a *net* USD 433 million price reduction for its majority stake in KEB.

The Respondent argues that it was Hana, not the FSC, that believed a lower sale price might ease public and political resistance to the deal and says the price reduction resulted from Hana's own perception of commercial advantage presented by (i) Lone Star's conviction; (ii) the FSC's resulting sale order; and (iii) the deteriorating economy. Hana acted on its own interest not as the FSC's "servant."

A. Summary of the majority position on the evidence on attribution

27. For the majority, the act attributable to the FSC, and thus to Korea is, essentially, **covert pressure** for a reduction of price, mentioned by the media and some ambiguous statements by Hana that the FSC would want a reduction of the price. It is quite telling that the majority relies mainly on "**messages**" or "**communications**"¹⁶ allegedly sent by the FSC to Lone Star through others, whether Hana or the media. Two headings in the Award can be mentioned here, indicating that for the majority, the FSC has used others to communicate messages to Lone Star: "*The FSC Uses Hana to Communicate its Conditions for Approval to Lone Star*" and "*The FSC Uses the Media to Communicate its Conditions for Approval to Lone Star*."¹⁷

¹⁶ See Award, para. 853 ("In the view of the Tribunal majority, the FSC Chairman **communicated** without ambiguity that approval required a price reduction because nothing but a price reduction could alleviate the FSC Chairman's anxiety about the potential political impact approval could have on his organisation" [emphasis added]). In other words, the majority considers that the FSC Chairman delivered without ambiguity his message that approval required a price reduction.

Award, para. 858 ("If, as Mr. [REDACTED] said, the people at the FSC 'are talking' to Hana about the 'adjustment of price,' then their **communication** to Hana was explicit, and, coming from Hana's regulator, would be disregarded by Hana and Lone Star at their peril" [emphasis added]). Again, the idea is that the FSC sent a message to Lone Star through Hana.

Award, para. 872(b) ("*Hankook Ilbo* also reported that the FSC's recommendation that Hana submit a new application 'can be interpreted as a **message** to 'lower the purchase price'" [emphasis added]).

Award, para. 874 ("While the weight that may be given to press reporting is variable, the numerous articles over a period of time quoting numerous FSC sources on the same theme provide persuasive corroboration of the Claimants' argument that the FSC was clearly **communicating** to Lone Star of the necessity of a price reduction not only through Hana was relaying this **message** through the media as well" [emphasis added]). Again, the idea here is that messages were sent to Lone Star both through Hana and the media.

Award, para. 882 ("The Tribunal by majority is satisfied on the evidence that the **communication** from the FSC was not simply that a lower price 'might make our job easier.' The clear **communication** from the FSC by words and conduct was that it would grant approval only when and if the share price was to be lowered sufficiently to provide political cover for the FSC in its dealings with the politicians, the unions and the vociferous critics of the level of profits that Hana had agreed to pay Lone Star" [emphasis added]).

Award, para. 936(d) ("The press, quoting an FSC official, reported that in this ruling, 'FSC opened a 'safe exit out' for Lone Star while sending a **message** to Hana Financial Group to 'lower the purchase price'" [emphasis added]).

¹⁷ Award, Secs. XIV(D)(3)(g), XIV(D)(3)(h), p. 330.

28. The majority bases its conclusion on attribution on indirect evidence, allegedly found in media articles, and in alleged statements by Hana in the surreptitiously recorded meetings of Miami and Honolulu, while at the same time disregarding entirely the witnesses' statements presented to the Tribunal by the representatives of **both** Hana and the FSC, as well as contemporaneous documents of the FSC and Lone Star.

B. Summary of my own position on the evidence on attribution

29. At the outset, it is worth noting that no international tribunal has ever declared a State responsible merely for sending messages or communications through others. It is also remarkable that no direct message, even informal, has ever been sent by the FSC to Lone Star.
30. Moreover, it is also worth underscoring that these indirect messages are far from clear. In fact, these indirect messages or communications are generally extremely ambiguous, if not plainly re-constructed to fit the conclusion adopted by the majority.
31. With respect to statements made by Hana representatives and the FSC officials, which the majority has disregarded, it is also worth mentioning that **all** of the factual witnesses with direct knowledge of these facts testified to the Tribunal that there was no price interference by the FSC. This witness evidence is contrary to the Claimants' allegations that the FSC "pressured" Hana and Lone Star to reduce the price to be paid by Hana and that the FSC "acted in concert with Hana to secure a lower purchase price that would appease public sentiment and national politicians."¹⁸ These factual witnesses include Mr. Seok Dong Kim (as the FSC's Chairperson),¹⁹ Mr. Joo Hyung Sohn (of the FSC),²⁰ Mr. [REDACTED] (Hana's Founding Chairperson),²¹ Mr. [REDACTED] (Hana's Deputy President),²² and others, as will be referenced in this Opinion and its Annex.
32. Having assessed all the evidence presented to the Tribunal, I do not think that such elements of evidence are sufficient to attribute an act or omission to the FSC, on the international level. I consider that the majority has not applied the well accepted rules on attribution of an act or omission to the State, as will be developed more fully in the following section.

3. An act attributable to the FSC? A thorough examination of the evidence on attribution

33. It is important for an international tribunal to evaluate carefully the evidence presented to it, as it is, and not as the tribunal wishes to interpret it. I will therefore evaluate successively

¹⁸ Reply, Sec. III.A.4.b.

¹⁹ Witness Statement of Seok Dong Kim, 20 March 2014 ("S.D. Kim First Witness Statement"); Second Witness of Seok Dong Kim, 15 January 2016 ("S.D. Kim Second Witness Statement").

²⁰ Witness Statement of Joo Hyung Sohn, 21 March 2014 ("J.H. Sohn First Witness Statement"); Second Witness Statement of Joo Hyung Sohn, 15 January 2015 ("J.H. Sohn Second Witness Statement").

²¹ Witness Statement of [REDACTED] 19 March 2014 ("[REDACTED] First Witness Statement"); Second Witness Statement of [REDACTED] 16 January 2015 ("[REDACTED] Second Witness Statement").

²² Witness Statement of [REDACTED] 19 March 2014 ("[REDACTED] First Witness Statement").

the evidence from the media, the representatives of Hana, the representatives of the FSC, and the evidence flowing from emails of Lone Star.

A. Can evidence of attribution be deduced from media articles?

34. The majority has heavily relied on media articles²³ to arrive at its conclusion that the FSC exerted pressure on Hana to obtain a price reduction. First, it seems needless to say that articles in the newspapers of a country cannot, of course, be attributed to that State. In fact, they are used in the Award by the majority as supposed **proof of the pressures** exercised by the FSC. Second, their evidentiary value is limited. Indeed, I share the finding of the Award, according to which “the weight that may be given to press reporting is variable,”²⁴ but draw opposite conclusions from the analysis of the content of the quoted press articles. Third, in the precise cases, the media reports were often quite cryptic. I take the example of an article of *Yonhap Infomax*:

The FSC essentially **alluded** that they would not approve the acquisition of subsidiary if there was **the risk that acquiring KEB would harm HFG’s financial soundness**. As such, in actuality, **it is interpreted** that the FSC is requiring HFG and Lone Star to reduce the purchase price for KEB.²⁵

35. For me, these kinds of statements do not prove anything. What is clear is that they are **merely conjecture** that the FSC **seems** to pressure Hana. Without proof, a conjecture remains a mere mental subjective re-construction.
36. **In sum**, I do not think that the heavy reliance of the majority on press articles to support its conclusion of the attribution of a pressure of the FSC for a price reduction is warranted.

B. Can evidence of attribution be deduced from the statements of Hana?

37. The behavior of Hana can evidently neither be attributed to the State. In fact, statements of Hana are either disregarded or re-interpreted by the majority to incriminate the FSC.

Extracts of the secret recording of the meetings between Lone Star and Hana

38. As far as I am concerned, I find it particularly striking that **no clear statement of a coercive involvement of the FSC** can be found in the surreptitiously taped conversations. Not

²³ These include 20 references to *Yonhap Infomax*, 10 references to *The Korea Times*, 12 references *JoongAng Daily* and 60 references to other media articles.

²⁴ Award, para. 874.

²⁵ Exhibits C-278/R-511, “FSC, Pressure on Hana Financial and Lone Star to Reduce Price” *Yonhap Infomax*, 21 November 2011 [emphasis added]. Moreover, one of the reasons invoked is the risk of a negative impact on Hana – which is a preoccupation entering clearly in the prudential mission of the FSC, if the deal were to go through, as initially planned, considering the change of circumstances. In the same vein, see the title in Exhibit R-304, “Chairman Seung Yu Kim Hints Possible Renegotiation of Korea Exchange Bank Purchase Price” *E-Today*, 28 September 2011 [emphasis added].

knowing that the conversation was taped, Hana had no reason not to be outspoken concerning the position of the FSC.

39. For example, during the 29 March 2011 meeting in Honolulu between Mr. [REDACTED] and Mr. [REDACTED]²⁶ the following exchanges took place:

[REDACTED] [...] So, no intention, our Chairman [REDACTED] warned me not to give you any wrong impression that we renegotiate any terms and conditions of already agreed SPA. [p. 9]

[...]

[REDACTED] [...] But rather they kind of indirectly gave impression that there may be some mechanism we can both utilize to make the deal to be changed superficially and therefore they can say that even though we order whole sale, we didn't approve the original SPA but rather changed SPA. [pp. 14-15]

[...]

[REDACTED] [...] I think that magnitude can justify FSC's decision to approve our transaction. That's **our feeling** based on our internal discussion.

[REDACTED] But they said that?

