

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the annulment proceeding between

**LSF-KEB HOLDINGS SCA AND OTHERS**

(“Claimants”)

and

**REPUBLIC OF KOREA**

(“Applicant”)

**ICSID Case No. ARB/12/37**

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**DECISION ON STAY OF ENFORCEMENT OF THE AWARD**

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**Members of the *ad hoc* Committee**

Prof. Lawrence Boo, President

Prof. Doug Jones, AO, Member

Ms. Eva Kalnina, Member

**Secretary of the *ad hoc* Committee**

Mr. Alex B. Kaplan

15 December 2023

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<b>TABLE OF KEY ABBREVIATIONS / DEFINED TERMS</b>	
1976 BIT	The Agreement Between the Republic of Korea and the Belgium-Luxembourg Economic Union on the Encouragement and Reciprocal Protection of Investments, which entered into force on 3 September 1976
2011 BIT	The Agreement Between the Government of the Republic of Korea and the Belgium-Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments, which entered into force on 27 March 2011
Applicant or Respondent or Korea	The Republic of Korea
Arbitration	<i>LSF-KEB Holdings SCA and others v. Republic of Korea</i> (ICSID Case No. ARB/12/37)
Award	Final award rendered on 30 August 2022 in the underlying arbitration proceedings, ICSID Case No. ARB/12/37
Claimants' Application	Claimants' Application for Partial Annulment of the Tribunal's Award dated 27 July 2023
Claimants or Lone Star	LSF-KEB Holdings SCA, LSF SLF Holdings SCA, HL Holdings SCA, Kukdong Holdings I SCA, Kukdong Holdings II SCA, Star Holdings SCA, Lone Star Capital Management SPRL and Lone Star Capital Investments S. à r. l.
Committee	<i>Ad hoc</i> annulment committee constituted on 1 November 2023 comprising Professor Lawrence Boo Geok Seng (President), Professor Doug Jones, AO, (Member) and Ms. Eva Kalnina (Member)

<b>TABLE OF KEY ABBREVIATIONS / DEFINED TERMS</b>	
Convention or ICSID Convention	The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966
Hearing	Hearing on the Respondent’s Request for Continuation of Stay of Enforcement of the Award held on 22 November 2023
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (2006)
KEB	Korea Exchange Bank
LSF-KEB	LSF-KEB Holdings SCA
Parties	The Claimants and the Respondent
Request	Request by the Republic of Korea for Continuation of Stay of Enforcement dated 1 November 2023
Respondent’s Application	Republic of Korea’s Request for Partial Annulment of the Tribunal’s Award dated 31 August 2023
Response	Claimants’ Opposition to the Respondent’s Request for a Stay of Enforcement dated 10 November 2023
Stay Tr. [page:line] [(speaker)]	Transcript of the Hearing on the Respondent’s Request for Continuation of Stay of Enforcement of the Award
Tribunal	Arbitral tribunal in the underlying arbitration constituted on 22 June 2020 consisting of The Honourable Ian Binnie, C.C., Q.C., a national of Canada (President), The Honourable Charles N. Brower, a national of the United States of America

**TABLE OF KEY ABBREVIATIONS / DEFINED TERMS**

	(Member, appointed by the Claimants) and Professor Brigitte Stern, a national of France (Member, appointed by the Respondent)
United States Court	The United States District Court for the District of Columbia

1. This Decision addresses the Republic of Korea’s request (the “**Request**”) for the continuation of the stay of enforcement of the ICSID award rendered on 30 August 2022 (the “**Award**”) by the arbitral tribunal (the “**Tribunal**”) in *LSF-KEB Holdings SCA and others v. Republic of Korea* (ICSID Case No. ARB/12/37) (the “**Arbitration**”).

## **I. INTRODUCTION AND THE PARTIES**

2. This Decision will continue to use the “**Claimants**” or “**Lone Star**” to refer to LSF-KEB Holdings SCA and others and the “**Respondent**,” “**Korea**” or the “**Applicant**” for the Republic of Korea, as in the Arbitration. The Claimants and the Respondent are collectively referred to as the “**Parties**.”
3. The Claimants are: (i) LSF-KEB Holdings SCA (“**LSF-KEB**”), (ii) LSF SLF Holdings SCA, (iii) HL Holdings SCA, (iv) Kukdong Holdings I SCA, (v) Kukdong Holdings II SCA, (vi) Star Holdings SCA, and (vii) Lone Star Capital Management SPRL, seven companies organized under the laws of the Kingdom of Belgium; and (viii) Lone Star Capital Investments S. à r. l., a company organized under the laws of the Grand Duchy of Luxembourg.
4. The dispute in the Arbitration concerned the Claimants’ purchase of a controlling interest in Korea’s third largest commercial bank, Korea Exchange Bank (“**KEB**”), and the alleged actions and omissions of Korea’s tax and financial services regulatory authorities said to have affected this investment.
5. The dispute was brought under: (i) the Agreement Between the Republic of Korea and the Belgium-Luxembourg Economic Union on the Encouragement and Reciprocal Protection of Investments, which entered into force on 3 September 1976 (the “**1976 BIT**”); (ii) the Agreement Between the Government of the Republic of Korea and the Belgium-Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments, which entered into force on 27 March 2011 (the “**2011 BIT**”); and (iii) the Convention on the Settlement of Investment Disputes between States and

Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**” or the “**Convention**”).

6. In the Award, the Tribunal declined to exercise jurisdiction under the 1976 BIT as the Claimants’ investments did not fall under one of the six protected investment sectors. The Tribunal found that it had jurisdiction under the 2011 BIT over the Claimants’ claims related to the Respondent’s post-27 March 2011 acts and/or omissions. The Tribunal dismissed the tax claims as lacking a legal and factual basis.
7. The Tribunal’s majority found that the Respondent breached the 2011 BIT’s fair and equitable treatment obligation; however, the majority determined that Claimant LSF-KEB was also at fault due to its criminal wrongdoing. The majority further ordered the equal share of the loss and awarded Claimant LSF-KEB USD 216.5 million in damages, plus interest from 3 December 2011. The costs of arbitration were divided equally, and each side was ordered to bear its own representation costs.
8. On 19 October 2022, the ICSID Secretary-General registered a request for rectification of the Award filed by the Respondent. On 8 May 2023, the Tribunal issued a decision on the rectification of the Award.

