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*In the matter of*

**The Renco Group, Inc.  
Doe Resources Corporation**  
*Claimants*

v.

**The Republic of Peru  
Activos Mineros**  
*Respondents*

*PCA Case No. 2019-47*

# **Respondents' Request for Bifurcation of Preliminary Issues**

21 February 2020



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**WHITE & CASE**

# **Respondents' Request for Bifurcation of Preliminary Issues**

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## Respondents' Request for Bifurcation of Preliminary Issues

1. The Republic of Peru ("Peru") and Activos Mineros S.A.C. ("Activos Mineros" and together with Peru, "Respondents") hereby submit their Request for Bifurcation of Preliminary Issues in this proceeding commenced by The Renco Group, Inc. ("Renco") and Doe Run Resources, Corp. ("DRRC," and together with Renco, "Claimants") under the Contract and Guaranty,<sup>1</sup> in accordance with the UNCITRAL Arbitration Rules and Procedural Order No. 1.

### I. Introduction

2. Respondents respectfully request that the Tribunal render a decision bifurcating this proceeding in order to address and resolve the objections set forth herein.

3. Claimants invoke the Contract and Guaranty as the purported bases for this arbitration. Claimants allege that Respondents consented to arbitrate this dispute under an arbitration clause in the Contract and Guaranty, and that an indemnity clause in the Contract require Respondents to appear in and defend lawsuits brought by third parties against Renco and numerous affiliates in U.S. court with respect to alleged environmental contamination at the smelting and refining complex in La Oroya, Peru (the "Missouri Lawsuits").

4. In each respect, Claimants' allegations raise discrete issues of contract law and interpretation that go to the heart of the Tribunal's jurisdiction and the admissibility of Claimants' claims. Respondents strongly object.

- **Parallel Proceedings.** The allegations implicate a number of longstanding disputes, including the Missouri Lawsuits that began in 2007, the initial Treaty and contract case between Renco and Peru dismissed in 2016 ("*Renco I*"), the pending Treaty Case ("*Renco II*"), and this Contract Case ("*Renco III*"). The posture of these various proceedings supports the bifurcation of Peru's objections, including because they present an opportunity to clarify and narrow, if not dismiss outright, this case, and put order to the circumstances.
- **Factors Relevant to Bifurcation.** The Tribunal's authority to bifurcate the proceedings is undisputed. It is also undisputed that bifurcation is intended to facilitate the efficient resolution of disputes, and is appropriate where the objections are *prima facie* serious and substantial; raise issues not intertwined with the merits; and, if successful, would dispose of all or an essential part of the claims. Respondents' objections meet all such considerations.
- **Objections.** Respondents object to the following:
  - ***Claimants Are Not Parties To The Contract Or Guaranty.*** Claimants Renco and DRRC are not parties to the Contract or the Guaranty, the instruments under which they allege to have brought this case and the source of the rights that they allege have been breached.

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<sup>1</sup> Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A dated 23 Oct. 23, 1997 (the "Contract") (R-1) and Guaranty Agreement dated 21 Nov. 1997 (the "Guaranty") (R-2).

- ***Respondents Have Not Consented To Arbitrate With Claimants.*** Claimants are not parties to either the Contract or the Guaranty, including the arbitration provisions therein. Peru is not a party to the Contract and Activos Mineros is not a party to the Guaranty, including the arbitration provisions therein. Given this fundamental lack of identity between the parties to the contractual instruments and the parties to this proceeding, Respondents have not consented to arbitrate with either Claimant under either instrument.
  - ***Respondents Have No Obligation To Arbitrate The Extension Of Contract Clauses To Non-Parties.*** Claimants are not parties to the Contract or the Guaranty, and have no rights under the indemnity (or any other) provisions. Neither 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.
  - **Satisfaction Of All Factors.** The objections raise discrete, but substantial, issues of contract law that can be addressed separately and have the potential to dispose of all claims. Indeed, similar issues were addressed separately, with Renco’s agreement, in the *Renco I* arbitration. Resolution of these issues at the outset could obviate the need for any merits inquiry, including with respect to complex factual, legal, and technical issues (concerning, *e.g.*, environmental and investment obligations) that Claimants’ allegations appear to implicate.
5. Bifurcation of the preliminary objections thus would promote efficiency and fairness, and potentially eliminate the considerable expense of time, resources, and effort that such questions on the merits would demand.

## II. The Parallel Proceedings

6. The centerpiece of Claimants’ case is their allegation that “Activos Mineros and Peru breached their obligations to Renco and Doe Run Resources under the Stock Transfer Agreement and the Guaranty”<sup>2</sup> because, purportedly, “Activos Mineros and Peru have refused to comply with their contractual obligations to appear in and defend the lawsuits brought by third parties who claim personal injuries.”<sup>3</sup> The referenced Missouri Lawsuits were brought against Claimants and a multitude of affiliates in U.S. court by Peruvian plaintiffs alleging various personal damages allegedly arising from exposure to harmful substances and environmental contamination at the La Oroya Facility.

7. The procedural posture of the Missouri Lawsuits, *Renco I*, *Renco II*, and this Contract Case (*Renco III*), all support the bifurcation and prompt resolution of Peru’s contractual objections as a preliminary question.

### A. The Missouri Lawsuits

8. The Missouri Lawsuits date back to 2007, when Peruvian plaintiffs began filing claims against numerous defendants, of which Claimants Renco and DRRC are only two out of approximately two dozen defendants over time that have included affiliated and parent companies, directors, and officers (collectively, the “Renco Defendants”). The cases involve more than 2,000 individual plaintiffs, and have been consolidated before the U.S. District Court for the Eastern District of Missouri as *A. et al. v. Doe Run Resources Corporation et al.*, Case No. 4:11-CV-00044

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<sup>2</sup> Claimants’ Notice of Arbitration dated 23 Oct. 2018 (“Notice of Arbitration”) § IV.

<sup>3</sup> Notice of Arbitration ¶ 3.

(the “Reid Cases”), and *J.Y.C.C., et al., v. Doe Run Resources, Corp., et al.*, Case No. 4:15-CV-1704-RWS (the “Collins Cases”). Common to all counts are allegations, *inter alia*, that the Renco Defendants “negligently, carelessly, and/or recklessly made decisions while located in the States of Missouri and/or New York,” and that those U.S. actions “resulted in the release of heavy metals and other toxic and harmful substances into the air and water and onto the properties on which the plaintiffs have in the past and/or continue to reside, use and visit.”<sup>4</sup>

9. The public dockets alone in these consolidated cases in U.S. federal court contain approximately 1,500 written submissions, which are in addition to further submissions in state and appellate courts, and information exchanged directly between the parties through discovery, mediation, or settlement discussions under seal and not currently available to the public. The Renco Defendants appear to have produced over three million documents, as well as various expert reports, as part of discovery. Should this arbitration proceed to the merits, or to a combined jurisdiction/merits phase, documents and information from the Missouri Lawsuits could be relevant and would have to be brought into the record of this proceeding for examination by Respondents and the Tribunal.