[REDACTED] No, they didn't say that. They didn't say that. [p. 19]

40. This is entirely coherent with Mr. [REDACTED] Witness Statements. **Hana took into account the general economic and political situation** and decided that it had a better chance to finalize the deal if the price was reduced and the sale of the illegally obtained majority shares in Lone Star did not end up in too important a windfall for Lone Star – a reduction was in Hana's commercial interest. In order to obtain a modification of a binding contract, Hana needed strong arguments. The strongest one was that the change in the price was **welcomed by the FSC**, which is what Hana conveyed to Lone Star. At the same time, Hana wanted to tell the truth, so it **never indicated that the FSC has requested** the price reduction; Hana only said that it believed it would be best or even necessary in its view to obtain the sale's approval.
41. The truth, as I understand it, is that Hana never clearly said that the FSC was requesting a price reduction, although Lone Star tried to make Hana say so. The formulas used by Hana concerning the fact that FSC would welcome a price reduction show that it was not the FSC's position as transmitted to Hana, it was **Hana's interpretation of the FSC's position**: "this is strictly **my personal feeling**," or "it was **my personal belief**" and "this

²⁶ Exhibit C-479, Transcript of 29 March 2011 Meeting in Honolulu Between [REDACTED] and [REDACTED]

was my own speculation,”²⁷ recognizing even that Hana “may have engaged in some **bluffing and exaggeration** in the way [it] described the situation to Lone Star.”²⁸

Witness testimonies of Hana

42. Numerous testimonies from Hana executives are to the same effect. For ease of reference and in order not to burden this Dissenting Opinion with long and repetitive citations, relevant extracts are gathered in the Annex to this Dissenting Opinion.²⁹

43. I will however cite an extract of one testimony and discuss the manner in which the majority has been dealing with it, i.e., the First Witness Statement of Hana’s Founding Chairman Mr. [REDACTED] cited in paragraph 654 of the Award:

I told Mr. [REDACTED] at the meeting [on 25–26 November 2011] that **Hana believed** that a price reduction was necessary for the acquisition to proceed. I did not tell Lone Star during the negotiation that the FSC was **conditioning its approval on a price reduction**, because **the FSC had never said anything like that**.³⁰

44. In the Award, it is stated by the majority that this testimony of Hana Chairman [REDACTED] was different in the ICC case than in the present ICSID case, in order to cast doubt on the credibility of the witness, as elaborated on in paragraph 852, which cites precisely what Mr. [REDACTED] declared to the ICC tribunal:

However, in testimony to the tribunal in the ICC Arbitration, Hana Chairman [REDACTED] made it clear that the need to “lower” Lone Star’s returns on the sale was more than a “personal belief” or “speculation” and in fact reflected what he had been told by the FSC Chairman. According to Hana Chairman [REDACTED]

*[...] The FSC Chairman mentioned that the FSC was under a lot of public and political pressure at the time. However, **it was clear to me** that if the pressure were to be reduced then he would not be opposed to working toward finalizing the approval of the transaction. Hence, **I inferred from our conversation** that he would need the Parties’ help in*

²⁷ [REDACTED] Second Witness Statement, para. 16.

²⁸ [REDACTED] Second Witness Statement, para. 6.

²⁹ Dissenting Opinion, Annex 1, [REDACTED] First Witness Statement, paras. 15–16; Dissenting Opinion, Annex 2, [REDACTED] Second Witness Statement, paras. 5–6; Dissenting Opinion, Annex 3, [REDACTED] First Witness Statement, para. 23; Dissenting Opinion, Annex 4, [REDACTED] First Witness Statement, paras. 14, 16; Dissenting Opinion, Annex 5, [REDACTED] First Witness Statement, para. 26.

³⁰ [REDACTED] First Witness Statement, para. 23 [emphasis added]. See also [REDACTED] Second Witness Statement, para. 16: “I also understand that Mr. [REDACTED] has stated that I told him on November 26, 2011 that the FSC would agree to approve the deal at the reduced price. That is not true, either. What I told Mr. [REDACTED] on November 26, 2011 was that *Hana* believed it would be easier for the FSC to approve the deal if the price were to be reduced. This was my own speculation.” [emphasis in the original].

overcoming the hurdles he faced. However, the FSC Chairman did not suggest – and I did not think it appropriate to ask – what the Parties could do in this regard.³¹

45. Contrary to the interpretation of the majority,³² I consider that it is crystal clear that the testimonies in both proceedings convey exactly the same ideas. More precisely, the two testimonies provide a very similar picture: (1) the FSC was under political pressure; (2) the FSC did not require a price reduction; and (3) the Hana Chairman speculated or inferred that the FSC would welcome a price reduction.
46. In fact, to the explicit speculation of Hana, the majority adds its own subjective speculation in stating the following, in the next paragraph 853 of the Award:

The Hana Chairman and the FSC Chairman were old friends. They were sophisticated in dealing with the Government at the highest levels. In the view of the Tribunal majority, the **FSC Chairman communicated without ambiguity** that approval required a price reduction because nothing but a price reduction could alleviate the FSC Chairman's anxiety about the potential political impact approval could have on his organisation.³³

47. I do not see anything "communicated without ambiguity." What seems to be implied here by the majority is that the message is that the FSC will not authorize the sale, if there is no price reduction, but this is a far cry from what the testimony conveys, as it goes through a biased interpretation. This is just one example of the manner in which the majority re-interprets what a witnesses declared, based on subjective rather than logical inferences.

Statements made during the Hearing

48. The same positions, as those presented in the Witness Statements, were reiterated during the Hearing. Commenting on an email from Hana to Lone Star,³⁴ in which Hana suggested that a new contract should be presented – before the FSC asked for a new application – Chairman [REDACTED] of Hana states in his First Witness Statement:

To be clear, these were all Hana's ideas. I did not discuss the content of this email with anyone at the FSC or the FSS. I was the Chairman of one of the largest financial groups in Korea (with over 18,700 employees) and had many years of experience in business

³¹ Award, para. 852, citing **Exhibit C-949**, ICC Award, para. 92 [emphasis added].

³² It can be noted here that the same confusion as mentioned in footnote 12 between the submission of Hana and its interpretation by the ICC tribunal is reiterated here between the testimony of Hana Chairman and its interpretation by the ICC tribunal can be found in para. 935 of the Award.

³³ Emphasis added.

³⁴ Dissenting Opinion, Annex 7, **Exhibit C-262**, Email from [REDACTED] to [REDACTED] 28 October 2011.

negotiations. I did not take any requests or pressures from the government in renegotiating the SPA with Lone Star.³⁵

49. During the Hearing, Chairman [REDACTED] of Hana confirmed in a strong statement that he did not discuss the price with the FSC, answering a question in cross-examination. This is what he said:

Price? From start to end, price was never discussed with FSC. And what I want to add is that the Chair of the FSC, I know his approach towards his work, and he is not a person who will take on such a liability, and that is why – I knew what kind of person he was – that's why I never even mentioned or brought up the topic of price.³⁶

50. **In sum**, as far as an act or omission attributable to the FSC is concerned, I consider that the **evidence from outside the FSC** – coming either from the media or from Hana itself – is too indirect, too scarce and too ambiguous to allow the Tribunal to conclude that an act or omission that could trigger the international responsibility of Korea is attributable to the FSC. If this evidence is read as it is, and not re-interpreted in a subjective manner, it seems quite clear that no overwhelming pressure was exercised on Lone Star to lower the price.

C. Can evidence of attribution be deduced from any act or statement of the FSC?

51. The **evidence emanating from the FSC itself** gives the same picture as the one already painted, implying an absence of positive coercive involvement of the FSC with the price reduction. The FSC always indicated that the price was for the parties to the sale to determine and that it would not interfere with a private contract. I quote below a contemporaneous statement made by the FSC Chairman before the National Assembly, as it seems extremely relevant to me.

Statement of Chairman Seok Dong Kim of the FSC, before the National Assembly

52. At the auditing session of the National Policy Committee of the National Assembly held on 7 October 2011, Chairman Kim of the FSC commented that “the contract price is **up to the parties to the contract to decide**.” In addition, he stressed that since “price is based on a private contract ... it is difficult for the financial regulators to comment.”³⁷ Chairman Kim of the FSC made this statement in front of the National Assembly, which means that it has to be taken seriously. It is interesting to note here that the majority did not consider this contemporaneous evidence as credible, as can be seen in the following extract of the Award, paragraph 750:

Despite the denials of FSC Chairman Kim, the majority of the Tribunal concludes for the reasons stated below that public and

³⁵ [REDACTED] First Witness Statement, para. 19 [emphasis added].

³⁶ TD6, 1674:3-9 [emphasis added].

³⁷ **Exhibit C-696**, Minutes of the National Assembly Hearing of the National Policy Committee, 7 October 2011, p. 12 [emphasis added].

Parliamentary wrath dictated the FSC's decision-making, and the FSC succumbed to the pressure by orchestrating a significant reduction in the purchase price of KEB by Hana.³⁸

Witness testimonies of the FSC

53. The representatives of the FSC have stated again and again that the FSC would not interfere in the price setting function of the market and that **the price should be determined autonomously by the two parties to the agreement**. Here again, for ease of reference and in order not to burden this Dissenting Opinion with long and repetitive citations, the relevant Witness statements are gathered in the Annex to this Dissenting Opinion.³⁹

FSC internal documents

54. Very surprisingly in my view, the majority overlooked entirely internal contemporaneous evidence from the FSC. It is indeed extremely relevant that there is a **total lack of corroborating internal documentation from FSC, indicating an order – or even a suggestion – to reduce the price**, and that these important pieces of evidence were utterly overlooked by the majority. For example, in a crucial FSC document entitled “Review Regarding Lone Star’s Sale of KEB,” dated 19 April 2011,⁴⁰ on which the FSC relied to authorize the sale, after examining three possible options, it is striking that **there is not a single mention of the price in these extensive discussions, even as a side consideration**. If the FSC intended to arrive at its decision in taking into account whether there was or was not a price reduction, some mention of this issue, considered as central by the majority, would at least have been alluded to. But as mentioned, the word “price” is not to be found in this internal FSC document.⁴¹
55. **In sum, there is not the slightest evidence emanating either from the Witness Statements of the representatives of the FSC or from contemporaneous statements or internal documents from the FSC which show a pressure exercised by the FSC to compel a price reduction.**

³⁸ Emphasis added.

