VOLUME 59, FALL 2017, ONLINE JOURNAL

The Renco Group, Inc. v. Republic of Peru: An Assessment of the Investor's Contentions in the Context of Environmental Degradation

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On July 2016, a Partial Award dismissed the Renco Group Inc. v. The Republic of Peru *case. The Award indicated, however, that a new arbitration claim could be pursued against the State. In view of this, this essay analyzes the US investor's legal contentions presented in the 2014 Memorial of Liability. The examination of this case considers the environmental and health effects of the investment in order to give proper weight to the arbitration claim. Due to weak environmental references to the 2006 US-Peru Trade Promotion Agreement (PTPA), this paper emphasizes the importance of striking a fair balance between the protection afforded to foreign investments and the state's ability to protect health and the environment. This case represents the first investor-State arbitration dispute lodged pursuant to the PTPA.*

On 15 July 2016, a UNCITRAL Tribunal (the Tribunal) released a partial Award dismissing the case concerning *Renco Group Inc. v. the Republic of Peru*.[1] The claim was submitted pursuant to the U.S.-Peru Trade Promotion Agreement (PTPA) signed in 2006.[2] The dispute concerns the operation of a metallurgical complex located in the Andean town of La Oroya, in central Peru. The complex, built in 1921 by a third private party, had, over the course of several decades, become outdated and was identified as the main source of air, soil, and water contamination. Sulfur dioxide (SO2) and lead are

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[1] The Renco Group Inc. v. The Republic of Peru, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, (Jul. 15, 2016) [hereinafter Partial Award].

[2] United States-Peru Trade Promotion Agreement Implementation Act, 19 USC § 3805 (2007) [hereinafter PTPA].

among the main sources of contamination generated by the complex. [3] Studies carried out in La Oroya highlighted the toxicity and hazardousness of lead, which mostly affected children (as shown by high levels of lead in their blood).[4] The problem was exacerbated by severe malnutrition among children, which increased the risk that children's bodies would absorb more pollutants from the environment.[5] Sulfur Dioxide, additionally, damaged the respiratory and circulatory systems, increasing mortality especially when found in high concentrations, as it was in La Oroya.[6]

This led Peru to seek an investor willing to purchase and modernize the plant to meet Peru's environmental goals. This was no easy task, as most investors are very hesitant to purchase a complex with such potential for environmental liability. Environmental disputes can indeed result in a tangle of litigation.[7] Despite these challenges, Doe Run Peru (DRP), a Peruvian subsidiary of New York-based Renco Group Inc. (Renco), purchased the complex from Centromin, a Peruvian State-run company, in 1997 for 247 million dollars (USD). [8] In addition to the purchase agreement, DRP agreed to carry out nine modernization projects at a cost of USD 129 million.[9] Problems arose during the execution of projects by DRP, which led the investor to trigger international arbitration against Peru.

Chapter 10 of the PTPA recognizes a foreign investor's right to initiate arbitration proceedings against the host state for an alleged breach of rights as recognized by the PTPA, along with provisions contained in either an Investment Agreement and/or

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[3] *See Ministerio de Salud—Direccion General de Salud Digesta: Direccion Ejecutiva de Ecologia y Proteccion del Ambiente—DEEPA*, INVENTARIO DE EMISIONES CUENCA ATMOSFERICA DE LA CIUDAD DE LA OROYA, 44 (Nov. 2005) http://www.digesa.sld.pe/DEPA/inventario_aire/fuentes_fijas/Informe%20Inventario%20Integrado%20Oroya%20-%20Huancayo.pdf [hereinafter 2005 Inventory of Emissions for the Oroya Basin].

[4] *See* Doe Run Peru, *Estudios de Niveles de Plomo en la Sangre de la Poblacion en La Oroya 2000-2001*, §1.3 http://www.bvsde.paho.org/bvsea/e/fulltext/estudio/estudio.pdf [hereinafter 2001 Studies of Blood Lead Levels in the Population of La Oroya].

[5] *Id.* at 14.

[6] *See e.g. Reid v. Doe Run Resources Corp.*, 2008 WL 3538410 (Mo. Cir. Aug. 7, 2008).

