



Background

Corporations Put Before Community Health in Renco Group v. Peru Case

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 public accountability. Under these pacts, multinational oil, mining, gas and energy (OMG) companies the right to challenge new government regulations for taxpayer funded-compensation – simply because these rules interfere with their future expected profits.²

This is not a simple hypothetical threat. Governments have been ordered to pay 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. OMG 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 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 OMG policies. Nearly half of the 129 cases pending before the World Bank’s investment dispute facility relate to OMG policies.

This memo examines a 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 by 2007 as part of an environmental remediation program. Although it is out of compliance, the company sought (and Peru granted) two extensions to complete the project.⁴ Renco now alleges (among other claims) that Peru’s failure to grant a third extension constitutes a violation of its FTA rights, and is demanding \$800 million from Peruvian taxpayers.⁵ Renco could make another FTA filing in the near future, but no arbitral proceedings have yet been publicized. Meanwhile, La Oroya’s children are suffering from pollution levels far above international standards.⁶

The investor-state case comes as both Americans and Peruvians are demanding change in OMG, trade and investment policies.⁷ This memo 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 the Trans-Pacific FTA, which may subsume the bilateral FTA the two countries have in a broader ten-nation pact. Similar changes should also be made in pending agreements with Colombia, Panama and Korea.⁸

I. Establishment of an OMG Company in Peru

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.⁹ 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.¹⁰

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...”¹¹

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.¹² 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.¹³

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,¹⁴ one of the richest men in America who owns one of the largest houses in America.¹⁵ 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.”¹⁶

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.”¹⁷

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.”¹⁸

II. Doe Run’s Contract 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.¹⁹ 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 1997.²⁰ 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.”)²¹ Doe Run committed to 12 projects, including a new sulfuric acid plant. 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.²²

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.”²³ 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.”²⁴

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.”²⁵

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...”²⁶

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 2007.²⁷

Doe Run included these documents in its 1998 filings with the U.S. Securities and 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.”²⁸

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

DRP sought and obtained approval for changes to various PAMA requirements in 1999, 2001, and 2002.²⁹ 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,³⁰ 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...”³¹ 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,”³² and allowed the Peruvian authorities to condition approval of the extension on the adoption of additional environmental mitigation measures.³³ Maria Chappuis, Peru’s mining regulator, complained that this regulatory treatment was too lax, and resigned her position in protest.³⁴

Under these new procedures, DRP asked for an extension in December 2005.³⁵ 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...”³⁶

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.³⁷ 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."³⁸ Then, in October 2006, Peru passed a law transferring Centromin's clean-up responsibilities to a new state-owned company, Activos Mineros.³⁹

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."⁴⁰ 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]."⁴¹ Renco's FTA filing, however, says that DRP is still indirectly, rather than directly owned, by Renco.⁴² 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.⁴³

While Renco's FTA filing blames much of the smelter's difficulties in meeting its environmental commitments on the 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.⁴⁴ 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.⁴⁵ The Peruvian government came under pressure to bail out Doe Run, which was Peru's fourth largest exporter.⁴⁶ 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.⁴⁷ 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.⁴⁸

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*.⁴⁹ 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."⁵⁰

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.”⁵¹

The text of the law stated that the 30-month period to March 2012 represented an absolute, non-negotiable maximum extension.⁵²

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.⁵³ 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.⁵⁴
- 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.”⁵⁵
- Levels of arsenic, which has been associated with various types of cancer and reproductive problems, many times greater than developed country cities.⁵⁶
- Levels of lead, which is associated with damage to children's brain and physical development, in excess of WHO standards.⁵⁷

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.⁵⁸

This combination of factors led the Blacksmith Institute – an environmental clean-up group closely linked to governments and corporations⁵⁹ – to label La Oroya one of the world’s ten worst polluted places in 2006 and 2007, alongside infamous sites like Chernobyl, Ukraine.⁶⁰

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.”⁶¹ 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.⁶²

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.”⁶³ AIDA has more recently petitioned IACHR to go beyond the precautionary measures and review Peru’s compliance with the underlying human rights standards.⁶⁴ 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.⁶⁵

In November and December 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. 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.”⁶⁶ Eleven similar complaints were lodged on behalf of 35 other plaintiffs in 2008.⁶⁷

Doe Run took the criticisms so seriously that it began attempting to court 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.”⁶⁸ CORE was a formal 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.”⁶⁹ Doe Run also invited Blacksmith to La Oroya,⁷⁰ and the latter ended up printing a more favorable report in 2008.⁷¹ 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.”⁷²

In late 2010, Doe Run also improperly contacted the child plaintiffs and intimidated their advocates, according to the Missouri law firm representing the children. “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 attorney his firm is using, and death threats against a 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.)⁷³

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, “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.”⁷⁴ On January 15, 2010, *EFE* reported:

“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.”⁷⁵

In January 2010, Renco reportedly was in negotiations to sell the Complex for \$415 million to investors Glencore International AG and Trafigura Beheer,⁷⁶ 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.⁷⁷

In early May 2010, the Peruvian government threatened to close down DRP if it did not obtain financing to restart its operations.⁷⁸ 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.⁷⁹

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."⁸⁰ A Peruvian government official then said DRP was proposing that the state allow it to postpone paying \$266 million in taxes for 100 years.⁸¹

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.⁸² In March 2011, Peru fined Doe Run a further \$2.5 million for not securing financing for completion of the sulfur project.⁸³

In February 2011, Renco apparently offered loan DRP up to \$50 million to remediate the soil's around the Complex – which was part of Centromin's PAMA.⁸⁴ It is unclear why Renco would make this offer, rather than simply use the money towards fulfillment of DRP's PAMA. It could be that this was a way for Rennert to see debt-related payment flows – a business strategy he had long employed.

Parallel to this, the 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."⁸⁵ 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."⁸⁶

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.⁸⁷ In January, DRP workers protested that four government agencies should not be counted as among DRP's creditors.⁸⁸ 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.⁸⁹ 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."⁹⁰

On April 1, DRP's second biggest creditor⁹¹ (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.⁹² (Reportedly, Doe Run Cayman was pushing for restructuring of DRP, while Cormin was pushing for liquidation.⁹³) 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.⁹⁴ In early May, the union sued Cormin for \$400 million.⁹⁵ In mid-May, Cormin bought the debt of three of DRP's other creditors.⁹⁶

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.”⁹⁷ 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.