## **II. PROCEDURAL BACKGROUND**

9. On 27 July 2023, the International Centre for Settlement of Investment Disputes (“**ICSID**”) received an application for partial annulment of the Award from Lone Star (the “**Claimants’ Application**”), together with Exhibits CAX-0001 through CAX-0035 and Legal Authorities CLX-0001 through CLX-0021.
10. On 7 August 2023, pursuant to Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (2006) (the “**ICSID Arbitration Rules**”), the ICSID Secretary-General registered the Claimants’ Application.
11. On 1 September 2023, ICSID received an application for partial annulment of the Award from the Republic of Korea (the “**Respondent’s Application**”), together with Legal Authorities RAA-0001 through RAA-0005. The Respondent’s Application also



contained a request under Article 52(5) of the Convention and Rule 54 of the ICSID Arbitration Rules for the stay of enforcement of the Award until the Respondent's Application was decided.

12. On 12 September 2023, pursuant to Rule 50(2) of the ICSID Arbitration Rules, the ICSID Secretary-General registered the Respondent's Application. On the same date, in accordance with Rule 54(2) of the ICSID Arbitration Rules, the Secretary-General informed the Parties that the enforcement of the Award had been provisionally stayed.
13. By letter to the Parties dated 13 October 2023, the ICSID Secretary-General proposed the appointment to the *ad hoc* Committee of Prof. Lawrence Boo, a national of the Republic of Singapore, as President, and Prof. Doug Jones, AO, a national of the Commonwealth of Australia and Ireland, and Ms. Eva Kalnina, a national of the Republic of Latvia, as Members. The proposed individuals had been designated to the ICSID Panel of Arbitrators by the Republic of Singapore, the Commonwealth of Australia, and the Republic of Latvia, respectively.
14. The Parties were invited to provide their comments on the proposal, if any, by 20 October 2023. By separate emails of 20 October 2023, the Parties confirmed that they did not have any comments on the proposed appointments.
15. On 1 November 2023, in accordance with ICSID Arbitration Rules 6 and 53, the ICSID Acting Secretary-General notified the Parties that the *ad hoc* Committee composed of Prof. Boo (as President), Prof. Jones and Ms. Kalnina had been constituted (the "**Committee**"). On the same date, the Parties were notified that Mr. Alex Kaplan, Senior Legal Counsel, ICSID, would serve as Secretary of the Committee.
16. Also on 1 November 2023, Korea submitted its Request, together with Exhibits RAE-0001 through RAE-0003 and Legal Authorities RAA-0006 through RAA-0019.
17. Following extensive pre-constitution correspondence between the Parties regarding the procedure related to the Request, the Committee sent correspondence to the

Parties on 2 November 2023 acknowledging the Parties' agreement regarding the due dates for the filing of the Request and the Claimants' Opposition to the Respondent's Request for a Stay of Enforcement (the "**Response**").

18. The Committee also understands that the Claimants have invoked Rule 54(2) of the ICSID Arbitration Rules, seeking the Committee's ruling on the Request 30 days after the constitution of the Committee, *i.e.*, by December 1, 2023. The ICSID Secretary-General's provisional stay remains effective until the Committee issues its Decision on Korea's Request.
19. Thereafter, on 10 November 2023, the Claimants filed their Response, together with Exhibits CAX-0036 through CAX-0065 and Legal Authorities CLX-0022 through CLX-0057.
20. On 19 November 2023, the Parties jointly submitted an Order from the United States District Court for the District of Columbia (the "**United States Court**"), where LSF-KEB, the Award creditor, had filed an action to enforce the Award. The Order states that "*this matter is stayed until termination of the stay of enforcement of the arbitration award in LSF-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No. ARB/12/37....*"<sup>1</sup>
21. A hearing on Korea's Request was convened on 22 November 2023 by video conference (the "**Hearing**").

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<sup>1</sup> *LSF-KEB Holdings SCA v. Republic of Korea*, United States District Court for the District of Columbia Case No. 1:23-cv-1911-APM, Order, 13 November 2023.

### III. THE PARTIES' POSITIONS

#### A. THE LAW APPLICABLE

##### (1) Applicable Legal Standard

###### *a. The Applicant's Position*

22. Korea refers to Article 52(5) of the Convention and Rule 54(2) of the ICSID Arbitration Rules, which confer on the Committee the authority to stay the enforcement of the Award during the pendency of the annulment proceeding. Article 52(5) states that “[t]he Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.”<sup>2</sup> Rule 52(4) similarly enables the Committee to stay the enforcement of the Award.<sup>3</sup>
23. Korea submits that the practice of granting stays of enforcement is consistent with the object and purpose of Article 52 of the Convention.<sup>4</sup> As recognised by the *ad hoc* committee in *Tenaris v. Venezuela*, a party cannot be expected to perform a “*pecuniary obligation of an award voluntarily, when it considers it fundamentally flawed, unless an ad hoc committee has rejected its consideration and upheld it.*”<sup>5</sup>
24. The *ad hoc* committee in *RREEF v. Spain* similarly reasoned that “[p]ermitting a stay is in reality a further step to preserve the Award’s eventual finality so that if affirmed by the annulment process, there could be no doubt as to its universal finality and enforceability.”<sup>6</sup>

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<sup>2</sup> Convention, Article 52(5)

<sup>3</sup> Request, ¶ 7.

<sup>4</sup> Request, ¶ 10.

<sup>5</sup> Request, ¶ 10, quoting **RAA-0006**, *Tenaris S.A. & Talta – Trading E Marketing Sociedade Unipessoal LDA. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Stay of Enforcement, 23 February 2018 (“*Tenaris v. Venezuela*”), ¶ 101.

<sup>6</sup> Request, ¶ 11, quoting **RAA-0010**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Stay of Enforcement, 28 October 2020 (“*RREEF v. Spain*”), ¶ 61.