³⁹ Dissenting Opinion, Annex 10, S.D. Kim First Witness Statement, paras. 19-20; Dissenting Opinion, Annex 11, S.D. Kim Second Witness Statement, para. 20; Dissenting Opinion, Annex 12, J.H. Sohn First Witness Statement, para. 19.

⁴⁰ Exhibit C-572.

⁴¹ In Section XIX of the Award, “Majority Clarification ...” it is said in relation to this document that: “The memo has a list of options for the FSC’s next steps. Significantly, for the majority, the list does not include the possibility of approval of the sale to Hana at the current price ...” I read and re-read the mentioned document, but could find nowhere anything close to what the majority allegedly interpreted. The three options were the following:

Option 1. Postpone the determination on Lone Star’s Eligibility and Approval on Acquisition Until the Court’s Final Decision.

Option 2. Denial of Eligibility and Sale Order + Approval on Acquisition.

Option 3. Reserve Decision on Eligibility + Approval on Acquisition.

There is not the slightest mention of the price, while there are two options referring to the authorization of the sale.

D. Can evidence of attribution be deduced from internal emails of Lone Star?

56. Last, the majority seems to attach a great importance to three internal emails of Lone Star, which are reproduced in the Annex,⁴² and analyses them as proving that the FSC exercised an overwhelming pressure on Hana in order to reduce the price. These emails purport to relay a conversation of Mr. [REDACTED] with the Deputy-Chairman of Hana, Mr. [REDACTED] conveying what the FSC supposedly said to Hana's Chairman [REDACTED] *i.e.*, that the FSC is pressuring Hana to reduce the price. This information is derived from what was supposedly said by Hana's Chairman to Hana's Deputy President, and then from the latter to Mr. [REDACTED] second-in-command of Lone Star. The majority gives great weight to these unverifiable oral statements referred to in the e-mails.
57. I have a very different reading of these exchanges than the majority, in view of the totality of exchanges between the two parties. First, in the three emails from the Deputy-Chairman of Hana, Mr. [REDACTED] the only conclusion that can be drawn is that it is coherent with what Hana has always said – that Hana used the alleged pressure of the FSC to make Lone Star accept the price reduction – which was clearly in Hana's commercial interest. It is quite convincing that Hana, having a lot to lose if the deal did not go through, used the strategy to scare Lone Star by implying that the FSC required a price reduction, when Hana was the one wanting it most. Second, – and this is in my view of utmost importance – **on the same date** as the first of the emails just mentioned, dated 28 October 2011⁴³ but a few hours later, while **the Deputy-Chairmen of Hana and Lone Star** were said to be conversing on the phone (with no way to verify what exactly was said), **Hana's Chairman** [REDACTED] sent a very clear email message to **Lone Star Chairman** [REDACTED] in which there is both a reference to the fact that the message contains the view of the situation by Hana – and not by the FSC – and a reference to the general political situation, as well as the market valuation and the financial situation in Korea, as appears in the following extensive extracts:⁴⁴

Dear Mr. [REDACTED]

It's been a year since we first signed the SPA and I hope we could close the transaction soon with amicable relationship. As we expect FSC's sale order notification to be made in next week, I am writing to you to share **my view on the current situation** and necessary actions for a coordinated closing of our transaction.

It is regrettable that the Seoul High Court's final verdict was not in favor of you, and FSC has subsequently given you a fulfilling order with a short remedy period. However, **I believe this is a gesture by**

⁴² Dissenting Opinion, Annex 6, **Exhibit C-263**, Email from [REDACTED] to [REDACTED] and [REDACTED] 28 October 2011; Dissenting Opinion, Annex 8, **Exhibit C-264**, Email from [REDACTED] to [REDACTED] and [REDACTED] 29 October 2011; Dissenting Opinion, Annex 9, **Exhibit C-267**, Email from [REDACTED] to [REDACTED] and [REDACTED] 1 November 2011.

⁴³ The email of 28 October 2011 was sent at 11:16 a.m.

⁴⁴ The complete email can be found in Dissenting Opinion, Annex 7, **Exhibit C-262**, Email from [REDACTED] to [REDACTED] 28 October 2011.

FSC that they would like to resolve the situation as soon as possible, if they could find a way without being blamed.

After the court verdict, **there are increasing voices that a punitive measures should be applied to Lone Star.** [...] **Considering political situations in Korea** (i.e., recent loss of Seoul Mayor position by the ruling party, National Assembly election in April next year, Presidential election in December next year, etc), I believe that we would face increasing stronger political resistance, unless we strive to expedite the closing of our transaction.

[...] [W]e are required to submit a new contract, as the existing contract was not entered in accordance with the sale order. In submitting a new contract, **we should find a way to alleviate political pressure on FSC** in approving the transaction, **especially by reflecting market valuation and turbulent financial industry.** **Otherwise, FSC can not be expected to proceed to an approval with the existing contract.**

58. If one looks at these exchanges, it appears that the second-in-charge of Hana was entrusted to relay a verbal message over the phone to the second-in-charge of Lone Star to the effect that the FSC was the driving force of the requested price reduction, while Hana's Chairman conveyed to Lone Star's Chairman in writing that the price reduction was indeed a suggestion of Hana, after an objective evaluation of the situation. The email of the Chairman of Hana, Mr. [REDACTED] is quite clear that the analysis of the political and financial situation is **Hana's view**. As is **Hana's view** the mention that the FSC "cannot be expected to approve the present deal" if the contract is not modified to take into account the political and financial surrounding, including the 6 October 2011 guilty verdict that was pronounced 3 weeks before that letter.⁴⁵

4. Conclusion on attribution

59. In my view, it is impossible to find that a State has committed an act that could be a violation of international law, based **on such flimsy elements, relying on mere speculations**, as exposed above. International responsibility of a State is too serious a matter for that.
60. Certainly, considering the importance of the transaction for all parties concerned – Lone Star, Hana and Korea – it is normal that **informal exchanges and communications** occurred between all stakeholders, but the evidence shows **no decision** attributable to the FSC. It is not denied that it was understood all over the place that the FSC wanted a price reduction, considering the general circumstances. But this is part of the overall economic and political situation in which an investor finds itself. **There does not exist a single document in the file showing that the FSC ordered or compelled Hana to reduce the**

⁴⁵ In fact, this was confirmed in [REDACTED] First Witness Statement, para. 19: "To be clear, these were all Hana's ideas. I did not discuss the content of this email with anyone at the FSC or the FSS ... I did not take any requests or pressures from the government in renegotiating the SPA with Lone Star."

price. The FSC has never given an instruction or addressed a directive to Lone Star, nor indeed to Hana. There is not the slightest documentary evidence to that effect. There is certainly a difference between a situation where the FSC would have compelled a certain outcome and a situation where a certain outcome was just welcomed by the FSC.

61. Although the Award seems to recognize this difference – in fact well understood by Mr. [REDACTED] – the majority just decided, by its own interpretation, that welcoming an outcome is equivalent to compelling an outcome, in paragraph 882 of the Award:

The Tribunal by majority recognises, as acknowledged by Mr. [REDACTED] during the surreptitiously recorded Honolulu Meeting, that “[i]f I were in a room with regulators and they said, we’re gonna sign this now. We’re gonna approve this right now if you do this, well that’s a slightly different thing than implying it might make our job easier if you would make some concessions.” The Tribunal by majority is satisfied on the evidence that the communication from the FSC was not simply that a lower price “might make our job easier.” The clear communication from the FSC by words and conduct was that it would grant approval only when and if the share price was to be lowered sufficiently to provide political cover for the FSC in its dealings with the politicians, the unions and the vociferous critics of the level of profits that Hana had agreed to pay Lone Star.

62. **In conclusion**, without an overt act of the FSC enjoining Lone Star to lower the price, or an omission like a refusal to authorize the sale, I do not see how it could be concluded that an act or omission could be attributed to Korea. **I know of no case where an act was attributed to a State on the international level based on hearsay, allusions, interpretations, conjectures, and speculations.**

III. ILLEGALITY: ADMITTING THERE WAS A COMPULSORY ACT OF THE FSC, SUCH BEHAVIOR IS NOT CONTRARY TO INTERNATIONAL LAW

63. Admitting, for the sake of reasoning, that an overwhelming pressure could be attributed to the FSC, the next question is whether this can constitute a violation of international law, considering the overall circumstances of the case. The majority insists on the fact that the FSC has violated international law, because it was motivated by its self-interest,⁴⁶ and acted unreasonably. I am in complete disagreement with such conclusions, for the following reasons:

- (1) The majority, insisting solely on the duty of the FSC to look at the buyer, disregarded entirely the general prudential mission of the FSC towards the banking system as a whole.

⁴⁶ There are numerous references to this idea; see, e.g., Award, paras. 19, 21(b), 21 (c)(ii), 549, 680, 741, 781, 848, 893.

- (2) The majority did not exercise the required deference towards acts of regulators, especially in such a sensitive sector as financial and banking regulation.
- (3) Contrary to the majority's opinion, nothing in the record indicates that the FSC acted in its self-interest.
- (4) The FSC acted reasonably and took due account of public opinion, without getting out of its role.