10. The Renco Defendants have sought dismissal and stay of the Missouri Lawsuits on various grounds over time, including on the basis that the Lawsuits purportedly could not proceed without the participation of Peru and Activos Mineros as “necessary and indispensable parties.”<sup>5</sup> The Missouri Court concluded that the lawsuits can and should proceed without the participation of Peru or Activos Mineros; that decision was upheld on appeal.<sup>6</sup> Indeed, it is evident that Respondents are immune from the jurisdiction of U.S. courts under the U.S. Foreign Sovereign Immunities Act and well-established precedent. John B. Bellinger III, former Legal Adviser to the U.S. Department of State, submitted a legal opinion in *Renco I* concluding that “Peru has neither explicitly nor implicitly waived its immunity from the jurisdiction of U.S. courts under the FSIA with respect to the claims filed in Missouri,” and that “it would not be reasonable to conclude that Peru waived its sovereign immunity and actually consented to litigate in U.S. courts.”<sup>7</sup>

11. The Missouri Lawsuits are pending, with discovery still ongoing and ordered to be completed in June 2020. To date, there has not yet been any trial or judgment on the merits. As publicly-available information confirms, Claimants Renco and DRRC are just two of many of the Renco-affiliated defendants. Neither Claimant is a party to the contracts containing the indemnification provisions on which they purport to rely in this proceeding. Doe Run Resources LTDA (“DRP”), the one Renco affiliate that is a party to the Contract, is not a party to the Lawsuits. Neither Respondent is, or has ever been, a party to the Missouri Lawsuits.

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<sup>4</sup> *A. et al. v. Doe Run Resources Corp., et al.*, (E.D. Mo. Case No. 4:11-cv-00044-CDP), Amended Complaint for Damages, 21 Feb. 2017, Dkt. 474, at ¶¶ 71, 75 (R-17); *see also* Petition for Damages, 7 Jan. 2011, Dkt. 7, at ¶ 20 (R-22).

<sup>5</sup> *A. et al. v. Doe Run Resources Corp.*, Case No. 4:11-cv-00044, Answer to Amended Complaint for Damages, 17 Dec. 2018, Dkt. 971, at ¶¶ 14-15 (asserting that “claims are barred in whole or in part by the doctrine of intervening cause or superseding cause, and any damages that Plaintiffs may have sustained were caused in whole or in part by actions of independent third parties, including, but not limited to, the Republic of Peru, Empresa Minera del Centro Del Peru S.A. (Centromin Peru S.A.), and Activos Mineros S.A.C.”; and that “Plaintiffs have failed to join parties that are necessary and indispensable under Federal Rule of Civil Procedure 19”) (R-20).

<sup>6</sup> *See, e.g., A. et al. v. Doe Run Resources Corp.*, Case No. 4:11-cv-00044, Memorandum and Order, 7 Dec. 2011 (R-23); *Sr. Kate Reid v. Doe Run Resources Corp.*, Appellate Case: 12-1079, at 11 (8th Cir. 2012) (R-24). The Missouri Court also has ruled that the “essence of plaintiffs’ claims against [Renco owner Ira] Rennert and Renco is that they took actions in Missouri that caused injuries to the plaintiffs in Peru.” *A. et al. v. Doe Run Resources Corp.*, Memorandum and Order, 16 Oct. 2018, Dkt. 949 at 14 (R-18).

<sup>7</sup> *Renco I*, Legal Opinion of John B. Bellinger III, 20 Feb. 2015, ¶¶ 34-35 (R-7).

## B. The Treaty Cases (*Renco I* and *Renco II*)

12. These arbitration 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”) as to alleged breaches of both (1) the Treaty and (2) the Contract and Guaranty, including nearly identical claims with respect to indemnification *vis-à-vis* the Missouri Lawsuits.<sup>8</sup> 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 due to dismissal of the claims, and which form the basis for preliminary objections now pending in the Treaty Case, *Renco II*; and
- (iii) **Contractual issues:** objections related to claims under instruments to which the claimants were not parties, and their corresponding attempt to extend the application of the indemnity clause.

13. Notably, Peru’s preliminary objections included the failure of Renco’s claims under the plain language of the Contract and Guaranty<sup>9</sup> – which Renco conceded was appropriate for resolution on a bifurcated basis under the Treaty.<sup>10</sup> Accordingly, the tribunal found, *inter alia*, that “Peru argues that these contract claims must fail as a matter of law because the party to the Stock Transfer Agreement [*i.e.*, DRP] is not a defendant in the U.S lawsuits,” and that “[b]oth Parties agree that this objection properly falls within the scope of Article 10.20.4,” governing preliminary objections under the Treaty.<sup>11</sup> As a result, the tribunal ordered contractual issues to be briefed and decided in a preliminary phase.<sup>12</sup> Both parties submitted multiple rounds of comprehensive submissions, including accompanying expert reports, on the issues.<sup>13</sup> There can be no surprise that these issues are long pending.

14. Ultimately, the *Renco I* tribunal did not rule upon the contractual issues because it dismissed Renco’s claims exclusively on the basis of Renco’s violation of the Treaty waiver

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<sup>8</sup> See, e.g., Claimant’s Amended Notice of Arbitration and Statement of Claim dated 9 Aug. 2011 (“Amended Notice of Arbitration and Statement of Claim”), ¶¶ 40, 42, 56.

<sup>9</sup> *Renco I*, Peru’s Notification of Preliminary Objections, 21 Mar. 2014 at 5 (stating, *inter alia*, that the “plain language of Contract Clauses 6.5 and 8.14 concerns third-party claims in relation to Doe Run Peru, which is the entity referred to in these clauses as the ‘Company’ or ‘Investor.’ Doe Run Peru is not a party to the St. Louis Lawsuits. Thus, even assuming the facts as alleged by Renco to be true, Peru, as a matter of law, could not have breached this Contract”) (R-12).

<sup>10</sup> See *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1 (“*Renco I*”), Claimant’s Submission Challenging the Scope of Preliminary Objections, 3 Apr. 2014, at 2 (conceding that the objection for “[f]ailure to state a claim for breach of the investment agreement . . . is a proper objection under Article 10.20(4)”) (R-12).

<sup>11</sup> *Renco I*, Decision As To The Scope Of The Respondent’s Preliminary Objections Under Article 10.20.4, 18 Dec. 2014, ¶¶ 243-52 (RLA-20) (emphasis added).