**b. The Claimants' Position**

25. The Claimants submit that the word “require” in Article 52(5) of the Convention indicates that the applicable law sets a high bar for Korea’s Request for the continuation of the stay of enforcement.<sup>7</sup> The Claimants place reliance on *Total v. Argentina*:

*[T]he ICSID Convention does not use other less categorical verbs, such as “recommend”, “deserve”, “justify” or similar words, but resorts to the imperative verb “require”...[T]o order the continuation of the stay of enforcement of the Award, the Committee has to be satisfied that the circumstances of the particular case so require. It is for the party seeking the stay to show that such circumstances exist, and thus, the stay of enforcement of the award should be continued.*<sup>8</sup>

26. The Claimants submit that even if the Committee finds that circumstances require the continuation of the stay, the Committee retains the discretion to decide otherwise.<sup>9</sup>

**(2) The Burden of Proof**

**a. The Applicant's Position**

27. Korea relies on the case of *Watkins v. Spain*,<sup>10</sup> where the *ad hoc* committee observed that each party bears the burden of proving any positive allegation that it raises. As such, Lone Star bears the burden of proving its case of the risks that Korea will not comply with the Award if annulment is denied.<sup>11</sup>

**b. The Claimants' Position**

28. The Claimants underscore that Korea bears the burden of proving that the circumstances require continuation of the stay of enforcement. As such, Korea must provide concrete evidence showing that a stay is required; general assertions and

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<sup>7</sup> Response, ¶ 21.

<sup>8</sup> Response, ¶ 21, citing **CLX-0033**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Stay of Enforcement, 4 December 2014 (“*Total v. Argentina*”), ¶¶ 79-80.

<sup>9</sup> Response, ¶ 23.

<sup>10</sup> Stay Tr. 12:4-12:16 (Mr. Ware); **RAA-0019**, *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Stay of Enforcement of the Award, 28 June 2021 (“*Watkins v. Spain*”), ¶23.

<sup>11</sup> *Ibid.*

speculation are not sufficient.<sup>12</sup> In this regard, the Claimants cite *Albaniabeg v. Albania*, in which the *ad hoc* committee provided a two-step analysis on stay of enforcement:

*The first step requires the [applicants] to establish the existence of particularized circumstances requiring the continuation of the stay, which the Committee agrees is an exceptional remedy, and in doing so the [applicants] must substantiate their allegations with evidence... In the event that the [applicants] are able to establish the existence of such circumstances, the Committee would proceed to the second step and assess whether, having regard to all the relevant circumstances and facts, a continuation of the stay should be granted...*<sup>13</sup>

29. From this test, the Claimants submit that a stay of enforcement is exceptional and justified only when the circumstances, proven by particularized evidence, so require.<sup>14</sup>

**B. THE TRENDS ON DECISIONS BY *AD HOC* COMMITTEES ON STAYS OF ENFORCEMENT OF AWARDS**

***a. The Applicant's Position***

30. Korea submits that the historical practice of *ad hoc* committees demonstrates a trend in favour of a stay of enforcement of the Award.<sup>15</sup> It relies on statistics, updated in 2023, which support that *ad hoc* committees have granted stays of enforcement in approximately 70 percent of publicly available decisions on enforcement.<sup>16</sup> It cites the observation of the *ad hoc* committee in *Tenaris v. Venezuela* that it:

*subscribe[d] to the mainstream jurisdiction of committees that exercise their discretion and grant stays when annulment of an award has been requested in good faith and neither with the*

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<sup>12</sup> Response, ¶¶ 18-19.

<sup>13</sup> Response, ¶ 20, quoting **CLX-0031**, *Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l v. Republic of Albania*, ICSID Case No. ARB/14/26, Decision Stay of Enforcement, 10 August 2021 ("**Albaniabeg v. Albania**"), ¶¶ 101-102.

<sup>14</sup> Response, ¶ 20. See also Response, ¶¶ 2, 4, quoting **CLX-0022**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement, 31 August 2017 ("**Burlington v. Ecuador**"), ¶ 73.

<sup>15</sup> Request, ¶ 12.

<sup>16</sup> Request, ¶ 8, citing **RAA-0008**, J. Tomkins, "Stay of Enforcement of ICSID Awards," JusMundi, 10 October 2023, ¶ 14 (finding that a stay was granted in 57 of 83 decisions for which information is available).

*abusive intention to escape the obligation to abide by its terms nor as a demonstration of its refusal to accept the obligation under the ICSID Convention to comply with the award.*<sup>17</sup>

**b. The Claimants' Position**

31. The Claimants disagree with the Respondent that current practice reflects a tendency toward granting stays of enforcement. The Claimants cite *Infrastructure Services v. Spain*, in which the *ad hoc* committee stated that it “does not accept that there is a prevailing practice amongst ICSID annulment committees which supports the existence of a presumption, whether *de jure* or *de facto*, in favour of granting a stay.”<sup>18</sup>
32. The Claimants have also presented statistics illustrating this point: *e.g.*, between 2017 and 2020, *ad hoc* committees decided 38 requests for a stay, but only 13 of those requests were granted (8 of which were conditional on some form of guarantee or undertaking).<sup>19</sup>

**C. WHETHER THE CIRCUMSTANCES OF THE PRESENT CASE REQUIRE A STAY**

**(1) Both Parties have filed Applications for Partial Annulment of the Award**

**a. The Applicant's Position**

33. Korea highlights that the Claimants are also seeking partial annulment of the Award, even as it seeks in parallel to enforce the Award before the United States Court. Korea refers to *Continental Casualty v. Argentina*, where the *ad hoc* committee observed:

*Nevertheless, in the Committee's view, it would not in general be appropriate for an award to be enforced in circumstances where neither of the parties considers the award to be final with extant applications for Annulment having been made for the entire Award.*<sup>20</sup>

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<sup>17</sup> Request, ¶ 9, quoting **RAA-0006**, *Tenaris v. Venezuela*, ¶ 104.

<sup>18</sup> Response, ¶ 16, quoting **CLX-0023**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Stay of Enforcement, 21 October 2019, ¶ 64.

<sup>19</sup> Response, ¶ 17, citing, *inter alia*, **CLX-0025**, J. Commission, “Decisions on Stays of Enforcement in International Arbitration,” Burford Capital, 2 November 2020, p. 2.

<sup>20</sup> Request, ¶ 15, quoting **RAA-0012**, *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Stay of Enforcement, 23 October 2009 (“**Continental Casualty v. Argentina**”), ¶ 14.