In November 2010, Peruvian regulators had said that, “If the company has a complaint against the Peruvian state, it is going to have to go to arbitration.”⁹⁸ On December 29, 2010, Renco took them up on their offer, launching an FTA attack on Peru's mining policies, claiming at least \$800 million in damages.⁹⁹ Renco has stated that it will proceed with the case under the rules of the United Nations Commission on International Trade Law (UNCITRAL).¹⁰⁰

By that time, Renco had already launched an over \$300,000 D.C. lobbying blitz to build up support for Renco's attack.¹⁰¹ 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.”¹⁰²

The lobbying appears to have paid off. On January 19, 2011, eight House Democrats signed a letter to U.S. Treasury Secretary Tim Geithner and State Department Secretary 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 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.¹⁰³

In response on February 15, the Treasury Department responded that the very *raison d’etre* 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.”¹⁰⁴

This intervention on behalf of one of the world’s worst polluters 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.”¹⁰⁵ 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.”¹⁰⁶

Some see 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.¹⁰⁷

VII. Renco’s FTA claims

Renco makes seven claims in its 15-page December 2010 Notice of Intent to Commence Arbitration under the FTA – the only detailed public document related to the FTA claim. 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].¹⁰⁸ 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 2010.¹⁰⁹ 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...”¹¹⁰ 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.”¹¹¹ 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.”¹¹²

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.”¹¹³ 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.)”¹¹⁴ 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).¹¹⁵ 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

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.”¹¹⁶ A similar claim to release a company from legal liability was made by *Chevron-Texaco* in its 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*).¹¹⁷

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.”¹¹⁸ 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.”¹¹⁹ 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...”¹²⁰ 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.

Second, Renco alleges that Centromin failed to live up to its PAMA obligations under the Contract by not remediating La Oroya’s soils.¹²¹ 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.¹²²

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.”¹²³

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. It would seem unfair to Oroyans to interpret Clause 15 as postponing installation of the sulfur plant for reasons such as these. 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.¹²⁴

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 2004.¹²⁵ 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.¹²⁶ The firm has also spent nearly \$1 million on lobbying expenditures over the last decade alone.¹²⁷ 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.¹²⁸

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.”¹²⁹

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.”¹³⁰

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.¹³¹ 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.¹³²

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 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.¹³³ Even highly experienced tribunalists disagreed as the content of the FET standard. In a dissent, the third tribunalist complained that this broad reading of FET could advantage foreign investors over domestic ones.¹³⁴ 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.”¹³⁵ Indeed, steady arbitral fees can give an incentive for arbitrators to find in favor of the investors whose cases fuel the system.

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.¹³⁶ 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 such a regime of forcing public payment for private firms’ unprofitable gambles be required in trade agreements. Yet, the FTA language provides a tribunal discretion to order such compensation.

We have already gone through the problems with the alleged Contract violations in the Notice of Intent, 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.¹³⁷ But Doe Run’s SEC filing from 1998 expose this claim as hollow, and the company knew full well the risks involved: “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.”¹³⁸

Renco complains that “the actual project costs vastly exceeded Peru’s initial estimates in 1997,”¹³⁹ but, as its 1998 SEC filings state, Doe Run had conducted its own due diligence on project costs.¹⁴⁰

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.”¹⁴¹ But the extension was neither “necessary” nor “required” as a legal or practical matter. Doe Run had considerable financial resources it could have called on 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. Investors should not 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.”¹⁴² 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. If the Peruvian government drew attention to these facts, then the authorities should not seem to be behaving unreasonably. Unfortunately, investor-state tribunals have a history of viewing matters differently, and finding FET violations for ministerial comments criticizing foreign investors.¹⁴³

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.¹⁴⁴ 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.”¹⁴⁵ For Doe Run to now claim that it didn’t anticipate that such claims could be launched and that it retained liability is disingenuous.

Renco states that Peru made an “unreasonable refusal to honor its commitment to assist DRP in overcoming fallout from the global financial crisis,”¹⁴⁶ but provides no evidence of such a commitment.

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 appears to be a reasonable one. 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.”¹⁴⁷ Little support is offered for this claim.

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, 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.”¹⁴⁸ 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 debt¹⁴⁹ – 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 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 our trading partners.¹⁵⁰ 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.¹⁵¹ 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.”¹⁵² Moreover, 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.¹⁵³ This interpretation of the standard for indirect expropriation cannot be justified as reflecting the general practice of states, 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.¹⁵⁴

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 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.¹⁵⁵

An Annex was added to recent FTAs that 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.”¹⁵⁶ 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.¹⁵⁷ The Renco Group case may be the first test of this Annex.

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.”¹⁵⁸ 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 OMG issue

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.¹⁵⁹ 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 little changes...”¹⁶⁰

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 happens 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.)¹⁶¹ A majority of Democratic freshmen and committee chairs also voted against the Peru FTA.¹⁶² 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.”¹⁶³

Despite these concerns, just before leaving office, the Bush administration certified that the pact could be implemented in February 2009.¹⁶⁴

OMG 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).¹⁶⁵ The comments by corporations – available for the first time through a Public Citizen request – were telling. Chevron Texaco, 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.”¹⁶⁶ Maple Gas wrote that the FTA will consolidate “a well-defined legal and juridical framework will guarantee the safe return of all investments made...”¹⁶⁷

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.”¹⁶⁸ It is therefore not surprising that the first investor-state case brought under the Peru FTA was by an OMG company.