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *Renco I*, Peru’s Preliminary Objection under Article 10.20.4, 20 Feb. 2015 (citing to Legal Report of Cardenas); Renco’s Opposition to Peru’s 10.20(4) Objection, 17 Apr. 2015 (citing to Legal Report of de Trazegnies); Renco’s Supplemental Opposition to Peru’s 10.20(4) Objection, 30 Jul. 2015; Peru’s Reply on Preliminary Objections under Article 10.20.4, 17 Oct. 2015 (citing to Second Legal Report of Cardenas and Legal Report of Hernandez); Renco’s Rejoinder to Respondent’s Preliminary Objections under Article 10.20(4), 24 Nov. 2015 (citing to Second Legal Report of Trazegnies and Legal Report of Oquendo) (R-12).

requirement. Nonetheless, the preliminary and in-depth treatment of contractual issues in *Renco I* reinforces that Peru's objections are appropriate for bifurcation in this arbitration, and indeed could lead to the prompt and efficient resolution of the case at the outset.<sup>14</sup>

### C. The Contract Cases (*Renco I* and *Renco III*)

15. *Renco I* involved claims under both the Treaty and the Contract, and was dismissed. In their initial Response to the Notice of Arbitration in this Contract Case (*Renco III*), Respondents, although under no obligation to do so and subject to a reservation of rights, identified certain objections, including with respect to the relevant parties and scope of the agreement to arbitrate. Respondents expressed their intention to be heard on those issues as a preliminary matter to resolve or define the scope of the proceeding.<sup>15</sup>

16. Subsequently, in an effort to facilitate full or partial agreement among the Parties with respect to bifurcation, Respondents proposed an initial step whereby Respondents would first submit a Notice Regarding Bifurcation on Preliminary Issues, followed by Claimants' submission of Comments to the Notice Regarding Bifurcation. This was incorporated into a joint proposal submitted to the Tribunal and reflected in Procedural Order No. 1.<sup>16</sup>

17. On January 28, 2020, Respondents submitted their Notice, which identified the proposed objections for bifurcation, explained that addressing the objections at the outset would promote efficiency and judicial economy, and invited Claimants' coordination with respect to a briefing schedule.<sup>17</sup>

18. On February 11, 2020, Claimants submitted their Comments to the Notice. In marked contrast to the extensive attention dedicated to contractual issues as a preliminary matter in *Renco I*, Claimants argued that Respondents' objections are both "frivolous" and "intertwined with the merits."<sup>18</sup> In this regard, Claimants relied on a superficial claim, supported by a snapshot of a signature block and with no reference to governing law, that they are "signatories" to and "expressly referenced in" the contractual instruments.<sup>19</sup> Claimants also identified no fewer than nine different merits issues that purportedly require resolution in order to address the straightforward contractual objections that Respondents have raised.<sup>20</sup> Neither argument has any merit, as detailed below.

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<sup>14</sup> Further to prior procedural discussions and as reflected in Procedural Order No. 1, the Parties and the Tribunal shall be free to make reference to the record of the proceedings in *Renco II* and *Renco III*. To facilitate efficiency and consistency in this regard, Respondents are designating exhibits and legal authorities sequentially in both *Renco II* and *Renco III*, as reflected in the corresponding consolidated indexes. Likewise, as various issues arising in *Renco I* are relevant in *Renco II* and *Renco III*, Respondents attach the public record of *Renco I* as Exhibit R-12.

<sup>15</sup> See Respondents' Letter dated 3 Dec. 2019.

<sup>16</sup> See Parties' Communication to the Tribunal dated 28 Jan. 2020; Procedural Order No. 1, PCA Case 2019-47, dated 3 Feb. 2020.

<sup>17</sup> Respondents' Letter dated 3 Dec. 2019.

<sup>18</sup> Claimants' Letter dated 11 Feb. 2020, at 3.

<sup>19</sup> Claimants' Letter dated 11 Feb. 2020, at 2-3.

<sup>20</sup> Claimants' Letter dated 11 Feb. 2020, at 3-4.

## D. Implications

19. There may be various implications with respect to the Treaty Case and the Contract Case pursuant to the way in which Claimants manage different fronts.<sup>21</sup> Over at least a decade, Renco and DRRC have attempted to dictate the pace of proceedings, or to play one set of proceedings off of another, to advance their own interests. In the Missouri Lawsuits, for example, the Renco Defendants repeatedly failed, in numerous attempts spanning several years, to remove the cases from state court to their preferred venue in federal court. In 2010, immediately after Renco filed the *Renco I* Treaty case, the Renco Defendants moved once again to transfer the cases to federal court, this time on the basis that they were “related” to the arbitration (a potential basis for removal under U.S. law). The Missouri Court granted the motion.<sup>22</sup> The Renco Defendants next moved to stay the Missouri Lawsuits entirely pending the resolution of *Renco I*. The Missouri Court denied that motion.

20. Meanwhile, in *Renco I*, Renco opposed Peru’s request to raise several different objections in a preliminary phase, but did agree that Peru could bring its objection regarding the plain meaning of the Contract with respect to indemnification *vis-à-vis* the Missouri Lawsuits. In other words, the one issue which Renco sought to advance at the outset in the first Treaty case was the one with direct relevance to its ongoing exposure in the Missouri Lawsuits. Having repeatedly tried to prevent Peru from being heard on its waiver objection, Renco since has attempted to invent excuses for its own confirmed violation of the Treaty and to oppose a prompt resolution of these issues.

21. This Tribunal hearing the Treaty Case (*Renco II*) and the Contract Case (*Renco III*) currently has the opportunity to dismiss, or clarify and narrow, each of the two proceedings, and to put order to these circumstances. Respondents reserve the right to make possible further comments on all of these issues.

## III. Factors Relevant To Bifurcation

22. It is undisputed that the Tribunal has the authority to decide preliminary objections in a phase that is bifurcated from the merits.<sup>23</sup> It is also undisputed that factors considered by tribunals with respect to bifurcation include whether the objections are (i) *prima facie* serious and substantial; (ii) intertwined with the merits; and (iii) if successful, would dispose of all or an essential part of the claims.<sup>24</sup>

23. With respect to the Tribunal’s authority to bifurcate, Article 17(1) of the UNCITRAL Rules provides that “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate,” and “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.” Article 23(3) provides that the “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

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<sup>21</sup> Respondents expect for the Parties to respect the channels of communication designated in the Terms of Appointment in connection with issues concerning this arbitration and the underlying dispute.

