

PERU: METALLURGICAL COMPLEX OF LA OROYA

When investor protection
threatens human rights

Article 12: 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness. Article 13: 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity,



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Foreword

Within the framework of an international seminar in July 2012, organised in Peru jointly by FIDH and its member organisation in Peru, APRODEH on corporate accountability for human rights abuses, FIDH visited La Oroya and Huancayo, to meet with civil society representatives in an attempt to understand the situation of inhabitants of La Oroya in the midst of complex and interrelated legal developments regarding environmental impacts of the metallurgical complex of La Oroya. This case illustrates how difficult it is for victims of corporate abuses to seek and obtain justice. FIDH wishes to pay tribute to the people of La Oroya, and in particular those who have dared to ask for the truth, denounced violations and claimed their rights with incredible courage and determination.

Context: Mining in Peru



Source:
<http://www.minem.gob.pe>

Mining is widespread in Peru, and a significant number of new major mining projects are under way.¹ According to the Observatorio de Conflictos Mineros en Perú in 2012, 25 millions hectares of land at national level are subjected to mining concessions, which represents a one million hectare increase from 2011.

Mining has become a low labour intensive industry (the mining and quarrying sector represents 0.5% in the total labour force against 17.1% in manufacturing or 22% in commerce, for example).² However, this activity provides important financial resources to the Peruvian State, as it accounted for about 4.2% of the GDP in 2011,³ and generated 10% of the total government revenue in 2005.⁴ Mineral exports have consistently accounted for the most significant portion of Peru's export revenue, comprising 60% in 2010.⁵

The President of Peru, Ollanta Humala, elected in June 2011, has committed to raising taxes on mining firms, and said that the revenue the taxes would generate would be used to fund social programs.⁶ This being

said, mining activities have a particularly high social and environmental cost. The government of Peru reportedly uses up to 50% of its mining taxes to compensate the regions for damage resulting from the mining industry.⁷

1. For an overview of the main mining investments under way in Peru, including those in the exploration or expansion phase, see Cartera estimada de proyectos mineros, September 2012, Dirección de Promoción Minera, Ministerio Energías y Minas.
2. International Labour Organization, "Sectoral Country Profile", p.7, 2008, http://www.ilo.org/sector/Resources/country-profiles/WCMS_161292/lang=en/index.htm.
3. National Institute for statistic and informatic 2012 – Economic information system, "Mining activities in GDP in constant values since 1994", Peru, <http://www.inei.gob.pe/web/aplicaciones/siemweb/index.asp?id=003>.
4. Revenue Watch Institute, "Peru Country Data, Peru extractive data snapshot", <http://www.revenuewatch.org/countries/latin-america/peru/country-data>.
5. Background note : Peru, 3 January 2012, US Department of State, <http://www.state.gov/r/pa/ei/bgn/35762.htm>.
6. Nationalist Humala edges out rival in Peru, unnerving investors', The Washington Post, 6 June 2011, http://www.washingtonpost.com/world/nationalist-humala-wins-election-in-peru-unnerving-investors/2011/06/06/AGu84YKH_story.html.
7. "Humala: Habrá impuestos a sobreganancias mineras", 10 July 2011, LaRepublica.pe.

Over the past years, conflicts relating to mining have risen sharply in Peru. The annual reports of the Ombudsman (Defensoría del Pueblo) show that while 47 social conflicts were reported in 2004, 229 conflicts were identified in 2012 in 24 regions of the country. According to the Ombudsman, most of them relate to social and environment issues.⁸ These conflicts are also increasingly violent.

Since June 2011, social conflicts in Peru have caused the death of 19 persons. Many of the conflicts are related to extractive industries.⁹ Confrontations between local communities opposing mining projects and the security forces have been particularly alarming in Cajamarca and Espinar over the past months.

In Cajamarca in July 2012, the government responded with excessive use of force to protests against the Conga project of expansion of a gold mining project by Newmont, a Canada-based transnational corporation. Local communities express concern that the project will harm the environment by draining mountain lakes and replacing them with man-made reservoirs, and by generating massive amounts of toxic waste.¹⁰

In Espinar, in the province of Cusco, the activities of the Tintaya mine project led by the Swiss company Xsata encountered massive opposition from local communities, who denounced in particular water contamination. As the conflict degenerated into violence in May 2012, two persons died.¹¹ A “*mesa de diálogo*” was set up between all the parties in July to address the grievances and establish a mechanism to monitor the impact on the environment.

In the department of Junin alone, there are more than 3,800 mining concessions – small, medium and large-scale mining industries, exploiting copper, silver, lead, zinc and other metals. More specifically in the Junin region, mining concessions increased by 8.2% over the past five years. In 2012, mining concessions represented 25.9% of the territory of the department of Junin.¹²

One of the largest mining projects in the Junin region is the Chinalco mining complex in Toromocho, Morococha District.¹³ That project will involve a huge open pit mine, which will entail the relocation of over 5 000 inhabitants. A dialogue is under way with people affected in order to discuss the conditions of such relocation. This dialogue is taking place in the framework of the *Mesa de concertación para la lucha contra la pobreza*, a body bringing together representatives of the State (at national and local levels), civil society (trade unions, churches, youth and women’s organisations), and corporations. The objective of this process is to prevent conflicts around the project and ensure that people’s concerns are taken into account. It remains to be seen whether such a large relocation, which has never taken place before in Peru, will be

8. Defensoría del Pueblo, Republica del Peru, “Violencia en los conflictos sociales” Informe defensorial n° 156, March 2012, <http://www.defensoria.gob.pe/modules/Downloads/informes/defensoriales/informe-156.pdf>

9. Coordinadora Nacional de Derechos Humanos, “¡Ni un muerto mas! : La CNDDHH se pronuncia por tres nuevas muertes en conflictos sociales”, 7 Sept. 2012, <http://derechoshumanos.pe/2012/09/%C2%A1ni-un-muerto-mas-la-cnddhh-se-pronuncia-por-tres-nuevas-muertes-en-conflictos-sociales/>

10. “Statement by Human Rights and Environmental Organizations, Regarding Repression and Human Rights Abuses in Peru”, July 11, 2012, http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Conga_NGO_statement.pdf

11. “Protesta en Espinar degeneró en muertes”, *La Republica*, May 2012, <http://www.larepublica.pe/29-05-2012/protesta-en-espinar-degenero-en-muertes>

12. Observatorio de Conflictos Mineros, “Décimo Informe del Observatorio de Conflictos Mineros en el Perú”, August 2012, <http://hiperactivacomunicaciones.blogspot.be/2012/08/decimo-informe-del-observatorio-de.html>

13. Aluminium Corporation of China (CHINALCO), a Chinese state-owned enterprise, is the world’s second largest alumina producer. According to its website, CHINALCO is committed to the strategic positioning of becoming an international poly-metallic mining company, see CHINALCO, http://www.chinalco.com.cn/zl/web/chinalco_en_show.jsp?ColumnID=122

achieved to the satisfaction of local communities concerned, and in line with international human rights principles with regard to development-based evictions and displacement.¹⁴

La Oroya: History of a tragedy

La Oroya is a city of more than 33,000 inhabitants in Peru's Central Cordillera mountain range, Department of Junin, Yauli Province. 176 km from Lima and 125 km from Huancayo (Junin department's capital), La Oroya is 3,750 meters high.

The city was built and grew around a metallurgical complex that was established as early as 1922 and operated by a US company until 1974, when the complex was nationalized. It is still described on the official website of the city as the "metallurgic capital of Peru and South America".¹⁵ The metallurgical complex processes minerals from neighbouring mines that include various metals in order to obtain a pure product, whose trade value is much higher.

The most recent owners of the metallurgical complex of La Oroya include Centromin, a state-owned company, which exploited the furnace from 1974 to 1997 after its nationalization (the pre-1974 owner had been a US company called Cerro de Pasco Cooper Corporation); and Doe Run Company (hereafter, Doe Run Peru, or DRP), the subsidiary of a US company called The Renco Group.¹⁶ As acknowledged on The Renco Group's website, "Since La Oroya is strategically located in the central highlands region of Peru, an area known for its complex polymetallic ores, it is well positioned to greatly benefit from the continued increase in investment in Peruvian mining".