The 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.¹⁶⁹ He deemed them as having a “manger dog” ideology, in apparent reference to an Aesop fable.¹⁷⁰ Unsurprisingly, indigenous groups did not like being likened to dogs, no matter the literary provenance.¹⁷¹

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.¹⁷²

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.¹⁷³ Police tried to forcibly remove the blockade, culminating in a bloody massacre in June in which 10 civilians and 23 police officers were killed.¹⁷⁴ 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.”¹⁷⁵ 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;¹⁷⁶ the administration refused.¹⁷⁷

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.¹⁷⁸ 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 2010.¹⁷⁹

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.¹⁸⁰ 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 at UNCITRAL. Or, as former Peruvian mining regulator María Chappuis said: “This case is like telling the government: I pollute, you pay.”¹⁸¹

Renco could make another FTA filing in the near future, but no arbitral proceedings have yet been publicized. Much is at stake in this case. 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, Humala had a long history of opposition to the U.S.-Peru FTA.¹⁸² 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.”¹⁸³

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.¹⁸⁴ Nonetheless, Obama greenlighted the status quo ante by adopting the Bush-negotiated pacts with Korea, Panama and Colombia. Observers are watching closely to see what model will be adopted by the Trans-Pacific FTA, although news reports worryingly report few changes from the past FTA template.¹⁸⁵

The needed changes are straightforward: the investor-state system should be eliminated, and the actual text of the investment chapter must be changed. Specifically, the FET and indirect expropriation provisions must be altered so that claims must comply with the “no greater rights” principle; 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 to launch investor-state cases must be eliminated.¹⁸⁶

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 Trans-Pacific FTA did not supplant the harmful investor-state rights of the U.S.-Peru FTA.

ENDNOTES

¹ See “The oil well and the damage done”, *The Economist*, June 17th, 2010. <http://www.economist.com/node/16381032>

² See Section VII.

³ Blacksmith Institute, “The Top Ten of The Dirty Dozen”, Project of The Blacksmith Institute, Spetember 2007, at 6.

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

⁴ See Sections I-IV.

⁵ See Sections VI and VII.

⁶ See Section IV.

⁷ See Section VIII.

⁸ See Section IX.

⁹ Anna K. Cederstav, Alberto Barandiarán, “La Oroya Cannot Wait” AIDA & SPDA Publication, September 2002, http://www.aida-americas.org/sites/default/files/La_Oroya_Cannot_Wait_1.pdf, at 19.

¹⁰ 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

¹¹ D.S. No. 016-93-EM, Article 9, passed May 1, 1993. Available at: <http://www.bvindicopi.gob.pe/regtec/19930501ds16-93-em.pdf>

¹² The Doe Run Resources Corporation Form S-4, Registration Statement Under The Securities Act Of 1933, 1998, at 53: “Metaloroya was established on September 20, 1997, and commenced operations on October 23, 1997, as the successor company to the operations of the former La Oroya Metallurgical Complex of Centromin, pursuant to the Subscription Agreement.”

¹³ 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.”

¹⁴ See U.S. District Court, E.D. Missouri, Sister Kate Reid and Megan Heeney (Next Friends) v. Doe Run Resources Corporation et. al., Second Amended Petition for Damages – Personal Injury, Dec. 5, 2007, at paragraph 5-11.

¹⁵ “#144 Ira Rennert” *Forbes*, March 10, 2010. http://www.forbes.com/lists/2010/10/billionaires-2010_Ira-Rennert_M9N4.html; Avni Patel, “Members of Congress, Obama Administration Go to Bat For Billionaire Investor” *ABC News*, March 8 2011. <http://abcnews.go.com/Blotter/members-congress-obama-administration-bat-billionaire-investor/story?id=13084422>

¹⁶ The Doe Run Resources Corporation Form S-4, Registration Statement Under The Securities Act Of 1933, 1998, at 28. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

¹⁷ “Doe Run’s Globalization Lesson,” *American Metal Market*, Jan. 19, 1998.

¹⁸ Peter Shinkle And Bill Lambrecht, “Doe Run Owner Built Empire On Junk Bonds Regulators Worry That Debt May Imperil Cleanup Efforts,” *St. Louis Post-Dispatch*, April 14, 2002.

¹⁹ Contract of Stock Transfer, Capital Increase and Stock Subscription in the Empresa Metalurgica La Oroya S.A., First and Second Clause. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

²⁰ Contract of Stock Transfer, Capital Increase and Stock Subscription in the Empresa Metalurgica La Oroya S.A., 4.5 and Fifth Clause. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

²¹ 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-rengo-letter-march-31-2011.pdf>

²² “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>

²³ 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>

²⁴ 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>

²⁵ 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>

²⁶ Contract of Stock Transfer, Capital Increase and Stock Subscription in the Empresa Metalurgica La Oroya S.A., Clause 15, at page 41. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

²⁷ Appended to Doe Run Resources Corporation’s Form S-4, Registration Statement Under The Securities Act Of 1933, 1998. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

²⁸ The Doe Run Resources Corporation Form S-4, Registration Statement Under The Securities Act Of 1933, 1998, at 23. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

²⁹ 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>

³⁰ 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

³¹ 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

³² Article 1.3: “1.3 La extensión del plazo sólo aplicará al proyecto (s) materia de la solicitud, no afectando ni los plazos ni los cronogramas para la ejecución de los demás proyectos previstos en el 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

³³ 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

³⁴ “‘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>

³⁵ Doe Run Peru, Request for Special Extension for Deadline to Comply with the Sulfuric Acid Plant Project [title translated from Spanish] (“Request for Special Extension for Deadline”), December 2005, Available at: <http://www.minem.gob.pe/minem/archivos/file/DGAAM/estudios/oroya/vol1.pdf>.

³⁶ Article 10: “La presente Resolución Ministerial no implica modificación alguna de las obligaciones, ni de los plazos estipulados en los contratos que Doe Run Perú S.R.L. y sus accionistas tienen celebrados con Centromin Peru S.A. y con el Estado Peruano, en particular los referidos a Garantías y Medidas de Promoción a la Inversión, cuyo incumplimiento por parte de la recurrente dentro de los plazos pactados en dichos contratos estará sujeto a las consecuencias jurídicas previstas en tales instrumentos.” See Resolución Ministerial No. 257-2006-MEM/DM, May 29, 2006. Available at:

http://intranet2.minem.gob.pe/web/archivos/dgaam/estudios/oroya/rm257_MEM_DM.pdf

³⁷ See <http://www.activosmineros.com.pe/amsac/index.php/proyectos-en-ejecucion/proyecto-3> (citing Resolución Directoral No. 082-2000-EM-DGAA), April 17, 2000.

³⁸ Letter from AIDA, Public Citizen and others to Secretaries Hillary Clinton and Timothy Geithner, dated March 31, 2011, at pages 4-5. Available at: <http://www.citizen.org/documents/peru-fta-rengo-letter-march-31-2011.pdf>

³⁹ 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>

⁴⁰ “Religious leaders ask Doe Run to reduce Peru plant emissions,” *AP*, June 12, 2007.