<sup>22</sup> *A. et al. v. Doe Run Resources Corp.*, Case: 4:11-cv-00059-CDP, Memorandum Opinion, 22 June 2011 (E.D. Missouri) (“Defendants The Renco Group Inc., DR Acquisition Corporation, Renco Holdings Inc., and Ira L. Rennet removed the case on January 7, 2011, claiming that plaintiffs’ actions are related to an arbitration currently set between The Renco Group and the government of Peru, and that the cases are therefore removable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.”) (R-21).

<sup>23</sup> See, e.g., Claimants’ Letter dated 11 Feb. 2020, at 2 (conceding that “Articles 17.1 and 23.3 of the 2013 UNCITRAL Arbitration Rules afford the Tribunal discretion to bifurcate the proceeding”).

<sup>24</sup> See, e.g., Claimants’ Letter dated 11 Feb. 2020, at 2.



agreement,” and that the “tribunal may rule on [such] a plea either as a preliminary question or in an award on the merits.” This authority “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.”<sup>25</sup>

24. Since inception, the UNCITRAL Rules have been designed to facilitate efficient dispute resolution, and have been revised over time to further achieve that goal. A leading commentary to the UNCITRAL Rules notes that “*efficiency [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,” and further that “early resolution of significant preliminary issues may yield substantial savings to the parties by either deciding the case or narrowing the scope of the dispute.”<sup>26</sup> Indeed, the UNCITRAL Rules reflect “a *preference for preliminary treatment* of jurisdictional issues ‘to avoid possible waste of time and costs.’”<sup>27</sup>

25. It is thus well established that bifurcation “is often justified on the grounds that, if successful, submissions on liability will be unnecessary”;<sup>28</sup> that, “[f]rom an efficiency perspective, tribunals could consider bifurcating evidentiary stages where decisions on certain facts will significantly impact upon the type and extent of evidence at later stages”;<sup>29</sup> and that failing to bifurcate could be “a waste of time and money for an arbitral tribunal” if it has “conducted an arbitration from beginning to end if its award then proves to be invalid for lack of jurisdiction.”<sup>30</sup> Ultimately, “[t]here is no point in spending time and money on a complicated factual investigation if the dispute may be resolved by the determination of a legal point as a preliminary issue.”<sup>31</sup>

26. Further to these widely accepted principles, a multitude of UNCITRAL tribunals have bifurcated proceedings to address preliminary objections – including, for example, in *Philip Morris v. Australia*,<sup>32</sup> *Mesa Power v. Canada*,<sup>33</sup> *Lee-Chin v. Dominican Republic*,<sup>34</sup> *Resolute Forest v.*

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<sup>25</sup> 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.”) (RLA-56).

<sup>26</sup> David D Caron & Lee M Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY, 2d Ed, at 457 (emphasis added) (RLA-43).

<sup>27</sup> *Id.* at 457-58 (emphasis added) (RLA-43).

<sup>28</sup> See Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION (2ND EDITION) at 243-44 (RLA-45).

<sup>29</sup> JEFFREY MAURICE WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 720 (Kluwer Law International 2012).

<sup>30</sup> Sigvard Jarvin, *Objections to Jurisdiction*, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 512-513 (Lawrence W. Newman & Richard Hill eds., 2004) (RLA-34).

<sup>31</sup> ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 371 (6th ed. 2015) (RLA-51).

<sup>32</sup> *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Bifurcation of the Procedure dated 14 Apr. 2014 ¶ 109 (RLA-48).

<sup>33</sup> *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 2 dated 18 Jan. 2013 ¶ 19 (RLA-42).

<sup>34</sup> *Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Procedural Order No. 2 Decision on Respondent Request for Bifurcation, 6 Mar. 2019 (RLA-59).

*Canada*,<sup>35</sup> and *Pey Casado v. Chile II*.<sup>36</sup> These same considerations also guide commercial arbitrations conducted under different rules,<sup>37</sup> and commercial arbitration tribunals likewise have bifurcated proceedings accordingly.<sup>38</sup>

27. With respect to the factors commonly considered by tribunals:<sup>39</sup>

- ***Prima Facie Serious and Substantial.*** This factor is satisfied where the preliminary objection is “credible and brought in good faith” and “not frivolous or vexatious,”<sup>40</sup> and where the tribunal cannot “*prima facie* exclude that [the objection] *might* be successful.”<sup>41</sup> This does not require a showing that the preliminary objection is likely to prevail.<sup>42</sup>

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<sup>35</sup> *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 4 Decision on Bifurcation dated 18 Nov. 2016 (RLA-53).

<sup>36</sup> *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile II*, PCA Case No. 2017-30 (PCA Case No. AA662), Decision on Respondent Request for Bifurcation, 27 June 2018 (RLA-58).

<sup>37</sup> See, e.g., SINGAPORE INT’L ARBITRATION CENTRE (SIAC), Rule 29 (2016) (“A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that: a. a claim or defence is manifestly without legal merit; or b. a claim or defence is manifestly outside the jurisdiction of the Tribunal.... The Tribunal may, in its discretion, allow the application for the early dismissal of a claim or defence under Rule 29.1 to proceed.”) (RLA-52); STOCKHOLM CHAMBER OF COMMERCE RULES (SCC), Art. 39 (2017) (“A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration....”) (RLA-54); LONDON COURT OF INT’L ARBITRATION (LCIA), Art. 14(4) (2014) (“The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal’s general duties at all times: ... to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute.”) (RLA-50); INT’L CENTRE FOR DISPUTE RESOLUTION (ICDR), Art. 20(3) (2014) (“The tribunal may decide preliminary issues, bifurcate proceedings ... direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.”) (RLA-49).

<sup>38</sup> See, e.g., ICC Case No. 14338, Award (extract), 2014 ICC Bull. 25 ¶ 26 (“[B]ifurcation is practical when the resolution of one issue might eliminate or reduce a number of issues remaining in dispute. The effect of a contract that may waive or release a party from liability, or that may foreclose or limit a party’s right to bring certain claims may well reduce the number of issues in dispute and consequently reduce the time and expense associated with this arbitration.”) (RLA-46); ICC Case No. 18864, Procedural Order Dec. 2013 (extract), 2014 ICC Bull. 25 (“[T]he nature of [the] jurisdictional and admissibility objections is such that these objections may lead to the conclusion that some or all of [the] Claims brought in this arbitration ... are to be denied without a need to entertain the merits of those Claims .... In the Tribunal’s view, this indeed speaks in favor of bifurcation, considering that doing so is likely to result in a more time- and cost-efficient resolution of the case.”) (RLA-47); ICC Commission Report on Controlling Time and Costs in Arbitration, no. 30 (2d ed., 2012); Appendix IV lit. a) ICC Rules (“The arbitral tribunal should consider, or the parties could agree on, bifurcating the proceedings or rendering a partial award when doing so may genuinely be expected to result in a more efficient resolution of the case.”) (RLA-40).

