



Analysis

Renco Group Uses Trade Pact Foreign Investor Provisions to Chill Peru's Environment and Health Policy, Undermine Justice

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The Gulf Coast oil spill and other oil and mining-related disasters have forced policymakers and the public to rethink the march towards deregulation of the companies that make money off of our natural resources.¹ But “free trade agreements” (FTAs) modeled on the controversial North American Free Trade Agreement (NAFTA), which was written before the lessons of the oil spill, give these extractive industries new tools to resist regulation and public accountability. Under these pacts, multinational oil, mining, gas and energy (OMG) companies gain the right to challenge government policies in foreign tribunals. There, they can skirt domestic courts and demand taxpayer funded-compensation – simply because they allege that environmental or health rules interfere with their future expected profits.²

This is not a hypothetical threat. Governments have paid out over \$675 million to investors in investor-state disputes under U.S. FTAs and bilateral investment treaties (BITs) – almost 70 percent of this related to OMG disputes. Natural resource issues have figured prominently in 75 percent of the cases where governments have paid money (nearly \$243 million) to investors to settle investor-state cases under U.S. FTAs and BITs. By contrast, in the cases where international investor arbitral panels sided with the government and against the investor, nearly 80 percent were unrelated to OMG issues. In other words, on the basis of the cases to date, OMG-related disputes are more likely to result in payments by taxpayers to corporations. Finally, the majority of the 25 known outstanding investor-state cases under U.S. FTAs and BITs (totaling \$11 billion in claims) relate to natural resource policies. Nearly half of the 129 cases pending before the World Bank's investment dispute facility relate to OMG policies.

This report examines an investor-state case brought against Peru under the U.S.-Peru FTA by the Renco Group Inc., a company owned by one of the richest men in America. The dispute relates to Renco's investment in a metal smelter in La Oroya, Peru – which has been designated as in the top 10 most polluted sites in the world.³ Renco's Peruvian affiliate promised to install sulfur plants to help remediate the environment by 2007 as part of an environmental remediation program. Although it is out of compliance with this contractual obligation, the company sought (and Peru granted) two extensions to complete the project.⁴ On December 29, 2010, Renco sent Peru a Notice of Intent that it was launching investor-state proceedings, alleging (among other claims) that Peru's failure to grant a third extension of the environmental remediation obligations constitutes a violation of the firm's FTA rights as a foreign investor. The company is demanding \$800 million in compensation from Peruvian taxpayers for alleged FTA breaches.⁵

The Renco case illustrates two deeply worrying implications of investor-state arbitration. First, it shows that ***even the mere threat of a case can put pressure on governments to weaken environment and health policies.*** It appears that the threat of this case was highly effective. Legislative branch allies of Ollanta Humala, the new Peruvian president that had criticized the

trade deal and Renco's actions during his campaign, have said that they are likely to grant an additional two-year extension for the remediation obligations. Meanwhile, the company will be allowed to continue operating as soon as May 2012.⁶ This worries Peruvian advocates, one of whom stated: "There is a silent epidemic here... The effects on the children are not easily visible, but they have all kinds of serious health problems, and those will only get worse if the smelter reopens."⁷

Meanwhile, La Oroya's children are suffering from pollution levels far above international standards,⁸ which brings us to the second worrying implication: **corporations are increasingly attempting to evade justice through the investor-state mechanism.** In October 2007, U.S. lawyers and advocates launched a case against Renco's companies in Missouri state courts to try to get compensation for the damages to the children's health. This case had a decent chance of success, since Renco's companies have also caused highly publicized pollution in Missouri, and the jury pool was likely to be skeptical of the company.⁹ In March and October 2008, a federal judge twice ruled against Renco's attempts to move the case to federal courts, saying there was no federal jurisdiction over this type of class action lawsuit, which was based on tort claims under Missouri law. Fast forward to January 7, 2011. Only a week after launching their investor-state case, Renco moved to have the class action case moved to federal courts. In June 2011, the exact same federal judge, considering almost exactly the same underlying plaintiffs' claims, determined that the existence of the investor-state case made this a federal issue. This ruling illustrates how the investor-state system can be used by corporations to try to evade justice.

Under the FTA rules, as of April 29, 2011, the company could have proceeded to the next step in its investor-state claim – the filing of a Notice of Arbitration. Why has the case not proceeded in the intervening months? The recent developments hint at a troubling answer: perhaps the company may have never intended to finalize its investor-state case. Some advocates speculate that Renco's investor-state case may have been just a tactic to avoid accountability in both Peru's regulatory system and Missouri's courts.¹⁰

In January 2012, an Ecuadorean appeals court reaffirmed a lower court's ruling that Chevron's subsidiary had caused massive pollution and health problems in Ecuador and it must pay \$18 billion to clean up the mess and address health problems.¹¹ Just days later, Chevron succeeded in getting an investor-state panel that had not even decided it had jurisdiction over the matter to order the Ecuadorean executive branch to block the Ecuadorean judicial branch from finalizing the ruling.¹² While the Ecuadorean government appears determined to reject the investor-state ruling, it may still prevent the cleanup from starting, as the ruling may be recognized by other countries whose cooperation is needed to collect the \$18 billion from Chevron, which now has no assets in Ecuador.¹³ Both cases spotlight the perils of the two-track justice created by the investor-state system, where corporations can put international law on a collision course with domestic justice. (Another similarity between the cases is that Renco and Chevron have the same law firm: King & Spalding.)

The Renco investor-state case comes as both Americans and Peruvians are demanding change in natural resource, trade and investment policies.¹⁴ This backgrounder concludes by offering a set of simple remedies that would ensure a better balance between the interest of the public and of OMG companies. U.S. and Peruvian negotiators have a unique opportunity to make these fixes

in negotiations now underway for a possible Trans-Pacific Partnership (TPP) trade deal, which may subsume the bilateral FTA the two countries have in a broader ten-nation pact. Unfortunately, initial press reports suggest that the Obama administration is pushing for NAFTA-style investment terms in the TPP as well.¹⁵

I. Background on the Smelter Operation and Peruvian Law

La Oroya is a town located in the Peruvian Andes in a minerals-rich region. Its 30,000 residents are predominantly poor and overwhelmingly economically dependent on mining-related activities.¹⁶ In 1922, the U.S. Cerro de Pasco Corporation founded a metallic smelter and refinery complex, which was expropriated in 1974 by the Peruvian government and handed over to Centromin, a state-owned entity.¹⁷

In 1993, Peru passed a landmark mining and environmental protection law, which required every mining company to agree with the government to an Environmental Adjustment and Management Program (PAMA, for its Spanish initials). The legislation stated that “The deadline for completing a PAMA will be established by the competent authorities, and in no instance may it exceed five to ten years...”¹⁸

In September 1997, Centromin created a company called Empresa Metalurgica La Oroya S.A., (“Metaloroya”). In preparation for the privatization, Centromin transferred ownership of the complex to Metaloroya.¹⁹ On October 23, 1997, a company called Doe Run Peru (DRP) acquired Metaloroya through a Contract of Stock Transfer (“Contract”), and by the end of the year the two entities had formally merged.²⁰

Nearly all of the shares in DRP are owned by Doe Run Cayman Limited (DRCL, a company incorporated in the Cayman Islands), which is owned by Doe Run Resources Corporation (DRRC, a New York corporation), which is owned by D.R. Acquisition Corp. (a Missouri corporation), which is owned by Renco (a New York corporation), which is owned and controlled by Ira Rennert,²¹ one of the richest men in America who coincidentally owns one of the largest houses in America.²² As stated in U.S. government filings, “As a result of his indirect ownership of Doe Run and the Guarantors, Mr. Rennert is, and will continue to be, able to direct and control the policies of Doe Run and the Guarantors, including mergers, sales of assets and similar transactions.”²³

American Metal Market reported in early 1998 how Doe Run’s acquisition was linked to the Peruvian government’s trade policies:

“According to Doe Run president Jeffrey Zelms, the acquisition was a case of the right property coming along and fitting into Doe Run’s previously laid plans. ‘We made our strategic plans well before we heard of La Oroya,’ he said. ‘We had to take into account the tremendous negative business climate in the U.S. toward natural resources companies.’ Zelms also said the company needed to diversify its product line as well as its geographical range... One of the challenges that faced any new owner of La Oroya was the task of cleaning up the site, which after years of operation had become thoroughly polluted. Zelms said that improving the site’s conditions will take time and

money, but he maintained that Doe Run is committed to cleaning up the site. ‘I expect to see a day when you can look at the horizon at La Oroya and not see any emissions,’ he said... the Doe Run president said he feels that the free-trade policies of Peruvian president Alberto K. Fujimori make Peru a promising place to do business.”²⁴

But a 2002 exposé in the *St. Louis Post-Dispatch* painted a more ominous picture:

“Over the years, Rennert has used hundreds of millions of dollars in junk bonds to borrow against the empire of industrial companies he owns... Rennert also used the bonds, issued by subsidiaries, to pay hefty dividends to his holding company, Renco Group Inc. In a series of junk bond issues since 1995, Rennert subsidiaries have borrowed \$1.1 billion and transferred \$322 million – or 29 percent – of the proceeds to Renco Group, according to documents the companies filed with the U.S. Securities and Exchange Commission. The subsidiaries were left to pay off the bonds, which carry high interest rates and are considered high-risk. Now, Doe Run and other of Rennert's companies are struggling under their debt load, and regulators are concerned that some of them may be unable to clean up environmental messes they are leaving behind.”²⁵

II. Doe Run’s Contract to Acquire the Smelter from the Peruvian Government Lays Out Substantial Environmental Clean-Up Obligations...