THE RENCO GROUP, INC.

The Renco Group, Inc. is a private, family-owned investment holding company founded in 1975, owned by Ira Rennert, a US billionaire. Based in New York, The Renco Group, Inc. has a diversified portfolio of subsidiaries including companies engaged in mining and mineral recovery, defence equipment production, fabrication of metal products and automotive supply.

Among Renco's main subsidiaries are AM General (US), a joint venture with Mac Andrews and Forbes Holding, Inc., operating in the design, engineering and production of special purpose vehicles for military and commercial customers; the Doe Run Company located in St Louis, Missouri (US), and Doe Run Peru, both specialising in smelting. Doe Run Peru is owned by Doe Run Cayman. It is unclear whether Doe Run Cayman is a subsidiary of Doe Run Corporation in the US, or a sister company of the same parent Renco group.¹⁷ Other Renco subsidiaries include Inteva headquartered in Troy (US), manufacturing interior systems, closure systems and motors and electronics; Kings of New Castle (US) retailing jewellery and gemstones; Unarco Material Handling (US) and US

14. OHCHR, Basic Principles and Guidelines on Development-Based Evictions and Displacement : Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18, February 2007.

15. <http://www.oroya.com.pe/>, accessed on 14 July 2012.

16. Doe Run employed approximately 3800 workers before it closed down in June 2009. See CooperAcción, "Una mala privatización", <http://www.cooperaccion.org.pe/noticias/una-mala-privatizacion.html>

17. See Public Citizen, Global Trade Watch, Renco Group uses Trade Pact Foreign Investor Provisions to Chill Peru's Environment and Health Policy, Undermine Justice, March 2012, p.3 and 6.

Magnesium, involved in the production of primary magnesium products in the Great Salt Lake area. The Renco Group has not publicized its adherence to international human rights standards, or corporate responsibility frameworks. Renco's Corporate Social Responsibility (CSR) strategy is divided into 3 themes: Environmental Responsibility, Employee Health & Safety, and Community Commitments.

With regard to protection of the environment, the Renco Group states that *"Our goal is not just to meet but exceed, to the best of our ability, all environmental standards set forth by the myriad of federal, state and local regulatory agencies that monitor our companies' operations"*.

In 1996, Centromin presented its Programa de Adecuación y Manejo Ambiental (PAMA), a ten-year plan to ensure compliance of the company's activities with the norms relating to the environment in force in Peru. The 1997 Stock Transfer Agreement between the government of Peru and Doe Run established an obligation on the Peruvian state to clean the soil of the pollution accumulated since the inception of the complex in 1922 until 1997. Under that contract, Doe Run was supposed to implement the majority of the other obligations under the Programa de Adecuación y Manejo Ambiental (PAMA). Initially, the nine environmental protection projects set out in the PAMA to be implemented by Doe Run were expected to cost US\$ 1,076 million. Doe Run Peru also assumed responsibility for any eventual modifications required by Peruvian law within the ten-year period ending in 2007.¹⁸

Among the nine projects to be implemented by Doe Run under the PAMA, DRP committed to:

- Build three sulfuric acid plants (for the copper, zinc and lead plants) to ensure that emissions of SO₂ did not go beyond the maximum level allowed under the law;
- Build a plant for the treatment of water from the copper refinery;
- Build a wall in the zinc plant to avoid spillover of acid;
- Build new warehouses for arsenic, copper and lead waste to avoid pollution of the river and air.¹⁹

Specific deadlines for the implementation of each of the nine projects were specified.²⁰

Subsequently, at the request of Doe Run, the PAMA was modified and extended several times.²¹ For example, in 1999 the capacity required for the acid plants (quantity of sulfuric acid that they should retain) was lowered.²² The PAMA was supposed to expire in 2007, and in 2005 on the basis of a supreme decree allowing for granting of extensions by the Peruvian authorities, Doe Run applied for a first extension, which was granted by the Minister of Energy and Mines after widespread controversy. As a consequence, Doe Run Peru had until October 2009 to comply with the PAMA's requirements.²³ Doe Run applied for a second extension in 2009, which was finally granted to Doe Run by the Peruvian authorities in September 2009 for a period of 30 months, until May 2012.²⁴ However, neither the State nor the company implemented their respective obligations under the PAMA. For example, when the activities stopped in June 2009, Doe Run had only built sulfuric acid infrastructures for the circuits of lead and zinc. As regards the circuit for copper,

18. EarthJustice, AIDA, SPDA and Public Citizen, "Open letter to Hillary Clinton and Timothy Geithner", 31 March 2011, <http://www.citizen.org/documents/peru-fta-rengo-letter-march-31-2011.pdf>.

19. The list of the nine projects is available on <http://www.secinfo.com/dVut2.7yH1.y.htm#1stPage>

20. Ibid.

21. Decreto Supremo, N° 046-2004-EM; 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).

22. Op. Cit (note 17).

23. Resolución Directoral No. 257-2006-EM/AAM (May 29, 2006).

24. Ley No. 29410, "Ley que prorroga el plazo para el financiamiento y la culminación del Proyecto Planta de Ácido Sulfúrico y Modificación del Circuito de Cobre del Complejo Metalúrgico de La Oroya", Sept. 25, 2009.

only 57% of the work had been implemented.²⁵ The government of Peru has not complied with its obligations to remediate the soil either, arguing that it would be a waste of resources as long as the company was continuing to pollute the area.²⁶ As a result, in 2006, La Oroya was considered as one of the ten most polluted cities in the world.²⁷ In 2007, according to the Blacksmith Institute, an environment NGO based in the US, La Oroya was still among the world's ten most polluted places.²⁸

The 23 October 1997 Stock Transfer Agreement between the government of Peru and Doe Run, provided that Centromin and the Republic of Peru (as its guarantor) assumed “*liability for any damages and claims by third parties attributable to the activities of DRP, Centromin or its predecessors*”, while the new owners worked to improve the complex through environmental projects in the period approved for the performance of the PAMA's environmental obligations. Only cases where claims arise directly from acts exclusively attributable to DRP that are unrelated to the PAMA were excluded from this provision.²⁹

As a result of the extension of the PAMA, which was initially supposed to expire in 2007, the above-mentioned clause relating to possible third party legal suits has continued to have effect. A third extension proposal was tabled in the Commission on Energy and Mines of the Peruvian Congress, but was eventually declined in March 2012 as a result of civil society mobilisation.³⁰

Recent developments: liquidation process of Doe Run Peru



Wall painting in La Oroya: “Doe Run strengthens the economy”

In 2009, Doe Run declared that it did not have enough capital to buy the minerals needed to continue processing in the La Oroya complex. A process of bankruptcy then started.³¹

The company argues that this situation is due to the initial non-extension of the PAMA in 2009, during a period of financial crisis, which led DRP's lenders not to renew a revolving loan necessary to DRP's day to day operations.³²

In November 2011, the Prosecutor of Peru

25. Cooperación, “Modernización del Complejo Metalúrgico de La Oroya será clave para reducir la contaminación, Plataforma La Oroya por un Cambio”, Nota de prensa N°39, 12 Juin 2012, <http://www.cooperacion.org.pe/noticias/modernizacion-del-complejo-metalurgico-de-la-oroya-sera-clave-para-reducir-la-contaminacion.html>
26. It has been evaluated that cleaning the soil and water in La Oroya would cost 175 million dollars to the State, while relocation would be much less expensive. However, local people do not wish to be relocated, they want the environment to be cleaned. - see Donna O’Kelly and James Wood, Feasibility Study, “*Relocation of La Oroya Antigua*”, April 2007.
27. Blacksmith Institute, <http://www.blacksmithinstitute.org/top10/worst35d.html>
28. <http://www.blacksmithinstitute.org/wwpp2007/finalReport2007.pdf>
29. “Stock Transfer Agreement”, Clause 6.2, as cited in Renco Group v. Republic of Peru.
30. See Letter by AIDA, APRODEH, SPDA to the President of the Peruvian Congress, Daniel Abugattás, regarding bill, N°636/2011-CR relating to extension of the PAMA, 22 February 2012.
31. For more details on the steps towards liquidation under the Peruvian law, see the “Ley General del Sistema Concursal”, as well as http://www.indecopi.gob.pe/0/modulos/JER/JER_Interna.aspx?ARE=0&PFL=7&JER=312.
32. Renco Group v. Republic of Peru, Ibid, p. 10.