1. The FSC has a prudential mission in relation to the Korean banking system

64. Professor Yong-Jae Kim, an expert called by the Respondent, testified on the role of the FSC as a regulator of the financial industry in Korea with broad discretionary powers:

[T]he financial regulatory authorities [*i.e.*, the FSC] also have the independent obligation to strictly regulate, examine, and if necessary restrict a major shareholder who disrupts the soundness of the relevant bank and **the safety and soundness of the financial industry** (the Stock Price Manipulation Case). Since manipulation of stock prices constitutes a criminal offence that threatens the soundness of the relevant bank directly and can put the broader financial industry into confusion, the FSC must impose corresponding measures upon a major shareholder who is found to have committed such a crime. If Lone Star as a major shareholder could sell all of its shares at a control premium, and then—by virtue of being a foreign company that already had divested—simply evade without consequence the system of surveillance and sanctions for criminal conduct that is entrusted to **the nation's financial regulatory authorities**, then the strict restrictions on bank ownership under the Banking Act become “in name only,” and in reality virtually meaningless. Moreover, the deterrent purposes that the regulation seeks to achieve – that aim to keep a bank's major shareholder fulfilling the ongoing eligibility (dynamic-fit-and-proper) requirements and to improve the soundness and creditworthiness of the relevant bank, thereby raising the **overall safety and soundness of the banking industry** – can never be accomplished. At the same time, all risks resulting from the questionable stock sale and purchase agreement would be shifted to the purchaser and eventually to the bank itself. For these reasons any misconduct on the seller's part are [*sic*] not irrelevant to the purchaser and the bank.⁴⁷

2. A certain deference is due to acts of regulators

65. In any case, international tribunals owe **a certain deference** to the decisions of regulators, unless they appear unacceptable. The task of a regulator, particularly in the financial and

⁴⁷ Expert Report of Yong-Jae Kim, 21 March 2014 (“Y.J. Kim First Expert Report”) [emphasis added].

banking markets, is not easily discharged in any country. Regulators can easily be criticized for acting too early or acting too late; for doing too much or doing too little. A regulator is not infrequently at the center of a political storm, with individual ministers, legislators and the media voicing strident demands that it must take or not take certain actions. Nonetheless, it cannot be assumed, without more, that, a regulator confronted by powerful popular or populist demands, improperly caves in to such demands. It was necessary, therefore, for the Tribunal to distinguish in this case between acts and omissions by the FSC itself and demands made by others that it should adopt certain acts and omissions.

66. Indeed, it is generally admitted that a certain deference is required from any arbitration tribunal towards a regulator under international law, as decided in *S.D. Myers v. Canada* and *Saluka v. Czech Republic*.

67. The *Saluka* tribunal concluded:

As the *S.D. Myers* tribunal has stated, the determination of a breach of the obligation of "fair and equitable treatment" by the host State

must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.⁴⁸

68. Further, invariably, a regulator must discharge its task with **a measure of discretion**. This was true of the FSC. The majority of the Tribunal therefore should have attached significance to the discretion exercised by the FSC. It is not the Tribunal's function here simply to substitute its own decisions for the decisions of the FSC taken at the time in the exercise of its powers. In other words, as regards a regulator, it is well-established under international law that even a claim that a regulatory decision is materially wrong or did not make the best decision in the eyes of an international tribunal, will not, by itself, suffice to establish a treaty violation; whether the disputed measure might have been good or bad at the time is not a matter for decision by an investment arbitration tribunal; and such tribunals do not have an open-ended mandate to second-guess a regulator's decision-making. As concluded by Professor Schreuer: "The decisive criterion for the determination of the unreasonable or arbitrary nature of a measure harming the investor would be whether it can be justified in terms of rational reasons that are related to the facts."⁴⁹

⁴⁸ Exhibit CA-058, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 305. See also Exhibit CA-030, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 283; Exhibit RA-070, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 318: "The measures adopted might have been good or bad, but this is not a matter which is for the Tribunal's [*sic*] to judge. As the Tribunal has already concluded, they were inconsistent with the domestic and Treaty frameworks. They were not, however, arbitrary in that they responded to what the Government believed and understood to be the best response to the unfolding crisis."

⁴⁹ Exhibit CA-062, C. Schreuer, "Chapter 10: Protection against Arbitrary or Discriminatory Measures," in C. Rogers and R. Alford, *The Future of Investment Arbitration* (Oxford University Press: 2009), p. 188.

3. The FSC did not act with concerns for its self-interest and in fact resisted the alleged pressure

69. If the main concern of the FSC would have been with its political future and its self-interest, as argued by the majority, it should just have refused the authorization and made an order that Lone Star must **sell the shares it was not allowed by law to keep on the open market** and appear as a hero in the fight against "Cheat and Run." In fact, to the contrary, the FSC was conscious that, in finally approving the sale, it might be subjected to strong criticisms. Indeed, the FSC document already mentioned, "Review Regarding Lone Star's Sale of KEB," dated 11 April 2011, made after the reversal of the acquittal and before the final conviction, shows that the FSC was aware that it might be criticized for its approval of the sale:

○ The government's original position was that it will decide whether to approve the sale after determining eligibility, and there is a **possibility that the government may be criticized for changing its original position.**

○ The **government may be criticized for abetting Lone Star's eat and run** by rushing the granting of the approval despite the legal uncertainties.⁵⁰

70. The fear of criticism, which the majority considers to be the main motivation of the FSC in its dealing with the sale to Hana, apparently did not constitute an obstacle to its refusal to order a punitive sale, as called for by many, and to its decision not to order a sale on the open market and to authorize a sale without any condition, while at the same time giving to Lone Star the maximum amount of time of 6 months authorized by the Banking Act to finalize the sale.
71. Having duly analyzed all the relevant evidence, I consider that it does not support a finding that the FSC lacked independence in the actual exercise of its functions towards Lone Star as a result of malign interference by the Respondent's executive or legislative branches, the media or others. In fact, the FSC resisted all the pressures, especially as it did not take a punitive sale order, as mentioned in the Respondent's Rejoinder on Jurisdiction and the Merits:

Claimants themselves acknowledge that the **FSC's ultimate decision *not* to impose punitive conditions on LSF-KEB – in the sale order** issued after its conviction for stock price manipulation – was made despite serious pressure from the National Assembly and even threats of lawsuits against individual FSC officials. Indeed, as even [REDACTED] **recognized following the FSC's approval of Lone Star's sale to Hana, "the Korean Financial Services Commission, in its ruling to allow Lone Star to sell its shares of KEB, resisted pressure from labor groups,**

⁵⁰ Exhibit C-572, FSC, "Review Regarding Lone Star's Sale of KEB," 19 April 2011, p. 9 [emphasis in the original].

opposition politicians, and civil activists to impose penalties and other punitive conditions on the sale.”⁵¹

72. Mr. Dai Gou Sung (of the FSC’s secretariat, as the head of its Banking Division) testified as follows with regard to the Compliance Order:

The legal issues that Lone Star’s excess shareholding presented were unprecedented, raising questions never before addressed under the Banking Act. There were scholars, politicians, and civic groups arguing that the FSC would have to impose conditions on Lone Star’s sale of its KEB shares. Some of those in favor of imposing conditions were members of the National Assembly—the entity that drafted the Banking Act; others in favor of imposing conditions were well-respected scholars. Other individuals were against imposing any conditions on the sale. We needed time to analyze the issue from all angles. But once we *did* analyze the issue, we reached **a conclusion that afforded Lone Star the maximum time period permitted under the Banking Act in which to dispose of its shares without imposing any conditions on the sale.** As is reflected in [the Disposition Order], we reached this decision after analysis of different viewpoints, and **careful consideration of the relevant laws and principles.** I still believe that it was the right conclusion, although I understand from media reports that **it was unpopular with many segments of the general public.**⁵²

73. This puts to rest the conclusion of the majority, summarized in paragraph 19 of the Award, but repeated again and again, that the FSC acted in its own self-interest and not as a fair regulator:

The Tribunal by majority concludes that the FSC violated the 2011 BIT by putting its own self-interest (in surviving the political storm surrounding Lone Star) ahead of its statutory mandate to consider fairly and expeditiously Hana’s application to acquire LSF-KEB’s controlling interest in KEB [...].

74. The fact that the FSC did not impose a punitive sale, which might have been considered logical, as Lone Star had no right to the control premium (as its control was obtained through a financial crime), shows that the FSC did not act in its self-interest, but took reasonable decisions, as will be developed now.

⁵¹ Respondent’s Rejoinder, para. 80, citing Exhibit R-394, Letter from [REDACTED] Regarding Sale of KEB to Hana Financial Group, 20 December 2011 [emphasis added].

⁵² Witness Statement of Dai-Gou Sung, 20 March 2014 (“D.G. Sung First Witness Statement”), para. 25 [emphasis added].

4. The FSC did not act arbitrarily or unreasonably

75. In spite of the measure of deference that investment tribunals must apply to the margin of discretion of a regulator, the majority found that the FSC has violated the FET standard provided for in Article 2(2) of the BIT:

Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment [...].

A. The chronology

76. This case presented the FSC, as the financial regulator of KEB and Lone Star in Korea, with difficult issues of supervision and enforcement in the exercise of its functions under Korean law. It does not seem contested that the FSC made extremely serious reviews and studies before deciding to allow the sale. For example, in a press conference, shortly after the reversal of the acquittal, it was stated that the “FSC collected as many opinions of legal experts as possible.”⁵³
77. As to the decisions taken by the FSC with regard to Hana’s application to acquire Lone Star’s shares in KEB, there is no cogent evidence that such decisions were, in the circumstances, unreasonable, irrational or discriminatory and in violation of the Respondent’s obligations towards Lone Star under the FET standard in Article 2(2).
78. What was the situation faced by the FSC? There was strong uncertainty as to whether Lone Star was guilty in the Stock Price Manipulation Case and the FSC decided to wait and see what was the position of the courts, the legitimate organs of the State to decide on criminal matters. This seems extremely reasonable, as a decision to authorize the sale and let Lone Star “eat and run” before the courts had decided on the Stock Price Manipulation Case, could have been strongly criticized, because the administration was substituting itself for the court system. When there was an acquittal in November 2008 in the Stock Price Manipulation Case, the legal uncertainty seemed to be over. Thus, for the period from November 2008 to March 2011, the FSC concluded that no “legal uncertainties” still existed that would impede a sale by Lone Star of its majority shareholding to a qualified purchaser. However, the first application in this period of time was Hana’s application of 13 December 2010; the FSC considered, **immediately**, that it could proceed with its examination of Hana’s application, and it was ready to authorize the sale in its meeting of 16 March 2011, a fact recognized by both Parties.
79. But a huge change occurred some days before that meeting, as the Korean Supreme Court reversed the acquittal decision. The FSC therefore had to deal with an investor which was going to be convicted of a serious financial crime, a conviction which indeed occurred on 6 October 2011. From that date, Lone Star was no longer entitled to keep its shares above 10% and thus **Lone Star was virtually deprived according to the law of its right to the control premium**. It had however a potential contractual right to benefit from the profits derived from the control premium, if the sale to Hana according to the terms of the contract signed before the guilty verdict would be authorized by the FSC. In such a situation, it

⁵³ Exhibits C-241/R-092, FSC Briefing on KEB, 12 May 2011.

seems logical that Hana took advantage of the weakened situation of Lone Star, which was under an obligation to sell its shares in a period of 6 months and could only sell them to Hana or to the open market. The open market option meant that Lone Star would lose all of its control premium, so Lone Star had to accept Hana's proposal to lower the price, which meant a much lower loss in the amount of the control premium. It is true that this outcome was also favored by the FSC, which was not seen as protecting an investor having committed a serious financial crime. But this is a far cry from concluding that the FSC imposed through the exercise of its administrative powers such a solution, which was to the benefit of both Hana and Lone Star.

