

**PCA CASE N° 2019-47**

**IN THE MATTER OF AN ARBITRATION  
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE  
CONTRACT OF STOCK TRANSFER BETWEEN EMPRESA MINERA DEL CENTRO DEL  
PERU S.A. AND DOE RUN PERU S.R. LTDA, DOE RUN RESOURCES, AND RENCO,  
DATED 23 OCTOBER 1997, AND THE GUARANTY AGREEMENT BETWEEN PERU AND  
DOE RUN PERU S.R. LTDA, DATED 21 NOVEMBER 1997**

- and -

**THE UNCITRAL ARBITRATION RULES 2013**

-between-

- 1. THE RENCO GROUP, INC.**
- 2. DOE RUN RESOURCES, CORP.**

-and-

- 1. REPUBLIC OF PERU**
- 2. ACTIVOS MINEROS S.A.C.**

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**PROCEDURAL ORDER NO. 3:  
DECISION ON BIFURCATION**

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**The Arbitral Tribunal**

Judge Bruno Simma (Presiding Arbitrator)  
Prof. Horacio Grigera Naón  
Mr. J. Christopher Thomas QC

**29 July 2020**

## 1 Background

- 1.1 By Notice of Arbitration dated 23 October 2018 (the “**Notice of Arbitration**”), the Claimants commenced these arbitration proceedings against the Respondents pursuant to Clause 12 of the Contract of Stock Transfer executed on 23 October 1997 (the “**Stock Transfer Agreement**”), Clause 3 of the Guaranty Agreement executed on 21 November 1997 (the “**Guaranty Agreement**”) and Article 3 of the UNCITRAL Arbitration Rules.
- 1.2 On 10 June 2019, Renco, Doe Run Resources Corporation, Peru, and Activos Mineros S.A.C. executed a Procedural Agreement, by which the Parties agreed that (i) the instant arbitration would be coordinated with the arbitration brought under the Trade Promotion Agreement between the Republic of Peru and the United States of America, dated 12 April 2006, entered into force on 1 February 2009, *The Renco Group, Inc. v. Republic of Peru*, PCA Case No. 2019-46 (“**Renco II**” or the “**Treaty Case**”), (ii) the same tribunal would be constituted to hear both arbitrations, and (iii) both arbitrations would be conducted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) (the “**UNCITRAL Arbitration Rules**”).
- 1.3 On 14 January 2019, the Respondents submitted their Response to the Notice of Arbitration (the “**Response to the NoA**”).
- 1.4 On 3 December 2019, the Respondents sent a letter to the Tribunal “giv[ing] notice regarding certain objections” with respect to “deficiencies and [...] certain threshold objections, including without limitation with respect to the relevant parties and scope of the agreement to arbitrate.”<sup>1</sup>
- 1.5 On 14 January 2020, a first procedural meeting was held via telephone conference during which the Parties agreed, and the Tribunal confirmed, that the procedural calendar for subsequent phases, if any, would be decided at the conclusion of the initial phase.
- 1.6 On 28 January 2020, the Respondents submitted a notice regarding bifurcation of preliminary issues.
- 1.7 On 3 February 2020, the Tribunal issued Procedural Order No. 1, which established a procedural calendar for written submissions leading up to a Hearing on Bifurcation.

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<sup>1</sup> Respondents’ Letter to the Tribunal, dated 3 Dec. 2019.