[7] The litigation between Chevron/Texaco and Ecuador stands as an example of overlapping and extended litigation seeking liability of the former US operator, Texaco, due to environmental degradation in the Amazon. These lawsuits ultimately led to an international arbitration claim under the US-Ecuador investment agreement. For more information concerning Chevron's contentions see Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, Claimant's Memorial on the merits (2010) http://www.italaw.com/sites/default/files/case-documents/ita0164.pdf.

[8] *See* The Contract of Stock Transfer Between Empresa Minera del Centro del Peru S.A. (Centromin) and Doe Run Peru S.R. LTDA (DRP), Clause 2 and Art. 3.2 (1997) http://www.secinfo.com/dVut2.7yH1.j.htm#1stPage [hereinafter 'Stock Transfer Agreement', STA or Investment Contract].

[9] The STA did not reference the modernization projects, referred to as PAMA (Programa de Adecuacion y Manejo Ambiental). It only referred to the extent that the PAMA projects related to environmental liability resulting from operation of the complex.

Authorization.[10] This treaty, like most investment treaties, contains few environmental references. The PTPA makes reference to environmental protection as an objective of the treaty in the Preamble.[11] In practical terms, however, arbitral tribunals do not rely on the preamble to influence interpretation of the treaty's text.[12] And even though the PTPA states that the dispute shall be decided "in accordance with this Agreement and applicable rules of international law;"[13] the practice of most tribunals is to rely on the treaty's plain language without importing "legal elements from other treaties."[14] Furthermore, investment treaties state the rights of foreign investors in such broad terms that tribunals are left with discretion to determine their actual content as they examine the factual basis of a given case.[15] This has led to inconsistent interpretations in international investment law.[16] Note that international investment tribunals do not enforce the host state's environmental or health laws. Nor can the state lodge counter claims against a foreign investor.

However, the PTPA leaves room for states to achieve environmental policy goals, notwithstanding limitations. Art. 10.11 provides that:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[17]

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[10] *See* PTPA art. 10.16.1.a.

[11] *See id*. at Preamble. (States resolve to "IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters.").

[12] Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 391 (2015).

[13] PTPA, *supra* note 2, art. 10.22.1.

[14] Grand River Enterprises Six Nations, Ltd., et al. (Can.) v. United States of America, (UNCITRAL) ¶ 71 (Jan. 12, 2011).

[15] *See, e.g*., Neer (U.S.) v. Mexico, 4 R.I.A.A. 60 (U.S.-Mex. Claims Comm'n 1926) (requiring a high threshold of wrongfulness such as "outrage, to bad faith, to willful neglect of duty to find the state in violation of the Fair and Equitable Treatment 'FET' standard"); *but see* William Ralph Clayton et al. (U.S.) v. Government of Canada*,* (UNCITRAL), PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 442–444, 588 (Mar. 17, 2015) (requiring a high threshold of seriousness, without requiring that state action be shocking or outrageous).

[16] Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1040 (2010).

[17] PTPA, *supra* note 2, art. 10.11.

The above provision allows the state to adopt and enforce measures that take the environment into account as long as such measures are consistent with protections afforded to investors and their investments under the PTPA. Obviously, this requirement could be used to weaken the state's power to increase environmental protections without breaching investment protections. The Renco submission depicts a case concerning enforcement measures adopted by Peru in the mist of an environmental crisis, allegedly in breach of investment standards. The claim, however, was stunted on jurisdictional grounds.