80. I consider that, even if it is admitted that the FSC has exercised an overwhelming pressure (*quod non*), it acted reasonably from the financial, social and economic points of view.

B. Even if overwhelming pressure would have been attributable to the FSC, there existed rational financial reasons to justify it

81. For me, the FSC was faced with a very complex and unprecedented situation, with which it tried to cope as best as it could. The FSC was trying to **monitor the financial market** in giving a sign that not every financial criminal behavior is irrelevant and without consequences. Moreover, even if it is admitted that its main focus had to be on Hana, I think that **taking into account the financial interests of Hana** was perfectly understandable. Even if it is admitted that it is proven (*quod non*) that the FSC acted so that the contract between Lone Star and Hana is finalized with a price reduction, it would probably have acted as any financial regulator in the world would have acted.
82. It can be recalled that, in May 2011, Hana proposed an interim share purchase transaction of 10% of the KEB shares at the price agreed to in December 2010. However, as acknowledged in paragraph 605 of the Award:

The board sought external legal advice from multiple law firms, and concluded that paying a share price that was at least 50% higher than the market price could be a breach of its fiduciary duty to shareholders.

83. The same type of consideration could justify an alleged pressure of the FSC to authorize only a sale at a price which did not unduly burden the shareholders of the buyer.

C. Even if overwhelming pressure would have been attributable to the FSC, there existed rational social reasons to justify it

84. Even if it is admitted that the FSC exerted some pressure to obtain a price reduction in order to appease public concerns, as a matter of principle, it is not illegitimate for a regulator, such as the FSC, to take some account of public or political opinion, unless in doing so it commits a violation of international law. The FSC was looking at preserving the **social peace**, which is not an unacceptable concern for a regulator. Indeed, as the *Electrabel v. Hungary* tribunal noted, "politics is what democratic governments necessarily address; and it is not, *ipso facto*, evidence of irrational or arbitrary conduct for a

government to take into account political or even populist controversies in a democracy subject to the rule of law.”⁵⁴

85. The same approach has been adopted by the *AES v. Hungary* tribunal:⁵⁵

Having concluded that Hungary was principally motivated by the **politics surrounding so-called luxury profits**, the Tribunal nevertheless is of the view that **it is a perfectly valid and rational policy objective for a government to address luxury profits**. And while such price regimes may not be seen as desirable in certain quarters, this does not mean that such a policy is irrational. One need only recall recent wide-spread concerns about the profitability level of banks to understand that so-called excessive profits may well give rise to legitimate reasons for governments to regulate or re-regulate.⁵⁶

86. In other words, it is rational for a Government to consider public opinion. But it should also be remembered that, at the end of the day, the FSC adopted a balanced position, as it did not take full care of public opinion as the Sale Order was not punitive.

D. Even if overwhelming pressure would have been attributable to the FSC, there existed rational economic reasons to justify it

87. It seems relevant to look at the figures too, in order to evaluate the situation. In the Award, paragraph 601, the following information is given:

In November 2010, KEB's shares were trading at KRW 12,300. Hana's November 2010 offer was KRW 14,250; the increased share price represented a control premium. By May 2011, KEB's shares had dropped 20%, while Hana's offer price was still KRW 14,250, meaning that the control premium, as a percentage of the market price, had roughly tripled.

88. The “loss” alleged by Lone Star in this arbitration has to be evaluated in regard to the undue profit obtained by Lone Star through the Stock Price Manipulation Case. According to the Respondent: “Lone Star’s stock price manipulation netted it an illegal profit calculated by the Respondent’s expert, Mr. [REDACTED] at over USD 800 million, an act of criminality the Korean regulators could not be expected to overlook.”⁵⁷ This figure presented by the Respondent has been acknowledged by the Award, paragraph 548: “The expert evidence of Mr. [REDACTED] is that the stock manipulation yielded Lone Star a profit on the order of USD 806 million (from which would be subtracted the USD 64

⁵⁴ Exhibit RA-050, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 8.23 [emphasis added].

⁵⁵ Exhibit RA-035, *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 10.3.34 [emphasis added].

⁵⁶ Emphasis added.

⁵⁷ Award, para. 13.

million ordered by the ICC to be paid to Olympus Capital). The Claimants' expert, Professor [REDACTED] does not set out a competing estimate."

89. This is to say, that even if the majority were right that the FSC exercised an overwhelming pressure in order to obtain a price reduction, the figures show that the decision was reasonable and proportionate to the different amounts at stake in the case.

5. Conclusion on the violation of international law

90. Even admitting that the FSC exercised an overwhelming pressure to obtain from the parties to the deal a reduction of price, this would not have been, in view of the very special circumstances of the case, an irrational or arbitrary act amounting to a violation of international law. To the contrary, if a pressure for a price reduction were attributed to the FSC, this should be considered as a reasonable, rational and proportionate response by the FSC, as the Korean financial regulator, to the unprecedented situation created by the conviction of Lone Star for a serious financial crime.

IV. EVEN ADMITTING THAT AN ILLEGAL ACT WAS COMMITTED BY THE FSC, THE RULES ON CAUSATION HAVE NOT BEEN APPLIED IN ACCORDANCE WITH ARTICLES 34 AND 39 OF THE ILC ARTICLES

91. Even assuming the majority were right in finding attribution of an internationally illegal act to the FSC, it has not applied the proper international law, as it has entirely disregarded the well accepted rules on causality and contributory negligence.

1. Summary of the position of the majority and of my position

92. The majority analyses causality in the following way, in the Award, paragraph 708:

It was the criminal conviction of 6 October 2011 which cost LSF-KEB its eligibility to continue to hold a controlling interest in KEB beyond 18 May 2012, and gave the FSC the leverage to orchestrate a price reduction.

93. And, even more explicitly, the majority of the Tribunal acknowledges in paragraph 804 of the Award that the loss was due to the criminal conviction and the pressure of the FSC:

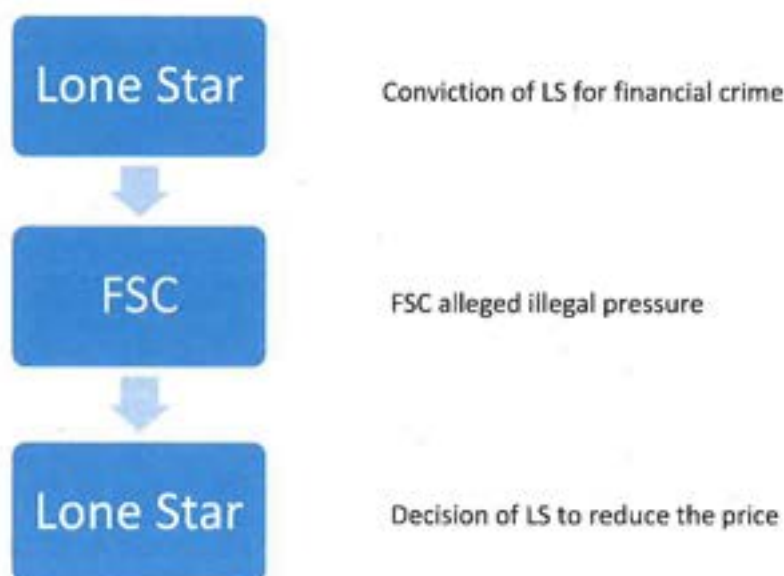
The Tribunal by majority concludes that the evidence establishes that "but for" the criminal conviction of LSF-KEB and the concurrent misconduct of the FSC, the Hana transaction would have been approved in a timely way and the loss avoided.

94. With due respect, I see things very differently. I consider that, even if the majority had not erred in finding a violation of international law by the FSC, the majority has not applied the proper international law to the analysis of causality, as it did not apply Article 34 of the ILC Articles, in spite of the Award clearly stating that "[t]he liability of a respondent State is dependent upon the establishment by a claimant of a causal link between the respondent

and the harm of which a claimant complains.”⁵⁸ Moreover, I consider that the majority did not apply the well-accepted rules on contribution of different causes to a damage, required by Article 39 of the ILC Articles.

2. The international rules on the responsibility of States concerning the apportionment of responsibility

95. In fact, what the majority wanted to do is to allocate a portion of responsibility to both the FSC for its alleged illegal pressure and to Lone Star for its commission of a serious financial crime. But, in purporting to do so, the majority did not apply the existing well-known substantive international rules on causation.
96. Deciding on the respective contribution of different facts to a final damage is not an easy task. The ICSID annulment committee in the *MTD Equity v. Chile* stated that “the role of the two parties contributing to the loss [is] [...] only with difficulty commensurable, and the Tribunal [has] a corresponding margin of estimation.”⁵⁹
97. I think that the apportionment in the present case is particularly complicated and interesting as one has to consider two interventions of Lone Star: first, the financial crime of Lone Star which ended up in its conviction **before** the alleged pressure exercised by the FSC; and then, the act of Lone Star accepting the price reduction **after** the alleged pressure exercised by the FSC. In other words, we are faced with a causal link as follows: **conviction/alleged pressure/acceptance of price reduction**, as illustrated in the following chart:



⁵⁸ Award, para. 674.

