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Renco Uses U.S.-Peru FTA to Evade Justice for La Oroya Pollution

U.S.-based Renco Group Inc. is trying to use the U.S.-Peru Free Trade Agreement (FTA) to evade justice after its subsidiary Doe Run has been widely accused of failing to fulfill its commitments to limit and clean up grievous pollution created by its metal smelter in La Oroya.¹ Renco, owned by one of the richest men in the United States,² is using the FTA to try to escape its environmental responsibilities in Peru and to avoid compensating the children who are suffering from pollution levels far above international standards³ in La Oroya, which was designated as one of the 10 most polluted sites in the world.⁴

To do this, Renco is using the FTA's notorious "investor-state" regime, which empowers multinational oil, mining, gas and energy corporations to skirt domestic courts and laws and directly challenge governments in foreign tribunals to demand taxpayer funded-compensation for claims that environmental or health policies interfere with their future expected profits. In December 2010, Renco notified Peru that it was launching an investor-state case against the country, demanding \$800 million in compensation⁵.

Renco's investor-state case makes many outrageous claims, including that the Peruvian government is attacking the corporation's new FTA investor privileges by not granting it a *third* extension to comply with its unfulfilled 1997 commitment to install pollution mitigation devices in its smelter,⁶ and by not assuming Renco's liability for health damage caused by pollution in La Oroya.⁷

Renco is using the FTA investor-state attack as a tool not just to evade justice in Peru, but also in the United States, where it has long sought to indefinitely delay, if not altogether derail, Missouri-based lawsuits seeking compensation for La Oroya's children. Beginning in October 2007, a U.S. law firm filed eleven personal injury lawsuits against Renco and Doe Run in Missouri state courts on behalf of 162 sickened Oroyan children.⁸ These cases are possible because Missouri (like other U.S. states) allows foreign plaintiffs to bring claims against companies located in the state.⁹ Missouri-based D.R. Acquisition Corp. (owned by Renco) owns Doe Run.¹⁰ The lawsuits alleged that while owning and operating the facilities in La Oroya, Doe Run had "negligently, carelessly and recklessly, made decisions that resulted in the release of metals and other toxic and harmful substances... which has resulted in toxic and harmful exposures to minor plaintiffs."¹¹ The cases had a decent chance of success, since Renco's companies have also faced heavy penalties for highly publicized pollution in Missouri (more information below),¹² and the jury pool was likely to be skeptical of the company.¹³ So, Renco repeatedly tried to get the cases moved out of the Missouri state courts and into U.S. federal courts. Three times it failed to do so.¹⁴ Renco also filed a claim that the lawsuits should be moved entirely to

Peruvian courts, a “*forum non conveniens*” claim likely to face a more hospitable reception in a U.S. federal court than in Missouri state courts.¹⁵

One week after notifying Peru of the launch of its FTA investor-state case, Renco moved for a fourth time in January 2011 to have the Missouri state court cases removed to U.S. federal courts, this time based on its FTA case against Peru. “The attempt by Doe Run to implicate the government of Peru is completely frivolous and is being done for this Hail Mary attempt to get federal jurisdiction ... It’s completely bogus,”¹⁶ said the U.S. lawyer for the Oroyan children. But this time, in June 2011, the same judge that had denied the past attempts ruled that, even though the underlying facts and players had not changed, the cases were now a matter of federal jurisdiction. The judge cited Renco’s new FTA case as cause for the change: “In removing these cases, defendants rely on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ... [U.S. law] allows removal of any action in state court in which ‘the subject matter ... relates to an arbitration agreement or award falling under the Convention...’ ... Accordingly, because the [FTA] arbitration panel’s decision on the claims raised by Renco ... could conceivably affect the issues in this case, these actions are removable...”¹⁷

Having escaped the jurisdiction of the Missouri courts, Renco then attempted to use the FTA to freeze the U.S. federal court cases, demanding that the process be stopped until the investor-state case was completed. This delay tactic was rejected in a December 2011 ruling.¹⁸ So, then Renco appealed. But on November 13, 2012 the federal Court of Appeals again rejected Renco’s demand.¹⁹ However, Renco has already indicated it will ask for a re-hearing, arguing that its FTA investor-state case requires a stay of the U.S. lawsuits against the company.²⁰ Even if that appeal is denied, Renco is likely to again claim that the entire matter should be moved to Peruvian courts, which would guarantee further delays.²¹ While Renco has used the FTA investor-state case to delay the U.S. lawsuits, it has taken no action on the FTA case itself since its initial 2010 notice, despite being authorized to do so since April 2011.