I. ANALYSIS OF THE 2006 PARTIAL AWARD ON JURISDICTION

The Award dismissed Renco's claim on jurisdictional grounds due to its failure to submit a valid waiver. According to art. 10.18.2 (b) of the PTPA, the foreign investor must submit a waiver together with a Notice of Arbitration (or request for arbitration) to the Respondent State. The Tribunal reiterated that by means of a written waiver, the foreign investor waives the right to pursue legal proceeding in local courts, and any other forum for the settlement of disputes concerning the alleged violation(s).[18] The case records show Renco introduced a declaration to the waiver provision reserving the right to bring the matter to another forum "for a resolution on the merits" if the present claim were to be dismissed or declared inadmissible.[19] The Tribunal concluded that such declarations are contrary to the object and purpose of the waiver provision, which was designed to avoid parallel or subsequent procedures.[20] Consequently, the claim was dismissed. The Tribunal further stated that Renco could commence a new arbitration with a 'clean' waiver.[21] However, submitting a new claim might trigger other jurisdictional problems.[22] It is also important to consider that the PTPA became effective on 1st February 2009 and is prospectively applicable from that date. Therefore, some of Renco's complaints, which may date back to 1997, fall outside the Tribunal's jurisdiction. There remain, however, disputes that are within the temporal scope of the Tribunal, such as

[18] *See* Partial Award, *supra* note 1, ¶ 95.
[19] *Id.* ¶ 58.
[20] *Id.* ¶ 87.
[21] *Id.* ¶ 184.
[22] Of the potential jurisdictional problems, additional waiver issues may arise. Records indicate that DRP and Renco each submitted a waiver together with the Notice of Arbitration. With the international claim already underway, DRP challenged the taking of property in local courts, creating "parallel proceedings." The Notice of Arbitration was subsequently amended to remove DRP, thus making Renco the only Claimant. The issue is whether two valid waivers—one for the parent company and the other for its subsidiary—are still required. The PTPA allows for either (1) Renco to bring suit as the sole party, or (2) for Renco to bring suit on behalf of DRP. These two options create a conflict of interpretation, leading Peru to argue that DRP, as the injured party, must bring suit, therefore barring the suit completely because of parallel proceedings in local court.

alleged unlawful expropriation claims and breach of the right to Fair and Equitable Treatment (FET).

II. RENCO'S MAIN CONTENTIONS AS PER THE 2014 MEMORIAL OF LIABILITY

This paper now turns to the issue of expropriation as presented by Renco in the 2014 Memorial of Liability.[23] A short introduction to Renco's investment is helpful to understand the dispute. In 1997, DRP purchased the complex from Centromin, and as a result, an investment contract referred to as a Stock Transfer Agreement (STA) was signed.[24] In an effort to promote environmental sustainability, the Government adopted a program called the Environmental Remediation and Management Program (PAMA) in the early 1990s.[25] Based on PAMA, modernization plans are prepared by the investor with the subsequent approval of the Ministry of Energy and Mines (MEM). The PAMA plan lays out the modernization activities and investments to be carried out by companies. In order to achieve PAMA goals, Peru adopted Maximum Permissible Levels (MPLs) of pollution in 1996.[26] MPLs measure the source of contamination, e.g., concentration of pollutants in stack gas emissions or discharges. All companies were given 10 years to gradually bring down emissions and waste discharges to meet these standards while still operating their facilities. At the time DRP purchased the complex, PAMA and MPLs were in force.

While the STA briefly mentions PAMA, the actual schedule of activities and the investor's financial obligations, the PAMA plans, were regulated by separate decrees. The complex's PAMA plans were prepared by Centromin and approved by the MEM in 1996.[27] When DRP began modernization work it found that Centromin had 'severely' undervalued certain modernization projects while omitting others, resulting in a much higher modernization cost for DRP than they had agreed to at the time of purchase.[28] DRP argues that, since more investment and time was necessary to fully modernize the

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[23] The Renco Group Inc. v. The Republic of Peru, ICSID Case No. UNCT/13/1, Claimant's Memorial on Liability (Feb.- 20, 2014) [hereinafter Memorial on Liability].
[24] *See* 'Stock Transfer Agreement', STA or Investment Contract, *supra* note 8.
[25] *See generally* The World Bank, *Wealth and Sustainability: The Environmental and Social Dimensions of the Mining Sector in Peru*, at 64 (2005) (providing a comprehensive background on the evolution of environmental regulation in mining in Peru, including the establishment of the Program for Environmental Remediation and Management-PAMA), *available at* http://siteresources.worldbank.org/INTPERUINSPANISH/Resources/AAA_Environment_and_Mining_in_Peru.pdf.
[26] The legal notion of Maximum Permissible Levels (MPL) was introduced for the first time in 1993 with the adoption of the Reglamento para la Protección Ambiental en la Actividad Minero-Metalúrgica; Supreme Decree Nº 016-93-EM of May 1, 1993 (Regulation of Environmental Protection for Mining Activities), Art. 1.
[27] *See* Memorial on Liability, *supra* note 23, ¶ 10.
[28] *Id.* ¶ 115.

