

PCA CASE N° 2019-46

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE
TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PERU AND THE
UNITED STATES OF AMERICA**

- and -

THE UNCITRAL ARBITRATION RULES 2013

-between-

THE RENCO GROUP, INC.

-and-

THE REPUBLIC OF PERU

PROCEDURAL ORDER NO. 12

The Arbitral Tribunal

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

8 April 2024

1 Procedural History

1.1 Pursuant to the agreement of the Parties, this arbitration (the “**Treaty Case**”) is being coordinated with *The Renco Group, Inc. and Doe Run Resources Corp. v. Activos Mineros S.A.C.*, PCA Case No. 2019-47 (the “**Contract Case**”).

1.2 On 3 February 2020, the Tribunal issued Procedural Order No. 1 for both Cases, which stated the following regarding post-Hearing matters:

9.2 The PCA shall arrange for simultaneous interpretation and live transcription of oral argument and testimony where necessary, further to the rules set forth below:

[...]

(d) The Parties shall attempt to agree on any corrections to the transcripts within 20 calendar days after receipt of the transcripts after the closing of the hearing. The agreed corrections may be entered by the Parties in the transcripts (the “**revised transcripts**”). In case of disagreement between the Parties, the Tribunal shall decide upon such disagreement and any correction adopted by the Tribunal shall be entered by the Parties in the revised transcripts.

9.3 Post-hearing briefs, statements of costs, closure of hearings and drafting of rulings shall be treated further to the rules set forth below:

(a) At the conclusion of any hearing, the Tribunal shall decide whether the Parties will file post-hearing briefs. In any event, any such submissions shall not contain new evidence, documents, sources, declarations, or expert reports.

(b) The Tribunal shall also consider when the Parties shall file submissions regarding costs.

1.3 On 7 February 2024, the Tribunal issued Procedural Order No. 10 for the Treaty Case and Procedural Order No. 11 for the Contract Case (the “**Hearing Procedural Orders**”) containing the protocol for the hearing on jurisdiction and merits (the “**Hearing**”) and the following provisions regarding post-Hearing matters:

11.2 The Parties shall attempt to agree on any corrections to the transcripts within 20 business days after the closing of the hearing. Each Party shall review its own opening statement, examinations, and closing statement, proposing edits to the other Party for review and agreement. Edits to original text should be done in-line. Edits or comments to the translated text should be done via footnote. There should be no changes to transcript line numbers. In case of disagreement between the Parties, the Tribunal shall decide upon such disagreement.

[...]

14.1 In accordance with paragraph 9.3(a) of Procedural Order No. 1, following consultation with the Parties at the conclusion of the Hearing, the Tribunal shall decide whether the submission of post-hearing briefs is necessary and, if so, shall establish their scope, maximum length, and submission dates.

14.2 In accordance with paragraph 9.3(b), the Tribunal shall also determine, after consultation with the Parties, the format and filing date of submissions on costs.

14.3 Corrections to the transcripts shall take place in accordance with paragraph 9.2(d) of Procedural Order No. 1 and paragraph 11.2 of this order.

1.4 The Hearing was held from 5 to 15 March 2024.

- 1.5 On 7 March 2024, the Tribunal asked the Parties during the Hearing whether it is their view that the Twelfth Clause of the Stock Transfer Agreement (the “**Arbitration Agreement**”) is governed by Peruvian law (the “**Arbitration Clause Question**”).
- 1.6 On 8 March 2024, the Parties provided their oral comments during the Hearing to the Arbitration Clause Question.
- 1.7 By e-mail of 9 March 2024, the Tribunal requested the Parties to address the following further question in relation to the Arbitration Clause Question in writing, jointly or separately, by no later than 14 March 2024: “Do the parties agree that Peruvian arbitration law governs the subjective scope of the arbitration clause (that is, the question of who are the parties to the arbitration clause) in the Twelfth Clause of the Stock Transfer Agreement?”. The Tribunal also requested that they indicate if they foresaw using the entirety of the hours allocated to each for the Hearing.
- 1.8 By e-mail of 11 March 2024, in response to the Tribunal’s request in its e-mail of 9 March 2024, the Claimant proposed utilizing the remaining hours to conclude the evidentiary record and deferring the Parties’ closing statements until they had reviewed the transcripts and submitted their post-hearing briefs (the “**PHBs**”). The Respondent objected to this proposal. The Tribunal decided to maintain the agreed schedule, including closing statements. It also informed the Parties that (i) it would provide them after the Hearing with a list of questions to be answered in their PHBs (the “**Questions**”); and (ii) the Tribunal would consider convening a further short hearing to provide an opportunity for final oral statements after the submission of the PHBs, if deemed appropriate.
- 1.9 By e-mail of 13 March 2024, the Tribunal invited the Parties to address in their respective closing statements the question on the status of the litigations taking place in Missouri (the “**Missouri Litigations**”). It also noted that it intended to include the question of the status of the Missouri Litigation among the Questions for their PHBs, providing the Parties an opportunity to respond further in writing to what each of them put forward during their closing statements.
- 1.10 By respective letters dated 14 March 2024, the Parties submitted separate responses in writing to the Arbitration Clause Question.
- 1.11 On 15 March 2024, after delivering their closing statements, the Parties provided their oral comments on various matters concerning the corrections to the transcript, PHBs, and submissions on costs (the “**Submissions on Costs**”). The Tribunal gave certain directions to the Parties and noted that it would provide further instructions in due course.