Renco’s Illegal Lead Pollution in the U.S. State of Missouri Results in \$72 Million Settlement

Renco’s history of lead pollution did not begin in Peru. Doe Run owns and operates numerous “lead mining, milling, and smelting facilities” in Missouri.²² Some are decades old. The Hurculaneum smelter has been in operation since 1892.²³ Renco acquired the smelter and all Doe Run facilities in 1994.²⁴ In 2002, the U.S. Department of Health and Human Services found that 28 percent of the children living in the vicinity of the Hurculaneum smelter, and 45 percent of the children living closest to the facility, had high blood lead levels “associated with the development of adverse health effects.” The Department declared the site to be “an urgent public health hazard.”²⁵ After the pollution persisted, in 2010 the U.S. Environmental Protection Agency (EPA) and the State of Missouri launched a lawsuit against Doe Run, alleging 48 counts of violations of the U.S. Clean Air Act, Clean Water Act and other rules.²⁶

In an October 2010 settlement, Renco’s Doe Run agreed to pay \$65 million to clean up toxic lead pollution from 10 facilities in Missouri, plus a \$7 million penalty for breaking at least nine environmental laws. Doe Run also agreed to shut down the Hurculaneum smelter, which the EPA estimated to be responsible for the annual emission of “at least 101,000 tons of carbon dioxide, 22 tons

of carbon monoxide, 2.5 tons of volatile organic chemicals, 23 tons of particulate matter, 13.5 tons of nitrogen oxides, 42,000 tons of sulfur dioxide and 30 tons of lead.”²⁷

In announcing the settlement, an EPA spokeswoman concluded: “For years families with children near Doe Run’s facilities have been exposed to unacceptable levels of lead, one of the most dangerous neurotoxins in the environment... Today’s settlement requires Doe Run to take aggressive actions to clean up their act and work to ensure that families living near the company’s facilities are protected from lead poisoning and other harmful pollution.”²⁸

Dangerous Investor-State Regime Would be Expanded in the Trans-Pacific Partnership (TPP)

Peru is now involved in negotiations for an expansion of its U.S. FTA to ten more countries through the Trans-Pacific Partnership (TPP). The TPP would allow even more corporations from the countries involved to evade justice by using the tactics Renco has employed. Governments have already been ordered to pay more than \$2.5 billion in taxpayer funds to corporations in investor-state disputes under U.S. FTAs and bilateral investment treaties (BITs). Over 90 percent of this taxpayer burden came from attacks on governments’ environmental, oil, gas or mining policies.

ENDNOTES

¹ Such criticisms come from a wide range of actors, including Peru’s federal government, Peru’s National Mining, Petroleum and Energy Society, and civil society organizations from Peru and the United States. See, for example, “Peru announces cancellation of U.S.-owned miner’s license,” *EFE*, July 28, 2010. Available at:

<http://www.laht.com/article.asp?CategoryId=14095&ArticleId=361361>. “Gremio minero de Perú expulsa a Doe Run por no cumplir con sus compromisos,” *EFE*, Jan. 29, 2010. Available at:

<http://www.google.com/hostednews/epa/article/ALeqM5jNc2DEEzhluPrAcqLegiskHvP6YQ>. Letter from AIDA, Public Citizen and others to Secretaries Hillary Clinton and Timothy Geithner, dated March 31, 2011. Available at: <http://www.citizen.org/documents/peru-fta-rengo-letter-march-31-2011.pdf>.