plant, an extension beyond the 10-year term was needed. The MEM responded with a less than three-year extension ending September 2009. As a condition of the extension, the 2001 Air Quality Standards (ECA) were made mandatory for DRP.[29] The ECA creates maximum levels of concentrations that air—as a whole—shall not exceed in order to prevent risk to human health. Application of the ECA was foreseeable under Peruvian laws and Renco does not challenge its application.[30] Admittedly, however, the ECA further increased investment cost. DRP considers the less than three-year extension as grossly unfair and arbitrary.[31]

When the 2009 deadline passed without DRP completing its work, Congress granted a second extension by way of an exception. [32] Congress also gave MEM the power to attach conditions.[33] As a result, the MEM mandated a trust that would channel 100% of DRP's revenues into an account controlled by the MEM.[34] DRP contended that establishing such a burdensome trust would make it impossible to obtain any credit by restricting cash flow. [35] The trust was ultimately reduced to 20%, but Renco states that DRP was left without sufficient time to obtain the necessary funds before the deadline. [36] After verifying DRP's inability to obtain financing, the MEM cancelled the company's operating license. Shortly after, the company was forced into bankruptcy in the mist of financial hardship. Under Peruvian laws, creditors are able to initiate bankruptcy against the debtor in hopes of repayment. By this time, DRP's total investment on PAMA projects had reached USD 300 million.[37]

It is in this context that the MEM claimed a USD 163 million (plus USD 87 million to allow completion of the last project) credit against DRP. DRP argued that, according to Peruvian laws, only administrative sanctions apply for the unfinished project. [38] After exhausting the appeal process, MEM's right to the credit was upheld by local courts. Thus, the MEM became DRP's major creditor with the ability to determine the fate of the company in bankruptcy proceedings. The creditors then agreed to sell the complex. Consequently, after making an overall USD 300 million investment in PAMA projects, in

[29] *Id.* ¶ 154.
[30] Resolucion Ministerial No. 315-96-EM-VMM (July 1996) (stating that the provisional Environmental Air Quality standards (ECA, Spanish acronym) would apply until replaced by national air quality standards).
[31] *See* Memorial on Liability, *supra* note 23, ¶ 309.
[32] Ley No. 29410 [Legislation of Peru, Act No. 29410] (Sep. 25, 2009), art. 1 (Congress justified the extension after finding that decontamination of La Oroya through modernization of the plant was a "public need.").
[33] *Id.* at art. 3.
[34] *See* Memorial on Liability, *supra* note 23, ¶ 184.
[35] *Id.* ¶ 15.
[36] *Id.* ¶ 189.
[37] *Id.* ¶ 323.
[38] *Id.* ¶ 192.

addition to paying USD 247 million to the Government at the time of purchase, DRP lost ownership of the metallurgical complex in the bankruptcy proceedings. Renco argues that, as a result, Peru deprived Renco of the 'whole' of its investment, amounting to an unlawful expropriation in breach of the PTPA art. 10.7.[39]

III. ASSESSMENT OF LIABILITY

The question of unlawful expropriation begins with the issue of inadequate extensions beyond the initial 10-year term, which Renco claims were arbitrary and in breach of FET standard. In 2005, at the time of the request for extension, alarming levels of air lead contamination generated by the complex were reported to be affecting the population. The US Center for Disease Control and Prevention (CDC), upon request of the USAID PERU Mission, released a report indicating that:

The presence of lead in soil, dust, water resources, and ambient air probably will continue to keep [blood lead levels] elevated in people in and around La Oroya. Ongoing discussions delay the protection young children need.[40]