2 Post-Hearing Matters

- 2.1 Considering the Tribunal’s previous directions and the Parties’ comments on post-Hearing matters, the Tribunal hereby issues the following determinations and instructions regarding the corrections of transcripts, PHBs, and Submissions on Costs. Accordingly, an updated Procedural Calendar including these matters is appended as **Annex 1**.

3 Corrections of Transcripts

- 3.1 Pursuant to paragraph 9.2(d) of Procedural Order No. 1 for both Cases and paragraph 11.2 of the Hearing Procedural Orders, the Parties shall submit in the format stated therein their agreed corrections to the transcripts in English and Spanish and any outstanding disagreements for the Tribunal’s decision by **Friday, 12 April 2024**.

3.2 Upon deciding any disagreements, the Tribunal will direct the court reporters to prepare final transcripts of the Hearing in English and Spanish incorporating the agreed corrections and those agreed by the Tribunal.

4 Post-Hearing Briefs

4.1 The Parties shall submit PHBs by **Friday, 7 June 2024**.

4.2 The PHBs should focus primarily on answering the Questions appended to this Procedural Order as **Annex 2**, but the Parties may also address other matters they deem pertinent for both Cases. To that end, the Parties are free to answer the questions in whichever order they choose, but are requested to use separate headings for each question, clearly indicating which question they are replying to. Where the questions are only directed to one of the Parties, the other Party is nevertheless invited to comment, if it so wishes.

4.3 The Parties shall also include in their PHBs a final articulation of their requests for relief for each Case.

4.4 The Parties shall not submit any new evidence or legal authorities in their PHBs. They are invited to provide appropriate references to the record for each question, where necessary. If there is no record evidence to support an answer to any of the questions, this shall be noted by the Party when responding to such question(s).

4.5 Each Party shall only submit one PHB addressing both Cases. To the extent possible, the PHBs should contain separate sections to address matters concerning the Treaty Case and those concerning the Contract Case.

4.6 In addition to the provisions of Section 4 of Procedural Order No. 1 for both Cases, the PHBs shall follow the following format:

- (a) Times New Roman, Arial, or any other font with a similar set size;
- (b) 12-point size font for the body of the text and 10-point size font for footnotes;
- (c) Double spaced for the body of the text and single or 1.5 spacing for the footnotes;
- (d) One inch margins;
- (e) No kerning;
- (f) Maximum of 18,750 words (excluding footnotes) or 75 pages (excluding the cover and signature pages in both cases), whichever is lesser. The Parties shall include the word count on the last page of their PHBs.

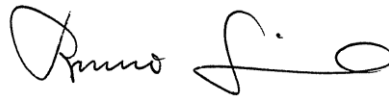
4.7 After receiving the PHBs, the Tribunal will determine whether it considers it necessary for the Parties to present additional oral arguments and answer any other questions the Tribunal might have.

5 Submissions on Costs

5.1 The Parties shall simultaneously file their Submissions on Costs on **Friday, 28 June 2024**.

- 5.2 The Parties shall file separate Submissions on Costs for the Treaty Case and for the Contract Case.
- 5.3 The Submissions on Costs shall be limited to a maximum of five pages each, including a list of the costs incurred separated by cost categories.
- 5.4 The Parties do not need to submit invoices or other documents to substantiate the costs described in their Submissions on Costs, unless the Tribunal so orders or one of the Parties contests the costs stated in the opposing Party's submission within ten days of their filing.

So ordered by the Tribunal.