² “Forbes 400 Richest Americans: Ira Rennert,” *Forbes*, published Sept. 2012, accessed Nov. 20, 2012. Available at: <http://www.forbes.com/profile/ira-rennert/>.

³ Anna K. Cederstav, Alberto Barandiarán, “La Oroya Cannot Wait” AIDA & SPDA Publication, September 2002, at 25, 41-48. Available at: http://www.aida-america.org/sites/default/files/La_Oroya_Cannot_Wait_1_0.pdf.

⁴ Blacksmith Institute, “The Top Ten of The Dirty Thirty”, Project of The Blacksmith Institute, September 2007, at 6. <http://www.worstpolluted.org/reports/file/2007%20Report%20updated%202009.pdf> and Blacksmith Institute, “The Worlds Worst Polluters: The Top Ten” Project of the Blacksmith Institute, October 2006. <http://www.worstpolluted.org/reports/file/10worst2.pdf>

⁵ The Renco Group, Inc. v. The Republic of Peru, Claimant’s Notice of Intent to Commence Arbitration under United States – Peru Trade Promotion Agreement, Dec. 29, 2010, at para 10. Available at: <http://italaw.com/sites/default/files/case-documents/ita0713.pdf>.

⁶ “Doe Run Peru has committed under its PAMA to implement the following projects over the next nine years, estimated in the PAMA to cost approximately \$107.5 million: (i) new sulfuric acid plants; (ii) elimination of fugitive gases from the coke plant; (iii) use of oxygenated gases in the anodic residue plant; (iv) water treatment plant for the copper refinery; (v) a recirculation system for cooling waters at the smelter; (vi) management and disposal of acidic solutions at the silver refinery; (vii) industrial waste water treatment plant for the smelter and refinery; (viii) containment dam for the lead muds near the zileret plant; (ix) granulation process water at the lead smelter; (x) anode washing system at the zinc refinery; (xi) management and disposal of lead and copper slag wastes; and (xii) domestic waste water treatment and domestic waste disposal. The actual current estimate for the environmental projects and related process changes for Doe Run Peru is \$195.0 million.” The Doe Run Resources Corporation Form S-4, Registration Statement Under The Securities Act Of 1933, 1998, at 91. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>.

⁷ For a summary of these allegations, see Public Citizen’s memo (in English): Todd Tucker, “Renco Group Uses Trade Pact Foreign Investor Provisions to Chill Peru’s Environment and Health Policy, Undermine Justice,” March 2012, at 14-22. Available at: <http://www.citizen.org/documents/renco-memo-03-12.pdf>.

⁸ A.O.A. v. Doe Run Resources Corp., 2011 WL 2553259 (E.D.Mo. June 22, 2011) (denial of plaintiffs’ motion to remand to state courts), at 3-4.

⁹ See Armin Rosencrantz & Richard Campbell, Foreign Environmental and Human Rights Suits against U.S. Corporations in U.S. Courts, 18 Stan. Env’tl. L. J. 145, 175-179 (1999); Svetlana Meyerzon Nagiel, Note: An Overlooked Gateway to Victim Compensation: How States Can Provide a Forum for Human Rights Claims, 46 Colum. J. Transnat’l L. 133, 155-160 (2007).

¹⁰ U.S. District Court, E.D. Missouri, Sister Kate Reid and Megan Heeney (Next Friends) v. Doe Run Resources Corporation et. al., Second Amended Petition for Damages – Personal Injury, Dec. 5, 2007, at para. 9.

¹¹ U.S. District Court, E.D. Missouri, Sister Kate Reid and Megan Heeney (Next Friends) v. Doe Run Resources Corporation et. al., Second Amended Petition for Damages – Personal Injury, Dec. 5, 2007, at para. 21.

¹² U.S. and State of Missouri v. Doe Run Resources Corp., et al, No. 4:10-cv-01895-JCH, (E.D.Mo. Dec. 21, 2011), (consent decree), at paras. 10-13. Available at: http://www.epa.gov/region07/cleanup/doe_run/pdf/consent_decree.pdf.