The CDC recommended that "air lead emissions [be reduced], both stack and fugitive, to levels that protect children".[41] The same observation applied to exposure from historic soil contamination.[42]

By the time this report was issued, DRP operated the complex for eight years without showing sufficient progress towards modernization. In 2005, another delegation, this time from the University of Missouri's School of Public Health, found that a number of soil contaminants, including mercury, cadmium and arsenic, were released by the plant, affecting a larger area including the Mantaro Valley.[43] This team presented, for the first time, studies on the impact of this combination of pollutants on human health.[44] These findings were not new. The Ministry of Health Directorate of Environmental Health (DIGESA) reported that the health administration was aware of elevated blood lead levels resulting from the air pollution crisis as early as 1999.[45] Health problems in La Oroya

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[39] *Id.* ¶ 390.

[40] *Development of an Integrated Intervention Plan to Reduce Exposure to Lead and Other Contaminants in the Mining Center of La Oroya, Perú*. (Centers for Disease Control and Prevention, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry Division of Emergency and Environmental Health Services (CDC/NCEH/DEEH/EHSB). (CDC/NCEH/DEEH/EHSM, Atlanta, GA), May 2005, at 33.

[41] *Id.* at *35.*

[42] *Id.*

[43] *See* FABIANA LI, UNEARTHING CONFLICT: CORPORATE MINING, ACTIVISM, AND EXPERTISE IN PERU 53-55 (Duke University Press 2012).

[44] *Id.*

[45] *See Estudio de Plomo en la Sangre en una Poblacion Seleccionada de la Oroya* (Ministry of Health, General Directorate of Health (DIGESA)). (DIGESA, Peru), Nov. 1999 (hereinafter 1999 DIGESA Report).; *See also* Consejo Nacional del Ambiente-CONAM, *GESTA ZONAL DEL AIRE DE LA OROYA,*

have been corroborated by exhaustive independent studies concerning emissions fluctuations during the time DRP ran the complex. One study shows that air quality deteriorated drastically from 1997 to 2000, as compared with the first year of the PAMA from 1995 to 1996.[46] Therefore, DRP's application for extension did not sufficiently prove that the company could implement effective measures to prevent further health injuries, but for less than three years.[47]

Moreover, the lack of progress towards the modernization projects is corroborated by the substantial delays in investment commitments.[48] Each delay exacerbated the contamination problem, becoming a major source of social unrest in the area.[49] The most significant delay was the modernization work on lead, cooper, and zinc plants, which had not even begun.[50] The modernization of these three plants consisted of turning the plants into sulfuric-acid plants, which would produce much lower levels of pollution than the plants produced before modernization. These plants generated the largest revenue, as well as the main source of pollution from the entire complex, making this final project the most expensive and important PAMA project. The MEM responded with a less than three-year extension—ending in September 2009—exclusively for the completion of these three plants, which represented over 60% of the total modernization budget.[51] The MEM reiterated that the length of the extension was ultimately necessary to avoid further health injury.[52] This decision was, arguably, not arbitrary.

"Plan de Acción para la Mejora de la Calidad del Aire en la Cuenca Atmosférica de La Oroya", (hereinafter 2006 Action Plan) pp. 16-18; 42-43. This report presents tables prepared by the General Directorate of Environmental Health (DIGESA) showing blood lead levels in affected communities in La Oroya in 1999 and 2005.

[46] *See* Anna K. Cederstav, and Alberto Barandiaran, *La Oroya Cannot Wai*t, Interamerican Association for Environmental Defense (AIDA) and Peruvian Society of Environmental Law (SPDA). (AIDA & SPDA, CA), Sept. 2002, at 51.

[47] *See* Resolucion Ministerial N. 257-2006-MEM/DM (Considerando para. 13; Conclusiones) (May 2006).

[48] *See* Universidad ESAN, Evaluación de la Solicitud de PRORROGA EXCEPCIONAL DE PLAZOS PARA EL CUMPLIMIENTO DE PROYECTOS MEDIOAMBIENTALES ESPECÍFICOS presentado por la empresa DOE RUN PERU SRL. ESAN. Lima, Febrero 2006, at 27 (stating that DRP's pending PAMA investment was worth USD 121.2 million at the time DRP applied for the first extension in 2004–2005), *available at*http://intranet2.minem.gob.pe/web/archivos/dgaam/estudios/oroya/Finalv1.pdf.