The Contract laid out over 40 pages of terms between Centromin and Doe Run. In exchange for 99.9 percent of Metaloroya’s shares, Doe Run would pay Centromin \$121.4 million.²⁶ The remainder of the shares would be held by Metaloroya employees. Doe Run committed to invest funds for fulfillment of a portion of Metaloroya’s PAMA, which had been agreed between Centromin and its Peruvian overseers in January and October 1997.²⁷ The PAMA would last through January 13, 2007, and was divided between those sections of the PAMA that Doe Run and Centromin would fulfill (subsequently “Doe Run PAMA” and “Centromin PAMA.”)²⁸ Doe Run committed to 12 projects, including a new sulfuric acid plant that would help remediate the environment. Doe Run estimated that “The actual current estimate for the environmental projects and related process changes for Doe Run Peru is \$195.0 million,” even though the PAMA only estimated \$107.5 million in costs.²⁹

Clause 5 of the Contract established that, from 1997 through 2006, Doe Run would only assume liability for damages and claims by third parties “that result directly from a default on the Metaloroya’s PAMA obligations on the part of” Doe Run, or from “those that arise directly due to acts that are not related to Metaloroya’s PAMA which are exclusively attributable to [Doe Run] but only insofar as said acts were the result of [Doe Run’s] use of standards and practices that were less protective of the environment or of public health than those that were pursued by Centromin until the date of signing of this contract.”³⁰ After 2006, Doe Run would assume liability for “acts that are solely attributable to its operations after that period.” Even after 2006, in instances where damages were attributable to both Doe Run and Centromin, the latter would “assume liability proportionately to its contribution to the damage.”³¹

Clause 7 of the Contract stated that Doe Run “has carried out its own investigation, examination, information and evaluation during the ‘due diligence’ process, directly or through third parties, on the basis of information accessible, available and provided by CENTROMIN.”³²

Clause 15 of the Contract stated that, “Neither of the contracting parties may demand from the other the fulfillment of the obligations assumed in this contract, when the fulfillment is delayed, hindered or obstructed by causes that arise that are not imputable to the obliged party and this obligation has not been foreseen at the time of the signing of this contract. All those causes are constituted, but not in a restrictive manner, by force majeure or act of God such as earthquakes, floods, fires, strikes whether declared legal or illegal, civil disturbances, extraordinary economic alterations, factors that affect transport generally, governmental prohibitions and catastrophes...”³³

Doe Run also consummated a “Legal Stability Agreement” with Peru that would freeze in place some of the tax and regulatory treatment it received from October 1997 through October 2007.³⁴

Doe Run included these documents in its 1998 filings with the U.S. Securities & Exchange Commission (SEC), where it adds the company understood the unpredictability of environmental regulation in a developing country:

“Given the developing nature of environmental law and enforcement policies in Peru, however, there can be no assurance that the Peruvian government will not in the future require compliance with additional environmental requirements that could adversely affect Doe Run Peru’s business, financial condition or results of operations. Further, there can be no assurance that the Peruvian government or other interested persons will not seek changes in the future to the terms and conditions of any of the agreements made by Doe Run Peru with the MEM that may adversely affect Doe Run Peru’s business, financial conditions or results of operations.”³⁵

III. ... But Doe Run fails to meet them

DRP sought and obtained approval for changes to various PAMA requirements in 1999, 2001, and 2002.³⁶ But in 2004, when DRP sought a five-year extension of its PAMA obligations, its request was denied. There was no legal framework for granting an extension under the 1993 mining law. While DRP claimed that “the 2002 financial crisis in the metal market... constituted an ‘extraordinary economic alteration’” under clause 15 of the Contract,³⁷ Peru does not appear to have ruled on whether *force majeure* covered such a situation.

However, in December 2004, the Peruvian government issued a supreme decree that allowed companies to apply before December 31, 2005 for an extension “that cannot be longer than three years, except that the [Director General of Mining Environmental Issues] can grant an additional year on the basis of a health risk analysis...”³⁸ Moreover, the decree stated that “The extension of the timeline shall only apply to the solicited work project, and will not affect the timelines ... for the other PAMA projects,”³⁹ and allowed the Peruvian authorities to condition approval of the extension on the adoption of additional environmental mitigation measures.⁴⁰ Maria

Chappuis, Peru's mining regulator, complained that this regulatory treatment was too lax, and resigned her position in protest.⁴¹

Under these new procedures, DRP asked for an extension in December 2005.⁴² On May 29, 2006, Peru granted a three-year extension for construction of the sulfuric acid plant only, conditional on the performance of additional environmental mitigation measures. The ministerial resolution granting the extension said explicitly, "The present ministerial resolution does not imply any modification of the obligations or the timelines stipulated in the contracts that Doe Run Peru and its shareholders have signed with Centromin and the Peruvian state..."⁴³

At the same time that Doe Run was seeking modification of its commitments, there were changes affecting Centromin as well. In 2000, Centromin's PAMA was revised so that the soil remediation efforts around the complex would be staggered until Doe Run completed its sulfur plant.⁴⁴ As environmental groups have noted, "Peru's decision to predicate the deadline for soil remediation on DRP's construction of the acid plant makes sense. If built according to plan, that acid plant would capture a sizeable portion of toxic emissions arising from the smelter. With the smelter operating, cleaning and replacing soils before DRP has honored *its* legal obligation to build the final acid plant would be a wasted investment because the soils would immediately become re-contaminated."⁴⁵ Then, in October 2006, Peru passed a law transferring Centromin's clean-up responsibilities to a new state-owned company, Activos Mineros.⁴⁶

While this was going on, changes were coming to Doe Run's complex ownership structure as well. In June 2007, the *Associated Press* reported that "Doe Run Company says Doe Run Peru is no longer its subsidiary. They are sister companies of the same parent, Renco Group."⁴⁷ DRP's website says, "This new arrangement freed Doe Run Peru from the liabilities of its former parent, allowing to nearly doubling its credit facility [sic]."⁴⁸ Renco's FTA filing, however, says that DRP is still indirectly, rather than directly owned, by Renco.⁴⁹ This suggests some additional layer of holding company intermediation. And the U.S. court filings from 2008 describe the ownership structure as unchanged from that described on page 2 above.⁵⁰

While Renco's FTA filing blames much of the smelter's difficulties in meeting its environmental commitments on the global financial crisis, it appears that Doe Run's problems began earlier. In August 2008, Doe Run claimed that it had not paid dividends to shareholders in three years because of its environmental clean-up expenses.⁵¹ Because all of Renco's companies are privately held, the statement is impossible to verify. (Doe Run discontinued its SEC filings in 2006.) What we do know is that, amidst falling commodity prices and a high debt burden, Doe Run reportedly suffered losses in the final quarter of 2008, leading its creditors to cancel its working capital line on February 24, 2009 – just weeks after the FTA went into effect. The next day, Doe Run halted payments to its suppliers.⁵² The Peruvian government came under pressure to bail out Doe Run, which was Peru's fourth largest exporter.⁵³ In April, a group of fifteen firms responsible for supplying the La Oroya facility with minerals granted Doe Run a line of credit in the range of \$100 million, and an additional bank-backed loan of \$75 million.⁵⁴ Nonetheless, operations ceased altogether on June 3, 2009 and the plant's 3,200 workers took a 90-day furlough that was eventually extended to the end of the year.⁵⁵

In August 2009, DRP declared insolvency and “submitted a request to Peru’s anti-trust institute Indecopi for it to study a solution for the company’s financial problems, granting it months of protection against its creditors,” according to *Metal Bulletin*.⁵⁶ According to *EFE*:

“‘This is a viable solution provided under force majeure, to protect the commitments to workers and so the accounts to pay salaries and other things won’t be frozen,’ Doe Run Peru general manager Juan Carlos Huyhua said. Doe Run has proposed injecting \$31 million of fresh capital into its operations, conditioned on the government’s granting an extension for completing the PAMA. While officials rejected that request, they indicated the government might provide more time if the company injects at least \$100 million in fresh capital, hands over 100 percent of its stock to the state as a guarantee and reaches an agreement with creditors.”⁵⁷

On September 25, 2009, the sulfur project was still not completed, and Peruvian authorities became worried that La Oroya would lose both the smelter jobs and the opportunity to have the area remediated. As *EFE* reported, the Peruvian Congress passed a law by an 85 to 1 majority that stated that...

“... efforts to clean up La Oroya – the most polluted city in the Americas – are a matter of public necessity and social interest and grants Doe Run a period of 10 months to seek funding for PAMA and another 20 to implement the program. The text added that Doe Run Peru, a unit of U.S.-based Renco Group, must provide guarantees that it can complete the clean-work within the allowable timeframe... An announcement by the government last week that it would only give the company an additional 20 months to comply with the PAMA was ill received by the company’s workers. Protests intensified on Tuesday, with the workers setting up roadblocks and clashing with police, one of whom was killed. Justice Minister Aurelio Pastor on Wednesday blamed Doe Run Peru executives for instigating the protests and announced that the government will file criminal charges against its president, Juan Carlos Huyhua, for aiding and abetting the policeman’s death. Although the company and its workers demanded that the deadline be extended by 36 months, labor leaders pledged Wednesday to halt all protests if lawmakers voted to push the deadline back by 30 months.”⁵⁸

The text of the law stated that the 30-month period to March 2012 represented an absolute, non-negotiable maximum extension.⁵⁹

IV. Rising public health concerns at La Oroya

Public health and environmental experts has long expressed concerns with environmental contamination at La Oroya. In 1999, Peru’s health ministry found that 99.1 percent of La Oroyan children had lead poisoning and 20 percent of these needed urgent medical attention.⁶⁰ An in-depth scientific study from 2002 by the Inter-American Association for Environmental Defense (AIDA, for its Spanish initials) noted several disturbing trends at La Oroya:

- Sulfur dioxide concentrations that exceeded World Health Organization (WHO) recommended limits by a factor of two or three on average, and by a factor of ten during the

morning work hours. Sulfur dioxide “damages the respiratory system, aggravates existing respiratory illnesses (especially bronchitis), and diminishes the capacity of the lungs to expel foreign particles such as heavy metals. It leads to a higher mortality rate, particularly when combined with the presence of elevated levels of particulate material.” The study found that sulfur dioxide levels doubled in the years after DRP’s acquisition of the complex.⁶¹

- Cadmium levels that exceeded WHO recommendations by as much as 40 times. “Cadmium damages the lungs, kidneys, and digestive tract and is considered a possible carcinogen.”⁶²
- Levels of arsenic, which has been associated with various types of cancer and reproductive problems, many times greater than developed country cities.⁶³
- Levels of lead, which is associated with damage to children’s brain and physical development, in excess of WHO standards.⁶⁴

A 2005 study by Saint Louis University later found that nearly all of Oroyan children had elevated blood lead levels, while a quarter had levels that the U.S. Center for Disease Control (CDC) would consider a medical emergency. Cadmium levels were three to five times the U.S. average, antimony (which can cause heart and lung disease) levels were thirty times higher, and high arsenic levels.⁶⁵