- 1.8 On 11 February 2020, the Claimants submitted their comments on the Respondent's notice regarding bifurcation (the "**Comments on Notice of Bifurcation**").
- 1.9 On 21 February 2020, the Respondents submitted their Request for Bifurcation on Preliminary Issues (the "**Request for Bifurcation**").
- 1.10 On 20 March 2020, the Claimants submitted their response to the Request for Bifurcation (the "**Response**").
- 1.11 Having confirmed the Parties' availability, by letter dated 27 February 2020, the Tribunal determined that the Hearing on Bifurcation would take place on 13 June 2020 instead of the originally-scheduled date (*i.e.*, 1 April 2020).
- 1.12 By respective letters dated 15 May 2020, the Parties proposed that the Hearing on Preliminary Objections take place by videoconference over two days rather than in person in Washington, D.C.
- 1.13 On 19 May 2020, the Tribunal confirmed that the Hearing on Preliminary Objections would take place by videoconference on 12-13 June 2020 and circulated a Draft Procedural Order No. 2 concerning the organization of the hearing for the Parties' comments.
- 1.14 On 3 June 2020, the Tribunal issued Procedural Order No. 2, establishing the format, schedule and all the technical and ancillary aspects for the Hearing on Bifurcation.
- 1.15 On 5 June 2020, a pre-hearing videoconference was held in order to discuss the organization of the Hearing on Bifurcation.
- 1.16 The hearing on Respondents' request for bifurcation (the "**Hearing on Bifurcation**") was held over two days by videoconference, 12 to 13 June 2020. The following persons attended the hearing:

Tribunal:	Judge Bruno Simma	Presiding Arbitrator
	Professor Horacio Grigera Naón	Arbitrator
	Mr. J. Christopher Thomas QC	Arbitrator
Claimants:	Mr. Joshua Weiss	The Renco Group
	Mr. Matthew Wohl	The Doe Run Company
	Mr. Edward Kehoe	King & Spalding

	Mr. David Weiss	King & Spalding
	Mrs. Isabel Fernandez de la Cuesta	King & Spalding
	Mr. Aloysius Llamzon	King & Spalding
	Mr. Cedric Soule	King & Spalding
	Mrs. Heleina Formoso	King & Spalding
	Mrs. Luisa Gutierrez Quintero	King & Spalding
Respondents:	Mr. Ricardo Ampuero	Republic of Peru
	Mr. Shane Martínez del Aguila	Republic of Peru
	Mr. Jonathan Hamilton	White & Case
	Ms. Andrea Menaker	White & Case
	Mr. Francisco Jijón	White & Case
	Mr. Jonathan Ulrich	White & Case
	Ms. Estefania San Juan	White & Case
Registry:	Mr. Martin Doe Rodriguez	Senior Legal Counsel, PCA
	Ms. Isabella Uría	Assistant Legal Counsel, PCA
	Ms. Alejandra Martinovic	Case Manager, PCA
Assistant to the Tribunal:	Dr. Heiner Kahlert	Assistant to the Tribunal
Others:	Mr. David Kasdan	Court Reporter
	Mr. Dante Rinaldi	Court Reporter
	Mr. Leandro Iezzi	Court Reporter
	Ms. Luciana Sosa	Court Reporter
	Ms. Silvia Colla	Interpreter
	Mr. Daniel Giglio	Interpreter
	Mr. Jason Aoun	Law in Order
	Ms. Amber Jade	Law in Order

## 2 The Respondents' Request for Bifurcation

2.1 The Respondents request that the Tribunal bifurcate the proceedings and consider the Respondents' three objections on "threshold contractual issues" (the "**Preliminary Objections**")

as preliminary questions.<sup>2</sup> The Respondents submit that bifurcation of the proceedings “would promote efficiency and fairness, and potentially eliminate the considerable expense of time, resources, and effort that such questions on the merits would demand”.<sup>3</sup>

### *The Respondents’ Preliminary Objections*

- 2.2 **First**, the Respondents’ object that neither of the Claimants are parties to the Stock Transfer Agreement or the Guaranty.<sup>4</sup> The Respondents further assert that Peru is not a Party to the Stock Transfer Agreement and that Activos Mineros S.A.C (“**Activos Mineros**”) is not a party to the Guaranty.<sup>5</sup> The Respondents contend that the Stock Transfer Agreement expressly provides that its parties are Empresa Minera del Centro del Peru S.A. (Centromin Peru S.A.) (“**Centromin**”), the predecessor of Activos Mineros, and Doe Run Peru S.R.LTDA (“**DRP**”), an affiliate of The Renco Group, Inc. (“**Renco**”) that is not a Party to this arbitration.<sup>6</sup> As for the Guaranty, the Respondents aver that this instrument was concluded between Peru and DRP.<sup>7</sup>
- 2.3 The Respondents contend that Peruvian law, which governs both the Stock Transfer Agreement and the Guaranty, does not support a finding that the Claimants are parties to the agreements, based simply on the presence of the Claimants’ signatures on the documents or the fact that the text of the documents refer to the Claimants.<sup>8</sup> According to the Respondents, Peru already demonstrated in *Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1 (“**Renco I**”) that the signatures and references on which the Claimants rely relate to Renco’s participation as guarantor under the “Additional Clause” of the Stock Transfer Agreement. However, Renco’s involvement as a guarantor does not, in the Respondents’ view, render Renco party to either agreement.<sup>9</sup>