Judge Bruno Simma
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Revised Procedural Calendar

<u>Event</u>	<u>Date</u>
Preliminary Document Production	N/A (Denied)
Claimant's Memorial	Thursday, 25 January 2021
Respondent's Counter-Memorial	Friday, 1 April 2022
Simultaneous exchange of requests for production of documents	Friday, 6 May 2022
Simultaneous exchange of objections to the requests for production of documents	Friday, 20 May 2022
Simultaneous submission to the Tribunal of each Party's respective completed Redfern schedule, including answers to the objections, and production of non-objected documents	Friday, 3 June 2022
Non-Disputing State Party Submission	Tuesday, 7 June 2022
Decision from the Tribunal on the document request objections	Monday, 25 August 2022
Production by each Party of the documents ordered by the Tribunal	Thursday, 15 September 2022
Claimant's Reply on Liability and Response on Jurisdiction	Monday, 1 May 2023
Respondent's Rejoinder on Liability and Reply on Jurisdiction	Friday, 1 September 2023
Claimant's Rejoinder on Jurisdiction	Tuesday, 7 November 2023
Hearing	Tuesday, 5 March 2024 to Friday, 15 March 2024
Joint submission of Correction of Transcripts	Friday, 12 April 2024
Simultaneous submission of Post-Hearing Briefs	Friday, 7 June 2024
Simultaneous submission of Submissions on Costs	Friday, 28 June 2024

Annex 2: Questions from the Tribunal to the Parties

For the avoidance of doubt, nothing contained herein should be construed as implying that the Tribunal has taken any position on the issues submitted. The questions only represent preliminary inquiries based on the pleadings, submissions, and evidence presented by the Parties thus far and are intended to enhance the Tribunal's understanding of the dispute.

1. Regarding the Missouri Litigations:

- a. What is the current status of the Missouri Litigations and the expected date of any forthcoming judgment(s)?
- b. Could the Parties please list the precise causes of actions asserted by the plaintiffs that remain pending for trial in the Missouri Litigations (with appropriate references to the Complaint(s) and other court filings or decisions)? If any causes of actions originally pleaded have been abandoned or ruled inadmissible by the Courts, please identify them.
- c. Is it possible under Missouri law that the defendants in the Missouri Litigations could be found liable for breach of one or more legal duties that do not pass through to DRP (and thus might not touch upon the allocation of responsibilities set forth in Sections 5 and 6 of the STA)?
- d. Put a slightly different way, could any potential judgment in the Missouri Litigations pronounce itself (i) upon DRP's liability or conduct; (ii) exclusively upon the liability or conduct of Renco, and/or DRRC and/or any of the other named defendants; or (iii) upon Renco, and/or DRRC and/or any of the other named defendants and DRP?
- e. Do the Missouri Litigations concern claims for the effects on human health arising from lead contamination exclusively, or do they also concern SO₂ and other contaminants?
- f. To what extent (if any) could the award in either of the present Cases and the ruling in the Missouri Litigations contradict each other? If such a potential conflict exists, would this warrant waiting to issue the award in either Case until after the Missouri Litigations have concluded?

2. Regarding the PAMA:

- a. What SO₂ emissions standards applied to DRP's operations as of the end of the (original) PAMA period in 2007 and thereafter?
- b. Considering the difference between the Parties regarding whether the entirety of the PAMA or only one of its projects was extended,¹ the Tribunal wishes to hear from the Parties on precisely which PAMA obligations were extended and precisely which PAMA obligations were not extended by each of the so-called PAMA extensions granted in 2006 and 2009?
- c. Under the PAMA and other Peruvian regulations, was DRP allowed to increase production, if so, by how much and under what precise conditions?

¹ In posing this question, the Tribunal uses the word "extension" in its ordinary sense and does not intend to give any special meaning to the word that it might bear under Peruvian law.