[49] *See* Martin Scurrah, Jeannet Lingan and Rosa Pizarro, *Case Study, Job and Health in Peru,* in GLOBALIZING SOCIAL JUSTICE: THE ROLE OF NON-GOVERNMENT ORGANIZATIONS IN BRINGING ABOUT SOCIAL CHANGE, at 175–176 (Jeffrey Atkinson and Martin J. Scurrah eds. New York: Palgrave Macmillan, 2009) (recalling that mining workers, trade unions, and the local government allied with DRP in supporting the extensions; and were against residents, who feared that another would increase health problems).

[50] *See generally* Ministerio de Energia y Minas (MEM), Informe N. 0118-2006-MEM Mayo 2006. [*hereinafter* MEM 2006 Report on DRP's Request for Extension], *available at* http://www.aida-americas.org/sites/default/files/refDocuments/MEM%20PAMA%20Approval%20May%2020061.pdf.

[51] *Id.* Annex I and II.

[52] *See* Li, *supra* note 44.

Government data confirms that substantial progress towards modernization was made from 2007 to 2009.[53] However, the extended deadline passed without DRP completely modernizing the copper plant that would have drastically reduced sulfur dioxide (SO2) emissions. High levels of SO2 emissions, likely due to the partly outdated copper plant, continued to be reported. [54] A second extension was then granted with the caveat that a trust be established to ensure that future revenues would be channeled into modernization projects; undoubtedly, due to La Oroya's critical environmental situation. DRP, however, could not get the necessary funding within the deadline set by Congress to restart this project.[55] Thus, DRP's license was cancelled.

Therefore, in light of Centromin's PAMA omissions in calculating the modernization costs, DRP was granted two extensions beyond the 2007 deadline to allow the company to meet environmental standards. Having received one effective extension, and a second financially frustrated extension, DRP did not complete the PAMA.

The failure to complete the last project resulted in a credit claim against DRP during the bankruptcy process. Renco argued that Peruvian laws do not support the existence of any credit in favor of the MEM, but the application of administrative fines and, eventually, closure of the plant in the case of non-compliance with the PAMA.[56] Local courts held that, based on the Peruvian Civil Code, DRP is obligated to fulfill its modernization projects under the PAMA.[57] Therefore, DRP owes the amount necessary for completion. However, neither the STA nor the laws implementing the PAMA explicitly state that the Civil Code would apply and generate a credit. Under the Peruvian legal system, nevertheless, the Code applies in situations where there is, for example, a

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[53] Organismo Supervisor de la Inversion en Energia y Mineria (OSINERGMIN), 'Supervision al Complejo Metalurgico La Oroya – DOE RUN PERU. Avances al 31 de Diciembre de 2009', at 12 (2009).

[54] *See* Ministerio de Salud (MINSA), Direccion General de Salud (DIGESA), —Oficina de Ecologia y Proteccion del Medio Ambiente:

Evaluacion de la Calidad del aire en la Ciudad de la Oroya - Junin (Octubre de 2006) (*hereinafter* 2006 DIGESA REPORT), CONCLUSIONES (noting that the town of La Oroya Antigua had 5 times the amount of lead and Sulfur Dioxide permitted under the ECA standards).

Monitoreo de Calidad del aire la Oroya (Mayo 2007) (*hereinafter* 2007 DIGESA REPORT), CONCLUSIONES (showing improvement in air quality, but also finding that lead and Sulfur Dioxide exceeded the average permissible national standard on some days).

Evaluacion de la Calidad del Aire en la Ciudad de la Oroya - Junin (Marzo – Abril 2008) (*hereinafter* 2008 DIGESA REPORT) (finding that lead and Sulfur Dioxide exceeded the maximum permissible limits), *available at* http://www.digesa.minsa.gob.pe/.

[55] Memorial of Liability, *supra* note 23, at 334.