⁴¹ See: “History of The Company”, Doe Run Peru, Accessed June 27, 2011 <http://www.doerun.com.pe/content/pagina.php?PID=764>.

Elsewhere, it said “Doe Run Cayman is an affiliate of Doe Run Peru, and the main creditor with 59% of the confirmed obligations in the bankruptcy proceeding in INDECOPI.” See Doe Run Peru, “Doe Run Peru Rejects Cormin & Trafigura’s Defamatory Campaign and Initiates Criminal Complaint” Doe Run Peru Press Release, May 12, 2011 <http://doerunperumedia.com.pe/english/wp-content/uploads/2011/05/051311Release.pdf>

⁴² *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 1. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

⁴³ *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.

⁴⁴ “Company spokesman Victor Andres Belaunde said that Doe Run Peru - which extracts copper, zinc and lead and is the town’s primary employer - has not paid dividends to its shareholders for three years because it is investing all of its profits in projects to improve the environment.” See Javier Otazu, “Polluted Peruvian town paying the price for mining bonanza,” *EFE Ingles*, Aug. 29, 2008.

⁴⁵ “A lack of financing has led to the suspension of activity at Peru’s fifth-largest exporter, Doe Run Peru (owned by US-based Renco Group). In March the company was forced to shut its La Oroya smelter, one of the largest in the Americas, after a group of banks froze its accounts on February 24th. Doe Run halted payments to suppliers the next day and, as a result, 30 mines that sold copper, zinc, gold and silver concentrates to 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.

⁴⁶ “Mineras privadas avalarán crédito de 175 millones de dólares a Doe Run Perú,” *EFE*, April 2, 2009.

⁴⁷ “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, Compania 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.

⁴⁸ Juan Weik, “Renco looking to sell Doe Run Perú for \$415 million – report,” *Metal Bulletin*, January 25, 2010.

⁴⁹ Juan Weik, “Renco looking to sell Doe Run Perú for \$415 million – report,” *Metal Bulletin*, January 25, 2010.

⁵⁰ “Doe Run Peru insolvent, begins restructuring,” *EFE*, Aug. 4, 2009.

⁵¹ “Peru gives Doe Run more time to complete clean-up work,” *EFE*, Sept. 24, 2009.

⁵² See Ley No. 29410 (Sept. 25, 2009) (extending deadline to May 2012). Available at:

<http://www.minem.gob.pe/minem/archivos/file/Mineria/legislacion/2009/setiembre/LEY%2029410.pdf>

⁵³ “Environmental Contamination in the Homes of La Oroya,” St. Louis University School of Public Health and Archdiocese of Huancayo, Peru, 2005, at 1. Available at:

⁵⁴ Anna K. Cederstav, Alberto Barandiarán, “La Oroya Cannot Wait” AIDA & SPDA Publication, September 20, at 25, 41-44. http://www.aida-americas.org/sites/default/files/La_Oroya_Cannot_Wait_1.pdf

⁵⁵ Anna K. Cederstav, Alberto Barandiarán, “La Oroya Cannot Wait” AIDA & SPDA Publication, September 20, at 25, 45. http://www.aida-americas.org/sites/default/files/La_Oroya_Cannot_Wait_1.pdf

⁵⁶ Anna K. Cederstav, Alberto Barandiarán, “La Oroya Cannot Wait” AIDA & SPDA Publication, September 20, at 25, 47. http://www.aida-americas.org/sites/default/files/La_Oroya_Cannot_Wait_1.pdf

⁵⁷ Anna K. Cederstav, Alberto Barandiarán, “La Oroya Cannot Wait” AIDA & SPDA Publication, September 20, At 25, 48. http://www.aida-americas.org/sites/default/files/La_Oroya_Cannot_Wait_1.pdf

⁵⁸ “Environmental Contamination in the Homes of La Oroya,” St. Louis University School of Public Health and Archdiocese of Huancayo, Peru, 2005, at 2.

⁵⁹ “Blacksmith Institute Supporters” Blacksmith Institute, Accessed June 27, 2011. <http://www.blacksmithinstitute.org/blacksmith-supporters.html> and “Blacksmith Institute Partners” Accessed June 27, 2011. <http://www.blacksmithinstitute.org/partners.html>