launched criminal proceedings against the owner of Doe Run, Mr. Ira Leon Renner, for submitting a fictitious debt to Indecopi (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual*, the Peruvian body in charge of organizing bankruptcies). Renner and the representative of Doe Run, Mr. Alberto Bruce Neil, are accused of fraudulent insolvency and false declaration in an administrative proceeding to the detriment of the State, Indecopi and the other creditors of the company (“*insolvencia fraudulenta y falsa declaración en proceso administrativo en agravio del Estado, Indecopi y los acreedores de dicha empresa*”). The prosecutor considered that the debt was fictitious because it had been created to the benefit, and upon decision, of the Renco Group.³³

As the result of a judicial process involving several hearings, the Indecopi recognized Doe Run Cayman Limited as the first private creditor in the process of liquidation (30.01%), and as a member of the council of creditors in the liquidation process (“*junta de acreedores*”). It should be noted that Doe Run Cayman owns 99.92% of Doe Run Peru and is a subsidiary of Renco Group, which owns 100% of its shares.³⁴ The other private creditors include Cormin, the main mineral trader in Peru and a subsidiary of Trafigura (5.64%); Volcan Compañía Minera and its subsidiaries (3.51%); Compañía de Minas Buenaventura and its subsidiaries (3.36%) and Glencore (2.74%).³⁵

The Peruvian State is the main creditor (44.81%), most of it corresponding to a debt of the company towards the Ministry of Energy and Mines (*Ministerio de Energía y Minas - MEM*) for US\$ 163 million for non-implementation of the *Programa de Adecuación y Manejo Ambiental* (PAMA).³⁶ Doe Run Cayman claims that the MEM should not be a creditor because it considers that the non-implementation of the PAMA cannot be converted into a debt in a bankruptcy process. This amounts corresponds to an assessment of the cost of completion of the remaining the PAMA’s obligations, and not to fines for not compliance with Peruvian law.

In May 2012, a first agreement was signed between the workers of Doe Run and the company in charge of the liquidation, Right Business SA.³⁷ Under that agreement, the workers will receive 70% of their salary at least until the end of December 2012. On 13 July 2012, a second agreement was signed between the workers’ representatives and Right Business. According to that agreement, the workers will receive the remaining 30% of their salary, as well as the interest, when the company starts its operations again. In addition, the company in charge of the liquidation agreed that the processing of zinc should start again in July 2012 because the PAMA provisions relating to that part of the activities had been adequately implemented. On 29 July 2012, the zinc circuit resumed its operations, involving the reintegration of 500 full time workers.³⁸

33. Blog, El Mantaro Revive, “Doe Run fingió una deuda para sorprender a Indecopi”, 20 de noviembre de 2011, http://elmantarorevive.blogspot.com/2011/12/indecopi-reconoce-doe-run-cayman-como_01.html

34. Gatoencerrado.net, “Suspenden junta de acreedores de Doe Run Perú : Rechazaron plan de reestructuración de Doe Run Cayman”, <http://www.gatoencerrado.net/store/noticias/67/67563/detalle.htm>

35. Ibid.

36. See notably Agencia Peruana de Noticias, “Indecopi convoca audiencia por apelaciones del caso Doe Run Perú”, November 2011, <http://www.andina.com.pe/Espanol/noticia-indecopi-convoca-audiencia-apelaciones-del-caso-doe-run-peru-384820.aspx>; Blog El Mantaro Revive, “Indecopi le reconoce deuda a Doe Run Perú”, 1 December 2011, <http://elmantarorevive.blogspot.com/2011/12/indecopi-reconoce-doe-run-cayman-como.html>

37. On 25 May 2012, Doe Run’s council of creditors (*Junta de Acreedores*) chose Right Business S.A. as the administrator in charge of the process of bankruptcy of the company.

38. “Doe Run Perú reinicia operaciones con 500 trabajadores en La Oroya”, *La Republica*, July 2012, <http://www.larepublica.pe/30-07-2012/doe-run-peru-reinicia-operaciones-con-500-trabajadores-en-la-oroya>

The Peruvian government has clearly stated that it will not authorize the resumption of operations in La Oroya metallurgical complex as long as the PAMA has not been implemented.³⁹ At the same time, the government is keen on gradually restarting operations at the metallurgical complex to respond in particular to the need for work.⁴⁰ In August 2012, the council of creditors rejected Doe Run's restructuring plan and decided that Right Business would continue managing the complex, until the process of selling the assets is complete.⁴¹ The operations of the complex started at the end of July 2012 with the activation of the zinc circuit. The production of lead may start again in January 2013, and preparations had already started in November 2012.⁴² However, the processing of copper, which represents the most important activity of the metallurgical complex, has not been authorized to date because of the non-implementation of the PAMA.

Denying the obvious

Air and blood analysis in La Oroya when the complex was operating

An activist from La Oroya told FIDH: *"When Doe Run started to exploit the metallurgical complex of La Oroya in 1997, the company built showers and provided clothes to the workers so that they could wash and change before going back home after work, in the evening. It also got involved in charity work. However, in parallel, the period between discussions with the workers and their trade unions for collective wage increase was extended from 1 to 5 years. It also suppressed the offer of daily milk to the workers."*⁴³

It is reported that while Doe Run was exploiting the complex between 1997 and 2009, the toxic smoke emitted by the furnace was more intense than ever; the air was unbreathable and made the eyes stream. Between 1999 and 2001, three major studies were carried out to measure the presence of lead in the blood of La Oroya residents. Those three studies converged to demonstrate that people were heavily contaminated, with 10 to 60 micrograms of lead per deciliter (µg/dL) of blood.

* The first of these studies was carried out in 1999 by a coalition of local NGOs, the Consorcio Unión para el Desarrollo Sustentable (UNES). The study focused on 48 pregnant women and 30 children under 3 years old. The results showed an average blood lead level of 39.49 µg/dL for the pregnant women, and 41.81 µg/dL for the children.⁴⁴ Those results are significantly above the levels recommended by the World Health Organization (WHO).

* A second study was conducted in 1999 by the DIGESA (Dirección General de Salud Ambiental) on a selection of people from La Oroya. It evidenced notably that 99.1% of the individuals examined had a level of lead in their blood higher than the one recommended by the WHO.⁴⁵

39. "Gobierno no dará más concesiones a Doe Run para que cumpla con su PAMA", *El Comercio*, March 2012, <http://elcomercio.pe/economia/1386262/noticia-gobierno-no-dara-mas-concesiones-doe-run-que-cumpla-su-pama>

40. "Reinicio de operaciones de Doe Run beneficiará a 500 trabajadores", *RPP Noticias*, July 2012, http://www.rpp.com.pe/2012-07-29-reinicio-de-operaciones-de-doe-run-beneficiara-a-500-trabajadores-noticia_506538.html

41. "Right Business continuará liquidación en marcha de Doe Run", *Peru21.pe*, 28 August 2012;

"Refinería de La Oroya tendrá nuevo dueño en agosto del 2013", *El Comercio*, 13 November 2012.

42. "Reactivarán circuito de plomo de La Oroya", *Peru 21*, 22 November 2012, available at peru21.pe.