[56] *Id.* at 192.

[57] *See* Corte Superior de Justicia de Lima. Octava Sala Especializada en lo Contencioso Administrativo con Sub Especialidad en Temas de Mercado. Sentencia. Expediente N.368-2012 (Ref. Sala 184-2013) DECISION (October 18th, 2012), *available at* https://www.pj.gob.pe/wps/wcm/connect/8775f2804513e75c9f369f279eb5db9a/D_Exp_368_2012_120814.pdf?MOD=AJPERES&CACHEID=8775f2804513e75c9f369f279eb5db9a.

breach of an obligation with economic content, as in the present case.[58] That said, it must be noted that the highest court dealing with this issue, La Corte Superior de Justicia de Lima, was split (3-2), reflecting the lack of clarity on whether fines or a credit would be generated in the case of a failure to fulfill the PAMA obligations.[59] Certainly, this aspect could raise an issue under the FET clause of the PTPA. Further, the interpretation of national laws concerning the legal character of the PAMA, and whether the PAMA is a legal obligation or merely an expression of environmental goals, will be an important element to consider when examining expropriation.

Another important aspect to the expropriation question is the proportionality of the measure.[60] That is to say, whether the aim of the measure—completion of the partially modernized copper plant— was proportional to its effect—deprivation of property. Restructuring would have been one option for avoiding a taking , DRP presented restructuring plans in 2011 and 2012 that would have allowed the firm to pay back creditors while simultaneously operating the complex. However, the Committee of Creditors rejected these plans since they all provided for operation of the partially modernized copper plant.[61] This was the most profitable, and most polluting (in terms of SO2) plant . As can be seen above, the question of expropriation is not as simple as asking whether property was taken. It implicates competing concerns about protecting foreign investments and environmental protection. Moreover, as the metallurgical complex guarantees the survival of Peru's mining industry, closure of this facility is not an option for the Government.

In addition to the above litigation, DRP's investment also led to environmental tort claims in the United States. According to Renco, these actions raise issues under the PTPA's FET standard. The investor indicates that between 2007 and 2013, close to a thousand residents, all children in La Oroya, or who were minors at the time of exposure, filed civil lawsuits against Renco, Doe Run Resources Corporation (DRRC), and other companies and officers associated with Renco for injuries caused by poisonous emissions.[62] All claims were filed in St. Louis, Missouri, where DRRC has its principal business.[63] Attempts to dismiss these claims were pursued by Renco on *forum non*

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[58] Codigo Civil Peruano (1984) arts. 1150-51.

[59] *See* Li, *supra* note 44. *See also* Corte Superior de Justicia de Lima, *supra* note 57, Dissenting Opinion of Judge TORRES GAMARRA and HASEMBAK ARMAS (stating that the MEM does not have the legal authority to invoke the Civil Code in this case, and that environmental laws explicitly provide for a system of fines).

[60] *See, e.g.*, Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Award, (Oct. 5, 2012), ¶¶ 404–05 (finding that the state's reaction, the termination of a contract worth many millions of dollars, was disproportional to the wrongdoing).

[61] Memorial on Liability, *supra* note 23, ¶ 201.

[62] *Id.* ¶ 275.

[63] *See e.g.*, *Reid v. Doe Run Resources Corp.*, *supra* note 6, Petition for Damages – Personal Injury.

conveniens grounds but, as of this writings, these lawsuits are still pending.[64] By the same token, unsuccessful attempts were made by Renco to stay the St. Louis claims pending international arbitration. The St. Louis courts have stated that the children bring negligence, conspiracy, and strict liability claims, and, as such, this issue is not "referable to arbitration."[65] This means that the St. Louis lawsuits do not create overlapping proceedings with the international litigation, in the view of local courts.