- ⁶⁰ Blacksmith Institute, “The Top Ten of The Dirty Dozen”, Project of The Blacksmith Institute, Spetember 2007. <http://www.worstopolluted.org/reports/file/2007%20Report%20updated%202009.pdf> and Blacksmith Institute, “The Worlds Worst Polluters: The Top Ten” Project of the Blacksmith Institute, October 2006. <http://www.worstopolluted.org/reports/file/10worst2.pdf>
- ⁶¹ EarthJustice, “Peru Supreme Court Demands Government Protect Public Health from Doe Run Smelter in La Oroya”, EarthJustice Press Release, June 30, 2006. <http://earthjustice.org/news/press/2006/peru-supreme-court-demands-government-protect-public-health-from-doe-run-smelter-in-la-oroya>
- ⁶² Sara Shipley Hiles, “Religious Leaders Challenge a Polluter,” *The Nation*, June 26, 2007.
- ⁶³ EarthJustice, “Human Rights Body Calls on Peru to Protect Citizens from Contamination by American-owned Smelter”, EarthJustice Press Release, September 5, 2007. <http://earthjustice.org/news/press/2007/human-rights-body-calls-on-peru-to-protect-citizens-from-contamination-by-american-owned-smelter> and Inter-American Commission on Human Rights, “Precautionary Measures 2007”, Report from the Inter-American Commission on Human Rights, Accessed June 27, 2011. http://www.cidh.oas.org/medidas/2007_eng.htm
- ⁶⁴ IACHR, Report No. 76/09, Petition 1473-06, Admissibility Community Of La Oroya, Peru, August 5, 2009. Available at: <http://www.cidh.oas.org/annualrep/2009eng/Peru1473.06eng.htm>
- ⁶⁵ Jarrod Hepburn, “As Peruvian citizens sue U.S. mining investors for environmental harms...” *Investment Arbitration Reporter*, May 17, 2011.
- ⁶⁶ See U.S. District Court, E.D. Missouri, Sister Kate Reid and Megan Heeney (Next Friends) v. Doe Run Resources Corporation et. al., Second Amended Petition for Damages – Personal Injury, Dec. 5, 2007, at paragraphs 21 and 33.
- ⁶⁷ 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). See also “Damages Suits In Missouri Key Part Of Renco Case,” *Inside U.S. Trade*, April 7, 2011.
- ⁶⁸ Paul Driessen, “Responsible Progress in the Andes,” CORE, October 2006, at 1. Available at: <http://www.eskimo.com/~rarnold/Peru%20CSR%20report%20-%20Oct%2006%20-%20English%20-%20web.pdf>
- ⁶⁹ Stephanie Mencimer, “Tea Partiers’ Next Target: The Climate Bill”, *Mother Jones*, November 10, 2009. <http://motherjones.com/politics/2009/11/tea-partiers-next-target-climate-bill>
- ⁷⁰ Letter from DRP to Blacksmith Institute, dated Oct. 5, 2007. Available at: <http://doerunperumedia.com.pe/english/wp-content/uploads/2010/03/Letter-to-Blacksmith.pdf>
- ⁷¹ See Blacksmith Institute, “Top 10 Most Polluted Places: La Oroya, Peru”, Report By the Blacksmith Institute, Accessed June 27, 2011. http://www.worstopolluted.org/projects_reports/display/41
- ⁷² “Critique of the May 2008 Blacksmith Institute report on La Oroya,” AIDA, 2008, at 1-2. Available at:
- ⁷³ Kelly Wiese, “Threats mar St. Louis-based Doe Run lawsuit in Peru,” *Missouri Lawyers Media*, March 3, 2011.
- ⁷⁴ “Peru retains \$14 mn in Doe Run funds to ensure clean-up,” *EFE*, Jan. 15, 2010.
- ⁷⁵ “Peru retains \$14 mn in Doe Run funds to ensure clean-up,” *EFE*, Jan. 15, 2010.
- ⁷⁶ Juan Weik, “Renco looking to sell Doe Run Perú for \$415 million – report,” *Metal Bulletin*, January 25, 2010.
- ⁷⁷ “Gremio minero de Perú expulsa a Doe Run por no cumplir con sus compromisos,” *EFE*, Jan. 30, 2010.
- ⁷⁸ “Gobierno peruano cerrará Doe Run si la empresa no consigue financiación,” *EFE*, May 6, 2010.
- ⁷⁹ “Gobierno peruano acusa a Doe Run de poner en riesgo reinicio de operaciones,” *EFE*, May 20, 2010.
- ⁸⁰ “Guerra de comunicados entre Gobierno y Doe Run por conflicto de La Oroya,” *EFE*, June 15, 2010.
- ⁸¹ “Sigue paro en La Oroya por segundo día en demanda de reanudación de fundición,” *EFE*, June 15, 2010.
- ⁸² “Peru announces cancellation of U.S.-owned miner’s license,” *EFE*, July 28, 2010.
- ⁸³ “OEFA multó a Doe Run con más de S/7 millones” *Radio Programas del Perú*, March 31, 2011. http://www.rpp.com.pe/2011-03-31-oefa-multo-a-doe-run-con-mas-de-s-7-millones-noticia_350816.html
- Organismo de Evaluación y Fiscalización Ambiental, “OEFA impone multa por 7.1 millones de nuevos soles a empresa minera DOE RUN”, OEFA Press Release, March 31, 2011. http://www.oeфа.gov.pe/index.php?option=com_content&view=article&id=583:oeфа-impone-multa-por-7-1-millones-de-nuevos-soles-a-empresa-minera-doe-run&catid=1:noticias-institucionales&Itemid=111
- ⁸⁴ “Doe Run Peru Announces Renco Group Loan Offer to Expedite Cleanup of La Oroya,” Feb. 24, 2011. Available at: <http://www.prnewswire.com/news-releases/doe-run-peru-announces-renco-group-loan-offer-to-expedite-cleanup-of-la-oroya-116853168.html>
- ⁸⁵ “MEM seeks to increase Doe Run Peru debt claim to US\$259mn,” *BNAmericas.Com*, Dec. 15, 2010.
- ⁸⁶ “MEM seeks to increase Doe Run Peru debt claim to US\$259mn,” *BNAmericas.Com*, Dec. 15, 2010.
- ⁸⁷ “Indecopi to confirm Doe Run Peru creditors before year-end,” *BNAmericas.Com*, Dec. 3, 2010; “Indecopi to hold first meeting with Doe Run Peru creditors in February,” *BNAmericas.Com*, Dec. 30, 2010
- ⁸⁸ “Doe Run Perú workers want govt out of group of creditors,” *BNAmericas.Com*, Jan. 27, 2011.
- ⁸⁹ “Indecopi rejects MEM debt claim for Doe Run Perú – report,” *BNAmericas.Com*, March 7, 2011; “Doe Run Perú creditors will have 45 days to approve restructuring or liquidation,” *BNAmericas.Com*, March 29, 2011.
- ⁹⁰ “Indecopi suspends Doe Run Perú’s creditor meetings,” *BNAmericas.Com*, April 4, 2011.
- ⁹¹ “Indecopi recognized a US\$28.9mn claim by Cormin, making it Doe Run Perú’s second biggest creditor with 11% of the voting rights... The group includes over 60 creditors. Peruvian miner Volcan is the third biggest creditor with US\$16.7mn, or 6.42% of the voting rights. It is followed by local miner Buenaventura (NYSE: BVN) with US\$13.1mn (5.02% of the voting rights), Minera Casapalca with US\$5.94mn (2.26% of the voting rights) and Vancouver-based Pan American Silver (TSX: PAA) with US\$5.61mn (2.14% of the voting rights). Indecopi recognized a claim by workers for 12.7mn soles (US\$4.52mn), which gives them 1.73% of the voting rights in the creditors group, Castillo said.” Other creditors include local miners El Brocal, Ares, Argentum, Atacocha, Raura and Santa Luisa.” See “Union workers reject legal action against Doe Run Cayman,” *BNAmericas.Com*, April 7, 2011.
- ⁹² “Doe Run Perú denies spending claims; bankruptcy talks set back,” *American Metal Market*, April 11, 2011.
- ⁹³ Juan Weik, “Renco begins \$800m arbitration against Peru on Doe Run Perú case,” *Metal Bulletin*, April 15, 2011.
- ⁹⁴ See “Union workers reject legal action against Doe Run Cayman,” *BNAmericas.Com*, April 7, 2011.