34. For Korea, the above reasoning applies with greater force as, unlike *Continental Casualty*, both Parties have requested annulment of the Award. The Parties' respective applications cover virtually all aspects of the Award (jurisdiction, merits, and damages).<sup>21</sup> Both Parties have requested the annulment of the damages which Lone Star is seeking to enforce.<sup>22</sup> It is thus uncertain as to "*whether Korea ultimately will have any pecuniary obligations under the Award at all.*"<sup>23</sup>
35. As such, Korea argues that it is not appropriate for the Award to be enforced where both Parties agree that the Tribunal's damages decision is fundamentally flawed.<sup>24</sup> Korea highlights that the Claimant has commenced an enforcement action in the United States Court for the damages ordered in the Award—USD 216,018,682 plus interest—even though enforcement of the Award was provisionally stayed by the ICSID Secretary-General.<sup>25</sup>
36. Korea says that if the provisional stay is lifted, Lone Star will continue to aggressively pursue enforcement of the Award, as demonstrated by its conduct before the United States Court<sup>26</sup> even after the ICSID Secretary-General informed the Parties of the provisional stay. An aggressive enforcement phase while both Parties are seeking to annul the Award would be "*inappropriate and prejudicial to Korea.*"<sup>27</sup>
37. At the Hearing, Korea referred the Committee to the case of *Dominion Minerals v. Panama*,<sup>28</sup> wherein Dominion, the award creditor, had sought to annul both the award on damages and the award on costs.<sup>29</sup> The *ad hoc* committee found that obliging Panama to pay damages or costs on a basis which was challenged by

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<sup>21</sup> Request, ¶ 16.

<sup>22</sup> Request, ¶ 16.

<sup>23</sup> Request, ¶ 2.

<sup>24</sup> Request, ¶ 16.

<sup>25</sup> Request, ¶¶ 3-6.

<sup>26</sup> Request, ¶ 18.

<sup>27</sup> Request, ¶ 18.

<sup>28</sup> Stay Tr. 16:6-18:21 (Mr. Ware), citing **CLX-0053**, *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Decision on Stay of Enforcement, 21 July 2022 ("**Dominion Minerals v. Panama**"), ¶¶ 77-79.

<sup>29</sup> **CLX-0053**, *Dominion Minerals v. Panama*, ¶ 78.

Dominion on annulment strongly militated in favour of staying the enforcement of the award.<sup>30</sup>

38. Korea disagrees with Lone Star's assertion that *Continental Casualty v. Argentina* did not establish a principle that a stay is required where both parties have sought annulment of the award. Instead, Korea submits that *Continental Casualty* has affirmed the general legal principle that a party should not approbate and reprobate.<sup>31</sup>

***b. The Claimants' Position***

39. The Claimants submit that there is no rule that the fact that the Parties have filed cross-annulments is a circumstance in favour of continuance of the stay of enforcement and a specific inquiry into determining whether a stay is mandatory.<sup>32</sup>
40. The Claimants highlight that their approach in seeking enforcement of the Award is not inconsistent with its request for partial annulment. Lone Star's annulment application only seeks to challenge the Tribunal's determination of contributory fault and its reduction of the damages awarded by 50% such that the sums awarded are only USD 216 million.<sup>33</sup> If the Claimant's request for partial annulment is successful, the damages award will remain intact, and it may then collect any additional damages.<sup>34</sup>
41. The Claimants observe that the case of *Continental Casualty* did not establish a principle that a stay is appropriate where both parties have sought annulment of the Award. The *ad hoc* committee in that case based its decision on the specific circumstances before it, as the amount of damages awarded was relatively small.<sup>35</sup>

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<sup>30</sup> CLX-0053, *Dominion Minerals v. Panama*, ¶ 79.

<sup>31</sup> Stay Tr. 20:20-21:11 (Mr. Ware).

<sup>32</sup> Response, ¶ 27.

<sup>33</sup> Stay Tr. 39:10-39:20 (Mr. Alexandrov).

<sup>34</sup> Response, ¶ 28.

<sup>35</sup> Response, ¶ 29, citing RAA-0012, *Continental Casualty v. Argentina*, ¶ 15.



42. Lone Star submits that the pursuit of enforcement of an arbitral award “*is the expected course of action*” and is not a circumstance justifying the continuation of the stay of enforcement of the Award. Article 53(1) of the Convention explicitly recognizes that an award creditor has a right to demand compliance with an award absent a stay. It states in relevant part, “[e]ach party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”<sup>36</sup>
43. Lone Star further rejects Korea’s suggestion that it improperly pursued enforcement in the United States Court<sup>37</sup> as it had acted transparently and complied with the Convention, the ICSID Arbitration Rules, and the provisional stay.<sup>38</sup> The enforcement action was initiated prior to the Respondent’s Application and the present Request, and the United States Court was informed by the Claimants that the enforcement of the Award might be provisionally stayed.<sup>39</sup> Any steps taken after the provisional stay was in force were to effectuate service on Korea.<sup>40</sup>

## **(2) Prejudice to the Claimants**

### ***a. The Applicant’s Position***

44. Korea also submits that the Claimants will not suffer any prejudice or hardship resulting from the stay as they (i) will be compensated for a delay in enforcement through the payment of post-Award interest in the amount of above USD 1 million a month up to the date of payment, should the Award not be annulled,<sup>41</sup> which creates a strong deterrent and fully compensates Lone Star;<sup>42</sup> and (ii) the principal amount of the ICSID Award of USD 216 million represents only 6% of Lone Star’s proceeds from the sale of the KEB stake to Hana Bank.<sup>43</sup>

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<sup>36</sup> Response, ¶ 26 and n. 48.

<sup>37</sup> Response, ¶ 6.

<sup>38</sup> Response, ¶ 15.

<sup>39</sup> Response, ¶¶ 7, 9.

<sup>40</sup> See Response, ¶¶ 10-14.

<sup>41</sup> Request, ¶ 31(a); Stay Tr. 52:10-52:12 (Mr. Ware).

<sup>42</sup> Stay Tr. 29:15-29:20 (Mr. Ware).

<sup>43</sup> Request, ¶ 31(b).