This combination of factors led the Blacksmith Institute – an environmental clean-up group closely linked to governments and corporations⁶⁶ – to label La Oroya one of the world’s ten worst polluted places in 2006 and 2007, alongside infamous sites like Chernobyl, Ukraine.⁶⁷

In 2006, in response to a lawsuit brought by AIDA and other groups, Peru’s Constitutional Court ordered the health ministry to declare a state of emergency in La Oroya, and “to immediately provide health care for those harmed by the contamination, especially children and pregnant women.”⁶⁸ In June 2007, a group of religious leaders from Peru travelled to New York in order to speak with Rennert about the environmental consequences of the metal smelter in La Oroya. However, Rennert declined to meet the delegation.⁶⁹

In September 2007, AIDA also got the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS) to ask Peru “to adopt the appropriate measures for making a specialized medical diagnosis of [La Oroyan requesters], provide specialized and adequate medical treatment for those persons whose diagnosis shows that they are at risk of facing irreparable harm to their personal integrity or life, and coordinate with the persons requesting the measures and the beneficiaries to ensure implementation of the precautionary measures.”⁷⁰ AIDA has more recently petitioned IACHR to go beyond the precautionary measures and review Peru’s compliance with the underlying human rights standards.⁷¹ These hearings, however, have put Peru in a Catch-22 situation. In response to the IACHR inquires, Peru has cited the conditionalities it placed on DRP before granting the PAMA extensions in 2006 and 2009. Renco’s investor-state arbitration challenge of Peru, however, cites these same measures as violating the FTA.⁷²

On October 4, 2007, the law firm of Schlichter, Bogard & Denton filed a personal injury lawsuit against Doe Run in Missouri courts on behalf of 137 sickened Oroyan children. This case is possible because Missouri (like other U.S. states) allows tort claims to be brought by foreign plaintiffs against companies located in the state, provided that the corporate decisions that led to

the alleged tort were also made in Missouri. In such cases, residents of the state in question will typically stand in for the plaintiffs as “Next Friends.”⁷³ As reiterated in later court documents, the suit alleged that,

“During the course of their ownership, operation, use, management, supervision, storage, maintenance, and/or control of operations of Doe Run, including their properties in La Oroya, Peru, and at all times relevant hereto, the Defendants, while located in the States of Missouri and/or New York, negligently, carelessly and recklessly, made decisions that resulted in the release of metals and other toxic and harmful substances, including but not limited to lead, arsenic, cadmium, and sulfur dioxide, into the air and water and onto the properties on which the minor plaintiffs have in the past and/or continue to reside, use and visit, which has resulted in toxic and harmful exposures to minor plaintiffs.” The lawsuit narrowly identified what it considered Doe Run’s liability, “As owner of the La Oroya metallurgical complex, Doe Run is liable for the activities and the toxic environmental releases from the complex since the date Defendants’ purchased the complex, October 24, 1997.”⁷⁴

The case had a decent chance of success, since Renco’s companies have also been accused of causing highly publicized pollution in Missouri,⁷⁵ and the jury pool was likely to be skeptical of the company.⁷⁶)

Doe Run has worked to try to block the case filed on behalf of Oroyan children from going forward. As one Missouri advocate who has been following the case put it, Doe Run’s goal was to “delay, distract, disrupt, get the case dropped while they intimidated or tried to entice families of those in La Oroya who are being represented to move out of LO (with the help of DRP) if they would pull out of the lawsuit.”⁷⁷

On November 2, 2007, the company first attempted to have the cases moved to federal courts, alleging that federal question jurisdiction existed because plaintiffs’ claims raised substantial questions relating to the acts and obligations of a foreign state (Peru), international law, and foreign policy issues. But on March 18, 2008, District Court Judge Catherine Perry ruled that the plaintiffs’ complaint only raised state law claims and alleged only acts and damages that occurred when the American defendants owned and controlled the Complex, and remanded the case to state courts.⁷⁸

After the La Oroyan plaintiffs slightly amended their case, Doe Run again attempted to push the case to federal courts, asserting federal diversity jurisdiction. This time, the company argued that the plaintiffs’ claims constituted a qualifying mass action under the Class Action Fairness Act (CAFA) of 2005. In this iteration, the plaintiffs withdrew their claim on August 5, 2008 for procedural reasons. The plaintiffs filed two new cases on August 7, 2008 alleging the same facts and claims as before. Doe Run moved to have both cases removed to federal courts on September 17, 2008 on CAFA-based arguments. Judge Perry disagreed, and again remanded the two cases to state courts on October 9, 2008. On November 21, 2008, Doe Run then attempted to have the two cases transferred from the City of St. Louis courts to the St. Louis County courts. On December 9, 2008, the plaintiffs’ lawyers filed another nine cases involving 17 additional plaintiffs, which Doe Run also attempted to move to the county courts. The Missouri trial court,

Missouri Court of Appeals and ultimately the Missouri Supreme Court on December 21, 2010 refused to move the cases to county courts. Meanwhile, Doe Run also attempted to get Peru to enter the cases in Doe Run's place, which Peru refused to do on November 26, 2010.⁷⁹

The Missouri law firm representing the children claimed that in late 2010, Doe Run also improperly contacted the child plaintiffs and intimidated their advocates. "What's really going on is that Doe Run is attempting to intimidate others from seeking out legal redress for injuries to their children by this violence and other threats," said attorney Roger Denton, citing broken windows at the law office of the local Peruvian attorney his firm is using, and death threats against a Peruvian church leader who had been supportive of the children's plight. (The Missouri courts could not find enough evidence to prove a link between the company and the actions.)⁸⁰

Doe Run then began courting civil society groups. In 2006, it invited the Congress of Racial Equality (CORE) to La Oroya. CORE then wrote a piece that criticized environmental and faith leaders for their advocacy: "aside from sponsoring duplicative blood-lead tests and spending probably millions to attack Doe Run and thwart La Oroya's interests, they have done nothing."⁸¹ CORE is a former U.S. civil rights organization that turned sharply to the right since the 1960s. As an investigative piece in *Mother Jones* stated, CORE is best "known among real civil rights groups for renting out its historic name to any corporation in need of a black front person."⁸² Doe Run also invited Blacksmith to La Oroya,⁸³ and the latter ended up printing a more report more favorable to the firm in 2008.⁸⁴ AIDA criticized this follow-up report, saying that it relied "on Doe Run's own portrayal of the situation," was not "based on actual air quality data, blood-lead levels, and other environmental and health indicators," and that the author of the report "fails to disclose a clear conflict of interest."⁸⁵

V. Smelter Winds Down

As the public health problems mounted, Peru became concerned that Doe Run was not going to be able to meet its environmental obligations. In November 2009, *EFE* reported that "the Economy Ministry also ordered Doe Run to provide at least \$100 million in financial guarantees to suppliers as a condition for resumption of operations at La Oroya. Doe Run Peru owes some \$110 million to its suppliers, which stopped providing the smelter with mineral concentrates due to the company's financial problems."⁸⁶ The January 15, 2010, *EFE* story also noted:

"Peru's Energy and Mines Ministry said it has retained \$14 million that mining company Doe Run Peru had placed in escrow to guarantee completion of an environmental clean-up operation. The decision to seize the funds was taken after a Jan. 8 deadline for renewing the surety bond expired, the ministry said Thursday... The performance bond was established as a requirement in 2006, when the ministry approved Doe Run's request for an extension of its deadline for completing an environmental clean-up at its metals processing complex in the central city of La Oroya, which environmental organizations say is one of the world's most polluted places."⁸⁷

In January 2010, Renco reportedly was in negotiations to sell the Complex for \$415 million to investors Glencore International AG and Trafigura Beheer,⁸⁸ suggesting that the investment still retained considerable value. Later that month, DRP was suspended from Peru's National Mining,

Petroleum and Energy Society (a private sector body) until it could show that it would be able to comply with the PAMA.⁸⁹

In early May 2010, the Peruvian government threatened to close down Doe Run Peru if it did not obtain financing to restart its operations.⁹⁰ Later that month, DRP presented a four-point proposal to the Peruvian authorities to restart if 1) the Peruvian government modified the Contract to hold the company harmless in the Missouri lawsuits; 2) lower DRP's tax burden by nearly \$270 million; 3) to not apply environmental standards to the company until the sulfur plant is complete; and 4) to suspend various fees levied against the company.⁹¹

In June 2010, as unionists cut off roads in La Oroya, DRP took out paid ads in newspaper *La República* accusing the government of violating the Contract. The Peruvian government responded with a press release accusing DRP of attempting to "blackmail the State by using bad union leaders."⁹² A Peruvian government official then said DRP was proposing that the state allow it to postpone paying \$266 million in taxes for 100 years.⁹³

On July 27, 2010, as promised, the Peruvian government revoked Doe Run's operating permit for the complex, citing that the company had not demonstrated that it would be able to finance its PAMA requirements.⁹⁴ In March 2011, Peru fined Doe Run a further \$2.5 million for not securing financing for completion of the sulfur project.⁹⁵

A February 2011 company news release suggests that Renco apparently offered to loan DRP up to \$50 million to remediate the soil's around the Complex – which was part of Centromin's PAMA.⁹⁶ It is unclear why Renco would make this offer, rather than simply use the money towards fulfillment of DRP's PAMA.

