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VIA E-MAIL

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The Renco Group, Inc. and Doe Run Resources Corp. v. Republic of Peru and Activos Mineros S.A.C.

Dear Members of the Tribunal:

The Tribunal in the referenced proceeding (the "Contract Case" or *"Renco III"*) indicated in Draft Procedural Order No. 1 that the Republic of Peru and Activos Mineros S.A.C. ("Respondents") should file a request for bifurcation on preliminary issues by February 21, 2020. As notified to the Tribunal earlier today, the Parties to the Contract Case have consulted and agreed to a preliminary step that may facilitate full or partial agreement with respect to bifurcation, whereby Respondents provide this notice regarding bifurcation, and Claimants will provide comments by February 11, 2020.

The Contract Case presents threshold issues relating to the Contract of Stock Transfer dated October 23, 1997 (the "Contract") and the Guaranty Agreement dated November 21, 1997 (the "Guaranty") that can and should be heard on a preliminary and bifurcated basis. These threshold contractual issues relate to the identity of the parties to the Contract, the scope of the relevant arbitration clauses and the Contract's indemnity clause. These issues are separate and apart from complex factual, legal and technical issues that perhaps may be relevant to a final resolution on the merits, as discussed below. Respondents invite Claimants to coordinate on the establishment of a briefing schedule with respect to these threshold contractual issues.

A. Procedural Status

These proceedings arise from a longstanding dispute that already was the subject of a prior arbitration styled as *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1 ("*Renco I*"). In *Renco I*, Renco brought claims under the Peru-U.S. Trade Promotion Agreement (the "Treaty") with respect to alleged breaches of both (1) the Treaty and (2) the Contract and Guaranty. While reserving all of its rights, Peru raised three types of objections in that arbitration:

(i) **Waiver violations**: violation by Renco of the Treaty's waiver provision, which was the basis for the dismissal of Renco's claims and an award in favor of Peru in *Renco I*;

(ii) **Temporal violations**: violation by Renco of the Treaty's temporal provisions, which the Tribunal did not ultimately reach in *Renco I* due to the dismissal of the claims, and which form the basis for preliminary objections now pending in the Treaty Case, *Renco II*; and

(iii) **Contractual issues**: issues related to claims under an agreement to which the claimants were not parties to rely on the Contract and Guaranty and extend the application of an indemnity clause.

Claims arising under the Contract are now pending in this Contract Case (*Renco III*) and there are threshold contractual issues that appropriately should be heard on a preliminary and bifurcated basis. These issues arose to some extent in *Renco I*, were cited in Respondents' preliminary response, and were anticipated in the letter of December 3, 2019.

B. Contractual Issues

In their Notice of Arbitration of October 23, 2018 (the "Notice of Arbitration"), Claimants Renco and Doe Run Resources Corp. ("DRRC") allege that their claims arise from the Contract and the Guaranty. In particular, the Notice states that the claims relate to suits in St. Louis, Missouri (the "St. Louis Lawsuits") for "personal injury brought by Peruvian citizens against Renco, Doe Run Resources, and others, currently in the courts of the United States," because, Claimants allege, "Activos Mineros and Peru have refused to comply with their contractual obligations [under the Contract and Guaranty] to appear in and defend the lawsuits brought by third parties who claim personal injuries."[1] Accordingly, Claimants invoke the Contract and Guaranty, the arbitration provisions in the Contract and Guaranty and, in particular, an indemnity clause in the Contract as the purported basis for the present arbitration proceeding.[2]

Claimants' claims implicate threshold contractual issues arising from a fundamental lack of identity between the parties to this proceeding and the parties to the contractual instruments.[3] These threshold contractual issues are appropriate for resolution in a preliminary phase:

- ***Parties To The Contractual Instruments.*** Claimants in this proceeding are not parties to the Contract or Guaranty. Moreover, only one of the Respondents is a party to each of the instruments:
  - *The Contract.* Claimants Renco and DRRC are not parties to the Contract. The Contract provides that it is between "on the one part … Empresa Minera del Centro del Peru S.A. (Centromin Peru S.A.) … and on the other part Doe Run Peru S.R.Ltda ["DRP"]."[4] Respondent Activos Mineros is a successor to Centromin. DRP is not a party to this proceeding. Renco and DRRC, *i.e.*, Claimants in this Contract Case, intervened in the Contract without being parties thereto.
  - *The Guaranty.* Claimants Renco and DRRC are not parties to the Guaranty. Respondent Activos Mineros is also not a party to the Guaranty. The Guaranty provides that it is between "the PERUVIAN STATE" and "DOE RUN PERU S. R. LTDA,"[5] *i.e.*, DRP, which is not a party to these proceedings. Moreover, the Guaranty was subsequently rendered null and void as a matter of Peruvian law and can no longer be the source of any rights and obligations.
- ***Arbitration Clauses.*** Claimants Renco and DRRC are not covered by the arbitration clauses in either the Contract or the Guaranty. The arbitration clause in the Contract provides that "any litigation, controversy, disagreement, difference or claim that may arise *between the parties* with regard to the interpretation, execution or validity derived or in relation to this contract that cannot be resolved by mutual agreement between them, will be submitted to legal arbitration of international character under the rules and procedures of UNCITRAL."[6] Claimants also mention Clause 3 of the Guaranty, which provides that "any litigation, dispute, controversy, difference or claim that may originate from or is related to this Guaranty Agreement will be resolved by applying the provisions set forth in Clause 12 of the [Stock Transfer Agreement]."[7] As a result of the lack of identity of parties, as described above, the Tribunal does not have

[1] Claimants' Notice of Arbitration dated 23 October 2018 ("Notice of Arbitration") ¶ 3.

[2] Notice of Arbitration ¶¶ 61, 66; *see also* the Contract of Stock Transfer dated October 23, 1997 (the "Contract"), Clause 12; Guaranty Agreement dated 21 November 1997 (the "Guaranty"), Clause 3.

[3] Respondents also have previously raised non-compliance with contractual preconditions to arbitration.

[4] Contract, Recitals. The Spanish original states: "El Contrato de Transferencia de Acciones, Aumento del Capital Social y Suscripción de Acciones de la Empresa Metalúrgica La Oroya S.A., 'Metaloroya S.A.', que celebran de una parte, Empresa Minera Del Centro Del Perú S.A. (Centromin Perú S.A.) . . . y, de la otra parte Doe Run Peru S.R. Ltda."

[5] Guaranty, Clause 1.1.

[6] Notice of Arbitration ¶ 61; Contract, Clause 12 (emphasis added).

[7] Notice of Arbitration ¶ 66; Guaranty Agreement, Clause 3.

jurisdiction because neither Respondent has consented to arbitrate with either Claimant under either contractual instrument.

- ***Indemnity Clause.*** Claimants rely in particular on the indemnity clause in the Contract.[8] The claims related to the indemnity clause are inadmissible because Claimants are not parties to the Contract or the Guaranty, and have no rights thereunder. Thus, as a threshold matter, neither Respondent is under an obligation to comply with an indemnity clause or indemnify Claimants (or third-party affiliates) in connection with the St. Louis Lawsuits, *i.e.*, personal injury lawsuits in the United States. This objection relates to the capacity of Claimants to avail themselves of the alleged indemnity, an issue that is distinct from the alleged violations of the clause, which could involve expansive factual, legal and technical issues.

C. Bifurcation Of Threshold Contractual Issues

Respondents invite Claimants to address and resolve these threshold contractual issues as a preliminary matter. Addressing these objections at the outset would facilitate efficiency and judicial economy, without the substantial expenditure of time, cost, and resources that would be incurred if these issues were addressed together with other allegations.