⁵⁹ Exhibit CA-042, *MTD Equity Sdn Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 101.

98. I take this opportunity to quote here some excerpts of my thesis⁶⁰ concerning precisely the role of the victim of an illegal act of a State, some of which have been quoted in paragraph 794 of the Award, but without the majority drawing any consequence from the quoted analysis.

99. In my thesis, I studied 3 different situations:

1. Acte de la victime intervenant « avant » l'acte de l'Etat (*i.e.*, the victim's act intervening "before" the act of the State);
2. Acte de la victime intervenant « après » l'acte de l'Etat (*i.e.*, the victim's act intervening "after" the act of the State); and
3. Acte de la victime intervenant « à côté » de l'acte de l'Etat (*i.e.*, the victim's act intervening "alongside" the act of the State).

* * *

1. The victim's act intervening "before" the act of the State

We only consider here cases where the act of the State appears to be provoked by a previous act of the victim [...].

In these conditions, it might occur that an individual's act gives to an act attributable to the State, which without the former would have been illegal, a legal basis which justifies the latter [...].⁶¹ [unofficial translation]

2. The victim's act intervening "after" the act of the State

Suppose that as a result of an illegal act, an individual reacts in a manner that is harmful to others or to himself. Will the victim's act or that of a third party be considered "produced" by the original unlawful act? It is very rare that in a situation of this kind, international jurisprudence accepts that human activity can be entirely determined by the prior wrongful act. The intervention of the will of the individual creates – to his detriment – a presumption

⁶⁰ B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Pedone, 1973), p. 382 (Foreword by P. Reuter) ("Thesis").

⁶¹ Thesis, p. 317:

1. Acte de la victime intervenant « avant » l'acte de l'Etat

Nous ne considérons ici que les cas où l'acte de l'Etat apparaît comme provoqué par un acte antérieur de la victime [...].

Dans ces conditions, il peut arriver qu'un fait de l'individu donne à un acte imputable à l'Etat, qui sans lui aurait été illicite, une cause juridique qui le justifie [...].

of freedom. Consequently, the causal link will generally be considered broken: it is the cost of freedom over determinism.

[...]

Even if “conditioned” by the wrongful act, the victim’s act, as we have already had the opportunity to mention, appears in the vast majority of cases as a “free” act intervening as an external element.⁶² [unofficial translation]

3. The victim’s act intervening “alongside” the act of the State

This is the simplest case, in which the act of the victim and the act of the State are totally independent of one another, and where the normal rules of causation are most easily applied [...].⁶³ [unofficial translation]

100. We are only concerned here by cases 1 and 2, as the analysis of causality is the analysis of a causal chain and not of independent events, like two different fires or two bullet shots coming from two directions, as the majority has analyzed.⁶⁴ Let us thus analyze the situation step by step, starting with the causal link between the conviction and the alleged illegal pressure of the FSC.

A. Causal link between the conviction and the alleged illegal pressure of the FSC

101. I will start with the first step of the causal chain: the conviction of Lone Star, in other words, the serious financial crime, which did not allow Lone Star to keep the shares above 10% of the shares. On 13 December 2010, Hana presented its first application to the FSC. On 16 March 2011 (approximately three months later), **the FSC was ready to approve**

⁶² Thesis, pp. 194-195, 328:

2. Acte de la victime intervenant « après » l’acte de l’Etat

Supposons qu’à la suite d’un acte illicite, un individu réagisse d’une manière dommageable pour autrui ou pour lui-même. Cet acte de la victime de l’acte illicite ou d’un tiers sera-t-il considéré comme « produit » par l’acte illicite initial? Il est très rare que dans une hypothèse de ce genre la jurisprudence internationale admette que l’activité humaine puisse être entièrement déterminée par l’acte illicite antérieur. L’intervention de la volonté de l’individu crée – à son détriment – une présomption de liberté. Aussi le lien de causalité sera-t-il en général considéré comme rompu: c’est la rançon de la liberté sur le déterminisme.

[...]

Même « conditionné » par l’acte illicite, l’acte de la victime, ainsi que nous avons déjà eu l’occasion de le mentionner, apparaît dans l’immense majorité des cas comme un acte « libre » intervenant comme un élément extérieur.

⁶³ Thesis, p. 341:

3. Acte de la victime intervenant « à côté » de l’acte de l’Etat

C’est la situation la plus simple, dans laquelle l’acte de la victime et l’acte de l’Etat sont totalement indépendants l’un de l’autre et où s’appliquent le plus aisément les règles normales de causalité [...].

⁶⁴ In the Award, para. 945(b), a reference is made to “acte de la victime intervenant à côté de l’acte de l’Etat”, but this is the wrong factual situation, which overlooks the necessary analysis in this case of the chain of causality.

the deal with the price negotiated in the Sale Purchase Agreement of 25 November 2010.⁶⁵ This means that without the conviction of Lone Star for the financial crime, the deal would – more certainly than not – have been closed as signed on 25 November 2010.

102. This is accepted by both Parties:

Claimants' Memorial

272. However, the FSC seemed unfazed by the drumbeat of opposition, and on February 28, 2011, **indicated that, at its regular committee session on March 16, it would review both (i) Hana's application** to acquire KEB as its subsidiary and (ii) Lone Star's qualifications to be a major shareholder as a non-industrial conglomerate. Although the FSC's formal language was non-committal, it signaled that **the agency expected to approve Hana's application at that time.**⁶⁶

Respondent's Counter-Memorial

834. [...] after the Seoul District Court rendered its decision in the illegal sale cases in November 2008, acquitting Minister Byeun and Lone Star's agent and attorney, Mr. [REDACTED] a path was cleared for the FSC to decide any application for acquisition of the KEB shares. Lone Star was fully aware of this fact, admitting in February 2009 that "[t]he Korean government now appears ready to approve a new owner of KEB." But while a number of potential buyers had expressed interest in acquiring the KEB shares, no application for acquisition approval was submitted until Hana's December 2010 application.

835. Without any supervisory issues preventing review of and decision on Hana's application at that time, **the FSC worked diligently to analyze the application. By the end of February 2011, after several exchanges with Hana seeking supplementary information and the Fair Trade Commission's review of the application for potential anti-competitive effects, the FSC indicated that a decision would be made at the Commission's next meeting.**⁶⁷

103. It is therefore common ground between the Parties that, after the acquittal of Lone Star in the Stock Price Manipulation Case, the FSC was ready to authorize the sale at the initial price.

⁶⁵ Exhibit C-227, Share Purchase Agreement Between Lone Star and Hana Financial Group, 25 November 2010.

⁶⁶ Emphasis added.

⁶⁷ Emphasis added.

104. The same understanding has been indicated in paragraph 234 of the Award:

The Respondent's version of events – which is not contested by the Claimants – is that the regulators made progress in the three months following Hana's December 2010 submission and were preparing to put the application on the Commission's agenda for an upcoming meeting on 16 March 2011.

105. The same analysis results from a quite telling heading on page 318 of the Award:

“But For” Lone Star's Criminal Misconduct the Hana Purchase might have been Approved by the FSC as Scheduled at its Meeting on 16 March 2011

106. The testimony of the then-President of KEB appointed by Lone Star, Mr. [REDACTED] is to the same effect. According to him, as recorded in the Award, paragraph 840:

- (a) the FSC was expected “by everyone else involved” to approve the Hana share purchase on 16 March 2011; and
- (b) the fact it did not do so was the result of the Supreme Court decision of 10 March 2011 in the Stock Manipulation Case.

107. The standard for factual causation is known as the “but-for” or “*sine qua non*” test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. For me, this is enough to prove that the loss was entirely due to the conviction of Lone Star. **In other words, without the conviction, Lone Star would have supported no loss.**

108. The fact that Lone Star was not entitled by law to the shares above 10% – and as a consequence to the share premium – was confirmed on 6 October 2011. From 10 March 2011, and even more from 6 October 2011, **Lone Star had become very vulnerable**, and more or less a prey for Hana, which could take this situation into consideration in order to obtain a better bargain. **Lone Star lost its entitlement to the control premium on its conviction on 6 October 2011. At this point in time, Lone Star was under the threat of losing its entire share premium.** In other words, Lone Star's position in KEB was “Dead Man Walking.”⁶⁸ The Award seems to recognize as much, in paragraph 844: “The Tribunal majority therefore concludes that ‘but for’ the criminal conviction, Lone Star would not have been in the position of jeopardy that led to its financial loss”

109. **The total loss of the control was a potential definite result of the conviction, without any undue pressure of the FSC.** This last remark seems important to me, as it appears that the loss of control did not in law result from any illegal pressure of the FSC, but rather from its entirely legal – and never contested by Lone Star – reaction to the conviction

⁶⁸ This expression is also used in paragraph 833 of the Award.

through the different Orders⁶⁹ emanating from the FSC, which were undoubtedly within its mandate. In fact, the authorization of the sale given by the FSC mitigated the possible complete loss of the premium. By accepting the price reduction, Lone Star implicitly recognized that its criminal conduct has placed it in a precarious position where it would lose not only a significant portion of the control premium but all of it. Viewed in this light, the FSC's approval of the Hana transaction on 27 January 2012 "rescued" Lone Star from a total loss of its control premium.