Parallel to this, DRP's bankruptcy proceedings had become quite contentious. In September, Peru's Ministry of Energy and Mines (MEM) "filed a request for Indecopi to recognize a US\$163mn debt related to Doe Run Peru's future investment plans for the completion of environmental cleanup program PAMA at the company's polymetallic smelter in La Oroya."⁹⁷ In December, MEM increased its request to \$259 million, "due to payments related to the company's failure to submit two letters of guarantee. The debt for failing to submit those documents is US\$18.2mn, according to MEM. In addition, the ministry said the debt should take into account an additional US\$77.7mn in accumulated interest since the original deadline to complete the PAMA program expired in January 2007."⁹⁸

Rennert, for his part, claimed that a majority of DRP's debt was due him, and therefore that he should be a part of the Indecopi committee.⁹⁹ In January, DRP workers protested that four government agencies should not be counted as among DRP's creditors.¹⁰⁰ In March, Indecopi rejected Activos Mineros and MEM's claims to creditor status, while allowing the creditor claims by tax agency Sunat and energy and mining investment regulator Osinergmin.¹⁰¹ Indecopi also decided to recognize a \$139 million claim by Doe Run Cayman, making it Doe Run Perú's largest creditor with 59.4 percent of the voting rights. *BNAmericas* reported that, "Doe Run Cayman's participation in the creditors group would give it a significant role in deciding the future of Doe Run Perú. A decision to liquidate or restructure the company requires the support of two-thirds of the voting rights in the creditors meeting."¹⁰²

On April 1, DRP's second biggest creditor¹⁰³ (commodity trader Trafigura Beheer's Consorcio Minero, or Cormin) obtained an injunction to stop Indecopi's proceedings. At issue was competing audit reports as to whether Doe Run Cayman had invested over \$120 million in the Complex, or whether it was as low as \$2 million – which Cormin contends as a basis to exclude Doe Run Cayman from the proceedings.¹⁰⁴ (Reportedly, Doe Run Cayman was pushing for restructuring of DRP, while Cormin was pushing for liquidation.¹⁰⁵) The La Oroya union, which was owed \$4.5 million by DRP (equivalent to 2 percent of the voting rights in the creditors' group, pushed for Doe Run Cayman to be included.¹⁰⁶ In early May, the union sued Cormin for \$400 million.¹⁰⁷ In mid-May, Cormin bought the debt of three of DRP's other creditors.¹⁰⁸

As Reuters reported, “Unless the recent uptick in metals prices continues, or credit markets become unstuck, more companies may find themselves in the position of Doe Run Peru, especially if they went into the global recession highly leveraged. ‘Companies are struggling to finance debt ... credit spreads have widened and the credit markets have all but closed for some companies. So we find that financing debt is challenging and extremely costly when they can get it,’ said Gayle Berry of Barclays Capital.”¹⁰⁹ In short, while the wider community of stakeholders (as represented by MEM) were excluded from the bankruptcy proceedings, Rennert's companies were represented on both sides of the equation: as shareholders who could control DRP's expenditure patterns, and also as debtors who were owed money by DRP.

VI. Renco takes its case to the U.S.

On December 29, 2010, Renco launched an attack on Peru's mining policies using the Peru FTA's investor-state system, claiming at least \$800 million in damages.¹¹⁰ Renco has stated that it will proceed with the case under the rules of the United Nations Commission on International Trade Law (UNCITRAL).¹¹¹

By that time, Renco had already launched an over \$300,000 D.C. lobbying blitz to build up support for the firm's Peru FTA case.¹¹² As Keenan Steiner of the Sunlight Foundation reports, Renco picked lobbyists who had an intimate connection to the Peru FTA:

“On Nov. 9, 2010, Timothy Keeler of Mayer Brown LLP registered to lobby for Renco Group. As the chief of staff of the office of the United States Trade Representative from 2006 to 2009, Keeler oversaw implementation of all U.S. trade agreements, according Mayer Brown's website, including the U.S.-Peru pact, which was approved by Congress on his watch. Mayer Brown's most recent lobbying disclosure says that Keeler is lobbying his former agency and Congress to negotiate with Peru over its ‘legal obligations and acknowledgement of full liability of injury claims.’ ... Six days after hiring Keeler, the Renco Group added Capitol Counsel, a firm that includes former Ways and Means Committee Chairman Jim McCrery, R-La., among its professionals. As ranking member after Republicans lost their majority in the 2006 elections, McCrery played a key role in moving the Peru trade agreement through Ways and Means. Renco's Capitol Counsel team also includes the shop's founder John Raffaelli, one of *Washingtonian Magazine's* 50 top lobbyists in 2007 and a former international trade counsel to the late Lloyd Bentsen, D-Texas, and Shannon Finley, who recently worked

for eight years as a political advisor to Max Baucus, D-Mont., who as Senate Finance Committee chairman, is perhaps the most powerful gatekeeper of trade deals in Congress.”¹¹³

On January 19, 2011, eight House Democrats signed a letter to U.S. Treasury Secretary Tim Geithner and Secretary of State Hillary Clinton urging both departments to get involved in the case. In particular, they noted that “the U.S. provides major funding to the Inter-American Development Bank [IDB] that is in turn quite active in Peru. A *de facto* expropriation would raise questions about the appropriateness of further IDB investment in Peru.” The threatening letter carbon-copied the president of the IDB and the Peruvian Ambassador to the U.S.¹¹⁴

In response on February 15, the Treasury Department responded that the very *raison d’être* for FTAs was to allow such investor-state challenges: “The United States negotiated the investment chapter of the [FTA] in order to permit investment disputes of this kind to be adjudicated... Our embassy has been in touch with the government of Peru with respect to this case, emphasizing that we expect both parties to make a good faith effort to work to resolve the pending financial and environmental issues.”¹¹⁵

This intervention on behalf of a firm accused of avoiding its environmental obligations angered many observers. On March 31, leaders of four U.S. and Peruvian advocacy organizations wrote to both secretaries, arguing “the Department of State should not support Renco in its dispute with the Government of Peru. To the contrary, the United States should do all within its power to encourage Renco to comply with all of its environmental obligations and ensure public health protection in La Oroya.”¹¹⁶ Treasury sounded a more measured tone in response, saying that, “While the Administration has urged the parties to work together to resolve their differences, we have not taken a position on the merits of DRP’s allegations.”¹¹⁷

Some saw a connection between the Missouri case – and in particular Doe Run’s repeated attempts to shift the case out of Missouri courts and into U.S. courts – and the decision to launch the investor-state claim. “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 and to perhaps see if there’s some pressure that would be applied on us in pursuing this claim... It’s completely bogus,” said the lawyer for the Oroyan children.¹¹⁸

The lawyer was uncannily prescient, as it turned out. On January 7, 2011, just a week after filing its Notice of Intent with Peru, Doe Run moved to have the eleven Missouri state court cases removed to federal courts. This was the fourth time Doe Run attempted this tactic: federal Judge Catherine Perry had ruled against them twice, while the plaintiffs themselves removed the case for technical reasons once. On June 22, 2011, Judge Perry ruled that the case, even though the underlying facts and players hadn’t changed, was now a matter of federal jurisdiction:

“In removing these cases, defendants rely on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards... Congress ratified the Convention in 1970 to ensure that United States citizens would have predictable enforcement of their arbitration agreements and awards in the courts of the United States and other signatory nations... [the implementing legislation] creates original jurisdiction in federal courts

for actions falling under the Convention... Most importantly for this case, [the legislation] allows removal of any action in state court in which ‘the subject matter ... relates to an arbitration agreement or award falling under the Convention...’ several courts have interpreted [the] ‘relates to’ language quite broadly... When confronting the issue of what actions ‘relate to’ arbitration agreements under the Convention and, thus, are removable under [the legislation], the Fifth and Ninth Circuits have both held that ‘whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of plaintiff’s case, the agreement “relates to” the plaintiff’s suit,’ and the case is removable... [italics in original] ... if the arbitration panel determines that Peru is contractually obligated to defend Renco and the other defendants, Peru could be required to enter into these cases as a defendant. Plaintiffs contend that only the defendants’ actions caused their injuries, not Peru’s, but this is a question of fact that cannot be determined simply by the pleadings, and an arbitration panel’s determination that Peru failed to remedy some of the environmental contamination in the years after the 1997 sale could be relevant to that question. Accordingly, because the arbitration panel’s decision on the claims raised by Renco before that panel – including Peru’s responsibility for and failure to clean up the environment around La Oroya – could conceivably affect the issues in this case, these actions are removable...”¹¹⁹

As of April 29, 2011, the Peru FTA would have allowed Renco to file its Notice of Arbitration, the second step towards arguing its investor-state claim. But, after the June 22 Missouri court ruling removed the cases to federal court, the company may have achieved the goals that the La Oroyan children’s lawyers and supporters allege: blocking or stalling the injured plaintiffs’ case from going forward. With the developments that would occur in Peru in the following months (see below), there may conceivably no longer have been any pressing need to actually pursue the Peru FTA investor-state case.

(After having successfully federalized its case in June, Doe Run attempted to derail the federal proceedings, arguing that the investor-state proceedings should take precedence. A seemingly exasperated Judge Perry denied this motion on December 7, 2011, noting that “the defendants have given no indication regarding how long the arbitration may take to complete... and the evidence for both sides continues to get more stale.”¹²⁰)

VII. Renco’s FTA claims

While it is unclear if Renco will actually proceed with its investor-state arbitration, it is worth exploring the seven claims the company made in its 15-page December 2010 Notice of Intent to Commence Arbitration under the FTA. The first three relate to violations of the Contract, while the final four relate to violations of the substantive standards of the FTA. Some background concepts will be helpful in understanding the basis of these claims.

Jurisdictional and Definitional Issues

The FTA allows investor-state panels to hear disputes related to “covered investments,” which are defined broadly in Article 10.28 in the following manner: “investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment,

including such characteristics as the commitment of capital or other resources, *the expectation of gain or profit*, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges..." [italics added].¹²¹ As the italicized portion makes clear, interests like "the expectation of gain or profit" can suffice as a characteristic of a covered investment.

While Renco's Notice of Intent does not spell out precisely what it feels is the "covered investment" under Article 10.28, it does mention an alleged investment of over \$120 million in the Complex between 1997 and 2002, and of \$300 million in PAMA-related expenditures from 1997 to 2010.¹²² Because Renco owns both DRP shares and debt, and DRP has or had operating licenses for the Complex, it is possible that the company might have a "covered investment" in various of the forms envisioned in Article 10.28.

The FTA also allows investor-state panels to hear disputes related to "investment agreements," defined as: "a written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government..."¹²³ DR had rights to "refine" raw materials that were previously owned by Peruvian state entities, and arguably the PAMA represented some infrastructure commitments. It is unclear how a tribunal would rule on whether DRP's arrangements with Peru amounted to an "investment agreement" or not.