There is ample authority for the Tribunal to allow bifurcation of these issues, or to order bifurcation in the absence of agreement. This Contract Case is governed by the UNCITRAL Arbitration Rules adopted in 2013 (the "UNCITRAL Rules"). The consideration of preliminary questions facilitate the fair and efficient resolution of disputes[9] – key objectives that underlie international arbitration, the UNCITRAL Rules, and various revisions to the Rules over time.[10]

Article 17 of the UNCITRAL Rules provides that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate," and that "in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." In addition, Article 23 of the UNCITRAL Rules provides that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement," and provides that the "arbitral tribunal may rule on [such] a plea either as a preliminary question or in an award on the merits." The tribunal's authority in this regard "encompasses the power to rule on whether in the circumstances it should exercise a jurisdiction that it has – in other words, the power to pronounce on the admissibility of the claim before it."[11]

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[8] Notice of Arbitration § IV.

[9] *See* Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION (2ND EDITION) at 2243-44 (explaining that "bifurcation of jurisdictional objections is often justified on the grounds that, if successful, submissions on liability will be unnecessary" and that "[a]bdicating efforts at case management and hearing all issues by default at a single, final hearing wastes valuable opportunities, for both the tribunal and the parties, to adopt more efficient and fair procedures and in the end seldom satisfies the parties*"); see also Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 Jan. 2005 ¶ 37 ("It is evident to the Arbitral Tribunal that it cannot go into the substance of a claim if that claim is submitted to the Tribunal by a legal entity that is not bound by the Contract on which the claim is based.").

[10] *See, e.g.*, David D. Caron & Lee M. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2ND EDITION) 457-58 (explaining that "[t]his provision of Article 23(3) is modeled after the first sentence of Article 16(3) of the Model Law. The negotiating history of the Model Law indicates a preference for preliminary treatment of jurisdictional issues 'to avoid possible waste of time and costs'"); Jan Paulsson & Georgios Petrochilos UNCITRAL Arbitration Rules (Nov. 2017), Section III, Article 23 ("[E]fficiency [is] the prime factor in determining whether a tribunal should rule on objections concerning jurisdiction as a preliminary matter or in an award on the merits."); 2010 UNCITRAL Rules Preamble ("Believing that the Arbitration Rules as revised in 2010 to reflect current practices will significantly enhance the efficiency of arbitration under the Rules").

[11] Jan Paulsson & Georgios Petrochilos UNCITRAL Arbitration Rules (Nov. 2017), Section III, Article 23 (further explaining that "[t]he Working Group 'confirmed its understanding that the general power of the arbitral tribunal … to decide upon its jurisdiction should be interpreted as including the power … to decide upon the admissibility of the parties' claims.' To illustrate, issues of timeliness of claims; *res judicata* defences; compliance with pre-arbitration 'cooling-off' periods or similar requirements; and absence of necessary parties will fall within the rubric of admissibility.").

Further to the fundamental objectives of procedural fairness and efficiency, tribunals deciding whether to address objections as preliminary questions have considered, for example, whether the objections are serious and substantial; can be considered separately from the merits; and if successful, would dispose of the claims or an essential part of the claims.[12] The threshold contractual issues in the Contract Case readily meet these criteria and should be addressed as a preliminary question to safeguard fairness and efficiency. The objections are serious and substantial; they raise fundamental questions as to which parties (if any) consented to arbitrate, and which parties (if any) are entitled to coverage under the instruments. The objections raise discrete issues that can be addressed separate and apart from complex technical questions relevant to the merits (including, for example, the scope of, and compliance with, various environmental obligations).

Accordingly, Respondents invite Claimants to coordinate on the establishment of a briefing schedule so that the parties may fully address the threshold contractual issues. For the avoidance of doubt, Respondents reserve the right to elaborate upon the issues set forth herein at the appropriate time in accordance with applicable instruments, laws and rules, and reserve all rights with respect to these proceedings.

Respectfully,

Jonathan C. Hamilton

cc: Counsel to Claimants

[12] *See, e.g.*, *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Bifurcation of the Procedure, 14 Apr. 2014 ¶ 109 (bifurcating proceedings pursuant to the 2010 UNCITRAL Rules after assessing the following criteria: "(1) Is the objection prima facie serious and substantial?; (2) Can the objection be examined without prejudging or entering the merits?; (3) Could the objection, if successful, dispose of all or an essential part of the claims raised?").