⁹⁵ “La Oroya workers seek US\$400mn in lawsuit against Cormin,” *BNAmericas.Com*, May 4, 2011.

⁹⁶ “Cormin buys debt of 3 firms in Doe Run Perú creditors group,” *BNAmericas.Com*, May 16, 2011.

⁹⁷ “Warning signs as Doe Run Peru nearly collapses,” *Reuters*, March 30, 2009. Available at: <http://in.reuters.com/article/2009/03/30/copper-conference-doerun-idINN3032779120090330>

⁹⁸ “Renco’s calls for govt to appear in US lawsuits likely to end in arbitration – MEM,” *EFE*, Nov. 23, 2010.

⁹⁹ The Renco Group, Inc. v. The Republic of Peru, Claimant’s Notice of Intent to Commence Arbitration under United States – Peru Trade Promotion Agreement, Dec. 29, 2010, at para 10. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹⁰⁰ “Government of Peru’s Actions Toward Doe Run Peru Said to Violate Trade Treaty between United States and Peru,” Renco Press Release, Jan. 5, 2011. Available at: <http://www.rencogroup.net/press01052011.php>

¹⁰¹ Keenan Steiner, “As dispute heats up, Renco continues lobbying for its Peruvian smelter,” March 8, 2011. Available at: <http://reporting.sunlightfoundation.com/2011/dispute-heats-renco-continues-lobbying-its-peruvian-smelter/>

¹⁰² Keenan Steiner, “Current and former officials intervene on company’s behalf in battle with Peru,” March 8, 2011. Available at: <http://reporting.sunlightfoundation.com/2011/doe-run-peru/>. Steiner goes on to note: Renco Group brought in Jones Walker and Palmer C. Hamilton on Nov. 11; in the fourth quarter of 2010, Jones Walker reported receiving \$110,000 from Renco, more than it reported for any other client. In 2011, two firms, Monument Strategies and Royer and Brooks, registered as lobbyists for Renco.”

¹⁰³ Keenan Steiner “Eight lawmakers signed a letter for Renco” *Sunlight Foundation Reporting Group*, May 4, 2011. <http://reporting.sunlightfoundation.com/2011/eight-lawmakers-signed-Renco-letter/>

¹⁰⁴ Keenan Steiner “Eight lawmakers signed a letter for Renco” *Sunlight Foundation Reporting Group*, May 4, 2011. <http://reporting.sunlightfoundation.com/2011/eight-lawmakers-signed-Renco-letter/>

¹⁰⁵ Letter from AIDA, Public Citizen and others to Secretaries Hillary Clinton and Timothy Geithner, dated March 31, 2011, at page 6. Available at: <http://www.citizen.org/documents/peru-fta-renco-letter-march-31-2011.pdf>

¹⁰⁶ Letter from Assistant Treasury Secretary for International Markets and Development Marisa Lago to Public Citizen, dated May 17, 2011. On file with Public Citizen.

¹⁰⁷ Kelly Wiese, “Threats mar St. Louis-based Doe Run lawsuit in Peru,” *Missouri Lawyers Media*, March 3, 2011.

¹⁰⁸ U.S.-Peru Trade Promotion Agreement, Article 10.28. At: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf

¹⁰⁹ 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 paras 28 and 34. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹¹⁰ U.S.-Peru Trade Promotion Agreement, Article 10.28. At: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf

¹¹¹ U.S.-Peru Trade Promotion Agreement, Article 10.16. At: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf

¹¹² U.S.-Peru Trade Promotion Agreement, Article 10.18. At: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf

¹¹³ 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 14. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹¹⁴ Jarrod Hepburn and Luke Eric Peterson, “Renco’s treaty claims against Peru...” *Investment Arbitration Reporter*, May 17, 2011.

¹¹⁵ U.S.-Peru Trade Promotion Agreement, Annex 10-H. At: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf

¹¹⁶ 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 paras 10 and 42. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹¹⁷ Jarrod Hepburn and Luke Eric Peterson, “Renco’s treaty claims against Peru...” *Investment Arbitration Reporter*, May 17, 2011.

¹¹⁸ 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 3. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹¹⁹ See U.S. District Court, E.D. Missouri, Sister Kate Reid and Megan Heeney (Next Friends) v. Doe Run Resources Corporation et. al., Second Amended Petition for Damages – Personal Injury, Dec. 5, 2007, at paragraphs 21 and 33.

¹²⁰ Glodomiro Sanchez Mejia, “Resolucion Ministerial #257-2006-MEM/DM”, Ministerio De Energia Y Minas Resolution, May 29, 2006. http://intranet2.minem.gob.pe/web/archivos/dgaam/estudios/oroya/rm257_MEM_DM.pdf

¹²¹ 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 paras 43-44. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹²² See Activos Mineros [successor to Centromin], Annual Report 2009, http://www.activosmineros.com.pe/amsac/images/stories/Archivos/Memoria%20Annual/ACTIVOS_MINEROS_MEMORIA_2009.pdf.

¹²³ 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 paras 45. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹²⁴ Doe Run Resources Corp SEC filings, line item on net income for Doe Run Cayman and Subsidiary. Profit information for 1998 from: Doe Run Resources Corp, Form 10-K405, SEC File No. 333-66291, SEC Film No. 1517401, January 29, 2001, at 18, Available at: <http://www.sec.gov/Archives/edgar/data/1061112/000091205701003170/0000912057-01-003170.txt>
Profit information for 1999-2000 from: Doe Run Resources Corp, Form 10-K, SEC File No. 333-66291, SEC Film No. 02655443, May 16, 2002, at 20, Available at: <http://www.sec.gov/Archives/edgar/data/1061112/000091205702021037/0000912057-02-021037.txt>
Profit information for 2001 from: Doe Run Resources Corp, Form 10-K, SEC File No. 333-66291, SEC Film No. 04844084, June 2, 2004, at 32, Available at: <http://www.sec.gov/Archives/edgar/data/1061112/000104746904019129/a2136340z10-k.htm>

Profit information for 2002 from: Doe Run Resources Corp, Form 10-K, SEC File No. 333-66291, SEC Film No. 05699078, March 23, 2005, at 98, Available at: <http://www.sec.gov/Archives/edgar/data/1061112/000104746905007373/a2154039z10-k.htm>

Profit information for 2003-2005 from:

Doe Run Resources Corp, Form 10-K, SEC File No. 333-66291, SEC Film No. 06701401, March 21, 2006, at 94, Available at: http://www.sec.gov/Archives/edgar/data/1061112/000110465906018264/a06-5938_110k.htm

¹²⁵ Julia C. Mead, “At Home in Versailles On the Atlantic”, *The New York Times*, July 4, 2004.