There are two jurisdictional conditions placed on FTA investor-state claims related to investment agreements. First, "the subject matter of the claim and the claimed damages [must] directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement."¹²⁴ Second, claims related to investment agreements are barred from being heard under the FTA if an investor "has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure."¹²⁵

Renco maintains that the Contract is an "investment agreement" under the FTA, and states that "Renco relied on the contractual commitment of Centromin and Peru to assume and accept liability for third-party claims when it agreed to purchase the Company. The sale transaction would not have occurred without this critically important commitment by Centromin and Peru."¹²⁶ By making this statement, Renco appears to be attempting to meet the first

jurisdictional requirement for FTA challenges of investment agreement breaches by stating that the investment wouldn't have occurred without the guarantees that Renco alleges were offered by the Contract. As to the second jurisdictional requirement, DRP is involved and has been involved in various administrative proceedings related to the Complex. It is unclear if any of these proceedings would serve to disqualify Renco's FTA claim of investment agreement breaches under the second jurisdictional requirement.

In any case, *Investment Arbitration Reporter* notes that Renco may face additional jurisdictional hurdles, "over whether the treaty covers conduct largely occurring before it entered into force, on 1 February 2009. Under Article 10.1(3) of the TPA, the parties are not bound in relation to 'any act or fact that took place ... before the date of entry into force of this Agreement.' Although relating to a different governing treaty, the U.S.–Ecuador BIT, the 2008 jurisdictional ruling in the first *Chevron v Ecuador* arbitration found that protection extended to disputes arising before the treaty's entry into force. (The treaty text there was, however, silent on the issue.)"¹²⁷ It is unclear whether an investor-state tribunal would find a violation of an investment agreement signed in 1997 (prior to the FTA entering into force), for alleged breaches that occurred largely before the FTA entered into force. Peru may raise jurisdictional objections on the basis of such timing concerns.

(Additionally, the U.S.-Peru FTA, unlike other U.S. pacts, additionally allows for arbitration in certain instances for breaches arising from Legal Stability Agreements (LSA).¹²⁸ Renco's Notice of Intent, however, does not appear to explicitly base any FTA claims on the LSA, which expired in 2007.)

Renco's Substantive Claims

Release from Legal Liability in U.S. Court: First, Renco alleges that Peru's failure to appear in the Missouri lawsuits, to assume "liability and responsibility for any damages that the plaintiffs may recover in the Lawsuits," and to release and hold "Renco and its affiliates harmless from those third-party claims" constitutes a violation of the Contract. In addition to the \$800 million in damages, Renco seeks a declaration stating that Peru is "exclusively liable for any judgment and damages that may be rendered in connection with the lawsuits" and "an order and award requiring Peru to release and indemnify the defendants from all liability associated with the lawsuits and to take on the defense of the lawsuits."¹²⁹ A similar claim to release a company from legal liability was made by *Chevron* in its recent BIT arbitration against Ecuador. This is perhaps not a mere coincidence, as Renco is represented in the case by the same law-firm as *Chevron* in its BIT case (*King & Spalding*).¹³⁰

If Renco is successful in obtaining the declaration from Peru in the UNCITRAL proceedings, it could amount to a wholesale revision of the division of liability envisioned in the original 1997 Contract. While Renco acknowledges that it actually shares some liability for third-party claims under the Contract, the Notice of Intent claims that this is only "in extremely narrow circumstances that are not present here."¹³¹ Renco does not mention that the Missouri lawsuit only holds Doe Run "liable for the activities and the toxic environmental releases from the complex since the date Defendants purchased the complex, October 24, 1997."¹³² The wording

of this claim suggests that the Oroyan children are only demanding damages for emissions under DRP's watch.

Moreover, Renco fails to note that, under the Contract, Doe Run is liable through 2006 for damages that were suffered because of failure to live up to its PAMA obligations (which would include Doe Run's admitted failure to build the sulfur plant). Doe Run assumed full liability for any damages caused by its operations after 2006. The 2006 PAMA extension explicitly stated that it does not "imply any modification of the obligations or the timelines stipulated in the contracts that Doe Run Peru and its shareholders have signed with Centromin and the Peruvian state..."¹³³ In sum, Renco would likely have responsibility for at least some of the damages, and it would be inappropriate to hold Renco *completely* "harmless" in the Missouri proceedings.

Contractual claims: Second, Renco alleges that Centromin failed to live up to its PAMA obligations under the Contract by not remediating La Oroya's soils.¹³⁴ But, as noted above, Centromin's PAMA was altered in 2000 to stagger its commitment until the sulfur plant had been built, so Peru appears to be in compliance with its obligations. In any case, Peru has in fact begun its soil remediation process.¹³⁵

Additional extensions: Third, Renco alleges that Peru breached the Contract "by failing to grant DRP adequate extensions of time to complete its PAMA obligations in light of certain circumstances of *force majeure*, including extraordinary economic alterations in 2002 and 2008, and the imposition upon DRP by Peru of additional and onerous environmental and operational obligations as a condition to granting the first extension in 2006."¹³⁶

This account leaves out the fact that, until 2005, there was no legal framework in Peru for granting extensions of PAMA under any circumstances. After being pressured by Doe Run to allow extensions, Peru *created* a new legal framework that would allow regulators to grant such a request. Peru then proceeded to grant two extensions, subject to certain additional clean-up requirements, which were part of the 2006 law change and the content of which was announced at the time.

Moreover, it is unclear that the circumstances described by Clause 15 of the Contract capture business cycle events such as the 2002 and 2008 recessions. Renco appears to be arguing that Peru should protect its investments from the business cycle, but does not mention that along with DRP's difficult times came profitable ones. Indeed, while DRP had negative net income in two years (2002 and 2003), it reported positive and even substantial profits in six years (1998-2001 and 2004-05, before it stopped filing detailed reports with the SEC). DRP made Doe Run over \$54 million in profits over 1998-2005, and helped offset Doe Run's losses on its U.S. operations for many of these years.¹³⁷

Moreover, Renco and its affiliates and owner – not Peru's government or La Oroya's residents – have chosen to spend their money in other ways. In 1998, Rennert began plans on his 66,395-square-foot, \$170 million Italianate mansion in the Hamptons, which was completed in 2004.¹³⁸ Renco and its employees have donated over \$1.3 million to candidates for office over the last two decades – 73 percent of it to Republicans, and more than \$1.2 million since buying Metaloroya.¹³⁹ The firm has also spent nearly \$1 million on lobbying expenditures over the last

decade alone.¹⁴⁰ Over 60 percent of these campaign donations (\$868,725 of \$1,379,675) and about a third (\$325,000 of \$985,000) of the lobbying expenditures have occurred since 2007 – the period that Doe Run has missed its environmental obligations.¹⁴¹

Minimum Standard of Treatment and Fair and Equitable Treatment: Fourth, Renco alleges that – through the actions above – Peru violated the FTA’s Article 10.5 on the Minimum Standard of Treatment. The provision states:

- “1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
 - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
 - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.”¹⁴²

This FTA provision is to be interpreted using Annex 10-A, which states:

“The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”¹⁴³

Even legal experts find these provisions circular, vague and worryingly elastic. The Annex was added to U.S. FTAs after various NAFTA tribunals stretched the Minimum Standard of Treatment rule to require government compensation of foreign investors for outlandish reasons.¹⁴⁴ For instance, in the *Pope & Talbot v. Canada* NAFTA case, a tribunal found that a bureaucrat’s unpleasant interactions with the U.S. timber firms constituted a breach of the Minimum Standard of Treatment rule, even when the tribunal dismissed as specious other more substantive alleged investor rights violations.¹⁴⁵

More recently, the majority of a three-member tribunal in the *Lemire v. Ukraine* case under the U.S.-Ukraine Bilateral Investment Treaty found that Ukraine violated Fair and Equitable Treatment (FET) by going against an investor’s expectation – founded largely on his presumptions as the outcome of a wave of privatizations – that he would be able to acquire a substantial number of radio licenses, at the expense of his Ukrainian competitors.¹⁴⁶ Even highly experienced tribunalists disagreed about the scope of the FET standard. In a dissent, the third tribunalist complained that this broad reading of FET could advantage foreign investors over

domestic ones.¹⁴⁷ Such dissents are of little consequence in investor-state cases, where the corporation has a hand in picking a majority (two of the three) of the tribunalists. As one legal expert has noted, “the adjudicators lack well-known safeguards of judicial independence (e.g. secure tenure, objective method of appointment to cases)... the system can and should do much more to protect itself and the arbitrators from various reasons to suspect bias in the decision-making process.”¹⁴⁸ Indeed, the system appears to have an in-built incentive to hear more cases, as arbitrators are paid by the hour.

Yet, the FTA Annex is hardly clarifying. What is the “general and consistent practice of States that they follow from a sense of legal obligation”? Unfortunately, enormous discretion remains for arbitral tribunals to determine what is “fair.” Further, there is no clear definition of what is meant by “security.” In past NAFTA cases, firms have argued that changes to policy, even those made through normal democratic processes in response to changed circumstances or elections, deny foreign investors security. The argument is that the foreign investor has relied on the host country’s past policy to initiate their investment.¹⁴⁹ Of course, no such guarantees against democratic change – or rights to be compensated if it occurs – are provided to domestic firms in U.S. law. Nor should a regime of forcing public payment for broadly applicable changes to regulatory policy or private firms’ unprofitable gambles be required in trade agreements. Yet, the FTA language provides a tribunal discretion to order such compensation.

The problems with the alleged Contract violations have been discussed above, but Renco makes several additional arguments in this section on FET violations.

Renco complains that DRP was subjected to additional environmental commitments, and that this violated their expectations.¹⁵⁰ But Doe Run’s SEC filing from 1998 expose this claim as hollow, given the company not only knew full well the risks involved but noted the prospect of future environmental policy changes in its SEC filings: “Given the developing nature of environmental law and enforcement policies in Peru, however, there can be no assurance that the Peruvian government will not in the future require compliance with additional environmental requirements that could adversely affect Doe Run Peru’s business, financial condition or results of operations. Further, there can be no assurance that the Peruvian government or other interested persons will not seek changes in the future to the terms and conditions of any of the agreements made by Doe Run Peru with the MEM that may adversely affect Doe Run Peru’s business, financial conditions or results of operations.”¹⁵¹

Renco also complains that “the actual project costs vastly exceeded Peru’s initial estimates in 1997,”¹⁵² but, as its 1998 SEC filings state, Doe Run had conducted its own due diligence on project costs.¹⁵³

Renco states that “The Congress of the Republic of Peru through the Law 29410, finally extended DRP’s time to complete its PAMA, but the Ministry of Energy and Mines, through an inferior range rule, passed such onerous financial regulations that DRP was unable to take advantage of the extension. It is a classic case of unfair and inequitable treatment for one Peruvian State organ (Congress) to grant a necessary and required extension that another State organ (the Ministry of Energy and Mines) effectively cancels out.”¹⁵⁴ But the extension was neither “necessary” nor “required” as a legal or practical matter. Doe Run had considerable

financial resources it could have used to finish its PAMA commitments and apparently chose not to do so.