<sup>39</sup> See, e.g., *Glamis Gold, Ltd., v. United States*, UNCITRAL, Procedural Order No. 2 (Revised) dated 31 May 2005 ¶ 12 (RLA-35); *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation) dated 31 Jan. 2018 ¶¶ 30, 39 (citing *Phillip Morris v. Australia*, Procedural Order No. 8 regarding Bifurcation of the Procedure dated 14 Apr. 2014 ¶ 109, and *Glamis Gold v. United States*, Procedural Order No. 2 (Revised) dated 31 May 2005) (RLA-57).

<sup>40</sup> *Resolute Forest Products v. Canada*, PCA Case No. 2016-13, Procedural Order No. 4 Decision on Bifurcation dated 18 Nov. 2016 ¶ 4.4 (“The determination of the first part of the test, namely whether an objection is ‘*prima facie* serious and substantial’ should not, in the Tribunal’s view, entail a preview of the jurisdictional arguments themselves. Rather, at this stage the Tribunal is only required to be satisfied that the objections are not frivolous or vexatious. In respect of the four objections that Canada seeks to have resolved on a preliminary basis, the Tribunal is satisfied that they are each credible and brought in good faith and cannot be excluded on a *prima facie* basis.”) (RLA-53).

<sup>41</sup> *Phillip Morris v. Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Bifurcation of the Procedure dated 14 Apr. 2014 ¶ 111 (RL-19) (emphasis added) (RLA-48).

<sup>42</sup> *Id.*, ¶ 109 (RLA-48); see *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 (Decision on Bifurcation), 28 June 2019 ¶51 (RLA-60).

- **Not Intertwined With the Merits.** This factor is satisfied where the preliminary objection can “be examined without prejudging or entering the merits.”<sup>43</sup> Thus, bifurcation is appropriate where the “facts involved in determining the objection in issue are distinct from those likely to be involved in determining the merits of the claims,” and where the objection involves “legal questions that are likely to be separate and distinct from those arising on the merits.”<sup>44</sup> Moreover, “the existence of some degree of overlap between the evidence relevant for answering jurisdictional questions and evidence relevant for answering questions pertaining to the merits is not an obstacle to bifurcation”; rather, “[w]hat would be required in order to join an objection to the merits is a more substantial overlap, such that a jurisdictional question could not be decided efficiently without also ruling on the merits of the case.”<sup>45</sup>
- **Disposing of All or Part of the Claims.** This factor is satisfied where an objection would dispose of “an essential part of the claims raised,”<sup>46</sup> result “in a material reduction of the proceedings at the next phase,” or is “likely to at least narrow the scope of issues to be briefed at the merits stage.”<sup>47</sup> This factor does not require a showing that the preliminary objections individually or collectively would result in the dismissal of all claims.<sup>48</sup>

## IV. Respondents’ Contractual Objections

28. Bifurcation is warranted where the potential benefits of efficiency outweigh any risks of delay or wasted expense; it is not necessary for all three factors addressed above to be satisfied in a given case for objections to be bifurcated.<sup>49</sup> In any event, Respondents’ objections in this case readily meet each of the factors and thus warrant bifurcation.

### A. Claimants Are Not Parties To The Contract Or Guaranty

29. The Contract expressly 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 [DRP].”<sup>50</sup> Respondent Activos Mineros is a successor to Centromin. Neither Claimant Renco, Claimant DRRC, nor Peru is a party to the Contract. DRP, the Renco affiliate that is a party to the Contract, is not a party to this arbitration.

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<sup>43</sup> *Phillip Morris v. Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Bifurcation of the Procedure dated 14 Apr. 2014 ¶ 109 (RLA-48).

<sup>44</sup> *Mesa Power v. Canada*, PCA Case No. 2012-17, Procedural Order No. 2 dated 18 Jan. 2013 ¶ 20 (RLA-42).

<sup>45</sup> *Pey Casado v. Chile II*, PCA Case No. 2017-30 (PCA Case No. AA662), Decision on Respondent Request for Bifurcation, 27 June 2018 (RLA-58).

<sup>46</sup> *Phillip Morris v. Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Bifurcation of the Procedure dated 14 Apr. 2014 ¶ 109 (RLA-48).

<sup>47</sup> *Mesa Power v. Canada*, PCA Case No. 2012-17, Procedural Order No. 2 dated 18 Jan. 2013 ¶ 19 (RLA-42).

<sup>48</sup> *Glamis Gold, Ltd. v. United States*, UNCITRAL, Procedural Order No. 2 (Revised) dated 31 May 2005 ¶ 12(c) (RLA-35); *Emmis Int’l Hldg., B.V. and others v. Hungary*, ICSID Case No. ARB/12/2, Decision on Application for Bifurcation dated 13 June 2013 ¶¶ 36-37 (RLA-44).

<sup>49</sup> *See, e.g., Pey Casado v. Chile II*, PCA Case No. 2017-30 (PCA Case No. AA662), Decision on Respondent Request for Bifurcation, 27 June 2018, ¶ 102 (describing the factors as “considerations . . . to be weighed in deciding for or against bifurcation.”) (RLA-58); *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, UNCITRAL, PCA Case No. 2016-7 1, Decision on the Respondent’s Application for Bifurcation (Procedural Order No. 4) ¶ 78 (“It is also worth noting that the Glamis Gold tribunal only enumerated the factors . . . as non-exhaustive elements to be considered in the quest for procedural efficiency”) (RLA-55).

<sup>50</sup> Contract (R-1).

30. In their Comments to the Notice Regarding Bifurcation, Claimants contend – supported by little more than a picture of a translation of a signature block – that Respondent’s objections are “frivolous” because Claimants are “signatories” to the Contract.<sup>51</sup> Claimants also point to a so-called “Additional Clause” in the Contract stating that “[t]he Consortium composed by [DRRC] and [Renco] warrants the compliance with the obligations contracted by the Investor, [DRP], therefore this contract is subscribed by” Claimants DRRC and Renco.<sup>52</sup> Claimants’ conclusory arguments as to a cropped, out-of-context picture of the Contract are belied by Renco’s own submissions and admissions in *Renco I*, which addressed principles of Peruvian law governing the Contract<sup>53</sup> and expert reports on Peruvian law.<sup>54</sup> The fact that Renco promptly engaged on the substance of these issues in a preliminary phase in *Renco I* only underscores that these issues can and must be resolved promptly here – and should not be further deferred until a later phase, combined with the merits in this proceeding, as Claimants propose.