**b. The Claimants' Position**

45. According to the Claimants, they will be unduly prejudiced by the continuation of the stay, as the events giving rise to this case occurred as early as 2007 and the Arbitration commenced in 2012. The Claimants observe that it took a decade to resolve the Arbitration, and a year has passed since the Award was rendered. The Claimants say that they should not be forced to wait any longer to collect the damages awarded.<sup>44</sup>
46. Furthermore, even if the Claimants would be compensated via post-Award interest for a delay in enforcement, the running of interest is not a circumstance that justifies a continuation of the provisional stay as confirmed by the committee in *SolEs v. Spain*.<sup>45</sup>

**(3) Whether the Applicant is Likely to Comply with the Award**

**a. The Applicant's Position**

47. Korea observes that *ad hoc* committees have balanced any prejudice that could be suffered by the award creditor in the event the stay remains in place, such as a risk that the applicant State will not comply with the Award.<sup>46</sup>
48. Korea submits that there is no credible risk that it “*would refuse or fail to comply with its pecuniary obligations under the Award, if it were not annulled.*”<sup>47</sup> Korea further states that it “*respects international law, complies with its international obligations, and has excellent credit ratings.*”<sup>48</sup> In this regard, it also points to its fulsome participation in the Arbitration, including its payment of all advances on costs requested by ICSID.<sup>49</sup>

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<sup>44</sup> Response, ¶ 30.

<sup>45</sup> Response, ¶ 31, citing, *inter alia*, **RAA-0011**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Stay of Enforcement, 26 August 2020, ¶ 81.

<sup>46</sup> Request, ¶ 30.

<sup>47</sup> Request, ¶ 30.

<sup>48</sup> Request, ¶ 30.

<sup>49</sup> Request, ¶ 30.

49. As for the Claimants' argument that Korea has sought to set aside two UNCITRAL awards and its citation of articles which the Claimants say demonstrates Korea's hostility towards the Award, Korea submits that these instances only prove that when Korea has identified defects in awards, it has exercised its right to post-award remedies.<sup>50</sup>
50. With respect to the Claimants' argument that Korea would not comply with the Award based on the parallel proceedings in which Korea's Supreme Court had determined that the Korean National Tax Service had wrongfully assessed taxes and it ordered the refund of such taxes, and such amounts remained outstanding, Korea denies that it failed to repay the funds but points out that the Parties are still undergoing domestic litigation. Korea further submits that this demonstrates a risk of delay, and not a risk of non-compliance, which is balanced by the accrual of post-award interest.<sup>51</sup>

***b. The Claimants' Position***

51. The Claimants deny Korea's assertion that there is no reason to believe that Korea would not honour the Award should its annulment request prove unsuccessful and point out that Korea has not pledged to honour the Award if its annulment application is unsuccessful.<sup>52</sup>
52. The Claimants contend that there are "*serious concerns*" about Korea's willingness to comply with the Award, as evidenced from 6 public statements made by Korean officials with respect to this case demonstrating hostility towards the Award,<sup>53</sup> Korea's history of frustrating awards in previous cases, and Korea's track record of delaying payments owed to Lone Star.<sup>54</sup>

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<sup>50</sup> Stay Tr. 24:4-24:19 (Mr. Ware).

<sup>51</sup> Stay Tr. 28:12-28:17 (Mr. Ware).

<sup>52</sup> Response, ¶ 32, referring to Request, ¶ 30.

<sup>53</sup> Response, ¶¶ 33-34.

<sup>54</sup> Response, ¶ 39.

53. Lone Star highlights that Korea has no history of compliance with ICSID awards.<sup>55</sup> Lone Star further emphasises Korea's past practice of non-compliance, based on publicly available information. Korea has received two other adverse investor-State arbitration awards and has sought to set aside both awards. In *Mohammad Reza Dayyani, et al. v. Republic of Korea (I)*, PCA Case No. 2015-38 (UNCITRAL), Korea's attempt to set aside the award was unsuccessful and it has yet to pay the award to the claimants, who have initiated a second arbitration alleging that Korea's failure to pay amounts to a breach of the applicable treaty.<sup>56</sup>
54. The Claimants further refer to a parallel proceeding wherein Korea's Supreme Court had ordered in 2017 that the Korean National Tax Service refund to Lone Star at least KRW 194 billion (about USD 172 million) in taxes and penalties that it wrongfully assessed. Korea has only refunded less than 15% of that sum, and Lone Star has brought further legal action in Korea to recuperate the sums due.<sup>57</sup> As such, there is every expectation that Korea will similarly delay or obstruct payment to LSF-KEB for as long as possible.<sup>58</sup>

#### **(4) The Risk of Non-Recoupment**

##### ***a. The Applicant's Position***

55. Korea submits that it would suffer significant prejudice if the stay were not granted<sup>59</sup> as there is a serious risk that it would not be able to recoup the sums paid to Lone Star in the event that the relevant part of the Award is annulled.<sup>60</sup> In support of its argument, Korea refers to *RREEF v. Spain* wherein the *ad hoc* committee stated that the "*possibility of recoupment is...one of the main factors to be considered.*"<sup>61</sup>

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<sup>55</sup> Stay Tr. 43:19-44:3 (Mr. Alexandrov).

<sup>56</sup> Response, ¶¶ 35-36, referring to, *inter alia*, **CAX-0050**, *Republic of Korea v. Mohammad Reza Dayyani and others*, EWHC Case No. CL-2018-000454, Judgment, 20 December 2019.

<sup>57</sup> Response, ¶ 38.

<sup>58</sup> Response, ¶ 37.

<sup>59</sup> Request, ¶ 17.

<sup>60</sup> Request, ¶ 19.

<sup>61</sup> Request, ¶ 19, citing **RAA-0010**, *RREEF v. Spain*, ¶ 64.

56. Korea submits that Lone Star is a private equity fund that “*historically has focused on investing in distressed or undervalued assets, and later selling those assets for a profit.*”<sup>62</sup> Should the Award be enforced, Korea posits that, the Claimants would “*promptly distribute back to its upstream investors any proceeds earned on the investments of holding companies like LSF-KEB.*”<sup>63</sup>
57. Korea relies on (i) the testimony of ██████████ in the Arbitration, which confirms that Lone Star has a fiduciary duty to distribute the proceeds back to its investors,<sup>64</sup> (ii) a 7 January 2020 letter to the ICSID Tribunal, and (iii) a presumption that 171 percent total net return on LSF-KEB’s investment in KEB was promptly distributed to upstream investors.<sup>65</sup> As such, the Award proceeds would be “*impossible*” to recoup.<sup>66</sup>
58. Korea further submits that the risk of non-recoupment is compounded by the substantial quantum of damages ordered against it, which would require an earmarked budgetary allocation by the Korean Government.<sup>67</sup>

### ***b. The Claimants’ Position***

59. Lone Star submits that the risk of non-recoupment does not assist Korea to discharge its burden of proof with respect to its Request, and relies on *Masdar v. Spain*, where the committee noted that “*any risk of recouping amounts recovered under awards that are later annulled is a normal consequence of the design and structure of the ICSID Convention*” and stated that risk of non-recoupment is “*not a factor in deciding whether the circumstances require a stay.*”<sup>68</sup>

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<sup>62</sup> Request, ¶ 21, citing, *inter alia*, **CWE-0002**, ██████████ First Witness Statement (in the Arbitration), ¶ 2 and Korea’s Counter-Memorial (in the Arbitration).