43. Milk provides calcium in a way so as to limit the effect of lead in the human body.

44. Consorcio UNES, Unión para el desarrollo sostenible de la provincia Yauili-La Oroya, "Evaluación de niveles de plomo y factores de exposición en gestantes y niños menores de tres años de la ciudad de La Oroya", 2000, http://bvs.minsa.gob.pe/local/MINSA/1240_GRAL1378.pdf.

45. DIGESA – *Blood Lead Study of a selected population in La Oroya*, Ministerio de Salud, DIGESA, 23rd – 30th November 1999.

* A third study was carried out by Doe Run itself on 5,062 children and adults. The average blood lead level was 17.7 µg/dL, while it was 25.7 µg/dL for 1,198 persons living closer to the metallurgical complex. The maximum level recorded was 36.7 µg/dL for children from 0 to 3 year old, and 32.9 µg/dL for 4 to 6 year old children.⁴⁶

The conclusion of this last study, however, was that the main sources of exposure to contamination were the lead accumulated in the vicinity of the metallurgical complex during its 78 years of exploitation, the current emissions from the complex, and emissions from cars and other sources such as lead-based paint, etc.⁴⁷

In November 2001, a technical group was set up by the State (*GESTA Zonal del Aire de La Oroya*) to study the quality of the environment, involving citizens of La Oroya as well as local officials. It investigated the sources of contamination in the city and concluded in 2004 that 99% of the air contamination was caused by the metallurgic complex. Among the main toxic emissions were Sulfur Dioxide (SO₂), lead and small particles, as well as considerable levels of arsenic and cadmium.⁴⁸

The level of SO₂ in the air has been consistently recorded by the *Sindicato de Obreros of the Metallurgical Complex of La Oroya* between 1998 and 2009. Those analysis show that SO₂ concentrations frequently exceeded the maximum level allowed by Peruvian environmental standards.⁴⁹

A study published in 2002 indicated that over 80% of blood lead levels in La Oroya children were two and three times higher than the level of concern of 10 µg/dL. It also found that arsenic, cadmium, suspended particles and sulfur dioxide in the air exceeded international acceptable levels and posed serious health risks to the community.⁵⁰

In 2005, the University of Saint Louis Missouri published a study on the blood and urine contamination of the people of La Oroya in comparison with a group of people from another close area. According to that study, children from La Oroya Antigua (the part of the city closest to the complex) under 6 years old showed higher levels of contamination than those in the rest of the city.⁵¹

La Oroya Antigua	Other parts of La Oroya
0% have less than 20 µg/dL	4% have less than 10µg/dL
73% have between 20 and 44 µg/dL	24% have between 10 and 19 µg/dL
27% have between 44 and 69 µg/dL	72% have between 20 and 44 µg/dL

46. Quoted in “Programa de Naciones Unidas para el Medio Ambiente (UNEP), Análisis del flujo del comercio y revisión de prácticas de manejo ambientalmente racionales de productos conteniendo cadmio, plomo y mercurio en América Latina y el Caribe”, December 2010, available at http://www.unep.org/hazardoussubstances/Portals/9/Lead_Cadmium/docs/Trade_Reports/LAC/Trade_report_LAC_Spanish_and_English.pdf.

47. Doe Run Peru, (2001a), *Estudio de Niveles de Plomo en Sangre de la población de La Oroya 2000-2001*.

48. Consejo nacional de ambiente, *Diagnostico de linea de base de calidad del aire de La Oroya*, Edición gráfica industrial IERL Peru, Lima, first edition: December 2004, p. 55. See also leaflet by Gesta Zonal del Aire de La Oroya, with the support of CONAM and USAid Peru. Available at <http://cdam.minam.gob.pe:8080/bitstream/123456789/526/1/CDAM0000398.pdf>.

49. E.P. Sanchez and C. Cabrera carranza, *Level s of dioxide of sulphur in La Oroya city historical analysis and perspectives*, FIGMMG, Vol. 12, N.º 24, 64-68 (2009) UNMSM, available at: http://sisbib.unmsm.edu.pe/bibvirtual/publicaciones/geologia/v12_n24/pdf/a07v12n24.pdf.

50. Anna K. Cederstav and Alberto Barandiarán, “La Oroya Cannot Wait”, AIDA/SPDA, 2002, http://www.aida-americas.org/sites/default/files/La_Oroya_Cannot_Wait_1_0.pdf.

51. Fernando Serrano, Facultad de Salud Pública, Universidad de San Luis, Missouri, “*Estudio sobre la contaminación ambiental en los hogares de La Oroya y Concepción, y sus efectos en la salud de sus residentes*”, December 2005.

SUMMARY OF FINDINGS:⁵²

- * 97% of children between 6 months and 6 years of age, and 98% of children between 7 and 12 years have elevated blood lead levels in La Oroya as a whole and 100% in La Oroya Antigua.
 - * La Oroya's population levels for many of the metals considered most toxic are more than three to six times the U.S. average, and urine cadmium more than 6 times the U.S. average.
 - * The mean urinary arsenic level for every age group in La Oroya is 50 µg/L or greater, up to 4 times greater for children under 6 years. Arsenic urinary levels considered of concern are those higher than 50 µg/L.
 - * Elevated blood lead and other metals were also found in Concepción, the control site. These results suggest that the problem of environmental contamination is not confined to La Oroya but extends to the Mantaro watershed.
-

Another study performed from June 2004 to June 2005 in a sample consisting newborns in La Oroya, showed that 75.3% of them had blood lead levels between 6 and 10 µg/dL, and 24.7% had more than 10 µg/dL. It concluded that it was “necessary to initiate prevention programs in pregnant women in order to prevent deleterious health outcomes in newborns”.⁵³

The above-mentioned studies show that air, soil and water contamination has been extremely serious from 1999 onwards, and has had a direct impact on the levels of heavy metals recorded in the blood and urine of La Oroya residents.

Health Impact of the pollution recorded

The toxic level or reference value of lead has decreased over the years, reaching 5µg/dL in the US in 2012 (the WHO reference value being 10µg/dL). Children under 6 years old are more susceptible to the toxic effects of lead than are adults as their brain and central nervous system are still developing. The half-life of lead varies depending upon the body compartment:

Blood	28 to 36 days
Soft tissue	40 years
Mineralizing tissues (bones)	Over 25 years

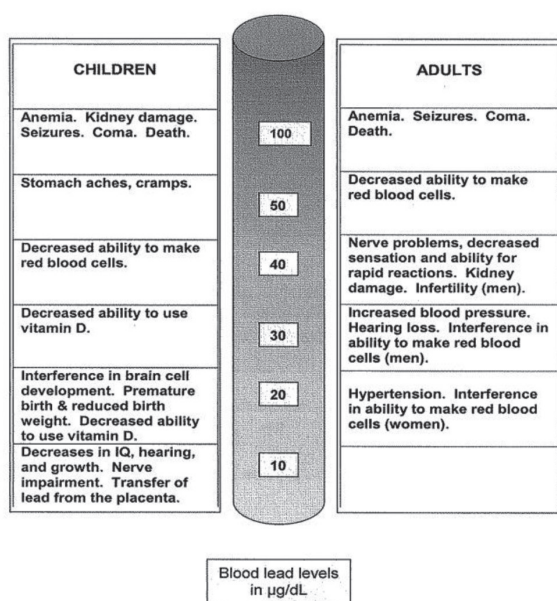
More than 70% of the total body burden of lead in children is contained in mineralized tissues. Thus, blood lead level is not an accurate reflection of the total body lead burden. Early diagnosis is desirable because most of the effects of lead toxicity are irreversible. Once diagnosed, treatment depends on the degree of blood lead elevation and the presence of symptoms. Long bone radiographs to detect lead lines are only useful as part of the diagnosis evaluation of children presenting more than 45µg/dL.⁵⁴

52. Fernando Serrano, Principal Investigator of the School of Public Health in Saint Louis University, Hearing before the Committee on Foreign Affairs of the U.S. House of Representatives: “*Poison Harvest: Deadly U.S. Mine Pollution in Peru*”, The Impact of Environmental Contamination on Public Health and Environmental Quality in La Oroya and the Mantaro Watershed, July 2012, <http://foreignaffairs.house.gov/112/HHRG-112-FA16-WState-SerranoF-20120719.pdf>

53. Godofredo Pebe, Hugo Villa, Luis Escate and Gonzalo Cervantes, “Niveles de plomo sanguíneo en recién nacidos de La Oroya, 2004-2005”, *Rev Peru Med Exp Salud Pública*. 2008; 25(4), p. 355, <http://www.ins.gob.pe/insvirtual/images/revista/pdf/Revista254.pdf>.