Moreover, Peru is a presidential system with separation between the legislative and executive branches. Thus, investors cannot expect, and indeed are unlikely to obtain, perfectly consistent treatment from two branches of government with different constitutional roles to fill. The legislature writes the laws, while the executive issues the implementing regulations, which may often specify bond or escrow requirements to help carry out those laws.

Renco states, without further support, that “Peru engaged in a smear campaign in the press against DRP. Peru’s statements to the press – including the Peruvian President’s public statement that DRP was no longer welcome in Peru – were intended to create an erroneous public opinion that DRP was responsible for the contamination of La Oroya and remiss in its remediation obligations.”¹⁵⁵ Without more information, it is difficult to evaluate these claims, or whether they would rise to inequitable and unfair treatment. However, the scientific studies showed that continued emissions after Doe Run acquired the plant did cause a health emergency in La Oroya, and Renco does not contest that it failed to meet its PAMA obligations. It is unclear how the Peruvian government drawing attention to these facts would equate with the authorities behaving unreasonably, much less in a manner that violates the FET standard. Unfortunately, investor-state tribunals have a history of viewing matters differently, and finding FET violations for ministerial comments criticizing foreign investors.¹⁵⁶

Renco states that Peru’s failure to assume liability for the Missouri lawsuits was a breach of its “legitimate expectations” when it made the investment, and that it would not have made the investment without these assurances.¹⁵⁷ However, the Contract does not remove Renco’s liability in all cases, as noted above. As Doe Run noted in its SEC filing from 1998, “Doe Run Peru also is subject to claims for alleged personal injury and property and other damages resulting from release of certain substances into the environment, including lead, to the extent such liabilities were not retained and are not satisfied by Centromin.”¹⁵⁸ This admission directly conflicts with Doe Run’s claim in its Peru FTA case that it didn’t anticipate that such claims could be launched or that it retained liability.

Renco states that Peru made an “unreasonable refusal to honor its commitment to assist DRP in overcoming fallout from the global financial crisis,”¹⁵⁹ but provides no evidence of such a commitment.

Discrimination: Fifth, Renco claims that Peru violated the FTA’s Article 10.3 on National Treatment by granting Centromin a PAMA extension without additional environmental clean-up requirements in 2000. As explained above, this decision by the government appears to be a reasonable one based on relevant facts. Unfortunately, the Article 10.3 obligation could be interpreted as prohibiting treatment that even *inadvertently* favors Peruvian firms. Renco also alleges that “while Peru subjected DRP to rigorous inspections, Peru seemingly imposed little quality control over Centromin.”¹⁶⁰ Little support is offered for this claim.

Indirect Expropriation: Sixth, Renco claims that the “unfair treatment of DRP continues and has the potential to culminate in an expropriation of the Complex, in violation of Article 10.7” of

the FTA. Because this is a speculation about future actions and outcomes, it is difficult to fully analyze the claim. Apparently the basis of this claim is that, if Indecopi were to count the projected PAMA expenditures as a basis for MEM gaining creditor status, this would constitute an “attempt to take over the company through bogus bankruptcy claims.”¹⁶¹ It is unclear how obtaining standing in a bankruptcy proceeding constitutes a real “take over” attempt. Even if MEM’s claims of \$163 million to \$259 million were recognized by Indecopi, MEM would still only hold 41 to 53 percent of DRP’s total debt¹⁶² – hardly an expropriation. Since Indecopi did not grant MEM creditor status, it seems unlikely that this expropriation claim could proceed, in any case. In any case, DRP’s announcement of a plan to sell off the Complex for over \$400 million even after the smelter operations had been suspended suggests that the assets could not have been expropriated and still retain considerable value.

These indirect expropriation claims are worrying. U.S. law would not typically allow for the types of regulatory takings claims regularly made under FTAs and BITs, nor would the law of U.S. trading partners.¹⁶³ The requirement of compensation for “regulatory takings” under the Fifth Amendment of the U.S. Constitution has generally been only held to apply to regulations that take nearly 100 percent of *real* property.¹⁶⁴ For example, the Supreme Court has indicated that personal property is unlikely to be the basis for a successful regulatory takings claim given that “in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.”¹⁶⁵ However, the indirect expropriation provision in investment agreements has been interpreted to require compensation based on the impact of the government measure on the value of the investment, regardless of whether there has actually been some appropriation of an asset by the government.¹⁶⁶ Yet, this interpretation of the standard for indirect expropriation cannot be justified as reflecting the general practice of states, as required in the Peru FTA annex noted above, given that the dominant practice of nations is to provide for compensation only when the government has actually acquired an asset, not when the value of an asset has been adversely affected by regulatory measures.¹⁶⁷

FTA Article 10.7 guarantees foreign investors compensation from a signatory government (i.e., from the taxpayers) for expropriation or nationalization of a covered investment either directly “or indirectly through measures equivalent to expropriation or nationalization.” This provision provides foreign investors rights to demand compensation even if their property has not actually been nationalized or seized, but has lost value because of even non-discriminatory government regulatory actions. Similar language in NAFTA has been the basis for successful investor demands to be compensated for “regulatory takings” – government regulatory policies that have the effect of undermining a foreign investor’s expected future profits or the value of an investment. For instance, in the Metalclad NAFTA ruling, the Mexican government was ordered to pay a U.S. firm \$15.6 million in compensation after the firm challenged a Mexican municipality’s refusal to grant construction and operating permits for a toxic waste facility the U.S. firm had acquired — after the operation had been closed down for contamination problems when owned by a Mexican firm. The government required the new owners to clean up the existing contamination before reopening the facility, the same obligation it had placed on the previous Mexican owners. (The lack of all necessary operating permits and the contamination problem had been made clear to the U.S. firm before it acquired the site.) The NAFTA tribunal

determined the government regulatory requirements constituted a regulatory taking and ordered compensation.¹⁶⁸

The Annex that was added to recent FTAs was intended to forestall such cases. Among other terms, it states: “Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”¹⁶⁹ When previous FTAs were being debated, this provision was criticized for leaving open *any discretion* for a tribunal to find a non-discriminatory public interest policy required compensation, which is not permitted in U.S. law.¹⁷⁰ The Renco Group case may be the first test of this Annex.

Most Favored Nation Read In of Other Obligations: Finally, Renco claims that Peru committed in other bilateral investment treaties (BITs) with third countries to “observe any obligation into which it has entered with regard to investments of nationals from these countries. This commitment, known as an ‘Umbrella Clause,’ by Peru extends to the present case through Article 10.4, which requires Peru to treat U.S. investors and investments no less favorably than it treats investors and investments from countries other than the United States.”¹⁷¹ Renco does not cite these other BITs, nor how Peru has violated “any obligation” with Renco.

VIII. Renco claim crashes into debate in U.S. and Peru about trade and natural resources

When the U.S. Congress approved the FTA in 2007, the pact’s supporters celebrated what was described as improved provisions in the environmental chapter of the FTA. In particular, the FTA gave the U.S. government the ability to bring cases against Peru for violating certain environmental standards and for not doing enough to combat illegally logged timber.¹⁷² But such pro-environment enforcement changes were dependent on a future U.S. government taking action, a move that would be highly contingent on other diplomatic concerns, bureaucratic resistance, and having an environment-friendly president. In contrast, the anti-environment investor rights were “self-enforcing.” A U.S. investor would only need to feel that its future expected profits were being undermined by an environmental regulation to launch an investor-state case, without worrying about diplomatic niceties or bureaucratic inertia. The government would then have to respond.

Indeed, the investment issue was the principal “environmental issue,” despite not being in the environmental chapter. Rep. Mike Michaud (D-Maine) captured the thoughts of many when he said during the Peru FTA floor debate: “This agreement is still based upon the same flawed NAFTA-CAFTA model. The proponents like to say it’s not. But if you look at the investment chapter, the core investment chapter language, there are very few changes...”¹⁷³

A majority of House Democrats voted against the deal, noting that its investment chapter was almost identical to CAFTA, and NAFTA before it. This was one of a very few instances in U.S. history where a majority of the House majority opposed their own Speaker. It only has happened in 0.002 percent of roll call votes since the founding of the Republic. (Tellingly, one of the few other such occasions was the 1993 vote on NAFTA.)¹⁷⁴ A majority of Democratic freshmen and committee chairs also voted against the Peru FTA.¹⁷⁵ As then representative and current Obama administration Labor Secretary Hilda Solís said,

“Serious concerns also remain about language in the Peru FTA that does not eliminate the excessive North American Free Trade Agreement (NAFTA) Chapter 11 foreign investor privileges. These investor privileges create incentives for U.S. firms to move offshore. These investor privileges have also been used to undermine efforts to protect the environment and public health. The provisions also allow foreign investors to bring suits before tribunals to challenge the government's implementation of natural resource contracts or leases, which have the potential to continue threatening the resources in Peru. For that reason, environmental organizations have expressed significant concerns about this trade agreement even though improvements were made to help stop the flow of illegally logged timber in Peru.”¹⁷⁶

Despite these concerns, just before leaving office, the Bush administration certified that the pact could be implemented in February 2009.¹⁷⁷

Natural resource companies strongly backed FTA investment rules

As early as 2004, the Bush administration asked for public comments about the proposed Andean FTA (the forerunner to the agreements with Peru and Colombia).¹⁷⁸ The comments by corporations – available for the first time through a Public Citizen request – were telling. Chevron for instance, noted the “admirable job” the U.S. government had done on pro-corporate investment protections for “20 years,” and said, “We oppose any weakening of those standards and request that the strong standards observed in the past BITs be preserved.”¹⁷⁹ Maple Gas wrote that the FTA will consolidate “a well-defined legal and juridical framework will guarantee the safe return of all investments made...”¹⁸⁰

In 2006, the U.S. Industry Trade Advisory Committee on Energy and Energy Services (known as ITAC 6) put out its official report on the Peru FTA. This report was written by U.S. corporations and lobby groups, including Duke Energy and Halliburton, and was presented to U.S. negotiators. While ITAC reports often go through all or many of the provisions of an agreement chapter-by-chapter, the ITAC 6 report was unusually terse. Under “objectives and priorities” of the group, the report read only: “Investment provisions.”¹⁸¹ It is therefore not surprising that the first investor-state case brought under the Peru FTA was by a natural resource company.