110. In other words, a close analysis of the legal documents adopted by the FSC in reaction to the conviction indicates that, although the loss of control was inherent in the conviction, **the Compliance Order of 25 October 2011, enacted in all legality by the FSC, allowed Lone Star to lose only part of the premium and not the totality, which was a real possibility.**
111. It results from all this that **the initial proximate cause** of Lone Star's loss was its conviction for a financial crime.
112. **The analysis could stop here**, but there is more. Even if the pressure is not considered justified, the causal chain has also to be considered as broken if we look at the second step of the causal link between the alleged illegal pressure of the FSC and the price reduction.

B. Causal link between the alleged illegal pressure of the FSC and the reduction of price

113. From the outset, it should be mentioned that the majority did not really deal with this second step in the causal chain, although paragraph 794 of the Award mentions the Respondent's argument on this issue

The argument is made by the Respondent, accordingly, that in the end, Lone Star willingly agreed to a price reduction in its own commercial interest.

114. As mentioned earlier in this Opinion, the act of an investor claiming to be a victim is generally not attributable to the State, unless the investor's act is **absolutely imposed** by an act of the State and the investor has **no other choice**. If we look at the usual situations in which a State is considered responsible for a violation of international law, we find a **coercive act**: either an act of the legislative or administrative power which takes a decision having an immediate effect (*e.g.*, an expropriation), or a decision of a court considered to be a denial of justice stripping an investor of its rights, or an act of the police or the army resulting also in a forced interference with an investor's property. In all these cases, there is an **act of the State that leaves no choice** to the investor.
115. The fact that, unless compelled, the act of a victim reacting to an alleged illegal act breaks the causal link, is also mentioned in my thesis, with some examples.⁷⁰ In a case where the

⁶⁹ The first step was the *Advance Notification of Disposition of 17 October 2011* (Exhibit R-102); the second step was the *Compliance Order of 25 October 2011* (Exhibit C-261); the third step was the *Disposal Order of 18 November 2011* (Exhibit C-274).

⁷⁰ See Thesis, p. 196.

words « *un acte décidé sous la contrainte* » (i.e., “an act taken under duress”) had to be interpreted, the *Commission de conciliation franco italienne* considered that « *il faut ... que la pression provienne d'une mesure de violence ou de contrainte prise par un gouvernement de l'Axe ou par un de ses organes. Il ne suffit pas que la formation de la volonté dérive de l'état des choses.* » (It is necessary ... that the pressure arises from a measure of violence or coercion taken by an Axis government or one of its organs. **It is not enough that the formation of the will is derived from the state of affairs.**)⁷¹

116. In the present case, the behavior of the FSC – even if considered illegal (which I do not analyze as such, as explained previously) – did not, in any way **compel** Lone Star to diminish the price. In fact, the majority did not base its reasoning on the existence of duress, as indicated in the Award, paragraph 799: “In the present case, the Tribunal also declines to find Lone Star acted under duress.” However, although the Award declares that Lone Star did not act under duress, the majority also decides that Lone Star’s decision to lower the price was not a commercial decision made of Lone Star’s own will – in other words, that Lone Star was forced to reduce the price – which I find quite contradictory. If Lone Star did not act under duress, it means that it was not compelled by any alleged FSC pressure, and that the cause of its loss was its own commercial decision.
117. **The Claimant made the decision to accept this price reduction, as it thought it was in its best interest.** What compelled the Claimant was the drop in share value and the Sale Order following its conviction in the criminal case. If the sale to Hana did not go through, the Claimant would have to sell its shares on the open market in the six months after the Sale Order. Lone Star chose to reduce its control premium from 75% to 50%⁷² rather than lose it completely.
118. In fact, it appears to me that whether there was FSC pressure or not, whether it was legal or not, whether the absence of authorization was perceived as a likely risk or not, if we look at causality, **the ultimate proximate cause** of the adoption of a lower price, **is the agreement of the parties to the contract** to do so, because of what they considered to be a mutual win-win commercial deal. In the circumstances of the case, the parties had choices other than the reduction of the price:
 - The parties could have agreed to postpone the deadline (until 18 May 2012) for completing the deal and finding a different outcome;
 - The parties could have put an end to the deal; or
 - The parties could have presented their new application with an unchanged price and see what happened.

⁷¹ *Différend Industries Vincentines Electro-Mécanique (I.V.E.M.)*, Commission de conciliation franco italienne instituée en exécution de l’art. 83 du Traité de paix avec l’Italie, Decision, 7 March 1955 in *Reports of International Arbitral Awards*, Volume XIII, p. 345 (available at: http://legal.un.org/riaa/cases/vol_XIII/33-846.pdf) [emphasis added] [unofficial translation].

⁷² The Award acknowledges in paragraph 881 that the loss was “the partially reduced control premium received in [Lone Star’s] sale of KEB shares.”

119. It is quite possible that the FSC, which wanted, as much as the parties, the deal to be finalized, might well have authorized the sale even with the initial price. The FSC welcomed the reduction, but **it might have approved the deal even without the reduction in price**, as, at the end of the day, the sale to Hana was in Korea's global economic interest. Such a possibility is not denied by the majority in the Award, when it states at paragraph 750:

The FSC was also in a "Catch-22" position. The FSC was not only creating problems for Hana and Lone Star, but at the same time creating adverse publicity internationally about Korea's hostile treatment of foreign investment.

120. Both parties to the deal thought that they had a better chance to obtain the FSC authorization with a reduced price, so they decided to lower the price for their own economic interests, preferring not to take the risk of the FSC's refusal.

3. Conclusion on causation

121. The proximate cause of loss is the cause that is predominant or operative. Here in fact there are two cumulative proximate causes, each being enough to break the causal link: the initial proximate cause, which is the conviction for a financial crime; and the ultimate proximate cause, which is the agreement of the parties to the sale, Lone Star and Hana, both accepting the price reduction. It is difficult to understand, in these circumstances, how the majority found that the alleged FSC indirect pressure was an important cause of the loss of part of Lone Star's premium.
122. **In conclusion**, the acts of Lone Star appear, from all angles, to have caused the loss it complains of, without any role being played in the causal chain by the alleged pressure of the FSC.

Brigitte Stern

Professor Brigitte Stern
Arbitrator

Date: 22 August 2022

ANNEX

As mentioned in my Dissenting Opinion, I quote here a certain number of statements which I consider relevant evidence, for case of reference when reading the Dissenting Opinion.

Dissenting Opinion, Annex 1

First Witness Statement of Hana's Founding Chairman [REDACTED]

I understand that Lone Star is alleging that Hana renegotiated the SPA price with Lone Star because the FSC had pressured Hana to do so. However, that is simply not what happened, and not what Hana told Lone Star, either. It is true that there was public criticism against Lone Star for trying to exit Korea with enormous profits, without having contributed to the long-term health of Korea's financial sector, without having paid its fair share of taxes, and without having compensated the victims of the serious financial crimes it had committed. It is also true that there were certain politicians who were echoing the views of certain civic groups and labor unions against Lone Star. But **the FSC never asked or pressured Hana to renegotiate the SPA price in response to these demands.**

It is a universal truth that a purchaser will try to use the circumstances to its advantage to bargain the sale price downward; in the same way, a seller will try to use the circumstances to its advantage to do exactly the opposite. In this case, the world economy and market index were working in favor of the acquirer, Hana. Without any pressure from the FSC, Hana intended to renegotiate the price downward, and it did. I initially proposed a one-billion dollar price reduction, and ultimately was successful in a 500 million dollar discount. Various players voiced their opinion on this high profile transaction, and Hana used those circumstances to its advantage in laying out the context for its request for a price reduction.⁷³

Dissenting Opinion, Annex 2

Second Witness Statement of Hana's Founding Chairman [REDACTED] some extracts being also cited in paragraph 851 of the Award, relating to a meeting of 15 March 2011 of Lone Star with Hana's Chairman [REDACTED]

It was my personal belief that we might improve the chances of winning regulatory approval by relieving that pressure, and that appearing to have lowered Lone Star's returns on the sale, even if only in a superficial way, might be an effective way to accomplish that. This was my personal speculation, based on my

⁷³ [REDACTED] First Witness Statement, paras. 15-16. Paragraph 16 is also cited in footnote 1163 of the Award.

observation of the **political scene** at the time. This was not, however, a message that ever was conveyed to me by the regulators.

We may have engaged in some **bluffing and exaggeration** in the way we described the situation to Lone Star [...].⁷⁴

Dissenting Opinion, Annex 3

First Witness Statement of Hana's Founding Chairman [REDACTED] cited in paragraph 654 of the Award:

I told Mr. [REDACTED] at the meeting [of 25–26 November 2011] that **Hana believed** that a price reduction was necessary for the acquisition to proceed. **I did not tell Lone Star during the negotiation that the FSC was conditioning its approval on a price reduction, because the FSC had never said anything like that.**⁷⁵

Dissenting Opinion, Annex 4

First Witness Statement of [REDACTED] Deputy President of Hana:

Hana decided to seek a price reduction from Lone Star solely **for its own business reasons**. I understand that Lone Star has alleged that the FSC pressured Hana to seek a price reduction. That is simply not true. The FSC never asked or pressured me to renegotiate the price terms with Lone Star.

[...]

We suggested to Lone Star that lowering the sale price could be one way to alleviate such potential political pressure. Our motivation, of course, was to persuade Lone Star to lower the purchase price, which **was in the economic interests of Hana and its shareholders**. [...] Although this was **a negotiating tactic on our part**, it also reflected **our honest belief** that lowering the price had the potential to ease some of the political opposition to the deal, which would have been a good thing for Hana, for Lone Star, and **(we speculated)** for the regulators responsible for approving the transaction.⁷⁶

⁷⁴ [REDACTED] Second Witness Statement, paras. 5–6 [emphasis added].

⁷⁵ [REDACTED] First Witness Statement, para. 23 [emphasis added]. See also [REDACTED] Second Witness Statement, para. 16: "I also understand that Mr. [REDACTED] has stated that I told him on November 26, 2011 that the FSC would agree to approve the deal at the reduced price. That is not true, either. What I told Mr. [REDACTED] on November 26, 2011 was that Hana believed it would be easier for the FSC to approve the deal if the price were to be reduced. This was my own speculation." [emphasis in the original].

