



ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/12/1

TETHYAN COPPER COMPANY PTY LIMITED V. ISLAMIC REPUBLIC OF PAKISTAN

DECISION PARTIALLY TERMINATING THE STAY OF ENFORCEMENT OF THE AWARD

30 October 2020

Tribunal:

[Joongi Kim](#) (President of the Ad Hoc Committee)

[Carita H. Wallgren-Lindholm](#) (Member)

[Bernardo Sepúlveda-Amor](#) (Member)

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Decision Partially Terminating the Stay of Enforcement of the Award

I. PROCEDURAL BACKGROUND

1. On 17 September 2020, the Committee rendered a Decision on the Stay of Enforcement of the Award (the "Decision") regarding Tethyan Copper Company PTY Limited's ("Claimant", "TCCA", "Tethyan") application for the termination of the stay of enforcement of the Award rendered on 12 July 2019 (the "Award") by the arbitral tribunal (the "Tribunal").

2. The Committee decided and directed in Paragraph 213 of the Decision *inter alia* that:

"213. For the foregoing reasons, the Committee hereby:

(a) DECIDES that the stay of enforcement of the Award rendered on 12 July 2019 shall be continued on a conditional basis;

(b) DECIDES that Applicant shall provide an unconditional and irrevocable bank guarantee or letter of credit for 25% of the Award, plus accrued interest as of the date of this Decision, from a reputable international bank based outside of Pakistan, pledged in favour of Claimant and to be released on the order of the Committee;

(c) DECIDES that Applicant shall provide the Committee with a letter signed by Pakistan's Minister of Finance or the official having full authority to bind Pakistan that, to the extent the Award is not annulled, it undertakes as follows:

(i) in compliance with its obligations under the ICSID Convention, Applicant will recognize the Award rendered by the Tribunal as final and binding and will abide by and comply with the terms of the Award;

(ii) in compliance with its obligations under the ICSID Convention, Applicant will unconditionally, irrevocably, and voluntarily pay the pecuniary obligations imposed by the Award within 120 days after the notification by the Secretary-General of ICSID of the Committee's Decision on the Annulment Application such that Claimant will be fully compensated including interest and will not need to engage in any action to recognize, enforce, or execute the Award under [Article 54 of the ICSID Convention](#) in any ICSID Contracting State; and

(iii) Applicant will attest that any amount of the Award attached or received by Claimant will not be subject to the intervention of Pakistan's courts initiated by the executive branch of the Pakistani government.

(d) ORDERS that should Applicant not furnish the security and undertaking in the terms as set out in Paragraphs (b) and (c), respectively, to the satisfaction of the Committee, within 30 days after

notification of this Decision, the stay of enforcement in the amount of 50% of the Award, plus accrued interest as of the date of this Decision, shall be lifted. The stay will be lifted according to this Paragraph provided that Claimant has submitted the undertaking set out in Paragraph (g) below.

(e) ORDERS Claimant to provide an unconditional and irrevocable bank guarantee or letter of credit in the amount of the costs that Applicant incurs for providing a bank guarantee or letter of credit according to Paragraph (b) above, which shall be confirmed by the Committee, from a reputable international bank based outside of Pakistan, pledged in favour of Applicant and to be released as determined by the Committee if the Award is annulled, within 30 days of Applicant's provision of the bank guarantee or letter of credit under Paragraph (b) above;

(f) ORDERS Claimant to place into an escrow account under the sole control of an international escrow agent and under the direction of the Committee any amounts collected through enforcement if the stay is lifted according to Paragraph (d) above;

(g) ORDERS Claimant to provide an undertaking, to the satisfaction of the Committee, that, if the Award is annulled, it will pay any amounts that Pakistan cannot recover from the escrow account that will hold assets obtained from enforcement, excluding those amounts due to Pakistan's third-party creditors;

(h) DENIES all other relief requested;

(i) RESERVES its right to revisit at any time its decision and order, by its own motion or, in light of the circumstances, at the request of either party based on a significant change in conditions and to the satisfaction of the Committee, to modify or terminate the stay, or vary or amend its decision regarding the undertakings herein; and,

(j) RESERVES its decision on costs for a subsequent stage of the proceedings."