<http://www.nytimes.com/2004/07/04/nyregion/at-home-in-versailles-on-the-atlantic.html?ref=irarennert>

¹²⁶ Sunlight Foundation campaign finance and lobbying data on Renco Group. Accessed June 27, 2011, Available at:

<http://influenceexplorer.com/individual/ira-rennert/5584c775c3d6455db6a701662dcd6d67> and

<http://influenceexplorer.com/organization/renco-group/20378061d80a4c5db53c6d0a236d1629>

¹²⁷ Sunlight Foundation campaign finance and lobbying data on Renco Group. Accessed June 27, 2011, Available at:

<http://influenceexplorer.com/organization/renco-group/20378061d80a4c5db53c6d0a236d1629>

¹²⁸ Sunlight Foundation campaign finance and lobbying data on Renco Group. Accessed June 27, 2011, Available at:

<http://influenceexplorer.com/organization/renco-group/20378061d80a4c5db53c6d0a236d1629>

¹²⁹ U.S.-Peru Trade Promotion Agreement, Article 10.5. At:

http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf

¹³⁰ U.S.-Peru Trade Promotion Agreement, Annex 10-B. At:

http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf

¹³¹ For a general background on how the annex was added to address criticisms arising from the experience under NAFTA, and how ultimately these critics were not satisfied, see: “States, Cities Flag Problems with DR-CAFTA Investment Provisions,” *Inside U.S. Trade*, April 22, 2005.

¹³² See Public Citizen summary of NAFTA investor-state cases at: <http://www.citizen.org/documents/investor-state-chart-april-2011.pdf>

¹³³ “Mr. Lemire had the legitimate expectation that Gala, which at the time was only a local station in Kyiv, would be allowed to expand on its own merits, in parallel with the growth of the private radio industry in Ukraine” (paragraph 69). See Award, Joseph Charles Lemire v. Ukraine (March 28, 2011) (Fernández-Armesto, Paulsson, Voss)

http://ita.law.uvic.ca/documents/LemireVUkraine_Award_28March2011.pdf

¹³⁴ See Dissenting Opinion of Arbitrator Dr. Voss, Joseph Charles Lemire v. Ukraine (March 1, 2011), at paras 69, 110, 133, 136, and 538. Available at: http://ita.law.uvic.ca/documents/LemireVUkraine_DissentOfJurgenVoss_1March2011.pdf

¹³⁵ See comments by Gus Van Harten at: <http://worldtradelaw.typepad.com/ielpblog/2011/06/is-investment-treaty-arbitration-biased-against-developing-countries.html#comments>

¹³⁶ See description of Metalclad, Tecmed and other cases in Benedict Kingsbury and Stephan Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law,” *New York University Public Law and Legal Theory Working Papers*, 2009, at 10. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980.

¹³⁷ 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 paras 48-49. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹³⁸ The Doe Run Resources Corporation Form S-4, Registration Statement Under The Securities Act Of 1933, 1998, at 23. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

¹³⁹ 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 49. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹⁴⁰ 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>

¹⁴¹ 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 50. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹⁴² 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 51. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹⁴³ See discussion of Biwater Gauff v. Tanzania case in Jarrod Hepburn and Luke Eric Peterson, “Renco’s treaty claims against Peru...” *Investment Arbitration Reporter*, May 17, 2011.

¹⁴⁴ 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 52. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹⁴⁵ The Doe Run Resources Corporation Form S-4, Registration Statement Under The Securities Act Of 1933, 1998, at 23. Available at: <http://www.sec.gov/Archives/edgar/data/1061112/0001047469-98-018990.txt>

¹⁴⁶ 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 53. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹⁴⁷ 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 paras 54-56. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf

¹⁴⁸ 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

¹⁴⁹ Indecopi recognized \$232 million in DRP debt (derived from the figure reported above that DRP owed Doe Run Cayman \$139 million, or 59.4 percent of the total debt). If Indecopi were to recognize \$163 million or \$259 million in additional debt for MEM, that would raise the denominator of the total debt outstanding to \$395 million to \$491 million. MEM’s lower bound claim would, ergo, represent \$163 million / \$395 million (41 percent). The upper bound claim would represent \$232 million / \$491 million (53 percent). See sources above.

¹⁵⁰ J. Peter Byrne, “Ten Arguments for the Abolition of the Regulatory Takings Doctrine,” *Ecology Law Quarterly*, 22, 1995; Vicki Been and Joel Beauvais, “The Global Fifth Amendment? Nafta’s Investment Protections and the Misguided Quest for an International

'Regulatory Takings' Doctrine," *New York University Law Review*, April 2003, Available at SSRN: <http://ssrn.com/abstract=337480>; Jeeyoung Kim, "National Chaos?: Would the Indirect Expropriation Provisions of the Korea-US FTA Destroy the Korean Land Use System," unpublished paper, 2008. Available at: http://works.bepress.com/jeeyoung_kim/

¹⁵¹ 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>

¹⁵² *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>

¹⁵³ 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>

¹⁵⁴ 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, the 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>

¹⁵⁵ 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.

¹⁵⁶ United States Model Bilateral Trade Agreement, Annex B-4(a), United States Department of State, 2004. <http://www.state.gov/documents/organization/117601.pdf> at 38

¹⁵⁷ "States, Cities Flag Problems with DR-CAFTA Investment Provisions," *Inside U.S. Trade*, April 22, 2005;

¹⁵⁸ *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 58. Available at: http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf See discussion of *Maffezini vs. Kingdom of Spain* case in Efraim Chalamish, "The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?" *Brooklyn Journal of International Law*, 34:2, 2009, at 324-327. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1543322 .

¹⁵⁹ Rep. Earl Blumenauer (D-Ore.), "House Passes U.S.-Peru Free Trade Agreement," Press Release, Nov. 7, 2007. Available at: http://blumenauer.house.gov/index.php?option=com_content&task=view&id=330&Itemid=71

¹⁶⁰ United States-Peru Trade Promotion Agreement Implementation Act, House of Representatives Floor Debate, Nov. 08, 2007. *Congressional Record*, at H13291.