31. In fact, as Peru demonstrated in *Renco I*, and as the Additional Clause itself plainly states, DRRC and Renco were identified under the Additional Clause in order to warrant compliance with the contractual obligations undertaken by DRP.<sup>55</sup> The Additional Clause did not grant Renco and DRRC any rights *vis-à-vis* Centromin, and did not transform them into parties to the Contract. Further, Renco’s participation as a guarantor under the Additional Clause terminated a mere *four days* after the Contract was signed, when Renco was released from the guaranty.<sup>56</sup> Nor does the appearance of DRRC and Renco in the signature block of the Contract, arising solely from their appearance in the Additional Clause, render them parties to the Contract with rights thereunder.<sup>57</sup>

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<sup>51</sup> Claimants’ Letter dated 11 Feb. 2020, at 3.

<sup>52</sup> Claimants’ Letter dated 11 Feb. 2020, at 3 (quoting Contract, Additional Clause).

<sup>53</sup> Contract, Clause 11 (R-1). The law of the seat recognizes that the law applicable to the contract determines who are the parties thereto. *See e.g., Kabab-Ji SAL (KJS) (Lebanon) v Kout Food Group (KFG)* (Kuwait) [2020] EWCA Civ 6 (refusing to enforce an ICC Award, analyzing the law of an arbitration agreement where the seat was Paris and the contract was to be governed by the law of England and Wales, the English Court of Appeals held that the English law governed the arbitration agreement) (RLA-61); *Kabab-Ji; Sulamrrica Cia. Nacional de Seguros S.A. v. Engenharia S.A.* [2012] EWCA Civ 638 at 25 (Eng.) (“[A]n express choice of law governing the substantive contract is ‘an important factor to be taken into account [and] likely... to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract.’”) (RLA-61); *see also Arsanovia v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) [2013] 1 Lloyd’s Rep 235 at 21 (“[T]he governing law clause is, at the least, a strong pointer to their intention about the law governing the arbitration agreement[...]The choice of an English seat did not mean that the parties were to have been taken to have impliedly chosen English as the law applicable to the arbitration agreement.”) (RLA-39).

<sup>54</sup> *See, e.g., Renco I*, Claimant’s Opposition to Peru’s 10.20(4) Objection, 17 Apr. 2015 (citing to Legal Report of de Trazegnies); Claimant’s Rejoinder to Peru’s Preliminary 10.20(4) Objection, 24 Nov. 2015 (citing to Second Legal Report of Trazegnies and Legal Report of Oquendo) (R-12).

<sup>55</sup> Contract (R-1).

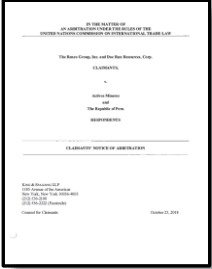
<sup>56</sup> *Renco I*, Peru’s Preliminary Objection under Article 10.20.4, 20 Feb. 2015 ¶ 16 (R-12); *see* Modification of the Contract to Transfer Shares, Increase Company Capital and Subscription of Shares of Metaloroya S.A. dated 17 Dec. 1999 (“[O]n October 27, 1997 and by virtue of the last paragraph of the Additional Clause of the Metaloroya Transfer Contract, the Special Committee of [Centromin] consented to releasing the Renco Group Inc. from obligations it acquired under said Contract, which is the reason why the Renco Group Inc. is no longer a [part] of the same.”) (R-3).

<sup>57</sup> The Contract does not contain a single other reference to Renco or DRRC, with the exception of the cover page of the copy of the public deed of the Contract and the heading of the public deed, which were inserted by the notary that recorded the public instrument, and the listing of Renco’s and DRRC’s representatives in the introduction to the public deed.

# Overview of Parties

## Contract Case

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*Parties*  
**Doe Run Resources, Corp.**  
**The Renco Group, Inc.**

**Republic of Peru**  
**Activos Mineros**

## Contract

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*Parties*  
**Doe Run Peru, S.R.LTDA.**  
*Additional Clause Guarantors*  
**Doe Run Resources, Corp.**  
**The Renco Group, Inc.**  
*For four days*

**Activos Mineros**  
*Successor to Centromin*

## Guaranty (terminated 2001)

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*Parties*  
**Doe Run Peru, S.R.LTDA.**

**Republic of Peru**

## Defendants in St. Louis Litigations

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**Doe Run Cayman Holdings, LLC**  
**Doe Run Resources, Corp**  
**DR Acquisition Corp.**  
**Fox, Theodore P.**  
**Kaiser, Marvin K.**  
**Neil, Albert Bruce**  
**Pyatt, Jerry**  
**Renco Holdings, Inc.**  
**Rennert, Ira L.**  
**The Renco Group, Inc.**  
**Zelms, Jeffrey L.**

32. In *Renco I*, for example, Peru established on the basis of legal analysis, authorities, and expert opinion the following with respect to the Contract:

Peru is not a party to the Contract; to the contrary, the Contract was entered into by Centromin and subsequently assigned to Activos Mineros, both of which have their own legal personalities separate and apart from the State. Article 1363 of the Peruvian Civil Code, which sets out the principle of privity of contract (*relatividad de los contratos*), expressly provides that '[t]he effects of the contract are limited to its parties and their heirs.' As Professor Cárdenas confirms, '[s]uch principle establishes who is subject to the effects produced by the contract; it means that only the parties to the contract are bound by its terms and can enforce the contractual obligations under it.' As a matter of law, Peru thus could not have breached the Contract, because Peru is not a party thereto and has no obligations thereunder . . . .

[W]hile Renco signed the Contract as one of the guarantors of DRP's obligations to the 'Investor' under the Contract, whatever obligations Renco had under the Contract as a guarantor were extinguished when Renco was released from its guaranty by Centromin four days after the Contract was concluded. As a matter of law, Peru thus could not have breached any obligations to Renco under the Contract, because Renco has no rights or obligations thereunder. Furthermore, even assuming *arguendo* that Renco had not been released as a guarantor under the Contract, Peru still could not have breached any obligations owed to Renco, because Centromin (and later Activos Mineros) did not undertake any obligations to Renco in the Contract. To the contrary, all of the contractual obligations undertaken by Centromin (and later Activos Mineros) in the Contract run to DRP, as the Company, or to DRC, as the Investor.<sup>58</sup>

33. The Guaranty, in turn, was entered into between "the PERUVIAN STATE [...] as party of the first part; and DOE RUN PERU S. R. LTDA. [...] hereinafter referred to as THE INVESTOR, as party of the second part."<sup>59</sup> Neither Claimant Renco, Claimant DRRC, nor Respondent Activos Mineros is a party to the Guaranty. DRP is not a party to these proceedings.