54. Hurwitz RL, Lee DA. “Childhood lead poisoning: Clinical manifestations and diagnosis”, in UpToDate, Rose, BD (Ed): Wellesley, MA, 2002.

Relationship between blood lead levels and health effects in children and adults:



Source: University of Saint Louis Missouri

Cadmium is a metal that can cause severe toxicity in humans. Prolonged cadmium exposure can affect a variety of organs, kidneys and bones being the most exposed organs. A urinary concentration of 10 µg/g of creatinine is considered to be the critical level. It can provoke kidney damage, tubular injury and lung cancer. Other than supportive therapy, there are no specific methods available for treating acute cadmium poisoning.⁵⁵

Arsenic is a known carcinogen affecting notably the skin (see table below), while excessive concentrations of **Sulfur Dioxide** in the air can provoke shortness of breath and aggravation of heart or lung disease.

Carcinogenic and non-carcinogenic effects associated with lead, arsenic and cadmium:

Metal of Concern	Potential Health Effects	
	Non-Carcinogenic	Carcinogenic
Lead	Irritability	Kidney
	Cognitive/Behavioral Dysfunction, Lower IQ	
	Muscle Weakness, Paralysis	
	Coma, Death	
Arsenic	Respiratory Irritation	Lung
	Nausea, Vomiting	Bladder
	Unusual Pattern of Skin Abnormalities -Darkening, Warts, Corns, Lesions	Skin
		Liver
Cadmium	Impaired Kidney Function Leading to Kidney Failure	Lung
	Demineralization of Bone (Density Loss)	Prostate

Source: US Centers for Disease Control & Prevention, Agency for Toxicological Substances & Disease Registry

Source: University of Saint Louis Missouri

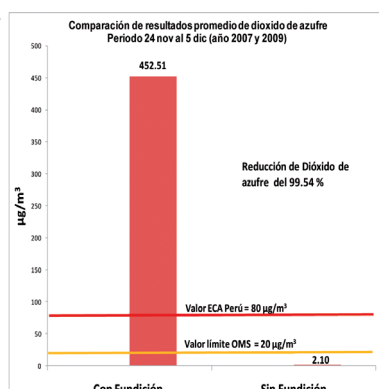
Air and blood analysis since the closure of Doe Run in 2009

In November-December 2009, an analysis of the air in La Oroya was carried out by El Mantaro Revive, a local environmental NGO, whose results were compared to similar analysis collected exactly 2 years earlier, in November – December 2007. The decrease in SO₂ contamination is striking (see table below) (phase out of 99.54%).⁵⁶

55. Elinder CG, Curhan GC, Sheridan A, “Epidemiology and toxicity of cadmium”, in UpToDate, 2012.

56. Daniel Álvarez Tolentino, Equipo técnico del Proyecto El Mantaro Revive, “Estudio comparativo entre las concentraciones de dióxido de azufre y material particulado registradas en el periodo de 24 noviembre al 5 de diciembre del 2007 (fundición en operación) y en el periodo de 24 de noviembre al 5 de diciembre del 2009 (fundición inoperativo) en La Oroya, Yauli, Perú”, December 2009.

NB: ECA = estándar de calidad de aire [air quality standard]



The air analysis of 2012 compared to 2007 shows that the level of pollution from micro particles less than 10 micrometers in diameter (PM10) has significantly decreased from 66.53 micrograms per deciliter of air (µg/dl) to 19.91µg/dl. The level of Sulfur Dioxide also phased out from 1,177.33 µg/dl to 2.63 µg/dl. Those numbers have been published by Doe Run Peru itself, which since 2007, as requested by the government, implemented a system to monitor the quality of the air, in order to measure to what extent DRP respects its obligations concerning the environment.⁵⁷

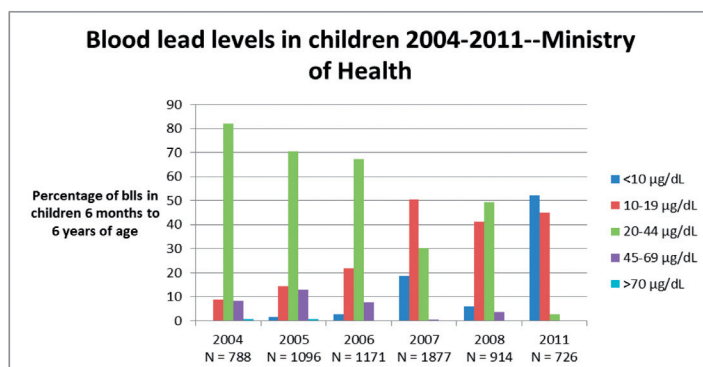
Source: Estudio comparativo de calidad de aire La Oroya Antigua.pdf

As regards micro particles (less than 10 micrometers, which have the highest potential to reach the lungs) and other heavy metals, the comparison is enlightening as well:

Micro particles PM10	57.75% decrease
Lead	98.82% decrease
Arsenic	99.37% decrease
Cadmium	93.42% decrease

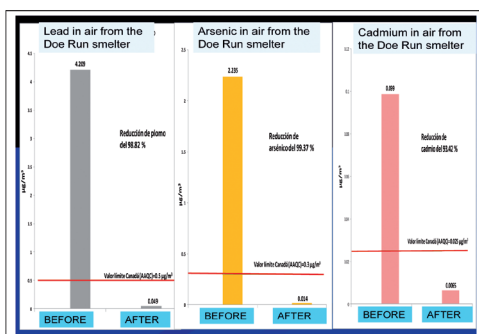
The last blood analysis was carried out in November 2011. That month, the public authorities carried out a blood census on 803 children from 6 months to 9 years, as well as pregnant women. The results were as follows:

Blood lead levels	Percentage
0 to 10 µg/dL	52.9%
10 to 20 µg/dL	45%
20 to 50 µg/dL	2.75%



Source:
Extracted from "The impact of environmental contamination on public health and environmental quality in La Oroya and the Mantaro Watershed", School of Public Health, Saint Louis University, 2012.

Comparisons of air levels of lead, arsenic and cadmium before and after the closing of the Doe Run Peru smelter



All recent analyses carried out since the closure of the metallurgical complex clearly demonstrate that abnormally high levels of heavy metals in the blood of La Oroya people was directly caused by the operations of the metallurgical complex, given the decrease that can be seen 2 years after it stopped its activities.

Source: see above.

57. Plataforma La Oroya por un Cambio, "Contaminación del aire disminuyó notablemente en La Oroya", Nota de prensa N°40, March 2012, <http://www.cooperaccion.org.pe/noticias/contaminacion-del-aire-disminuyo-notablemente-en-la-oroya.html>.

Since the metallurgical complex now run by Right Business started partially operating on 28 July 2012 (zinc circuit), high levels of air contamination have been reported. Monitoring of the quality of the air carried out by DIGESA between 1 and 24 August revealed that for at least 10 days, the level of Sulphur Dioxide exceeded the Peruvian authorised limit of 80 (ug/m3) per day.⁵⁸ According to Right Business, measures were immediately taken to correct these emissions.⁵⁹



La Oroya Antigua,
August 2012.

David against Goliath

When local people started to discuss the results of the first studies with the company and to ask for protective measures, the reply was not only a total denial and campaigns of disinformation, but also stigmatization and attacks against those daring to speak out.

“The company told us that the mothers were responsible for such results because they have bad hygienic habits [they do not wash their children], they made the mothers feel to blame”, said one victim met by FIDH in July 2012.