¹⁶¹ Public Citizen analysis of data from: <http://voteview.com/downloads.asp>

¹⁶² "Peru FTA Vote Shows Strong Democratic Support But No Majority," *Inside U.S. Trade*, Nov. 9, 2007.

¹⁶³ See Comment by Rep. Hilda Solís (D-Calif.), Providing For Consideration Of H.R. 3688, United States-Peru Trade Promotion Agreement Implementation Act, *Congressional Record*, House of Representatives – Nov. 7, 2007, at H13307.

¹⁶⁴ See Susan C. Schwab, "Statement of U.S. Trade Representative Susan C. Schwab Regarding Entry into Force of the Peru FTA", USTR Press Release, January 16, 2009. <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/statement-us-trade-representative-susan-c-schwab-r>

¹⁶⁵ Trade Policy Staff Committee; Request for Public Comment on Review of Employment Impact of United States-Andean Free Trade Agreement Negotiations, 69 *Federal Register* 94 (May 14, 2004), FR Doc 04-10957. <http://www.thefederalregister.com/d/p/2004-05-14-04-10957> Trade Policy Staff Committee; Committee; Initiation of Environmental Review of the Free Trade Negotiations With Certain Andean Countries; Public Comments on Scope of Environmental Review, 69 *Federal Register* 71 (April 12, 2004), FR Doc 04-8238.

<http://www.thefederalregister.com/d/p/2004-04-12-04-8238> Office of the United States Trade Representative; Notice of intent to initiate negotiations on a free trade agreement between the United States and Colombia, Peru, Ecuador, and Bolivia request for comments, and notice of public hearing, 69 Federal Register 31 (February 17, 2004), fr17fe04-142.

<http://www.mail-archive.com/pen-l@galaxy.csuchico.edu/msg85880.html>

¹⁶⁶ Written Comments to the United States Trade Representative Regarding US-Andean Countries Free Trade Agreement: Advice Regarding Separation Of Beneficiary Countries And Economic Necessity/Opportunity, Submitted by: ChevronTexaco. On file with Public Citizen.

¹⁶⁷ Letter from Maple Gas Chairman John Hanks to USTR Robert Zoellick, March 16, 2004. On file with Public Citizen.

¹⁶⁸ “Report on the US-Peru Free Trade Agreement”, Industry Trade Advisory Committee on Energy and Energy Services, January 2006. http://ustraderep.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Reports/asset_upload_file813_8973.pdf

¹⁶⁹ Alan Garcia Perez, “El Síndrome del perro del hortelano,” *El Comercio*, Oct. 28, 2007. Available at:

http://elcomercio.pe/edicionimpresa/html/2007-10-28/el_sindrome_del_perro_del_hort.html#print; Alan Garcia Perez, “Receta para acabar con el perro del hortelano,” *El Comercio*, Nov. 25, 2007. Available at: http://elcomercio.pe/edicionimpresa/html/2007-11-25/receta_para_acabar_con_el_perr.html;

Alan Garcia Perez, “El perro del hortelano contra el pobre,” *El Comercio*, March 2, 2007. Available at: <http://elcomercio.pe/edicionimpresa/html/2008-03-02/el-perro-hortelano-contra-pobre.html>; Anthony Bebbington, “The New Extraction: Rewriting the Political Ecology of the Andes,” *NACLA Report on the Americas*, Sept./Oct. 2009, page 12. Available at: http://www.sed.manchester.ac.uk/research/andes/publications/papers/Bebbington_NACLARReport.pdf.

¹⁷⁰ “The Dog in the Manger,” Aesop Fables Electronic Text Center University of Virginia, accessed June 24, 2011. Available at: <http://etext.virginia.edu/etcbin/toccer-new2?id=AesFabI.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=31&division=div1>;

Alan Garcia Perez, “El perro del hortelano contra el pobre,” *El Comercio*, March 2, 2007.

¹⁷¹ Letter from Asociación Interétnica de Desarrollo De La Selva Peruana to Alan Garcia, dated Nov. 13, 2007. Available at: <http://www.aidesep.org.pe/editor/documentos/59.pdf>

¹⁷² Travis McArthur and Todd Tucker, “A Year after Implementation of Peru Free Trade Agreement, U.S. and Peru Left with Broken Promises and No New Trade Model,” 2010. Available at: http://www.citizen.org/documents/Pacific_Rim_Backgrounder1.pdf.

¹⁷³ Asociación Interétnica de Desarrollo De La Selva Peruana, News Release, April 13, 2009. Available at: <http://www.aidesep.org.pe/index.php?codnota=629>

¹⁷⁴ “Investigate Violence Against Indigenous People in Peru,” *Amnesty International Online Activism Center*, June 4, 2010. Available at: <http://www.amnesty.org/en/appeals-for-action/investigate-violence-against-indigenous-people-peru>

¹⁷⁵ Simon Romero, “Protestors Gird for Long Fight Over Opening Peru’s Amazon,” *New York Times*, June 11, 2009. Available at: <http://www.nytimes.com/2009/06/12/world/americas/12peru.html>.

¹⁷⁶ Letter from environmental groups to Secretary Hillary Clinton, dated June 12, 2009. Available at: http://www.ciel.org/Publications/Peru_Clinton_15Jun09.pdf

¹⁷⁷ “USTR Holds Back On Controversial Peru Decrees At Root Of Protests,” *Inside U.S. Trade*, May 6, 2011, June 19, 2009.

¹⁷⁸ “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.

¹⁷⁹ See Figure 1(a) in Matt Finer and Martí Orta-Martínez, “A second hydrocarbon boom threatens the Peruvian Amazon: trends, projections, and policy implications,” *Environ. Res. Lett.* 5 (2010) 014012 (10pp). Available at: http://servindi.org/pdf/ERL10_1_014012.pdf

¹⁸⁰ 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>

¹⁸¹ “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 contamina 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>

¹⁸² “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.

¹⁸³ “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/>

¹⁸⁴ For a compilation of these commitments, see <http://www.citizen.org/Page.aspx?pid=905>.

¹⁸⁵ “U.S. TPP Investment Proposal Retains Investor-State, Breaks New Ground,” *Inside U.S. Trade*, March 10, 2011.

¹⁸⁶ 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>