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<sup>2</sup> Request for Bifurcation, ¶ 49.

<sup>3</sup> Request for Bifurcation, ¶ 5.

<sup>4</sup> Request for Bifurcation, ¶¶ 29-36.

<sup>5</sup> Request for Bifurcation, ¶¶ 29, 33.

<sup>6</sup> Request for Bifurcation, ¶ 29, *referring to* Stock Transfer Agreement (**R-001**); Hearing Transcript, 13 June 2020, 195:1-13.

<sup>7</sup> Request for Bifurcation, ¶ 33, *referring to* Guaranty (**R-002**); Hearing Transcript, 13 June 2020, 195:14-20.

<sup>8</sup> Request for Bifurcation, ¶¶ 30-32, 34; Hearing Transcript, 13 June 2020, 234:11-235:7.

<sup>9</sup> Request for Bifurcation, ¶¶ 30-32, 34. *See also Renco I*, Claimant’s Opposition to Peru’s 10.20(4) Objection, 17 Apr. 2015, *referring to* Legal Report of de Trazegnies; *Renco I*, Claimant’s Rejoinder to Peru’s Preliminary 10.20(4) Objection, 24 Nov. 2015, *referring to* Second Legal Report of Trazegnies

- 2.4 **Secondly**, the Respondents submit that the Tribunal lacks jurisdiction because the arbitration clauses in the Stock Transfer Agreement and the Guaranty do not cover claims by the Claimants.<sup>10</sup> The Respondents argue that the scope of the arbitration agreements in Clause 12 of the Stock Transfer Agreement and Clause 3 of the Guaranty is limited to disputes between the parties to such contracts, and thus the “Respondents have not consented to arbitrate with either Claimant under either instrument.”<sup>11</sup>
- 2.5 **Thirdly**, the Respondents argue that the claims related to the indemnity clause, or any other clauses, of the Stock Transfer Agreement are inadmissible, given that the Claimants, as non-parties to the Stock Transfer Agreement and the Guaranty, have no rights thereunder.<sup>12</sup> Consequently, according to the Respondent, “[n]either Respondent has an obligation to indemnify Claimants or their third-party affiliates, including with respect to lawsuits in U.S. court that concern actions taken in the United States by Renco and its affiliates.”<sup>13</sup>

#### *The Respondents’ Request for Bifurcation*

- 2.6 The Respondents assert that a preliminary decision on its objections described above is warranted under Articles 17 and 23 of the UNCITRAL Rules.<sup>14</sup> In deciding whether to bifurcate the proceedings, the Respondents argue, tribunals have considered whether the objections at stake: (i) are *prima facie* serious and substantial; (ii) are not intertwined with the merits; and (iii) if successful, would dispose of the claims or an essential part of the claims.<sup>15</sup> The Respondents emphasize that, even if not all of the mentioned elements are satisfied, bifurcation would be

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and Legal Report of Oquendo (**R-012**); *Renco I*, Peru’s Preliminary Objection under Article 10.20.4, 20 Feb. 2015, ¶ 16 (**R-012**).

<sup>10</sup> Request for Bifurcation, ¶¶ 37-42.

<sup>11</sup> Request for Bifurcation, ¶ 4. *See also* Request for Bifurcation, ¶¶ 37-42, *referring to* Stock Transfer Agreement, Clause 12 (**R-1**); Guaranty, Clause 3 (**R-002**); Hearing Transcript, 13 June 2020, 235:12-236:9.

<sup>12</sup> Request for Bifurcation, ¶¶ 43-44.