The company reportedly started creating dissent among the people of La Oroya, threatening to lay off workers cooperating with NGOs. A systematic campaign of harassment took place against citizens protesting against the contamination. People organized protests and called for the death of those perceived as the leaders of the movement for an increased respect of the environment and people’s health in the city. Some persons were even physically attacked on certain occasions, while verbal threats and even death threats were part of everyday life. Pressure and threats were constant: *“For example, the company said that it would not accomplish certain works or make certain donations to local people because it pretended that one person from the neighborhood was active in an NGO opposing the company (...)”*, said one activist from La Oroya met by FIDH.

The State, including the Ministry of Health, the Ministry of Interior and the Municipality of La Oroya, also denied the problem or tried dissuading citizens from protesting. At the beginning of the 2000’s certain officials reportedly pretended that lead is not toxic and that the population of La Oroya had become immune.

After the closure of the metallurgical complex in June 2009, NGOs campaigning to preserve the environment and health of La Oroya’s inhabitants were accused by workers of the metallurgical complex of being responsible for its closure. *“Development is necessary, but life should*

58. For recent information on La Oroya, visit <http://laoroyaporuncambio.blogspot.fr/>, accessed on 28/11/12.

59. “Right Business: Doe Run está estabilizado y no contamina La Oroya”, RPP noticias, 27 August 2012.

be respected” [*Yo digo que se necesita desarrollo, pero que se respete la vida*], summarized a representative of a local NGO met by FIDH. “*The legitimate concern of the workers and trade unions is to make sure that people get a job. But this should not be to the detriment of their own health, or the health of their neighbors, wife and children*”.

In spite of this stigmatization and threats, a project called “El Mantaro Revive” was founded in 2006.⁶⁰ Its mandate notably includes measuring contamination in the blood of a group of inhabitants of La Oroya (mainly constituted of children, as the most exposed to risks related to lead contamination). The implementation of that project was initially complicated because of the reluctance of the population, who had been told that NGOs wanted to obtain the closure of the metallurgical complex. Then, thanks mostly to capacity building activities, the project was more widely accepted. From 2006 to 2010, El Mantaro Revive measured the quantity of heavy metals in the blood of a group of inhabitants every 6 months. In 2010, the project started a new phase, with regular analysis of local air, soil and water, as well as some food items (milk, potatoes).

As recently as in April 2012, threats and harassment against one of the leaders of an environmental NGO promoting the health of the people of La Oroya, the Movimiento por la Salud de La Oroya (el MOSAO), was widely denounced.⁶¹ A few days before the FIDH visit in Huancayo, the bishop of Huancayo, Monseñor Pedro Barreto Jimeno, had received death threats on his facebook account. These recent events show that in spite of the fact that today tensions are much lower than in the past, activists in La Oroya.

This tense climate is also illustrated by the fact that the walls of La Oroya are covered with paintings made by the factory’s workers as late as in 2010 and 2011, stressing that Doe Run is not damaging the environment, and stigmatizing NGOs. The influence of the company remains very strong, in spite of its bankruptcy: “*Renco has roots in La Oroya, it has never stopped working through its own channels of communication*”, declared a resident met by FIDH.⁶²



Wall painting in La Oroya:
“No to anti-mining NGOs”.

60. El Mantaro Revive website: <http://elmantaroalive.blogspot.fr/>

61. Rosa Amaro y su lucha por un ambiente saludable en La Oroya, 11 April 2012, <http://es.oxfamamerica.org/tag/mosao/>

62. Spanish translation: “*Renco tiene sus raíces en La Oroya, nunca dejó de trabajar con sus medios de comunicación.*”

Multiple and intricate legal suits

Legal suit in Peru against the State (2002-2006)

On 6 December 2002, a group of citizens from La Oroya filed a suit against the Peruvian State (Ministry of Health and General Directorate of Environmental Health – DIGESA) for inaction on its obligation to protect their right to health and to a healthy environment. At first (1 April 2005) and second instance (11 October 2005) hearings, the Peruvian courts ruled in favour of the claimants. On 12 May 2006, the Constitutional Court of Peru ordered the State to implement a series of measures within 30 days:⁶³

- The Ministry of Health should implement an emergency system to cure the people contaminated by lead in La Oroya
- The Ministry of Health, through the General Directorate of Environmental Health (DIGESA), should make a rapid diagnosis, as required by Supreme Decree 074-2001-PCM (Regulation of National Environmental Air Quality Standards [*Reglamento de Estándares Nacionales de Calidad Ambiental del Aire*]), in order to implement plans of action to improve the quality of air.
- The Ministry of Health should declare a state of alert in La Oroya, in conformity with Supreme Decree 074-2001-PCM and Law 26842 (General Law on Health [*Ley General de la Salud*]).
- The DIGESA should establish programmes of epidemiological and environmental monitoring.

In addition, the Constitutional Court exhorted various public entities as well as “*private companies such as Doe Run Peru SRL to also participate in relevant actions to protect the health of the people of La Oroya, as well as the environment*”.⁶⁴

Proceedings against the State of Peru before the Inter-American Human Rights system (2005-today)

On 21 November 2005, 3 NGOs (Asociacion Interamericana para la Defensa del Ambiente (AIDA), Centro de Derechos Humanos y Ambiente (CEDHA) and EarthJustice), asked for precautionary measures from the Inter-American Commission on Human Rights on behalf of a group of 65 affected persons. On 31 August 2007, these measures were ordered by the Commission, asking the Peruvian State to:

- Adopt relevant measures to establish specialist medical diagnosis for the beneficiaries;
- Provide specialized and adequate medical treatment for the persons identified by diagnosis as at risk of irreversible damage to their physical integrity or their life; and
- Coordinate with the complainants and the beneficiaries in the implementation of such measures.

In March 2010, a hearing was held at the Interamerican Commission in Washington, where the implementation of precautionary measures was analysed. Representatives of the plaintiffs denounced the weaknesses of the measures taken by the State to date to address the situation of inhabitants of La Oroya.⁶⁵ Furthermore, on 27 December 2006, within 6 month of the above-mentioned decision of the Constitutional Court, the group of victims filed a complaint before the Inter-American Commission on Human Rights (number P-1473-06) arguing the

63. That decision was notified to the Peruvian State on 27 June 2006.

64. Sentencia del Tribunal Constitucional, see <http://www.tc.gob.pe/jurisprudencia/2006/02002-2006-AC.html>.

65. See reportage on the hearing at: http://www.aida-americas.org/es/project/laoroya_en, and the video of the hearing at: <http://vimeo.com/10469416>.

violation by the Peruvian authorities of several provisions of the Inter-American Convention on Human Rights.⁶⁶ On 5 August 2009, the Commission declared the complaint admissible, based on a possible violation of articles 4, 5, 13, 19, 8 and 25 of the Convention. Since two of the victims passed away while the procedure was still pending before the Commission, the case now brings together 63 persons. The plaintiffs are now waiting for the final report on the merits from the Commission. It seems the report could be released in March 2013.

Legal suit in the US against the owners and operators of Doe Run Peru (2008-today)

In 2007 and 2008, a consortium of US and Peruvian lawyers filed a suit against Renco, Doe Run Resources and affiliated entities and individuals in the State Court of Missouri in the US, where the headquarters of the parent company are located. This case was filed on behalf of several hundred children of La Oroya, for personal injuries and damage caused by alleged lead exposure and environmental contamination.

DOE RUN CONDEMNED FOR LEAD CONTAMINATION IN THE US

Herculaneum is a city in the State of Saint Louis, in the US. A metallurgic furnace processing various metals has been operating there for years. In August 2011, the companies Doe Run, Fluor Corp and A.T. Massey Coal, were condemned to pay US\$358.5 million (US\$38.5 million in compensatory damages for exposure to lead air emissions and \$320 million in punitive damages), to compensate 16 inhabitants for damage to health resulting from lead contamination between 1986 and 1994.⁶⁷

The plaintiffs, who spent at least part of their childhood living near the Doe Run smelter in Herculaneum, claimed that lead emissions caused IQ point reductions and attention deficit, hyperactivity disorder, asthma and other problems. For the moment, no compensation has been given to the plaintiffs, as the case has been brought to Missouri Supreme Court.