3. Regarding the STA in general:
 - a. Clause 3.6 states that on the date of the signing of the STA, a “special general meeting of shareholders of the Company” would take place “for the purpose of adopting the necessary agreements for the execution of this contract”. Did such a meeting take place? If so, who participated in the meeting, and what was discussed?
 - b. It appears to be common ground between the Parties that Clause 8.14 bears upon the matters in dispute in the Contract Case.² The Tribunal has noted the existence of Clause 8.10, which deals with certain representations and warranties of Centromín and the Company which provides that “Centromín agrees to indemnify, defend and protect from damages the Company *and its shareholders, directors, officers, employees, agents and independent contractors* from claims, demands, suits, actions, procedures and harm caused by or as a result of any inaccuracy in the aforementioned representation” (Tribunal’s emphasis). From the Tribunal’s reading of the STA, this is the only indemnification, defence, and protection obligation that explicitly extends the scope of the beneficiaries to the shareholders, etc. of the Company. What effect, if any, does this Clause have for the interpretation of Clauses 5 and 6 and the balance of Clause 8 of the STA?
 - c. The Tribunal has noted the description of DRP’s ownership in the assignment agreement of 1 June 2001 (R-4). Who owned DRP at the time the STA was signed, and at all relevant points in time?
4. Regarding the phrase “standards and practices that were less protective of the environment or of public health” (Clause 5.3(a) of the STA):
 - a. What should the Tribunal understand as “standards and practices”? Does this phrase refer to the manner in which the facilities were operated, to the relevant industry or regulatory norms, or to the results of the facilities’ operations (*e.g.*, on emissions, air quality, or human health)?
 - b. Given Centromín’s authorship of the PAMA, do the contents of the PAMA (both as to the description of the then-current operations of the facilities as well as the prioritization and schedule of PAMA projects) reflect the relevant “standards and practices” of Centromín?
 - c. At what time or over what period should Centromín’s standards and practices be evaluated for the purposes of the STA in light of the phrase “that were pursued by Centromín until the date of execution of this contract” in Clause 5.3(a) (*e.g.*, from 1974-1997, in 1997 only, at some other time, or over some other period)?
 - d. At what time or over what period should DRP’s standards and practices be evaluated for the purposes of the STA (*e.g.*, in 1997, from 1997 until the end of the PAMA period, at or until the date on which the Missouri Litigation claims were filed, at the end of the PAMA period only, at some other time, or over some other period)?

² Statement of Claim in the Contract Case, para. 171; Transcript of the Hearing, Day 9, 1617:9-16, 1619:5.

- e. Should the question of whether “standards and practices [...] were less protective” be assessed as seen at the time or according to present understandings with the benefit of hindsight?
5. The Tribunal has noticed in the chart at Exhibit AA-54 (p. 81 of the PDF) that while production in the lead circuit increased in 1997-2002, production decreased slightly in the copper circuit and increased slightly in the zinc circuit over the same period. How would this be expected to affect lead and SO₂ emissions?
6. Regarding MEM’s credit and the bankruptcy proceedings:
 - a. What specific percentage did MEM’s and other public entities’ credits represent in the bankruptcy proceedings at the different relevant moments in time?
 - b. Considering MEM’s arguments and the difference in the findings of the administrative authorities and courts in Peru, what was the ultimate basis for the credit asserted by MEM and recognized in the bankruptcy and insolvency proceedings?
 - c. Considering that MEM’s credit was said to have derived from a PAMA-related obligation, is it of a public nature? Was MEM acting with public authority in the bankruptcy proceedings?
 - d. Did DRP make any progress on PAMA Project No. 1 (sulfuric acid plants) during the course of the bankruptcy proceedings? If so, what effect (if any) did this have on the amount of MEM’s credit in those proceedings?
 - e. Did MEM ever receive any distribution from DRP’s liquidation, and in what amount? Has MEM taken any steps towards the completion of the last sulfuric acid plant?
 - f. Has there been any revegetation or soil remediation performed by or at the behest of Activos Mineros (or Centromín) since the end of the plant’s operations and the liquidation of DRP?
7. [For the Claimant:] What specific judicial measures (or exact portions of judgments) does Renco invoke as part of its “substantive denial of justice” claim?
8. Having regard to the STA’s provisions concerning the assignment of interests, and Dr. Payet’s acknowledgment that on his interpretation of the Additional Clause there might be an “imperfection” given the fact that not all of the parties represented at the execution of the STA and the Additional Clause subsequently consented to the two assignments of contractual rights:³ if Dr. Payet is correct, does it follow that the assignments were ineffective under Peruvian law? If they were ineffective, what would be the impact of such ineffectiveness on the present Contract Case proceedings?
9. Is it common ground between the Parties that under Peruvian law a debt must be paid before a right to subrogation can arise?
10. The Tribunal notes that the Inter-American Court of Human Rights has recently issued a judgment in a case related to the community of La Oroya and the Facility (the “**IACtHR Judgment**”). Accordingly, the Parties are requested to submit the IACtHR Judgment as an

³ Transcript of the Hearing, Day 3, 452:6-456:13.

exhibit along with the translation of the sections each Party considers appropriate in accordance with paragraph 4.2(c)(ii) of Procedural Order No. 1 of both Cases. Regarding the IACtHR Judgment:

- a. What weight (if any) should the Tribunal grant to the analysis and findings of the Inter-American Court of Human Rights?
- b. Could the Parties please provide any comments they have concerning the IACtHR Judgment?