The FTA’s investment rules were extremely controversial in Peru as well. While the U.S. Congress was weighing the Peru FTA, the country’s president, Alan García, penned a series of op-eds accusing Peru’s indigenous groups and his political opponents of invoking environmentalism and indigenous rights as a pretext to block access to mining and timber exploitation in their ancestral lands.¹⁸² He deemed them as having a “manger dog” ideology, in apparent reference to an Aesop fable.¹⁸³ Unsurprisingly, indigenous groups did not like being likened to dogs, no matter the literary provenance.¹⁸⁴

After the FTA was approved, García began pushing a set of trade pact-related forestry changes that would take some steps to improve governance in the sector, but which would also relieve the

government of some of its obligations to consult with indigenous groups before making changes to forestry, mining, or timber policies impacting their lands.¹⁸⁵

Indigenous groups predictably opposed these moves, calling an indefinite popular mobilization beginning in early April 2009 that led to protesters blockading roads in the town of Bagua.¹⁸⁶ Police tried to forcibly remove the blockade, culminating in a bloody massacre in June in which 10 civilians and 23 police officers were killed.¹⁸⁷ The *New York Times* reported that according to Peruvian Foreign Minister José García Belaunde, “The ultimate aim of the protesters was to prevent Peru from carrying out a trade agreement with the United States, because one of the most contentious of the decrees that were suspended on [June 11, 2009] would bring Peru's rules for investment in jungle areas into line with the trade agreement.”¹⁸⁸ Environmental groups called on the Obama administration to declare that none of the Peruvian government's supposed investment-opening measures were stipulated by the FTA;¹⁸⁹ the administration refused.¹⁹⁰

Peru is still not in full compliance with its environmental obligations over two years later, and the Obama administration has no plan to launch state-state dispute.¹⁹¹ Despite the violence and the lack of a new forestry law, Peru's FTA privileges have never been suspended. Also worrying is that Peru's Amazonian land under concession to U.S. and other oil, gas and mining companies has risen from around 10 percent before trade negotiations started in 2003, to an estimated 70 percent in 2010.¹⁹²

This was not the change that environmentalists and indigenous groups had hoped for.

IX. Conclusion and Policy Recommendations

The Renco Group case again spotlights the concerns that have led many in Congress and U.S. civil society to demand changes to the past model of trade pact investor rights and an end to their private enforcement.¹⁹³ It is a particularly egregious case, pitting one of the world's wealthiest men on one side, and children in a poor and polluted community on the other. If Rennert had spent a mere fraction of his wealth on meeting DRP's environmental commitments, the children would have been better off, and there would likely be no basis for the FTA investor-state dispute.

Renco alleges wrongdoing on Peru's part. But as one Peruvian analyst has noted, “If in 2004, Peru had not granted a PAMA extension, Renco would not have been able to utilize the FTA, which entered into effect five years later.” Indeed, after 2007, Renco was no longer protected by the terms of the LSA, or the favorable, pre-2006 division of liability of the Contract. In other words, Peru's own flexibility with the company is what landed it before a Peru FTA investor-state tribunal. Or, as former Peruvian mining regulator María Chappuis said: “This case is like telling the government: I pollute, you pay.”¹⁹⁴

Renco could make another FTA filing in the near future, or they may not even choose to. As some advocates have pointed out, this could be yet another case of a company using investor-state proceedings to chill public interest regulation and evade justice.

Both Peruvians and Americans are exasperated with unfair trade agreements that put investors' interest before the public interest, and are voting accordingly. In June 2011, Peruvians elected

Ollanta Humala as their president. A former Peruvian military officer, Humala had a long history of opposition to the U.S.-Peru FTA.¹⁹⁵ During his campaign, Humala said that, “we will demand that Doe Run meets its PAMA requirements and that the state meet its obligations as well... we will now allow blackmail by any company, who are obligated to solve this problem in the best way. If they do not, we’ll take this case to court.”¹⁹⁶

Unfortunately, recent indications are that Humala may be backing off his campaign pledges, and may have succumbed to the chilling effect that investor-state challenges can present. Humala’s legislative branch allies have said that they are likely to grant an additional PAMA extension for two years. Meanwhile, Renco’s Peruvian subsidiary has announced that it plans to restart operations as soon as May 2012.¹⁹⁷ One advocate who worked for a period in the García government’s environmental ministry stated that a reopening “would send a terrible message about the kinds of investments that Peru as a country is looking for... The renewed emissions would have an immediate negative effect on the population of La Oroya.”¹⁹⁸

The flip-flop factor seems to be multinational. In the United States, President Obama won over working class voters by promising a break with the failed trade policies of the past, making specific commitments during his campaign to fix these very trade pact foreign investor provisions.¹⁹⁹ Nonetheless, Obama greenlighted the *status quo ante* by pushing for congressional adoption of the Bush-negotiated pacts with Korea, Panama and Colombia that contained the very investor provisions he criticized as a candidate. Observers are watching closely to see what model will be adopted in the TPP, although news reports worryingly report few changes from the past FTA template.²⁰⁰

The needed changes are straightforward: the investor-state private enforcement system should be eliminated, and the actual text of the investment chapter must be changed. Specifically, the FET and indirect expropriation provisions must be revised so that they do not provide greater substantive or procedural rights to foreign investors relative to domestic firms; policies to prevent and mitigate financial crises must be allowed; a general exception for environmental and labor protections (from the investment and other chapters) must be instituted; and the loopholes that allow corporations to engage in shell games using subsidiaries to launch investor-state cases must be eliminated.²⁰¹

Absent these changes, polluting oil, gas and mining companies will continue to use investor-state enforcement as a way of weakening much needed regulation. It would be unconscionable if any TPP did not supplant the harmful investor-state rights of the U.S.-Peru FTA.

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ENDNOTES

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- ¹⁷ *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 15. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf
- ¹⁸ D.S. No. 016-93-EM, Article 9, passed May 1, 1993. Available at: <http://www.bvindicopi.gob.pe/regtec/19930501ds16-93-em.pdf>
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- ²⁰ The Doe Run Resources Corporation Form S-4, Registration Statement Under The Securities Act Of 1933, 1998, at 64. “On October 23, 1997, Doe Run Peru acquired Metaloroya from Centromin, a Peruvian government-owned conglomerate, as part of the ongoing privatization program sponsored by the government of Peru. On December 30, 1997, Metaloroya was merged into Doe Run Peru.”
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- ²⁸ Ministry of Energy and Mines, Directorial Resolution No. 334-97/EM/DGM, Oct. 16, 1997. This document notes the “period of environmental adaptation of ten (10) years (1997-2006) of the Program of Adaptation and Environmental Management of La Oroya Metallurgical Complex of Centromin...” Referenced in Letter from AIDA, Public Citizen and others to Secretaries Hillary Clinton and Timothy Geithner, dated March 31, 2011, at page 3. Available at: <http://www.citizen.org/documents/peru-fta-renco-letter-march-31-2011.pdf>
- ²⁹ “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>
- ³⁰ Contract of Stock Transfer, Capital Increase and Stock Subscription in the Empresa Metalurgica La Oroya S.A., Clause 5, pages 9-14. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

³¹ Contract of Stock Transfer, Capital Increase and Stock Subscription in the Empresa Metalurgica La Oroya S.A., Clause 5.3(a), at page 12. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

³² Contract of Stock Transfer, Capital Increase and Stock Subscription in the Empresa Metalurgica La Oroya S.A., Clause 7, at page 17. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

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³⁶ See Resolución Directoral No. 178-99-EM/DGM (Oct. 19, 1999); Resolución Directoral 133-01-EM/DGM (Apr. 16, 2001); Resolución Directoral 028-2004-EM/DGM (Oct. 25, 2002). Referenced in Letter from AIDA, Public Citizen and others to Secretaries Hillary Clinton and Timothy Geithner, dated March 31, 2011, at page 3. Available at: <http://www.citizen.org/documents/peru-fta-rengo-letter-march-31-2011.pdf>

³⁷ 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 31. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

³⁸ Article 1.1-1.2: "1.1 Hasta el 31 de diciembre de 2005, los titulares de actividad minera podrán solicitar a la Dirección General de Asuntos Ambientales Mineros (DGAAM) del Ministerio de Energía y Minas, una prórroga del plazo de ejecución de uno o más proyectos específicos contemplados en el Programa de Adecuación y Manejo Ambiental – PAMA aprobado, sustentada en razones excepcionales debidamente acreditadas según los procedimientos establecidos en el presente decreto supremo. 1.2 La prórroga del plazo no será mayor a tres años, salvo que la DGAAM otorgue un año adicional sobre la base del Estudio de Análisis de Riesgos de Salud previsto en el inc. h) del artículo 2.2 del presente decreto supremo." See *Decreto Supremo N° 046-2004-EM – Establecen Disposiciones Para La Prórroga Excepcional De Plazos Para El Cumplimiento De Proyectos Medioambientales Específicos Contemplados En Programas De Adecuación Ambiental –PAMA (29.12.04)*. Available at: http://intranet2.minem.gob.pe/web/archivos/dgm/legislacion/D.S.N_046-2004-EM.pdf

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⁴⁰ Article 4: "Artículo 4º.- MEDIDAS ESPECIALES: El Ministerio de Energía y Minas, sobre la base de la información obtenida de los Estudios de Análisis de Riesgo de Salud, así como de los procesos de fiscalización anteriores y las opiniones de la DGM y dela DIGESA, podrá condicionar la aprobación de la prórroga solicitada por el titular minero a la adopción de medidas especiales tales como repriorización de objetivos ambientales de los PAMA, reprogramación, suspensión o sustitución de proyectos, así como cualquier otra medida complementaria o compensatoria orientada a remover riesgos sobre el medio ambiente, la salud o la seguridad de la población y a cautelar la adecuada ejecución del PAMA." See *Decreto Supremo N° 046-2004-EM – Establecen Disposiciones Para La Prórroga Excepcional De Plazos Para El Cumplimiento De Proyectos Medioambientales Específicos Contemplados En Programas De Adecuación Ambiental –PAMA (29.12.04)*. Available at: http://intranet2.minem.gob.pe/web/archivos/dgm/legislacion/D.S.N_046-2004-EM.pdf