In another class action brought against the Fluor corporation, Doe Run Resources Corporation, Doe Run Investment holding company, Renco Group and Ira Rennert, in 2001 for damage to real property located in Herculaneum, the parties reached a settlement in April 2012, agreeing on US\$55 million in property damage compensation. Doe Run Resources Corp. is responsible for the entire amount. The agreement also releases the former owners of the smelter from liability.⁶⁸

In October 2010, following a civil claim by the US Government, Missouri State and the Environment Protection Agency (EPA), Doe Run Resources Corp. agreed to spend approximately US\$65 million to correct violations of several environmental laws (including the Clean Air Act and Clean Water Act) at 10 of its lead mining, milling and smelting facilities in southeast Missouri. The settlement also requires the company to pay a US\$7 million civil penalty.⁶⁹

66. Inter-American Commission of Human Rights, Petition on Admissibility, Comunidad de la Oroya, No 1473-06, 5 August 2009, http://www.cidh.oas.org/annualrep/2009sp/Peru1473-06.sp.htm#_ftn4.

67. El Mantaro Revive, "Sancción aplicada a DOE RUN en Estados Unidos debe replicarse en el Perú", 4 August 2011, <http://elmantaroalive.blogspot.com>.

68. "Doe Run's owner to pay \$55M for property damage" in Missouri Lawyers Weekly, 30 April 2012.

69. Environmental Protection Agency, "Doe Run Resources Corporation Settlement", October 2010, <http://www.epa.gov/compliance/resources/cases/civil/mm/doerun.html>.

Additional victims joined the case later on, and 1760 children of La Oroya, born between 1997 and 2009, are now represented in this procedure. Doe Run considers that the Peruvian State should compensate those victims, based on the 1997 Stock Transfer Agreements which provides, as explained above, that Peru will be responsible for any legal suit relating to the company's activities as long as the PAMA is in force, i.e. *"indemnify it [Doe Run] for any damages, liabilities, or obligations for which it [The Peruvian State] has assumed liability and obligation"*.⁷⁰

In August 2011, The Renco Group asked the Court to stay proceedings pending its arbitration with the Republic of Peru (see below).⁷¹

According to some analysts, the intent to pursue international arbitration is a mere legal tactic by The Renco Group to move the class action from the Missouri Court, where it has decent chance of success to a federal jurisdiction. As a matter of fact, in June 2011 the federal judge who had previously rejected the claim to move the case to the federal level, determined that the existence of the investor-state litigation made this a federal issue.⁷²

International arbitration between Peru and Doe Run

On 29 December 2010, The Renco Group, on its own behalf and on behalf of its affiliate Doe Run Peru, served the Republic of Peru with a Notice of Intent to Commence an International Arbitration Proceeding under the Trade Promotion Agreement between the United States of America and the Republic of Peru (the Free Trade Agreement – FTA).⁷³

TRADE COOPERATION AGREEMENT BETWEEN PERU AND THE UNITED STATES

On 7 December 2005, Peru and the US signed a Trade Cooperation Agreement (FTA), generally known as the Free Trade Agreement. In addition to market access, the FTA deals with other trade related issues such as intellectual property, investments, trade competition policies, financial services, telecommunications, etc. The FTA was ratified by Peru in April 2006, but it was not ratified by the US Congress, due to various objections from Democrat members of the Congress. A Protocol of Amendment revisiting the Agreement was signed on 10 May 2007. This introduced some changes in the FTA's chapters concerning employment, environment and health related issues, among other matters. The FTA entered into force on 1 February 2009.

Chapter 10 of the FTA deals with the protection of foreign investments and Investor-State Dispute Settlement. The Treaty provides for fair and equitable treatment of investors; most favoured nation treatment for US investors and protection against expropriation. Interestingly, Article 10.11 on Investment and Environment sets forth 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 concern."*

70. Stock Transfer Agreement, Clause 6.5.

71. Defendants' memorandum in support of their motion to stay proceedings pending arbitration, 12 August 2011, available at: <http://www.aida-americas.org/sites/default/files/refDocuments/Doe%20Run%20Motion%20to%20Stay%2011-08-12.pdf>

72. Public Citizen, Global Trade Watch, "Renco Group uses Trade Pact Foreign Investor Provisions to Chill Peru's Environment and Health Policy, Undermine Justice", March 2012, pp.9 and 13.

73. "Government of Peru's Actions Toward Doe Run Peru Said to Violate Trade Treaty Between United States and Peru", The Renco Group Inc., 5 January 2011, <http://www.rencogroup.net/press01052011.php>.

Overall, the FTA includes safeguards both for labour rights and environmental protection, in its Preamble and in Chapter 18, which is dedicated to the environment. In particular article 18.3 states, “*The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties*”. This chapter also protects rights to access to justice and reparation, and provides for sanctions in case of a violation of environmental regulations.

On 7 April 2011, The Renco Group announced it had commenced a formal international arbitration proceeding against the government of Peru under the FTA pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).⁷⁴ The Renco Group reportedly claims no less than 800 million dollars. It claims to have been a victim of unfair and inequitable treatment and that the government of Peru has failed to afford it full protection and security. The Renco Group also claims compensation for expropriation.

In addition Renco intends to seek an award declaring Peru exclusively liable for any judgment and damages that may be rendered in connection with the aforementioned lawsuits. Renco also intends to seek an order requiring Peru to release and indemnify it from all liability associated with the lawsuits and to take on the defence of the lawsuits.⁷⁵

Renco Group claims to have fully implemented all its PAMA obligations, while Centromin and the government of Peru have not remediated the soil in and around the town of La Oroya. It also points to the fact that the government of Peru has refused to accept responsibility for the claims brought by residents from La Oroya who claim various injuries resulting from environmental contamination from the complex.⁷⁶

According to the company, “*the Republic of Peru and Activos Mineros have affirmatively denied liability for these third-party damage claims, for which they are exclusively liable under the terms of the Stock Transfer Agreement and the Guaranty. They have also failed and refuse to release the defendants in the Lawsuits from liability, and to assure the obligation of taking the lead in defending against the Lawsuits*”.⁷⁷

The company argues that the Peruvian government placed extra responsibilities on Doe Run Peru under the PAMA that were not foreseen in the initial purchase agreement. The government extended the PAMA deadline twice, but refused to grant a third deadline, which RENCO considers to be unfair treatment, in violation of Article 10.5 of the FTA.

Renco also argues that Centromin was subjected to fewer requirements than Doe Run in the process of implementing its PAMA obligations, constituting discriminatory treatment violating Article 10.3 of the FTA (under which “*each party shall accord to investors of the other party*

74. Ibid.

75. Ibid.

76. Ibid.

77. *The Renco Group, INC., Claimant, v. The Republic of Peru, respondent*. Claimant’s Notice of Intent to Commence Arbitration Under United States – Peru Trade Promotion Agreement.

treatment no less favourable than that it accords, in like circumstances, to its own investors”). According to Renco, the Peruvian State has been trying to become the company’s top creditor in the bankruptcy procedure because Doe Run Peru had not completed its PAMA obligations. If the State becomes top creditor, it could take Doe Run over. This, according to DRP, would be indirect expropriation.⁷⁸

The last argument of The Renco Group in the arbitration case is that the Peruvian State’s refusal to shield Doe Run and Renco from lawsuits related to the environmental contamination caused by DRP’s metallurgical facility violates Article. 10.4 of the FTA. This is allegedly because Peru has agreed to observe any obligation into which it has entered with regard to investments of nationals from other countries with which there are bilateral investment treaties. Renco claims that Peru’s refusal thereby constitutes a violation of the “treatment no less favourable” clause. This argument relates to the fact that the Peruvian government did not intervene in the legal suit filed against Renco by children from La Oroya for personal injury in the US.⁷⁹

In March 2012, Members of the Congress of the United States urged the *“State Department and the Treasury Department to refrain from supporting the company in its FTA arbitration proceeding with the government of Peru. If anything, the United States Government should be urging Renco to drop its investor-state claim.”*⁸⁰

Conclusion: Responsibilities of actors involved

The human right to health of the people of La Oroya and especially of its children, who are particularly vulnerable to lead and other heavy metal contamination, has undoubtedly been violated for many years. Not only has the air been contaminated for years (as proven by several studies), but the quality of soil and water in the area endangers the food that people are consuming and jeopardizes their right to food⁸¹ and clean water.⁸² The environmental impacts of the Metallurgical complex of La Oroya have been widely documented. In the long run, it is the right to life of the inhabitants of La Oroya that is at stake.