34. In their Comments to the Notice Regarding Bifurcation, Claimants similarly contend that Renco and DRRC are "expressly referenced in the Guaranty."<sup>60</sup> These superficial arguments likewise are at odds with the analyses of Peruvian law conducted in *Renco I*. For example, Peru established with respect to the Guaranty:

Renco is not a party to the Guaranty, nor is it a beneficiary thereunder. Renco thus has no standing to seek to enforce the Guaranty against Peru in this arbitration. As Professor Cárdenas confirms, under Article 1873 of the Peruvian Civil Code, a 'guarantor is bound only for the obligations that it has expressly assumed,' and guarantees thus are strictly construed under Peruvian law. Article 2.1 of the Guaranty provides that 'THE STATE hereby guarantees THE INVESTOR [DRP] the representations, assurances, guarantees and obligations assumed by THE TRANSFEROR [Centromin] under the Stock Transfer, Capital Increase and Stock Subscription Contract referred to in numeral 1.1 hereof.' As Article 2.1 reflects,

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<sup>58</sup> *Renco I*, Peru's Preliminary Objection under Article 10.20.4, 20 Feb. 2015 (internal citations omitted) (R-12).

<sup>59</sup> Guaranty Agreement (R-2).

<sup>60</sup> Claimants' Letter dated 11 Feb. 2020, page 3.

the rights set out in the Guaranty run specifically to DRP as the ‘Investor,’ and not to Renco; indeed, there are no other parties or beneficiaries even mentioned in the Guaranty. Peru thus could not have breached any obligation to Renco under the Guaranty, because Renco, as a matter of law, has no right to invoke the protections set forth therein.

That the rights set forth in the Guaranty run only to DRP, and not to Renco, is further confirmed by the specific authorization granted to the Vice Minister of Mines to execute the Guaranty on behalf of the Republic of Peru. As that authorization reflects, DRP – and not Renco – is specifically identified as the beneficiary of the guarantee.<sup>61</sup>

35. 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. On June 1, 2001, DRP “assign[ed] its contractual position as ‘Investor’ under the Contract” to Doe Run Cayman Ltd. (“DRC”), a British Virgin Islands company, which “assume[d] all of the ‘Investor’s’ rights and obligations under the Contract.”<sup>62</sup> That assignment terminated the Guaranty, in accordance with Article 1439 of the Peruvian Civil Code, which provides that “[t]he guarantees offered by a third party do not pass to the assignee without the express authorization of the third party.”<sup>63</sup> This issue, too, was addressed in detail in *Renco I*.<sup>64</sup>

36. Accordingly, as Respondents will demonstrate in greater detail at the appropriate time, Claimants are not parties to the Contract or Guaranty, and have no rights thereunder. In any event, for purposes of bifurcation, it is sufficient – and indeed, evident – that the objection is neither “frivolous” nor tied to the many merits issues that Claimants suggest. Indeed, at this juncture, the Tribunal does not need to decide the objection, or even whether the objection is likely to prevail, but rather only whether the objection is appropriate for resolution in a preliminary phase. Given that the objection clearly is not frivolous, implicates a review of discrete contractual issues and limited facts based on the face of the instruments, and does not require an inquiry into the merits – as reinforced by the Parties’ preliminary treatment of such issues in *Renco I* – these focused but fundamental legal issues can and should be resolved on a bifurcated basis.

## **B. Respondents Have Not Consented To Arbitrate With Claimants**

37. The arbitration clause (Clause 12) in the Contract states:

[A]ny 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.<sup>65</sup>

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<sup>61</sup> *Renco I*, Peru’s Preliminary Objection under Article 10.20.4, 20 Feb. 2015 (internal citations omitted) (R-12).

<sup>62</sup> Assignment of Contractual Position between Due Run Peru S.R.L and Doe Run Cayman Ltd. dated 1 June 2001 (“Contract Assignment”), Clause 2 (R-19).

<sup>63</sup> Peruvian Civil Code, Article 1439 (RLA-62).

<sup>64</sup> *Renco I*, Peru’s Reply on its Preliminary Objection under Article 10.20.4, 20 Feb. 2015 ¶¶ 74-80 (R-12).

<sup>65</sup> Contract, Clause 12 (emphasis added). The Spanish original states: “CUALQUIER LITIGIO, CONTROVERSIA, DESAVENENCIA, DIFERENCIA O RECLAMACIÓN QUE SURJA ENTRE LAS PARTES RELATIVOS A LA INTERPRETACIÓN, EJECUCIÓN O VALIDEZ DERIVADO O RELACIONADO CON EL PRESENTE

38. The Guaranty, in turn, 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 [Contract].”<sup>66</sup>

39. Because Claimants Renco and DRRC are not party to the Contract or the Guaranty, they cannot avail themselves of the arbitration clauses therein. Respondent Peru is not a party to the Contract (including the arbitration clause) and Respondent Activos Mineros is not a party to the Guaranty (including the arbitration clause). Accordingly, Respondents have not consented to arbitrate this dispute with either Claimant, and the Tribunal has no jurisdiction to adjudicate the dispute.

40. It is fundamental that consent is the cornerstone of arbitration.<sup>67</sup> Both the Panama Convention and the New York Convention require a valid agreement to arbitrate as a condition for enforcement or recognition of an award.<sup>68</sup> It is evident from the face of the contractual instruments that there can be no valid arbitration agreement between Claimants and Respondents.

41. In their Comments to the Notice Regarding Bifurcation, Claimants suggest that, purportedly, it is *Respondents* that “wish to look beyond the four corners of the [Contract] 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.”<sup>69</sup> Claimants have it backwards. The contractual instruments speak for themselves, and Claimants now seek to venture beyond the four corners to consider “the non-signatory party’s involvement with the conclusion, performance, and termination of the underlying contract,” which Claimants suggest are “are all questions for the merits.”<sup>70</sup>

42. No such consideration of additional questions is needed. Even accepting at face value Claimants’ transparent attempt to inject alleged “merits” issues into the inquiry, the question of consent to arbitrate under the Contract and Guaranty remains a quintessential jurisdictional issue that can be resolved without venturing into complex factual, legal, and technical issues (as to, *e.g.*, environmental obligations and compliance) that would arise during a merits phase. In any event, so long as the objections are not intertwined with the merits, as they are not here, there is no impediment to a tribunal considering discrete factual issues in deciding a jurisdictional objection in a bifurcated proceeding. Indeed, if there is any debate to be had about non-parties availing themselves of arbitration and indemnification clauses, the time to have that debate is now – not in

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CONTRATO QUE NO PUEDA SER RESUELTO DE MUTUO ACUERDO ENTRE ELLAS, SERÁ SOMETIDO A ARBITRAJE DE DERECHO, DE CARÁCTER INTERNACIONAL AL AMPARO DE LAS REGLAS Y PROCEDIMIENTOS TAL COMO FUERON ESTABLECIDOS POR UNCITRAL.” (R-1).