<sup>63</sup> Request, ¶ 23.

<sup>64</sup> Stay Tr. 31:2-31:6 (Mr Ware); Stay Tr. 58:2-58:5 (Mr. Ware), Request, ¶ 23.

<sup>65</sup> Request, ¶¶ 24-27.

<sup>66</sup> Request, ¶¶ 20-21.

<sup>67</sup> Request, ¶ 28.

<sup>68</sup> Response, ¶ 40, citing **CLX-0043**, *Masdar Solar & Wind Coöperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Procedural Order No. 3 (Decision on Stay of Enforcement), 20 May 2020, ¶¶ 119-120.

60. The Claimants further submit that LSF-KEB does not pose a high risk of non-recoupment as it is not an individual, is not a shell company with a sole controlling individual or no assets, and it is not at risk of bankruptcy.<sup>69</sup> Moreover, Lone Star affirms that it has a track record of compliance with adverse judgments.<sup>70</sup>
61. Lone Star further contends that the distribution of funds to investors is not a sufficient circumstance to warrant a stay and submits that it would be irresponsible for LSF-KEB to distribute these proceeds while the Respondent's Application is pending.<sup>71</sup> Lone Star further indicates its willingness to provide a written undertaking with respect to the sums obtained during the pendency of annulment proceedings:

*If the ad hoc Committee has any concerns in this regard, Claimants would be willing to enter into a written undertaking stating that the parent entities in Lone Star's Fund IV (which held the investment in LSF-KEB) will not distribute any amounts obtained through enforcement proceedings during the pendency of the annulment proceedings to their investors, so that such funds are available to be returned in the event Korea's Annulment Request is granted (or such proportional amount as may be appropriate, based on which portions of the Award may be annulled).*<sup>72</sup>

62. As for Korea's assertion that it would require an earmarked budgetary allocation, the Claimants refer to *OI European Group v. Venezuela*, where the *ad hoc* committee stated that if an award debtor could avoid payment of the award simply on grounds that the money would need to come from public funds, then "Article 52(5) of the ICSID Convention and Arbitration Rule 54(1) would be dead letter provisions."<sup>73</sup> Lone Star further highlights that such a budgetary allocation would not result in irreparable

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<sup>69</sup> Response, ¶ 41.

<sup>70</sup> Response, ¶ 42.

<sup>71</sup> Response, ¶ 44.

<sup>72</sup> Response, ¶ 44.

<sup>73</sup> Response, ¶ 47, quoting **CLX-0052**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay of Enforcement, 4 April 2016, ¶ 120.

harm to Korea as it is a high-income country,<sup>74</sup> a point which the Claimants say is conceded by Korea.<sup>75</sup>

**D. WHETHER STAY SHOULD BE CONDITIONAL IF ORDERED**

**(1) The Applicant's Position**

63. At the Hearing, Korea submitted that the stay of enforcement of the Award should be unconditional as both Parties have filed annulment applications against the flawed damages assessment in the Award.<sup>76</sup>
64. In support of its argument, Korea referred the Committee to the case of *Dominion Minerals v. Panama* wherein the fact that the award creditor was seeking annulment of the award was a factor militating in favour of a grant of an unconditional stay of enforcement.<sup>77</sup>

**(2) The Claimants' Position**

65. Absent direct payment of the Award, the Claimants urge the Committee to require Korea to:
- a. Deposit the funds into an escrow account held by ICSID outside of Korea;
  - b. Provide an irrevocable and unconditional bank guarantee with a first-tier, non-Korean, international bank; or
  - c. Provide an irrevocable and unconditional letter of credit with a first-tier, non-Korean, international bank.<sup>78</sup>
66. The Claimants also request that “[t]he requisite security or written undertaking...be provided within 30 days of the ad hoc Committee’s decision on Korea’s Request for a

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<sup>74</sup> Response, ¶¶ 46-47.

<sup>75</sup> Stay Tr. 47:18-48:19 (Mr. Alexandrov).

<sup>76</sup> Stay Tr. 10:4-10:18 (Mr. Ware).

<sup>77</sup> Stay Tr. 18:13-18:21 (Mr. Ware), quoting **CLX-0053**, *Dominion Minerals v. Panama*, ¶¶ 71-93 (specifically ¶¶ 77-79).

<sup>78</sup> Response, ¶ 48.

*Stay, and if it is not timely provided, the stay should terminate automatically, without need for further intervention by this Committee.”*<sup>79</sup>

67. For the Claimants, these options will constitute the most effective way to ensure that Korea will pay the awarded damages if the Respondent’s Application does not succeed. In the alternative, a less preferred option for the Claimants would be to order Korea to provide a written assurance signed by the Minister of Justice or such other high-level official that can bind the Korean Government—that it will pay the full amount of the Award should the Respondent’s Application fail.<sup>80</sup> The Claimants further submit that they would not be put in a better position than they are currently in if Korea simply provides a guarantee that “*it will comply with its obligations under the Award and under the ICSID Convention.*”<sup>81</sup>

#### **IV. THE COMMITTEE’S ANALYSIS**

##### **A. THE APPLICABLE LAW**

##### **(1) Applicable Legal Standard**

68. The continuation of stay of enforcement of an award is governed by Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules. Article 52(5) of the ICSID Convention states as follows:

*The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.*

69. The question as to the applicable legal standard and the question of the burden of proof seems to have concerned *ad hoc* committees in almost every application for stay of enforcement. While the Convention emphasises the binding nature of the Award in Article 53, it also provides an aggrieved party the right (albeit on limited grounds) to

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<sup>79</sup> Response, ¶ 50.

<sup>80</sup> Response, ¶ 49.

<sup>81</sup> Stay Tr. 50:5-50:14 (Mr. Alexandrov).



seek its annulment under Article 52. Some *ad hoc* committees have observed that annulment under the ICSID system is an exceptional remedy<sup>82</sup> as the grounds justifying the same are limited and exceptional. Such a proposition is, of course, uncontroversial.

