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February 11, 2020

VIA EMAIL

Judge Bruno Simma
Iran-United States Claims Tribunal
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Re: **PCA Case No. 2019-47 - *The Renco Group, Inc. v. The Republic of Peru***
(Contract Case) / Claimants' Comments to Respondents' Bifurcation Notice

Dear Members of the Tribunal:

In accordance with the Procedural Calendar annexed to Procedural Order No. 1, Claimants provide comments to Respondents' Notice regarding Bifurcation on Preliminary Issues of January 28, 2020.

Respondents allege that (1) Claimants are not parties to the Contract of Stock Transfer Agreement of October 23, 1997 ("**Stock Transfer Agreement**") or to the Guaranty Agreement of November 21, 1997 ("**Guaranty**"); (2) Claimants are not "covered by the arbitration clauses in either the [Stock Transfer Agreement] or the Guaranty;" and (3) Claimants' claims related to the indemnity clause in the Stock Transfer Agreement "are inadmissible because Claimants are not parties to the [Stock Transfer Agreement] or the Guaranty."¹ In essence, Respondents claim that the contract dispute between the Parties is not arbitrable and that these three "threshold issues"

¹ Notice Regarding Bifurcation on Preliminary Issues, January 28, 2020, pp. 2-3.

concerning arbitrability “can and should be heard on a preliminary and bifurcated basis.”² Claimants respectfully disagree.

Although Articles 17.1 and 23.3 of the 2013 UNCITRAL Arbitration Rules afford the Tribunal discretion to bifurcate the proceeding, there is no presumption in favor or against bifurcation.³ When deciding on a request for bifurcation, tribunals must consider whether the objections are serious, whether the issues to be separated are so intertwined with the merits that there would be no savings in time or cost, and whether the bifurcation would preserve or improve fairness and procedural efficiency.⁴ Respondents concede that, in deciding whether to bifurcate the three arbitrability issues for which Respondents seek a preliminary determination, this Tribunal must assess whether the posited objections “are serious” and “can be considered separately from the merits.”⁵

Respondents’ arbitrability objections are baseless, because Claimants are signatories to the Stock Transfer Agreement,⁶ which contains the provision requiring that all disputes arising from or relating to the Stock Transfer Agreement should be decided by arbitration.⁷ Below is an exact replication of the English translation of the Stock Transfer Agreement’s signature page (with yellow highlighting added):

SIGNED: JEFFREY L. ZELMS, REPRESENTING DOE RUN PERU SOCIEDAD DE

RESPONSABILIDAD LIMITADA AND THE DOE RUN RESOURCES CORPORATION.

**SIGNED: JORGE MERINO TAFUR, REPRESENTING EMPRESA METALURGICA LA OROYA
S.A. “METALOROYA S.A.”** =====

SIGNED: MARVIN M. KOENIG, REPRESENTING RENCO GROUP, INC. =====

**AUTHORIZING THESE MINUTES IS DR. LUCIANO BARCHI VELA OCHAGA, ATTORNEY-AT-
LAW REGISTERED UNDER NUMBER 15455 OF THE BAR ASSOCIATION OF LIMA.-**

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² *Id.*, p. 1.

³ See *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, Decision on Bifurcation, January 31, 2018, ¶ 8.

⁴ See *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-7, Procedural Order No. 4, Decision on Respondent’s Application for Bifurcation, April 18, 2017, ¶¶ 76, 78.

⁵ Notice Regarding Bifurcation on Preliminary Issues, January 28, 2020, p. 4.

⁶ **Exhibit C-1**, Stock Transfer Agreement, October 23, 1997, p. 67.

⁷ *Id.* pp. 59-60, Twelfth Clause.

The Stock Transfer Agreement also provides that: “[t]he Consortium composed by the Doe Run Resources Corporation and the Renco Group, Inc., warrants the compliance with the obligations contracted by the Investor, Doe Run Peru S.R.LTDA., therefore this contract is subscribed by the Doe Run Resources Corporation ...; and the Renco Group, Inc...”⁸ Claimants are expressly referenced in the Guaranty as well, which provides that any dispute shall be resolved in accordance with the arbitration clause contained in the Stock Transfer Agreement. Because Claimants are parties to both instruments, and to the arbitration agreements contained and/or referenced therein, the arbitrability objections that Respondents raise are frivolous and do not warrant a bifurcation of this proceeding.

To the extent that Respondents wish to look beyond the four corners of the Stock Transfer Agreement and the Guaranty, and introduce evidence that Claimants are not signatories/parties to these instruments, or parties to the arbitration clauses contained and/or referenced therein, then the issues that the Tribunal would have to consider are necessarily and intrinsically intertwined with the merits. Because Respondent’s arbitrability objections cannot be considered separately from the merits, and because doing so would neither preserve nor improve fairness and procedural efficiency, the Tribunal should reject Respondents’ request for bifurcation and address the three arbitrability issues in a consolidated proceeding together with the merits.

To this end, it is widely accepted that “entities that have not formally executed an arbitration agreement, or the underlying contract containing an arbitration clause, may nonetheless be bound by the agreement to arbitrate.”⁹ The factors that tribunals consider to make such a determination include the non-signatory party’s involvement with the conclusion, performance, and termination of the underlying contract. Those are all questions for the merits.

Thus, were the Tribunal to entertain the notion that the Claimants are not signatories/parties to the Stock Transfer Agreement and the Guaranty, despite the fact that Claimants signed the Stock Transfer Agreement, the Tribunal would have to hear evidence on the following issues, among others, to determine whether Claimants nonetheless can invoke the arbitration clauses contained and/or referenced in both instruments: (i) Peru’s privatization process for the La Oroya Complex, including why Peru’s initial privatization round failed;¹⁰ (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;¹¹ (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;¹² (iv) Claimants’ participation in the bidding process for the La Oroya Complex;¹³ (v) Claimants’ respective roles in the negotiation of the Stock Transfer Agreement and the Guaranty with the Peruvian government,

⁸ *Id.*, pp. 65-66.

⁹ Gary Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International (2014), pp. 1411-1412.

¹⁰ Notice of Arbitration, October 23, 2018, ¶ 15.

¹¹ *Id.*, ¶¶ 18, 21.

¹² *Id.*, ¶¶ 23-26.

¹³ *Id.*, ¶ 22.

Peru's Special Privatization Committee, and Empresa Minera del Centro del Peru S.A. or Centromin;¹⁴ (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;¹⁵ (viii) Claimants' agreement to incorporate Doe Run Peru as a special acquisition vehicle simply to comply with Peruvian law;¹⁶ and (ix) Claimants' involvement in the execution of the Stock Transfer Agreement.

In sum, the three arbitrability issues that Respondents seek to bifurcate are not grounded in fact or law, and to the extent Respondents wish to introduce facts that are, by definition, intertwined with the merits of this dispute, Claimants respectfully object. Bifurcating Respondents' arbitrability objections would neither preserve nor improve fairness and procedural efficiency in this case. To the contrary, it would aggravate the Parties' burden in terms of time, costs, and resources. The Tribunal should dismiss Respondents' request for bifurcation.

Sincerely,



Edward G. Kehoe

cc: Jonathan C. Hamilton, White & Case LLP

¹⁴ *Id.*

¹⁵ *Id.*, ¶ 28.

¹⁶ *Id.*, ¶ 22.