¹³ Public Citizen interview with a Missouri advocate who has been following the case, March 1, 2012.

¹⁴ See AAZA v. Doe Run Resources Corp., No. 4:07CV1874 CDP, 2008 WL 748328 (E.D.Mo. Mar. 18, 2008) (order granting plaintiff’s motion to remand to state courts). And see A.O.A. v. Doe Run Resources Corp., 2011 WL 2553259 (E.D.Mo. June 22, 2011) (denial of plaintiffs’ motion to remand to state courts).

¹⁵ See A.O.A., et al., through Next Friends Sister Kate Reid and Megan Heeney v. Doe Run Resources Corp., et al, No. 4:08-CV-01416-CDP, (E.D.Mo. Sept. 24, 2008) (memorandum in support of defendants’ motion to dismiss plaintiffs’ petition).

¹⁶ Kelly Wiese, “Threats mar St. Louis-based Doe Run lawsuit in Peru,” Missouri Lawyers Media, March 3, 2011.

¹⁷ A.O.A. v. Doe Run Resources Corp., 2011 WL 2553259 (E.D.Mo. June 22, 2011) (denial of plaintiffs’ motion to remand to state courts), at 4.

¹⁸ A.O.A. v. Doe Run Resources Corp., 2011 WL 6091724 (E.D.Mo. Dec. 7, 2011) (denial of defendants’ motion for a stay).

¹⁹ Sheri Qualters, “Eighth Circuit: Foreign Arbitration Doesn’t Stay Case Over Smelting Contamination,” *The National Law Journal*, Nov. 16, 2012. Available at:

http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202578499480&Eighth_Circuit_Foreign_Arbitration_Doesnt_Stay_Case_Over_Smelting_Contamination.

²⁰ Public Citizen interview with part of the plaintiffs’ legal team in the Missouri case, Nov. 19, 2012.

²¹ Public Citizen interview with part of the plaintiffs’ legal team in the Missouri case, Nov. 20, 2012

²² Environmental Protection Agency, “North America’s Largest Lead Producer to Spend \$65 Million for Environmental Violations at Missouri Facilities,” EPA press release, Oct. 8, 2010. Available at:

http://www.epa.gov/region07/cleanup/doe_run/pdf/hq_news_release_R336-100810.pdf.

²³ Agency for Toxic Substances and Disease Registry, “Health Consultation: Determination if Remedial Actions Are Protective of Public Health—Herculeaneum Lead Smelter Site,” U.S. Department of Health and Human Services, April 16, 2002, at 1. Available at: <http://health.mo.gov/living/environment/hazsubstancesites/pdf/Hercprotectiveaction.pdf>.

²⁴ Doe Run, “Company Information,” 2004, accessed Nov. 20, 2012. Available at:

<http://www.doerun.com/ABOUTUS/COMPANYINFORMATION/tabid/60/language/en-US/Default.aspx>.

²⁵ Agency for Toxic Substances and Disease Registry, “Health Consultation: Determination if Remedial Actions Are Protective of Public Health—Herculeaneum Lead Smelter Site,” U.S. Department of Health and Human Services, April 16, 2002, at 2. Available at: <http://health.mo.gov/living/environment/hazsubstancesites/pdf/Hercprotectiveaction.pdf>.

²⁶ See U.S. v. Doe Run Resources Corp., No. 4:10-cv-01895-JCH, 2010 WL 5586260 (E.D.Mo. Oct. 8, 2010) (complaint).

²⁷ Environmental Protection Agency, “North America’s Largest Lead Producer to Spend \$65 Million for Environmental Violations at Missouri Facilities,” EPA press release, Oct. 8, 2010. Available at:

http://www.epa.gov/region07/cleanup/doe_run/pdf/hq_news_release_R336-100810.pdf.

²⁸ Environmental Protection Agency, “North America’s Largest Lead Producer to Spend \$65 Million for Environmental Violations at Missouri Facilities,” EPA press release, Oct. 8, 2010. Available at:

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