<sup>13</sup> Request for Bifurcation, ¶ 4; Hearing Transcript, 13 June 2020, 195:21-196:9.

<sup>14</sup> Request for Bifurcation, ¶¶ 22-23.

<sup>15</sup> Request for Bifurcation, ¶¶ 22, 27, *referring to* *Glamis Gold, Ltd., v. United States*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12 (**RLA-035**); *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), 31 Jan. 2018, ¶¶ 30, 39 (**RLA-057**); Hearing Transcript, 13 June 2020, 194:20-25, 199:16-200:5.

justified where “the potential benefits of efficiency outweigh any risks of delay or wasted expense”.<sup>16</sup> The Respondents consider that all of the above criteria are met in the instant case.<sup>17</sup>

- 2.7 **First**, the Respondents assert that these objections are not frivolous, raising “serious and substantial” questions regarding the consent to arbitrate and the scope of the contractual rights under the Stock Transfer Agreement and the Guaranty.<sup>18</sup> Therefore, the Respondents submit that their objections should be deemed *prima facie* as serious and substantial.<sup>19</sup>
- 2.8 **Secondly**, the Respondents aver that the Preliminary Objections raise “discrete contractual issues and limited facts” which do “not require an inquiry into the merits”.<sup>20</sup> According to the Respondent, “the basic questions as to whether Claimants have any rights under the contractual instruments” at stake in this arbitration can and should be decided separately from the merits.<sup>21</sup> In this regard, the Respondents emphasize that “similar issues were addressed separately, with Renco’s agreement, in the *Renco I* arbitration”.<sup>22</sup>
- 2.9 **Thirdly**, the Respondents submit that “[s]hould the Tribunal conclude that Claimants are not parties to the contractual instruments that they have invoked, that they are not parties to the arbitration agreements, and that they cannot avail themselves of the indemnity provisions, then the claims cannot proceed”.<sup>23</sup> Thus, the Respondents maintain that the Preliminary Objections “could result in the outright dismissal of all claims”.<sup>24</sup>
- 2.10 **Finally**, the Respondents contend that the prior and parallel proceedings related to the present arbitration support the bifurcation of the Preliminary Objections.<sup>25</sup> Specifically, the Respondents

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<sup>16</sup> Request for Bifurcation, ¶ 28, referring to *Pey Casado v. Chile II*, PCA Case No. 2017-30, Decision on Respondent Request for Bifurcation, 27 Jun. 2018, ¶ 102 (**RLA-058**); *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7, Decision on the Respondent’s Application for Bifurcation (Procedural Order No. 4), ¶ 78 (**RLA-055**).

<sup>17</sup> Request for Bifurcation, ¶ 45.

<sup>18</sup> Request for Bifurcation, ¶¶ 36, 42, 22, 46; Hearing Transcript, 13 June 2020, 200:23-202:19.

<sup>19</sup> Request for Bifurcation, ¶ 46.

<sup>20</sup> Request for Bifurcation, ¶ 36. See also Request for Bifurcation, ¶¶ 42, 44, 47; Hearing Transcript, 13 June 2020, 202:22-204:5.

<sup>21</sup> Request for Bifurcation, ¶ 47; Hearing Transcript, 13 June 2020, 204:7-205:1.

<sup>22</sup> Request for Bifurcation, ¶ 4.

<sup>23</sup> Request for Bifurcation, ¶ 48; Hearing Transcript, 13 June 2020, 205:3-206:12.

<sup>24</sup> Request for Bifurcation, ¶ 48.