⁴¹ "Pero es Doe Run el que no ha cumplido con el PAMA y ha seguido contaminando a La Oroya. Con este comunicado es como si le dijera al gobierno: yo contaminao y tú pagas", dijo a IPS María Chappuis, ex directora general de Minería. Chappuis renunció a su cargo en diciembre de 2004 a causa de la aprobación de una norma que permitía ampliarle el plazo del PAMA a Doe Run." See Milagros Salazar, "La Nueva Jugada de Doe Run," *IPS*, Jan. 14, 2011. Available at: <http://www.bilaterals.org/spip.php?article18859>

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⁴⁶ See Decreto Supremo No. 058-2006-EM <http://intranet2.minem.gob.pe/web/archivos/dgm/legislacion/058-2006-EM.pdf>, noted at: <http://www.activosmineros.com.pe/amsac/index.php/nosotros/historia>

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⁵⁰ Petition for Damages – Personal Injury, A.O.A. v. Doe Run Resources (Mo. Cir. Ct. City of St. Louis filed Aug. 7, 2008 (No. 0822-CC08086), at paras 5 through 11.

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the smelter were forced to seek other buyers. The case of Doe Run underscores the dangers facing other metals companies at a time when global minerals prices are low and anxious banks are quick to call in their loans. The company was squeezed by falling commodity prices, high debt payments and the financial burden of implementing a large-scale environmental clean-up programme in La Oroya, a mining town east of Lima, which was ranked amongst the ten most polluted in the world. After the company suffered losses in the fourth quarter, its creditors became concerned and cancelled its US\$75m working capital line.” See “Peru business: Big exporter hit by crisis,” *The Economist Intelligence Unit*, April 8, 2009.

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⁵⁴ “Mining filial Doe Run Peru has been able to thrash out a solution to its dire financial troubles and should be able to get the Complejo Metalurgico de La Oroya, Peru, up and working again. The aid has come not from the State as at first suggested but instead from 15 firms from the same sector that use La Oroya for foundry and refinery services on their minerals. The fifteen include Sociedad Minera El Brocal, Compañia de Minas Buenaventura, Cormin, Glencore and Volcan; they have committed to a concentrates loan of US\$100mil and have guaranteed a working-capital credit-line from the banks to the tune of US\$75mil. The firms will activate this aid once Doe Run has taken the filial’s capital up by the equivalent of US\$156mil (the debt it has run up with the firm’s main shareholder, Renco). They are also set to appoint an overseer who will monitor the books at Doe Run Peru until the debts are paid off.” See “Doe Run Peru saved by counterparts,” *El Comercio* (Peru), April 3, 2009.

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⁵⁶ Juan Weik, “Renco looking to sell Doe Run Perú for \$415 million – report,” *Metal Bulletin*, January 25, 2010.

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⁷⁵ The U.S. Environmental Protection Agency (EPA) and State of Missouri launched a civil case against Doe Run in 2010 alleging 48 counts of violations of the Clean Air Act, Clean Water Act and other rules. U.S. v. Doe Run Resources Corp., No. 4:10-cv-01895-JCH, 2010 WL 5586260 (E.D.Mo. Oct. 8, 2010) (complaint).

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¹⁶¹ 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 57. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

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¹⁶⁴ See Eduardo Moisés Peñalver, Is Land Special? 31 *Ecology L.Q.* 227, 231 (2004) ("it is almost beyond dispute that . . . the [Supreme] Court has focused overwhelmingly on regulations affecting land and that landowners bringing regulatory takings claims stand a greater chance of prevailing in the Supreme Court than the owners of other sorts of property"); Molly S. McUsic, The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 *B.U. L. Rev.* 605, 647, 655 (1996) ("Economic interests, such as personal property, trade secrets, copyright, and money, are all recognized by the Court as 'property' under the Fifth Amendment, but receive little protection against government regulation."); J. Peter Byrne, Ten Arguments for the Abolition of Regulatory Takings Doctrine, 22 *Ecology L.Q.* 89, 127 (1995) ("the Supreme Court has shown absolutely no interest in applying the regulatory takings doctrine to assets other than land"). Taken from: Sierra Club, Public Citizen, et. al. "Investment Rules in Trade Agreements: Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership," Aug. 9, 2010. Available at: <http://www.citizen.org/documents/InvestmentPacketFINAL.pdf>

¹⁶⁵ Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1027-28 (1992). The Supreme Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which involved a claim that the disclosure of trade secrets by the federal government constituted a taking, is sometimes cited as an example of the application of the regulatory takings analysis outside the context of real property. The Court in *Monsanto*, however, stressed that "[w]ith respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data." *Monsanto*, 467 U.S. at 1012. Accordingly, "*Monsanto* is a case in which the government conduct in question was the functional equivalent of a direct appropriation of the entire piece of property, as opposed to a mere regulation of that property." Eduardo Moisés Peñalver, Is Land Special? 31 *Ecology L.Q.* 227, 231, n. 20 (2004). Taken from: Sierra Club, Public Citizen, et. al. "Investment Rules in Trade Agreements: Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership," Aug. 9, 2010. Available at: <http://www.citizen.org/documents/InvestmentPacketFINAL.pdf>

¹⁶⁶ Andrew Newcombe, The Boundaries of Regulatory Expropriation in International Law, 20:1 *ICSID Review – FILJ* at 4 (2005) (noting that "under the 'orthodox approach' [a regulatory] expropriation occurs when a foreign investor is deprived of the use, benefit, management or enjoyment of all or substantially all of its investment" rather than whether the government has actually appropriated the investment for its own use). Taken from: Sierra Club, Public Citizen, et. al. "Investment Rules in Trade Agreements: Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership," Aug. 9, 2010. Available at: <http://www.citizen.org/documents/InvestmentPacketFINAL.pdf>

¹⁶⁷ See A.J. Van der Walt, Constitutional Property Clauses: A Comparative Analysis (1999) at 17 ("the distinction between police-power regulation of property and eminent-domain expropriation of property is fundamental to all [constitutional] property clauses, because only the latter is compensated as a rule. Normally, there will be no provision for compensation for deprivations or losses caused by police-power regulation of property.") United States law is an exception in this regard, and under certain circumstances – most notably in the "rare circumstance" when a regulatory measure destroys all value of real property – requires compensation even when there has been no appropriation of the property by the government. See *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992). Taken from: Sierra Club, Public Citizen, et. al. "Investment Rules in Trade Agreements: Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership," Aug. 9, 2010. Available at: <http://www.citizen.org/documents/InvestmentPacketFINAL.pdf>

¹⁶⁸ Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 32-35.

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- ¹⁹¹ “U.S. Has No Solid Timeline For Peru To Comply With FTA Forestry Annex,” *Inside U.S. Trade*, May 6, 2011. See also, “Statement by Ambassador Ron Kirk On the Passage of Peru’s Forestry and Wildlife Law,” USTR, June 16, 2011.
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- ¹⁹³ The “Trade Reform Accountability, Development and Employment Act of 2009” had over 140 co-sponsors in the 111th Congress. It includes a provision that says “If the trade agreement contains provisions related to investment, such provisions shall...not be subject to an investor-state dispute settlement mechanism under the trade agreement. (Trade Reform Accountability, Development and Employment Act 2009, H.R. 3012, 111th Cong., (Introduced June 4, 2009.)) For more information, see: <http://www.citizen.org/Page.aspx?pid=454>
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¹⁹⁵ “En Perú, el terremoto se va a llamar Ollanta,” *El Nuevo Herald*, Dec. 25, 2005; “En tenso ambiente, candidatos peruanos cierran campañas electorales,” *Deutsche Presse-Agentur*, June 1, 2006.

¹⁹⁶ “Tenemos que aplicar con severidad los Programa de Adecuación y Manejo Ambiental (PAMA) y no permitir que las empresas y el Estado evadan su responsabilidad. No podemos decir que el Perú avanza mientras exista contaminación”, manifestó Ollanta. En ese sentido, sostuvo que la empresa Doe Run deberá asumir su responsabilidad en la descontaminación de La Oroya. “Nosotros exigiremos que Doe Run cumpla con el PAMA y que el Estado asuma lo suyo también. Me preocupa el trabajo de más de mil trabajadores que están en esa empresa y necesitamos darles la tranquilidad de que no van a perder su trabajo. Lo que no vamos a permitir es el chantaje de ninguna empresa, que está obligada a solucionar este problema de la mejor manera, de no ser así, llevaremos este tema al área judicial”, indicó Ollanta.” See “Ollanta Humala: ‘Con contaminación el Perú no avanza,’” Available at:

<http://elecciones2011.votatube.com/ollanta-humala-%E2%80%9Ccon-contaminacion-el-peru-no-avanza%E2%80%9D-elecciones-2011/>

¹⁹⁷ “Doe Run Peru Applauds Possible Extension Of Environmental Program,” *Dow Jones*, Feb. 17, 2012. See:

<http://www.foxbusiness.com/news/2012/02/17/doe-run-peru-applauds-possible-extension-environmental-program/#ixzz1nEOp5odV>

¹⁹⁸ Simeon Tegel, “In Peru, one of the world’s worst polluters is set to reopen,” *Global Post*, Feb. 28, 2012. Available at:

<http://www.minnpost.com/global-post/2012/02/peru-one-worlds-worst-polluters-set-reopen>

¹⁹⁹ For a compilation of these commitments, see <http://www.citizen.org/Page.aspx?pid=905>.

²⁰⁰ “U.S. TPP Investment Proposal Retains Investor-State, Breaks New Ground,” *Inside U.S. Trade*, March 10, 2011.

²⁰¹ See: Sierra Club, Public Citizen, et. al. “Investment Rules in Trade Agreements: Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership,” Aug. 9, 2010. Available at: <http://www.citizen.org/documents/InvestmentPacketFINAL.pdf>