3. As of 19 October 2020, the Islamic Republic of Pakistan ("Applicant" or "Pakistan") did not submit the unconditional and irrevocable bank guarantee or letter of credit for 25 percent of the Award plus accrued interest as of the date of the Decision and the undertaking by the Minister of Finance or the official having full authority to bind Pakistan as required under Paragraphs 213(b) and 213(c) of the Decision.
4. On 20 October 2020, Claimant submitted a letter stating that Pakistan "failed to comply" with the conditions set out in Paragraphs 213(b) and 213(c) of the Decision and that the stay of enforcement should be lifted in the amount of 50 percent of the Award plus accrued interest pursuant to Paragraph 213(d). Claimant submitted a sample of the text of the undertaking based on Paragraph 213(g) and requested the Committee to lift the stay accordingly "immediately upon receipt of the fully executed undertaking".
5. By email of 22 October 2020, Claimant submitted an undertaking that was jointly executed by Claimant's Chairman of the Board of Directors, Mr. William M. Hayes, and another Member of the Board of Directors, Mr. Rich Haddock, providing as follows:
"Dear Members of the Committee,

We refer to the Annulment Committee's Decision on Stay of Enforcement of the Award dated September 17, 2020 (the 'Decision').

Pursuant to the instructions of the Annulment Committee in the Decision, Tethyan Copper Company Pty Limited hereby undertakes that it will place into an escrow account, under the sole control of an international escrow agent and under the direction of the Committee, any amounts collected through its enforcement of the ICSID Award rendered on 12 July 2019 by the arbitral tribunal in Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan (ICSID Case No. ARB/12/1) (the 'Award').

Tethyan Copper Company Pty Limited likewise undertakes that, if this Committee annuls the Award, it will pay the Islamic Republic of Pakistan any amounts that Pakistan cannot recover from the escrow account excluding those amounts due to Pakistan's third-party creditors."

6. On 27 October 2020, at the invitation of the Committee, Pakistan submitted a response regarding the Claimant's undertaking. In its letter, Pakistan requested that the Committee require "TCCA to provide a copy of the consent or resolution that authorizes the undertaking without a board of directors meeting or which permits the meeting to be held electronically, as we understand to be required under the laws and rules applicable to TCCA".
7. On 28 October 2020, TCCA submitted a copy of the resolution of its Board of Directors dated 20 October 2020 authorizing "[a]ny two available Directors... to sign the Undertaking on behalf of the Board" and a copy of Article 70 of its Constitution concerning how its Board of Directors may pass written resolutions.

II. THE COMMITTEE'S ANALYSIS

8. The Committee granted a continuation of the stay of enforcement of the Award subject to the conditions established in the Decision. The Committee conditioned the stay of enforcement upon both parties providing appropriate security and undertakings because it determined that "this solution appropriately balances both parties' concerns and interests under the circumstances of the case".¹
9. As of the date of this decision and past the 30-day deadline, Pakistan has not posted the required bank guarantee or security for the amount of 25 percent of the Award and has not provided the required undertaking for continuation of the stay. As a result, the conditions stipulated in Paragraphs 213(b) and 213(c) of the Decision have not been met.
10. Given that Pakistan has not fulfilled the conditions required under Paragraphs 213(b) and 213(c), Tethyan is not required to meet the conditions under Paragraph 213(e) of the Decision.
11. On 22 October 2020, Tethyan submitted an undertaking jointly executed by its Chairman and a Member of its Board of Directors. The Committee has reviewed Tethyan's undertaking, Tethyan's

¹ Para. 208, Decision.

Board of Directors' resolution of 20 October 2020 and Article 70 of Tethyan's Constitution and finds that in form and substance Tethyan's undertaking meets the requirements as stipulated under Paragraph 213(g) of the Decision.

12. The Committee concludes that Applicant has not complied with the conditions to fully maintain the stay of enforcement whereas Claimant has complied with the conditions for partially terminating the stay as called for under the Decision.
13. The Committee therefore decides that (1) the stay of enforcement for 50 percent of the Award plus accrued interest will be terminated as provided under Paragraph 213(d) of the Decision, and orders that (2) Claimant must place into an escrow account under the sole control of an international escrow agent and under the direction of the Committee any amounts collected through enforcement of the Award as provided under Paragraph 213(f) of the Decision.

III. DECISION AND ORDER

14. For the foregoing reasons, according to [Article 52\(5\) of the ICSID Convention](#) and ICSID Arbitration Rule 54(3), the Committee hereby:
 - a. DECIDES that the stay of enforcement of the Award will be lifted in the amount of 50 percent of the Award plus accrued interest as of the notification this decision;
 - b. ORDERS Claimant to place into an escrow account under the sole control of an international escrow agent and under the direction of the Committee any amounts collected through enforcement of the Award;
 - c. RESERVES its right to revisit at any time its decision or order, at the request of either party or by own its motion, to vary or amend its decision or order; and,
 - d. RESERVES its decision on costs for a subsequent stage of the proceedings.