<sup>25</sup> Request for Bifurcation, ¶ 7.

refer to the following proceedings: (i) two pending consolidated cases initiated in 2007 before the U.S. District Court for the Eastern District of Missouri by over 2,000 individuals against two dozen defendants, which include the Claimants (the “**St. Louis lawsuits**”);<sup>26</sup> (ii) *Renco I*, which concluded in 2016 with an award in which the tribunal declined its jurisdiction to rule upon the claimant’s claims on the basis of the latter’s failure to comply with the waiver requirement set forth in the Trade Promotion Agreement between the Republic of Perú and the United States of America, dated 12 April 2006, entered into force on 1 February 2009 (the “**Treaty**”);<sup>27</sup> and (iii) the pending *Renco II* proceedings also brought on the basis of the Treaty.<sup>28</sup>

- 2.11 With respect to the St. Louis lawsuits, the Respondents point out that the 1,500 written submissions and the over three million documents produced in the framework of those cases “could be relevant and would have to be brought into the record of this proceeding” for the assessment of the merits of the Claimants’ claims in this arbitration.<sup>29</sup> The Respondents also note that discovery is still ongoing.<sup>30</sup> Regarding *Renco I*, the Respondents advance that both the Claimants and the tribunal in that case deemed it appropriate to resolve Peru’s preliminary objections concerning the Stock Transfer Agreement and the Guaranty on a bifurcated basis, even if it ultimately never ruled on those issues.<sup>31</sup> The Respondents further maintain that the Claimants have exploited the parallel existence of *Renco I* and the St Louis lawsuits by “play[ing] one set of proceedings off of another, to advance their own interests”.<sup>32</sup> The Respondents urge this Tribunal “to put order to these circumstances”.<sup>33</sup>

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<sup>26</sup> Request for Bifurcation, ¶¶ 8-11, *referring to A. et al. v. Doe Run Resources Corporation et al.*, Case No. 4:11-CV-00044; *J.Y.C.C., et al., v. Doe Run Resources, Corp., et al.*, Case No. 4:15-CV-1704-RWS.

<sup>27</sup> Request for Bifurcation, ¶¶ 12-14.

<sup>28</sup> Request for Bifurcation, ¶¶ 15-18.

<sup>29</sup> Request for Bifurcation, ¶ 9.

<sup>30</sup> Request for Bifurcation, ¶ 11.

<sup>31</sup> Request for Bifurcation, ¶¶ 13-14, *referring to Renco I*, Peru’s Notification of Preliminary Objections, 21 Mar. 2014, p. 5 (**R-012**); *Renco I*, Decision as to the Scope of The Respondent’s Preliminary Objections Under Article 10.20.4, 18 Dec. 2014, ¶¶ 243-52 (**RLA-020**); Hearing Transcript, 13 June 2020, 197:23-198:16.

<sup>32</sup> Request for Bifurcation, ¶¶ 19-20, *referring to A. et al. v. Doe Run Resources Corp.*, Case: 4:11-cv-00059-CDP, Memorandum Opinion, 22 June 2011 (E.D. Missouri) (**R-21**).

<sup>33</sup> Request for Bifurcation, ¶ 21.



### 3 The Claimants' Response

3.1 The Claimants submit that this Tribunal should reject the Respondents' request to bifurcate the present proceedings. The Claimants contend that, while this Tribunal is empowered to bifurcate these proceedings under the UNCITRAL Arbitration Rules, there is "no presumption in favour or against bifurcation".<sup>34</sup> Rather, the Claimants note that the Parties are in agreement that, to grant a bifurcation request, tribunals must determine that: "(1) the objections are substantial; and (2) the potential benefits of efficiency in a bifurcated arbitration outweigh any risks of delay or wasted expense; and (3) the objections are not intertwined with the merits".<sup>35</sup> The Claimants submit that the Respondents' request for bifurcation fails to satisfy any of these three requirements.<sup>36</sup>

#### *The Prima Facie Seriousness of the Respondents' Objections*

3.2 The Claimants maintain that the Respondents' objections are "baseless"<sup>37</sup> and are therefore "not 'substantial,' in that they lack meaningful merit".<sup>38</sup>

3.3 **First**, the Claimants argue that the Respondents' objections that the Claimants are not parties to the agreements must fail, as the Claimants are clearly indicated as signatories on the Stock Transfer Agreement's signature page and are expressly referenced in the Guaranty Agreement.<sup>39</sup> The Claimants note that the Respondents do not deny that the Stock Transfer Agreement was executed by Jeffrey L. Zelms and Marvin M. Koenig, who acted as representatives of Doe Run Peru and Doe Run Resources and Renco, respectively. The Claimants also submit that the "Additional Clause" included in the agreement explicitly states, "therefore this contract is subscribed by The Doe Run Resources Corporation . . . and The Renco Group, Inc."<sup>40</sup> The