70. The Claimants also take the view expressed by some *ad hoc* committees that a stay of enforcement is an exceptional form of relief.<sup>83</sup> The Claimants do not, however, suggest that an applicant for such relief must show exceptional circumstances. They contend that the applicant must instead show “*particularized*” circumstances requiring a stay.<sup>84</sup> As such, they maintain that Korea must bear the burden of establishing that the circumstances are such as to require a stay of enforcement on that reasoning of Article 52(5) of the Convention.
71. Much has been discussed with respect to the use of the term “*require*” in Article 52(5) of the Convention suggesting that it is an “*imperative*”<sup>85</sup> term that imposes upon the party seeking stay the burden to show that such circumstances exist. The Committee, however, views Article 52(5) as merely establishing the legal standard to be met before enforcement may be stayed pending the decision on annulment. It does not speak to the burden of proof, exceptional or otherwise, required of the applicant seeking continuation or termination of the stay.

## (2) Burden of Proof

72. As observed by the Committee in *RREEF v. Spain*, the ICSID Arbitration Rules do not impose the burden solely on the applicant seeking the stay but also on the party seeking a modification or termination of the stay.<sup>86</sup> Rule 54(4) of the ICSID Arbitration Rules provides:

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<sup>82</sup> See, e.g., **CLX-0033**, *Total v. Argentina*, ¶¶ 73-74.

<sup>83</sup> Response, ¶ 20, quoting **CLX-0031**, *Albaniabeg v. Albania*, ¶¶ 101-102; Response, ¶ 23, quoting **CLX-0022**, *Burlington v. Ecuador*, ¶ 73.

<sup>84</sup> Response ¶ 20.

<sup>85</sup> **CLX-0033**, *Total v. Argentina*, ¶¶ 79-80.

<sup>86</sup> **RAA-0010**, *RREEF v. Spain*, ¶ 51.

(4) A *request* pursuant to [the stay of enforcement by the Tribunal or Committee] *shall specify the **circumstances that require the stay or its modification or termination***. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations. [emphasis added]

73. It thus follows that, on a proper understanding of Article 52(5) of the Convention read with Rule 54 of the ICSID Arbitration Rules, the burden of proof lies simply with the party making a positive assertion in the context of an application for a stay.

74. As such, it is for Korea as the Party seeking a stay to show circumstances which it alleges require the stay, while the burden lies on the Claimants to show that the circumstances which they allege require there to be no stay. The Committee will then consider these circumstances and decide where the balance lies, giving the Committee the entire discretion of whether to continue or terminate the stay.

**B. OBSERVATIONS ON THE TRENDS ON DECISIONS BY *AD HOC* COMMITTEES ON STAY OF ENFORCEMENT**

75. Each Party has presented statistics to the Committee showing the number of ICSID cases in which *ad hoc* committees have granted a continuation of stays of enforcement. Each Party has also tried to draw observations as to whether such decisions are on an upward or declining trend, to suggest to the Committee that it should follow these trends. Quite plainly, such statistics and trends, if any, should not have any role to play in the Committee's consideration of the facts of each specific case placed before it. The Committee's role is to determine if the circumstances require a continuation of the stay of enforcement or otherwise and nothing more.

**C. THE CIRCUMSTANCES OF THE PRESENT CASE**

**(1) Both Parties have filed Applications for Partial Annulment of the Award**

76. In most cases, it would be the award debtor, as applicant for annulment, who would seek a stay of enforcement to maintain the *status quo* pending the decision on the annulment. Where **both** parties apply for annulment, whether in whole or in part, the

most sensible approach would be for the successful party to refrain from seeking enforcement. It is therefore unusual for an award-creditor to seek annulment and at the same time resist a stay of enforcement of the award.

77. The *ad hoc* committee in *Dominion Minerals v. Panama* was dealing with one such case and observed that the fact that Dominion, the award creditor, had applied for partial annulment was a “*key circumstance...of critical significance, and which justifies a stay*”<sup>87</sup> of enforcement of the award.
78. It further reasoned that while Dominion was seeking to annul the award on damages and costs, it was also seeking to have the interest continuing to accrue.<sup>88</sup> The *ad hoc* committee took the view that Dominion’s argument that it was not seeking annulment of liability but only the damages awarded was “*problematic*” and “*inconsistent*” with its resisting a stay of enforcement sought by Panama.<sup>89</sup>
79. The Committee shares this same view. A party who seeks annulment of an award, whether in part or in whole, must have believed or have grounds to believe that the award suffers from an annulable defect. It is therefore inconsistent for it to request, at the same time, that it should be permitted to enforce the award to the extent that it believes it is so entitled.
80. Lone Star in this case has sought annulment on several aspects of the Award, one of which relates to the finding on contributory fault, *viz.* that LSF-KEB contributed to its losses equally with Korea in respect of the price reduction of USD 433 million in the sale of KEB shares, and thus the damages awarded were reduced by 50%.<sup>90</sup>
81. As a basis for annulment of this finding, Lone Star asserts that it was not heard by the Tribunal on the theory of contributory fault and describes this as the “*gravest*”

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<sup>87</sup> CLX-0053, *Dominion Minerals v. Panama*, ¶¶ 71.

<sup>88</sup> CLX-0053, *Dominion Minerals v. Panama*, ¶¶ 80-81.

<sup>89</sup> CLX-0053, *Dominion Minerals v. Panama*, ¶¶ 74-75.

<sup>90</sup> Award, ¶¶ 948(c)-(e).

example of the Tribunal's alleged departure from fundamental rules of procedure.<sup>91</sup> It further asserts that the Tribunal made "*egregious errors*"<sup>92</sup> in the Award.