These actions raise disputes between Renco, Peru, Centromin, and DRP about environmental liability. Provisions contained in the STA create an interpretation problem about liability for environmental damage between DRP and Centromin. A Guaranty Agreement was also signed by Peru and DRP, by which Peru guaranteed the assurances assumed by Centromin in the STA. Based on these agreements, DRP seeks compensation for damages since "the Renco Consortium has spent many millions of dollars defending [these] lawsuits."[66] Peru's broad liability approach in the STA—with limited exceptions—made sense, according to Renco, because Centromin and its predecessor operated the site for seventy-five years "without investing in necessary technological upgrades," which caused significant environmental damage.[67] This option also made it possible for DRP to operate the facility without fear of being liable for environmental contamination. According to DRP, these considerations influenced Renco's decision to invest in Peru. Meanwhile, Peru remains reluctant to make any payments for the St. Louis claims. Consequently, the Claimant contends that Peru breached the foreign investor's legitimate expectations of PTPA art. 10.5, as Renco would never have invested in Peru had it known that it would ultimately be responsible for environmental damange in La Oroya. Likewise, the STA and the Guaranty Agreement are claimed to be in breach.

However, neither Peru nor DRP are defendants in the St. Louis claims, which were brought specifically against Renco. The STA exclusively regulates contractual relations between Centromin and DRP, and was adopted to protect DRP, the subsidiary, and not Renco, the US parent company, from third party environmental claims, and then only on specified grounds.[68] Since the St. Louis lawsuits do not target DRP, Peru's refusal to defend the St. Louis lawsuits may not violate Renco's legitimate expectations. In this sense, Peru's position may not be regarded as being in breach of the PTPA. Further, the

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[64] *Reid v. Doe Run Resources Corp.*, 74 F. Supp. 3d 1015 (E.D. Mo. 2015).
[65] *See A.O.A. v. Doe Run Resources Corp*., 4:11CV44 CDP, 2011 WL 6091724 (E.D. Mo. Dec. 7, 2011) (denying a motion to stay the St. Louis proceedings pending international arbitration based on the fact that injury for environmental damage caused by the complex is not referable to arbitration). This decision was upheld on appeal. *See Reid v. Doe Run Resources Corp.,* 701 F.3d 840 (8th Cir. 2012).
[66] Memorial on Liability, *supra* note 23, ¶ 90.
[67] *Id.* ¶ 75.
[68] *See* STA, *supra* note 8, art. 5.3 (providing grounds of liability for damages and claims by third parties for acts attributable to DRP such as those resulting from DRP's PAMA project failure).

STA—an investment contract signed between two companies—may not satisfy the definition of "Investment Agreement" under the PTPA's umbrella clause (art. 10.16).[69]

IV. CONCLUSION

The PTPA is limited in its explicit incorporation of environmental standards. This presents significant obstacles for the state in enforcing environmental policies without breaching investment protections. Should the Renco arbitration claim move forward, understanding the environmental and health crisis in La Oroya will be crucial in affording appropriate weight and understanding to the international claim. In this broader context, analysis of this case requires engaging in a debate concerning the international protections afforded to foreign investment and the state's ability to protect human health and the environment.

Moreover, the Renco case illustrates the close connection between environmental degradation and the right to health. The alleged victims of this environmental contamination continue to seek justice and have targeted Peru before national [70] and international bodies due to the Government's failure to regulate pollution in the time during which DRP operated the plant.[71] The need to strike an appropriate balance between the promotion of foreign investment and protection of the environment and health continues to be a challenge for states, especially in the global south.

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[69] *See* PTPA, *supra* note 2, art. 10.16 (defining an Investment Agreement as an "agreement between a national authority of a Party and a covered investment or an investor of another Party […]").

[70] Sentencia del Tribunal Constitucional, *EXP. N.º* 2002-*2006-PC/TC*. LIMA. PABLO MIGUEL. FABIÁN MARTÍNEZ Y OTROS. 12 Mayo 2006. (finding the Ministry of Health responsible for not adopting measures necessary to protect the health of people in La Oroya and ordering the adoption of urgent health care measures).

[71] *See* Inter-American Commission of Human Rights. ADMISSIBILITY, COMMUNITY OF LA OROYA. PERU. REPORT No. 76/09. PETITION 1473-06. Aug. 5, 2009. This case is currently pending. http://www.cidh.oas.org/annualrep/2009eng/Peru1473.06eng.htm.