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<sup>34</sup> Comments on Notice of Bifurcation, p. 2; Response, ¶ 18, *citing* UNCITRAL Rules (2013), Art. 17(1). The Claimants point out that under Article 23(3) of the 2013 UNCITRAL Rules imposes no presumption that challenges to jurisdiction require bifurcated proceedings, which contrasts from the presumption indeed contained within the 1976 version of the UNCITRAL Rules. *See* Response, ¶ 19, *referring to* UNCITRAL Rules (1976), Art. 21(4).

<sup>35</sup> Response, ¶ 4, *referring to* Request for Bifurcation, ¶¶ 22-28. *See Glamis Gold, Ltd. v. United States*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c) (**RLA-035**).

<sup>36</sup> Response, ¶ 5.

<sup>37</sup> Comments on Notice of Bifurcation, p. 2.

<sup>38</sup> Response, ¶ 6 [internal quotations omitted].

<sup>39</sup> Comments on Notice of Bifurcation, p. 2; Response, ¶ 6; Hearing Transcript, 13 June 2020, 209:15-210:17.

<sup>40</sup> Response, ¶ 24, *citing* Stock Transfer Agreement, at 1, 7, 65-66 (**C-001**).

Claimants note that the Guaranty Agreement similarly explicitly references the Claimants.<sup>41</sup> Consequently, the Claimants maintain that they are entitled to all rights and obligations set out therein and are, “[a]t a minimum”, third-party beneficiaries of the Guaranty Agreement, including with respect to the obligation under Article 6 to assume liability for third-party damages and claims related to environmental contamination, “irrespective of which member of the Renco Consortium or affiliated company or individual was sued”.<sup>42</sup>

3.4 **Secondly**, in light of the foregoing, the Claimants also dispute as meritless the Respondents’ second objection that they have not “consented” to arbitrate this dispute with the Claimants, which is based on the same grounds as the Respondents’ first objection.<sup>43</sup> According to the Claimants, Activos Mineros and Peru have consented to arbitrate this dispute with Claimants under the Stock Transfer Agreement and the Guaranty Agreement, as well as with respect to claims under the Peruvian Civil Code for contribution and unjust enrichment, “because Claimants advance these latter claims ‘in relation to’ the Stock Transfer Agreement”.<sup>44</sup> The Claimants add that the “broad arbitration clauses” of the Stock Transfer and Guaranty Agreements are separable from the rest of the provisions of the agreements and therefore bind all of the Parties to this arbitration even if the Tribunal should find that any other provisions are not binding on them.<sup>45</sup>

3.5 **Thirdly**, the Claimants reject the Respondents’ objection that the Claimants lack rights under the indemnity provisions of the Stock Transfer Agreement. The Claimants note that Article 6 of the Stock Transfer Agreement obligates Peru as guarantor and Activos Mineros as successor to Centromin to “assume liability” for third-party damages and claims relating to environmental contamination”.<sup>46</sup> The Claimants also contend that the interpretation of the agreement is a merits issue that cannot justify bifurcation of the proceedings.<sup>47</sup>

#### *The Efficiency of Bifurcation in the Instant Proceedings*

3.6 The Claimants assert that bifurcation of the Respondents’ contractual objections would impose procedural inefficiencies while failing to yield meaningful benefits. Relying on *Glamis Gold v.*

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<sup>41</sup> Response, ¶¶ 25-26.

<sup>42</sup> Response, ¶¶ 26-27; Hearing Transcript, 13 June 2020, 216:21-217:14.

<sup>43</sup> Response, ¶ 28.

<sup>44</sup> Response, ¶ 31; Hearing Transcript, 13 June 2020, 217:15-24.

<sup>45</sup> Response, ¶ 31; Hearing Transcript, 13 June 2020, 217:25-218:6, 242:4-18.

<sup>46</sup> Response, ¶ 33; Hearing Transcript, 13 June 2020, 195:1-13, 218:15-219:8.