82. Lone Star contends that even if it fails in its bid to annul the Award's findings on contributory fault and the apportionment of damages, the awarded damages of USD 216.5 million, which represents 50% of its losses, would remain,<sup>93</sup> which it submits is not inconsistent with its opposition to the continuation of the stay of enforcement of the Award.
83. In the Committee's view, the Claimants' position presumes that if the Claimants' Application succeeds, it will receive the full damages of USD 433 million and that if it fails, the awarded damages of USD 216.5 million would remain. Lone Star's position is simply untenable in that it entertains no possibility that the Respondent's Application, which seeks to annul the Award's findings on liability, award of damages, and decision on costs,<sup>94</sup> could succeed.
84. In *Continental Casualty v. Argentina*, both parties sought annulment, as is the case here. The *ad hoc* committee, in ordering the continuation of stay of enforcement of the award, observed that while Continental, like Lone Star, did not request the annulment of that part of the award which it was seeking enforcement:

*[I]t would not in general be appropriate for an award to be enforced in circumstances where neither of the parties considers the award to be final with extant applications for Annulment having been made for the entire Award.*<sup>95</sup>

85. The Committee agrees with the underlying rationale expressed by the *ad hoc* committee in *Continental Casualty*. By seeking annulment, whether in whole or in part, the requesting party asserts that there are defects in the award which affects its

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<sup>91</sup> Claimants' Application, ¶ 18.

<sup>92</sup> Claimants' Application, ¶ 18.

<sup>93</sup> Award, ¶ 948(e)(i).

<sup>94</sup> Respondent's Application, ¶ 241(a).

<sup>95</sup> RAA-0012, *Continental Casualty v. Argentina*, ¶ 14.

certainty and finality. Thus, an award creditor who seeks annulment of the award, whether in whole or in part, should await the outcome of the annulment process.

86. Further, the Committee's view is fortified by the extent of the Parties' annulment applications. In this regard, the Claimants have sought to annul findings on:

*(i) the Tribunal's refusal to exercise jurisdiction under the 1976 BIT or the 2011 BIT over Respondent's breaches with respect to the HSBC transaction and certain of Claimants' tax claims, (ii) the Award's apportionment of Claimants' loss in the Hana transaction to cut in half the damages awarded for Respondent's breach of the 2011 BIT, (iii) the amount awarded, and (iv) the Award's failure to hold Respondent liable for conduct of its tax authorities.<sup>96</sup>*

87. The Respondent's Application seeks the following relief:

*Annul (i) paragraph 948 of the Award, which sets forth the Majority's finding of liability, award of damages, and decision on costs, and (ii) all paragraphs of the Award that support the determinations contained in paragraph 948...<sup>97</sup>*

88. The Respondent's Application is extensive and seeks the annulment of liability, damages, and costs, and both Parties seek to annul the damages awarded. In such a scenario, and on the face of the Parties' annulment applications, the Committee considers it premature and inappropriate for any part of the Award to be enforced before any opportunity to consider the alleged defects.

89. On this basis alone, the Committee considers it appropriate to order the continuation of the stay of enforcement of the Award. However, giving due respect to the Parties' other contentions, the Committee will discuss them briefly.

## **(2) Prejudice to the Claimants**

90. Lone Star contends that this Arbitration had taken about a decade before the Award was finally issued and more than a year has since elapsed. It urges that no further delay should be permitted as the Claimants have waited long enough, and that it

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<sup>96</sup> Claimants' Application, ¶ 129.

<sup>97</sup> Respondent's Application, ¶ 241(a).

should now be permitted to enforce the Award against Korea. The Claimants further submit that the accrual of post-award interest would not be sufficient to compensate the Claimants for their continuing loss and does not justify the continuation of the stay.

91. The Committee sees little merit in this argument. The duration of the Arbitration enabled each Party to present their best case to the Tribunal. There is no suggestion that any Party had caused any unnecessary delay. In any event, the Committee is satisfied that any delay in payment under the Award would be ameliorated by the accrual of post-award interest should the Claimants prevail on annulment.

### **(3) Whether the Applicant is Likely to Comply with the Award**

92. The Committee disagrees with Lone Star's argument that there is a serious risk and "*every reason to expect that*"<sup>98</sup> Korea would not comply with the Award based on the various public statements made by certain political leaders and its allegation that the Korean Government had disregarded some orders made against it.
93. The Committee views such statements as merely the expressions of disagreement with the decisions of the Tribunal. They are entirely consistent with the Respondent's belief that it was right, and that it would challenge the adverse orders made against it.
94. Similarly, Korea's conduct in challenging the awards made in other non-ICSID investor-State arbitrations were lawful exercises of its rights under the arbitration procedures of the respective regimes, and not reflective of a tendency to renege on its obligations.
95. Korea has a modern judicial system. The fact that the Korean Supreme Court has, on occasions, ruled in favour of Lone Star and against the Korean National Taxation Service, is testament to the independence of the Korean judiciary. If indeed, the

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<sup>98</sup> Response, ¶ 37.

Korean Government should fail to comply with any court order as Lone Star asserts, the Korean judiciary will no doubt be able to address such non-compliance.

96. As a State, Korea has much at stake should it choose to defy or not comply with any award made against it. The fact that Korea has sought annulment as permitted under the Convention and the ICSID Rules is not an indication that Korea has any intention not to make payment in satisfaction of any ICSID award. On the evidence before this Committee, there seems to be no reasonable basis to assume that Korea would renege on its obligations both under the BIT or as a party to the ICSID Convention.
97. In any event, if Korea refuses to comply with the pecuniary obligations imposed by the Award should they survive the annulment process, Lone Star has recourse to mechanisms within Korea and outside of Korea to enforce the same.

#### **(4) Risk of Non-recoupment**

98. Following the Committee's analysis and decision above (at paragraph 89), the question of whether there is a risk of non-recoupment of payments made to Lone Star in satisfaction of the Award, should the stay be lifted, no longer arises for consideration. It should be said however, that the Committee is not convinced that the undertaking suggested by counsel for Lone Star meets the concerns regarding non-recoupment raised by Korea.

#### **D. WHETHER A STAY SHOULD BE CONDITIONAL, IF ORDERED**

99. Given the Committee's decision above (at paragraph 89), there is also no further need to consider if a stay should be granted on conditions such as the provision of security. However it is apposite to observe that the Committee is not satisfied that there are circumstances requiring security to be provided.

#### **V. DECISION**

100. **For the reasons set forth above, the Committee hereby:**

- (1) Grants Korea's Request and orders that the stay of enforcement of the Award is continued and remains in effect, without security or other conditions, until the Committee renders its decision on the Parties' annulment applications; and
- (2) Reserves its decision on costs to the Committee's decision on the Parties' annulment applications.

[signed]

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Prof. Doug Jones, AO  
Member of the *ad hoc* Committee

[signed]

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Ms. Eva Kalnina  
Member of the *ad hoc* Committee

[signed]

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Prof. Lawrence Boo  
President of the *ad hoc* Committee