<sup>66</sup> Notice of Arbitration ¶ 66; Guaranty Agreement, Clause 3 (R-2).

<sup>67</sup> See, *e.g.*, W. W. Park, *Non-Signatories and International Contracts: An Arbitrator’s Dilemma*, in Belinda McMahon, *Multiple Parties in International Arbitration*, ¶ 1.01 - 1.03 (Oxford University Press ed. 2009) (“Like consummated romance, arbitration rests on consent . . . . [C]onsent (even implied from circumstances) remains the cornerstone of arbitration, at least by arbitrators who value intellectual rigor and analytic integrity.”) (RLA-37).

<sup>68</sup> PANAMA CONVENTION Art. 1 (“An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.”) (RLA-63); NEW YORK CONVENTION, Art. II (1) (“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship . . . .”) (RLA-32).

<sup>69</sup> Claimants’ Letter, 11 Feb. 2020, at 3.

<sup>70</sup> Claimants’ Letter, 11 Feb. 2020, at 3.



the midst of a later phase involving complex technical and legal questions as to environmental and other obligations, and the record of the Missouri Lawsuits.

### **C. Respondents Have No Obligation To Arbitrate The Extension Of Contract Clauses To Non-Parties**

43. Claimants' claims related to the indemnity clause and Missouri Lawsuits are inadmissible because Claimants are not parties to the Contract or the Guaranty, and have no rights thereunder. In fact, the specific rights and obligations related to third-party claims under the Contract run expressly only to the "Investor" or to the "Company." As non-parties to the Contract, neither Renco nor DRRC is the "Investor" or the "Company."<sup>71</sup> Respondents have no obligation to arbitrate the extension of the indemnity clause (or any other clause) to Claimants (or any other non-party to the Contract), with respect to lawsuits in the United States against non-parties or otherwise.

44. As with Respondent's other objections, Claimants seek in their Comments to make this straightforward issue appear more complicated than it is, including by suggesting that the Tribunal also must consider, *inter alia*, "Peru's express retention of broad liability for environmental remediation and third-party claims relating to environmental contamination," and "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."<sup>72</sup> Even as articulated by Claimants, these issues are separate and distinct from the question as to whether Claimants, as non-parties to the Contract and Guaranty, can avail themselves of indemnity provisions under the Contract – regardless of the scope of issues which Peru and/or Activos Mineros allegedly agreed (or did not agree) to indemnify.

## **V. Bifurcation of Respondents' Contractual Objections**

45. Respondent's objections readily meet all of the factors relevant to bifurcation. The objections are serious and substantial; raise discrete issues that can be addressed separate and apart from complex technical questions that could arise on the merits; and, if granted, would dispose of all or substantially all claims. As noted, "[t]here is no point in spending time and money on a complicated factual investigation if the dispute may be resolved by the determination of a legal point as a preliminary issue."<sup>73</sup> That is precisely the case here.

### **A. Serious And Substantial**

46. Respondents' objections are serious and substantial because they go to the heart of the Tribunal's jurisdiction and the admissibility of Claimants' claims. They raise fundamental questions as to which parties (if any) consented to arbitrate, and which parties (if any) are entitled to coverage under the contractual instruments on which Claimants purport to rely. The objections are credible and brought in good faith. Indeed, Respondents have responsibly and consistently raised objections regarding the parties to the contractual instruments and the scope of contractual rights since certain Renco Defendants improperly sought to involve Peru and Activos Mineros in the Missouri Lawsuits a decade ago. Peru also raised such contractual objections in *Renco I* – and,

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<sup>71</sup> Nevertheless, Claimants inaccurately and improperly insert themselves into contractual text. *See, e.g.*, Notice of Arbitration ¶¶ 50-51.

<sup>72</sup> Claimants' Letter, 11 Feb. 2020, at 3-4.

<sup>73</sup> ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 371 (6th ed. 2015) (RLA-51).

far from treating them as “frivolous” and “intertwined with the merits,” as Claimants now suggest, Renco did not object to having them addressed in a preliminary phase.

## **B. Separate And Distinct Issues**

47. Respondents’ objections involve specific issues of contractual interpretation and Peruvian law, applied to a limited set of facts (including the language of the Contract and Guaranty), that are distinct from issues likely to arise on the merits. Contrary to Claimants’ assertions, it is not necessary “to hear evidence” on the merits in order to resolve these contractual objections.<sup>74</sup> Indeed, the basic questions as to whether Claimants have any rights under the contractual instruments – with respect to arbitration, indemnification, or otherwise – can and should be decided separately from any determination as to the scope of such rights or any corresponding obligations, let alone the violation of any such rights or obligations. Indeed, as noted, these focused legal questions were addressed in a standalone phase in *Renco I*, without consideration of the merits issues that Claimants now suggest are relevant.

## **C. Disposing Of All Or An Essential Part Of The Claims**

48. Respondents’ objections could result in the outright dismissal of all claims. Should 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 and must be dismissed. In this regard, Respondent’s objections favor bifurcation even more strongly than in cases where an objection would dispose of only an essential part of a claim. Indeed, given the potentially dispositive nature of Respondent’s objections, it would cause significant prejudice – and impose substantial, unnecessary expenditures of time, effort, and cost – to require that the objections are briefed and adjudicated at the same time as complex technical and legal issues on the merits, only for the Tribunal to dismiss the entirety of the claims years from now on the basis of these preliminary objections.

## **VI. Request for Relief**

49. Respondents’ Request for Bifurcation of Preliminary Issues has established that the Tribunal has authority to bifurcate the proceeding; identified the focused contractual issues that can and should be addressed in a bifurcated phase; delineated factors that are considered relevant to deciding whether to bifurcate; and confirmed that these factors all favor bifurcation of these objections.

50. Respondents will set forth in full their objections and requests for relief pursuant to the calendar to be ordered by the Tribunal. For the avoidance of doubt, Respondents reserve the right to bring objections, preliminarily or otherwise, and to articulate and expand upon the objections and 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.

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<sup>74</sup> Claimants’ Letter, 11 Feb. 2020, at 3.

51. Based on the foregoing, Respondents respectfully request that the Tribunal render a decision bifurcating this proceeding in order to address and resolve Respondents' objections, and establishing an efficient procedure for doing so.

Respectfully submitted,

  
\_\_\_\_\_  
**WHITE & CASE**

*Counsel to the Republic of Peru and  
Activos Mineros S.A.C.*

February 21, 2020