<sup>47</sup> Response, ¶ 34.

*United States*, the Claimants submit that, in examining the procedural benefits of bifurcation, “the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings”.<sup>48</sup> According to the Claimants, bifurcation would unduly extend these proceedings without a substantial reduction in time or costs in subsequent proceedings, as it would still require the Tribunal to consider extensive expert, documentary, and factual evidence relating to the interpretation of the agreements under Peruvian law.<sup>49</sup> Moreover, the Claimants assert that the Tribunal might then have to rehear that same evidence on the merits and, irrespective of the Tribunal’s decision on the Respondents’ objections, the Tribunal would still be required thereafter to decide the Claimants’ claims under the Peruvian Civil Code for contribution and unjust enrichment.<sup>50</sup>

- 3.7 The Claimants additionally maintain that the Respondents’ have essentially requested to bifurcate specific liability issues from the rest of the matters of liability arising in this arbitration. The Claimants submit that it is “exceedingly rare” for a tribunal to bifurcate some issues of liability from others because liability issues are often intertwined and bifurcating them is unlikely to advance procedural efficiency.<sup>51</sup>

*The Intertwining of the Respondents’ Objections with the Merits of the Case*

- 3.8 The Claimants argue that, in order to substantiate their jurisdictional objections, the Respondents would need to introduce evidence “intrinsically intertwined with the merits” with respect to the following issues:

(i) Peru’s privatization process for the La Oroya Complex, including why Peru’s initial privatization round failed; (ii) the steps that Peru took in the second privatization round to attract investors, which included answering questions from bidders and publishing two rounds of bidders’ questions and official answers; (iii) Peru’s express retention of broad liability for environmental remediation and third-party claims relating to environmental contamination as part of its privatization of the La Oroya Complex; (iv) Claimants’ participation in the bidding process for the La Oroya Complex; (v) Claimants’ respective roles in the negotiation of the Stock Transfer Agreement and the Guaranty with the Peruvian government, Peru’s Special Privatization Committee, and Empresa Minera del Centro del

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<sup>48</sup> Response, ¶ 35, *citing Glamis Gold, Ltd. v. United States*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c) (RLA-035).

<sup>49</sup> Response, ¶¶ 37-42, *referring to* Legal Expert Report of Dr. Fernando de Trazegnies, 14 Apr. 2015, § 4.1 at 12-14 (C-007) ; Hearing Transcript, 13 June 2020, 219:9-223:22, 242:19-243;18.

<sup>50</sup> Response, ¶¶ 7, 43-44; Hearing Transcript, 13 June 2020, 213:9-214:3.

<sup>51</sup> Response, ¶ 22, *referring to* Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al.; Sep. 2015) (CLA-006).

Peru S.A. or Centromin; (vi) the facts and circumstances surrounding Claimants' signature of the Stock Transfer Agreement (vii) whether Claimants would have agreed to and proceeded with the transaction without the critically important commitments by Activos Mineros and Peru as to potential third party claims; (viii) Claimants' agreement to incorporate Doe Run Peru as a special acquisition vehicle simply to comply with Peruvian law; and (ix) Claimants' involvement in the execution of the Stock Transfer Agreement.<sup>52</sup>

- 3.9 According to the Claimants, the Respondents' objections—which relate to the interpretation of clauses in the Stock Transfer and Guaranty Agreements—are, in fact, merits arguments.<sup>53</sup> The Respondents' first objection, the Claimants argue, “calls upon the Tribunal to determine the existence, nature and scope of Claimants' substantive rights under the Stock Transfer Agreement and the Guaranty Agreement.”<sup>54</sup> The Claimants add that, while the Respondents' second objection that they have not consented to arbitrate this dispute is a jurisdictional objection, any decision in this respect requires a finding on the first objection.<sup>55</sup> As for the Respondents' third objection, in the Claimants' view, the central question underpinning the objection is whether Centromin's assumption of liability for third-party damages under Article 6 of the Stock Transfer Agreement extends to claims asserted against Renco and DRP.<sup>56</sup> The Claimants contend that this “is not only a merits question, it is one of the ultimate merits issues in this case”.<sup>57</sup>