⁷⁶ [REDACTED] First Witness Statement, paras. 14, 16 [emphasis added].

Dissenting Opinion, Annex 5

First Witness Statement of [REDACTED] Deputy President of Hana, also cited in footnote 925 of the Award:

At this meeting [of 25–26 November 2011], Lone Star again repeatedly asked us, “Did the FSC tell you that?” and “Did the FSC ask you to reduce the price?” Chairman [REDACTED] repeatedly said “no,” each time explaining that the financial regulators had not said anything about reducing the price. Rather, as we explained to Lone Star, it was certain individual politicians (e.g., National Assemblymen) that had complained about the price of the SPA. We said **it was only our “feeling” that reducing the price would make it easier for the FSC to approve Hana’s application.**⁷⁷

Dissenting Opinion, Annex 6

Email from [REDACTED] to [REDACTED] and [REDACTED] 28 October 2011:⁷⁸

From: [REDACTED]
Sent: Friday, October 28, 2011 11:16 AM
To: [REDACTED]
Subject: Hana

Guys

I talked with [REDACTED] from hana today. He explained the following ;

The FSC has asked Hana to approach us to renegotiate the price of our contract downward. The fsa realize they should approve the deal, but I want to be criticized for allowing Lone Star to make too much profit.

I told him that the FSA should request this directly to us rather than going through Hana. He said that the FSA could not propose this to us since the request is improper because it is not within their scope to set the price. He said that is why they are doing it through Hana verbally rather than in writing.

He said that chairman [REDACTED] was told this directly by the FSA. Lets discuss when you get a chance.

Thx. [REDACTED]

⁷⁷ [REDACTED] First Witness Statement, para. 26 [emphasis added].

⁷⁸ Exhibit C-263.

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Subject: Letter from Chairman [REDACTED]
Date: Fri, Oct28, 2011 16:12

Dear Mr. [REDACTED]

It's been a year since we first signed the SPA and I hope we could close the transaction soon with amicable relationship. As we expect FSC's sale order notification to be made in next week, I am writing to you to share **my view on the current situation** and necessary actions for a coordinated closing of our transaction.

It is regrettable that the Seoul High Court's final verdict was not in favor of you, and FSC has subsequently given you a fulfilling order with a short remedy period. However, I believe this is a gesture by FSC that they would like to resolve the situation as soon as possible, if they could find a way without being blamed.

After the court verdict, **there are increasing voices that a punitive measures should be applied to Lone Star**. It is not only KEB labor union, but NGOs/civil activists and politicians who argue for a punitive forced sale by Lone Star. Some politicians have claimed that the existing contract should be nullified and National Assembly should pass a new law for punitive sale measures. They claimed that Lone Star was in-eligible in its original purchase of KEB and reaps excessive premium from the current market price. Moreover, Mr. Sohn, a head of the opposition party, publicly declared at the KEB labor union rally last Sunday that the current contract between Hana and Lone Star should be invalidated and his party would strongly urge the government to make a punitive sale order. **Considering political situations in Korea** (i.e., recent loss of Seoul Mayor position by the ruling party, National Assembly election in April next year, Presidential election in December next year, etc), I believe that we would face increasing stronger political resistance, unless we strive to expedite the closing of our transaction.

Despite an increasing demand for a punitive sale order, Hana has persuaded FSC that such an order would not be applicable in this situation. But, even if a normal sale order is made by FSC, we are

⁷⁹ Exhibit C-262 [emphasis added].

required to submit a new contract, as the existing contract was not entered in accordance with the sale order. In submitting a new contract, **we should find a way to alleviate political pressure on FSC in approving the transaction, especially by reflecting market valuation and turbulent financial industry. Otherwise, FSC can not be expected to proceed to an approval with the existing contract.**

I believe it would be mutually beneficial if we could close the transaction at the earliest possible time by doing so. I appreciate your cooperation to date and hope that we both do our best to complete the last part of our transaction.

Yours sincerely,

[REDACTED]

Dissenting Opinion, Annex 8

Email from [REDACTED] to [REDACTED] and [REDACTED] October 29, 2011.⁸⁰

From: [REDACTED]
Sent: Saturday, October 29, 2011 3:30 AM
To: [REDACTED]
Subject: Hana

Guys, I had another talk with [REDACTED] of Hana Bank this morning. He didn't have any different information than yesterday. He reiterated that the FSA was pushing them to reduce the price. He said that Hana was happy that it was a good price and is anxious to close the deal as it is, and their request for a reduction is only because of the FSA demands. I'll let you know if I hear anything else.

■

Dissenting Opinion, Annex 9

Email from [REDACTED] to [REDACTED] and [REDACTED] 1 November 2011.⁸¹

From: [REDACTED]
Sent: Tuesday, November 01, 2011 3:23 AM
To: [REDACTED]
Subject: Hana

Guys, [REDACTED] from Hana Bank called me last night. He repeated what he said last time: that the FSC was pressuring them to renegotiate a lower price to "give them an excuse" to approve the

⁸⁰ Exhibit C-264.

⁸¹ Exhibit C-267.

deal. I, of course, told him that the sale order should be excuse enough. Nothing different from last time.

I'll talk with each of you on the phone.

■

Dissenting Opinion, Annex 10

First Witness Statement from FSC Chairman Seok Dong Kim, partly – the first paragraph – cited in footnote 638 of the Award:

As I explained above, one of my guiding principles as FSC Chairman was that **the FSC should not interfere in the price setting function of the market**. Consistent with that principle, I never—at any time—gave any instruction to anyone at the FSC regarding the price for Hana's acquisition of Lone Star's shares or regarding political opposition to the transaction. I at no time heard of anyone at the FSC having incited or forced Hana to renegotiate the price of its existing agreement with Lone Star, and I believe that no one at the FSC tried to violate the non-interference principle, which I repeatedly emphasized.

After Lone Star was found guilty, as discussed above, when I was present at the National Assembly on October 7, 2011, many questions were posed to me regarding possible price renegotiations between Hana and Lone Star following Lone Star's conviction. I replied, "If Hana and Lone Star intend to renegotiate the terms and conditions of their current share sale and purchase agreement, the price should be determined autonomously by the two parties to the agreement. [...]"⁸²

Dissenting Opinion, Annex 11

Second Witness Statement from FSC Chairman Seok Dong Kim, partly cited in the Award in footnote 1152, shortly after the reversal of the acquittal in the Stock Price Manipulation Case, relating to his meeting of 15 March 2011 with Hana's Chairman ■

Mr. ■ asked for the meeting to inquire about the impact that the Supreme Court's decision might have on Hana's application to acquire KEB. My calendar was already quite full, so my assistant scheduled the meeting with Mr. ■ in between two previously-scheduled appointments on March 15. The meeting with Mr. ■ began at 2:40 pm and could not have lasted more than 10 or 15 minutes, because I had another appointment with a former high-ranking official in the Ministry of Finance beginning at 3 pm. I conveyed to Mr. ■ the FSC's basic position at the time, which

⁸² S.D. Kim First Witness Statement, paras. 19-20 [emphasis added].

was that the application would be decided according to law and principle, and that the ultimate decision was for the Commission to make. I would not have been in a position to say more than this because whether to give final approval for acquisition could only be decided by the Commission. Again consistent with my belief in the importance of the government avoiding interference in prices negotiated by private agreement, I did not say anything about the purchase price of Hana's deal with Lone Star, which still was of no interest to me.⁸³

Dissenting Opinion, Annex 12

First Witness Statement of Joo Hung Sohn of the FSC:

I understand that Lone Star is arguing in this arbitration that the FSC pressured Hana to seek a reduction in the purchase price for Lone Star's KEB shares. That is false. I was the senior official in charge of processing Hana's application, and in that capacity had several communications with Hana regarding the application. I never discussed price in any of those discussions, or in any other communications with Hana. However, I never discussed with Hana the detailed content of its November 14, 2011 status report before Hana submitted it. I never told Hana that it needed to seek a new contract with Lone Star. I also never requested, pressured, or

⁸³ S.D. Kim Second Witness Statement, para. 20 [emphasis added]. This testimony materially accords with the testimony of Hana's chairman regarding this meeting. He testified that it was "a very brief meeting ... which I had requested to inquire what effect the Supreme Court's remand decision in the stock price manipulation case would have on Hana's pending application. I recall that, at that meeting, which could not have lasted more than about 10 or 15 minutes, Mr. Kim said something to the effect that a legal review was underway, and that the ultimate decision would be made by the Commission in due course. There was no discussion of price whatsoever" (██████████ Second Witness Statement, para. 3). See also, to the same effect, what is recorded in footnote 802 of the Award:

Hana Chairman ██████████ testified before the ICC tribunal as follows:

Hana's view was that the issue of Lone Star's disqualification was separate from Hana's Application, not least because Lone Star had not yet been convicted. I tried to convince the FSC Chairman to take the same view. During my meeting with the FSC Chairman, he indicated that the FSC was undertaking a legal review of the situation and that the final decision on Hana's Application was for the FSC to make, which it would do in due course. The FSC Chairman mentioned that the FSC was under a lot of public and political pressure at the time. However, it was clear to me that if the pressure were to be reduced, then he would not be opposed to working toward finalizing the approval of the transaction. Hence, I inferred from our conversation that he would need the Parties' help in overcoming the hurdles he faced. However, the FSC Chairman did not suggest – and I did not think it appropriate to ask – what the Parties could do in this regard. [emphasis in the Award]

Chairman ██████████ testified under cross-examination that as a result of his meeting with the FSC Chairman, he formed the view that Hana would stand a better chance of securing the FSC's approval if there was a reduction in the price.

encouraged Hana to renegotiate the terms of its transaction with Lone Star.⁸⁴

⁸⁴ J.H. Sohn First Witness Statement, para. 19 [emphasis added].