#### *The Implications of Renco I*

- 3.10 Contrary to the Respondents' allegations, the Claimants maintain that Renco did not agree to have Peru's relevant contractual objections decided on a preliminary basis in *Renco I*.<sup>58</sup> The Claimants note that Article 10.20.4 of the Treaty imposes an obligation on tribunals to decide as a preliminary matter objections that a claimant has failed to state a “viable legal claim”. The Claimants submit that it was only on this basis—which does not apply in this arbitration—that Renco did not object to the preliminary treatment of the Respondent's objections.<sup>59</sup> The Claimants further contend that Renco initially adopted the same position as the Claimants do in the instant

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<sup>52</sup> Comments on Notice of Bifurcation, pp. 3-4.

<sup>53</sup> Response, ¶¶ 8, 46; Hearing Transcript, 13 June 2020, 210:12-212:25.

<sup>54</sup> Response, ¶ 46.

<sup>55</sup> Response, ¶ 47; Hearing Transcript, 13 June 2020, 213:1-8.

<sup>56</sup> Response, ¶ 50; Hearing Transcript, 13 June 2020, 214:4-216:5.

<sup>57</sup> Response, ¶¶ 8, 50-51.

<sup>58</sup> Response, ¶¶ 53-54.

<sup>59</sup> Response, ¶¶ 54-55.

proceedings that these issues should be adjudicated with the merits because they require the interpretation of extrinsic evidence.<sup>60</sup>

#### **4 The Tribunal's Analysis**

4.1 The Parties agree that the Tribunal's decisions on the organization of the proceedings in accordance with Articles 17 and 23 of the UNCITRAL Rules are to be guided by considerations of fairness and efficiency, as mentioned expressly in Article 17(1) and also impliedly incorporated in Article 23. The Parties also agree on the applicable test to meet the twin criteria of fairness and efficiency in respect of an application for the bifurcation of preliminary objections. In order to support bifurcation, the objections in question should be:

- (i) *prima facie* serious and substantial;
- (ii) not intertwined with the merits; and
- (iii) capable, if successful, of disposing of the claims or an essential part of the claims.

4.2 Preliminarily, the Tribunal considers that all three of the Respondents' objections are serious and substantial. The Respondents' objections would also dispose of all, or at least the majority of, the Claimants' claims, even if the Claimants' claims under the Peruvian Civil Code for contribution and unjust enrichment were left standing. For the avoidance of doubt, however, the Tribunal notes that its review of the claims and defences at this stage of the proceedings is necessarily a limited and preliminary exercise. While the Tribunal's current view is that the Respondent's objections would justify bifurcation, this does not reflect any settled views on the merits of the objections to jurisdiction or on the merits of the dispute itself.

4.3 On the other hand, the Tribunal agrees with the Claimants that the Respondent's objections are intertwined with the merits and may require the consideration of closely related arguments and much of the same evidence as the merits. Bifurcation is therefore not warranted in the sense that significant inefficiency is likely to result if the Respondent's objections are not ultimately upheld. The Tribunal would in that scenario be required to reassess a lot of the same or similar evidence and argument once again on the merits, whereas it may otherwise have been able, with modest additional time and expense, to decide most or all of the merits in a single phase.

4.4 The Tribunal notes the Respondent's warning regarding the volume of evidence from and relating to the St. Louis lawsuits that might have to be brought into the record of these proceedings for the

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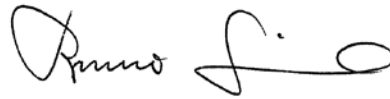
<sup>60</sup> Response, ¶¶ 10-11, 54, 57.

assessment of the merits of the Claimants' claims in this arbitration. However, the Tribunal considers that this issue can be managed appropriately, the Parties remaining free to make an application to the Tribunal as to how to handle this issue most efficiently as and when it arises.

**5 The Tribunal's Decision**

5.1 For the foregoing reasons, the Tribunal dismisses the Respondent's Request for Bifurcation.

**So ordered by the Tribunal.**



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Judge Bruno Simma  
(Presiding Arbitrator)

On behalf of the Tribunal