It is thanks to the fight of courageous people in the impoverished community of La Oroya that the devastating pollution caused by the Metallurgical complex could end, that the plant will resume operations in conditions that comply with national and international standards relating to health and the environment, and that those responsible may ultimately be held to account.

78. “Renco Commences Arbitration Against Peru In First Case Under U.S. FTA”, NJGI, 7 April 2011, <http://justinvestiment.org/2011/04/rengo-commences-arbitration-against-peru-in-first-case-under-u-s-fta/>

79. Ibid.

80. US Congress Members’ Letter to Honorable Hillary Rodham Clinton, Washington, March 29, 2012.

81. According to the UN special Rapporteur on the Right to Food, “Food should be safe for human consumption and free from adverse substances, such as contaminants from industrial or agricultural processes”, see <http://www.srfood.org/index.php/en/right-to-food>

82. The right to water has been recognized as a human rights as part of the right to an adequate standard of living and right to health (see CESCR General Comment 15 (2002), The right to water). On 28 July 2010 the UN General Assembly adopted a resolution (UNGA, A/RES/64/292. “The human right to water and sanitation”) acknowledging that clean drinking water and sanitation are essential to the realisation of all human rights.

RIGHT TO HEALTH AND TO A HEALTHY ENVIRONMENT

At the international level, the right to health is guaranteed by Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ratified by Peru), which recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The right to health *“embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”* The right to health includes an obligation on the part of the state to prevent *“the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.”*⁸³

The right to health is also guaranteed by the Convention on the Rights of the Child. At the regional level, the American Declaration on the Rights and Duties of Man holds that *“every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”* The right to health is explicitly protected by Art. 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (or the “San Salvador Protocol”), which also guarantees in its Art. 11 the right to a healthy environment, specifying that everyone shall have the right to live in a healthy environment, to have access to basic public services and that *“the States Parties shall promote the protection, preservation, and improvement of the environment.”*

Repeated failure by the State to uphold its obligation to protect human rights

The State of Peru has failed to take the necessary measures to protect its population from exposure to dangerous substances. It has also denied people the right to be informed about contamination and its consequences, as well as about mitigation measures to protect health. The right to information is protected by Art. 19 of the International Covenant on Civil and Political Rights, and Art. 13 of the American Convention on Human Rights. Access to information on health issues is recognised as an essential element of the right to health by the Committee on Economic, Social and Cultural Rights (CESCR) and the UN Special Rapporteur on the right to health.⁸⁴

Despite the alarming levels of pollution in La Oroya, no wide epidemiological study⁸⁵ has been carried out on the actual consequences of decades of exposure to harmful substances. Nor has the population of La Oroya been given access to specialist medical care, in spite of numerous studies highlighting the dangers faced by the population – including studies by Public institutions, such as DIGESA. Today in La Oroya, only two medical centers are operating, one being reserved for workers (Esalud medical center), and neither being equipped to deal specifically with exposure to harmful substances such as lead.

83. Ibid.

84. CESCR, op. cit. UN Doc E/C.12/2000/4 Para 3. See also, UN Special Rapporteur on the Right to health, Report to the UN Human Rights Council, A/HRC/7/11, 31 January 2008.

85. Some partial studies have been carried out such *Prevalencia de la de las enfermedades respiratorias en niños escolares de 3 a. 14 años y factores asociados a la calidad del aire, La Oroya, Junín,*

The State of Peru has also directly failed to abide by its obligations under the PAMA, which include to remediate the soil after decades of pollution caused by Centromin and its predecessors before the takeover by Doe Run Peru in 1997.

Even when required by the highest judicial instance of Peru in May 2006, and subsequently by the Inter-American Commission in August 2007, to take urgent measures in favour of La Oroya, the State of Peru has failed to protect the community from the activities of a private actor and actually granted extensions of the PAMA to the company in 2006 and 2009. The State of Peru has adopted a number of measures with a view to mitigating the negative impacts for the people of La Oroya, including improvement of medical services for people affected with the assistance of the Ministry of Health, monitoring of the quality of air, water etc.⁸⁶ However, while the complex was still fully operating, these measures appeared both partial and insufficient to protect the right to health of the people of La Oroya, as the emission of harmful substances was ongoing.

The obligation of States to protect human rights against the activities of non-State actors including multinational corporations is a well established principle in international human rights law, as recalled recently by the UN Guiding Principles on Business and Human Rights adopted by the UN Human Rights Council in June 2011. This obligation requires States to take positive measures *“to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”*.⁸⁷

The Inter-American system has made clear that under their obligation to protect individuals' rights, Member States of the OAS have a responsibility to ensure that third parties, such as transnational corporations, do not violate those rights and therefore can be held accountable if they fail to do so. The Inter-American Court identified this responsibility in the first case that was submitted to it by stating that *“an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”*.⁸⁸

Responsibilities of Doe Run Peru

It is now widely acknowledged that private actors, such as multinational corporations have responsibilities with regard to human rights, as recalled by the UN Human Rights Council's adoption of the Guiding Principles on Business and Human Rights in June 2011. The Guidelines make clear that *“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”*.⁸⁹

This responsibility *“exists independently of States' abilities and/or willingness to fulfil their own human rights obligations”*.⁹⁰ The fact that the State of Peru has not implemented its PAMA

86. The measures are detailed in the Admissibility Decision of the Inter-American Commission of Human Rights, See No. 76/09, pericón 1473, 5 August 2009.

87. Guiding Principles on Business and Human Rights : Implementing the United Nations “Protect, Respect and Remedy”, A, HRC/17/31, June 2011, para I.A.1.

88. I/A Court H.R., *Velazquez Rodriguez v. Honduras*, judgment on its merits, 29 July 1988, Series C No. 4.

89. Guiding Principles, op.cit., June 2011.

90. Ibid, Principle 11.

obligation to clean the soil of La Oroya from pollution caused before 1997 does not shield Doe Run Peru from its own responsibilities for violations of its obligations under the PAMA for more than 12 years, where that has impacted on the human rights of others.

The UN Guiding Principles make clear that companies “*should comply with all applicable laws and respect internationally recognized human rights, wherever they operate; and seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements*”;⁹¹ however Doe Run Peru has on the contrary sought exemptions from the Peruvian legal framework on the environment environment by requesting several extensions to the PAMA, and the lowering of its standards.

The UN Guiding Principles also make clear that “*where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes*”.⁹² On the contrary, Doe Run is actively pursuing international arbitration against the State of Peru with the view to avoiding being held liable by a US court for its adverse impacts on the human rights of people affected by its own activities, in spite of the fact that the claims relate to damages suffered between 1997 and 2009, and not before. The international arbitration served by The Renco Group also appears to be a way to put pressure on the government of Peru to obtain more favourable conditions within the framework of the liquidation process of its subsidiary in Peru.

This case illustrates the conflict between private international law, in particular the legal framework for protecting foreign investments, and respect for human rights. Although the FTA between Peru and the United States provides for the protection of the environment, labour rights and health, it is being used by a private company to sue a government in order to avoid liability for human rights abuses. This appears to be contrary to the spirit of the trade agreement which provides in its Art. 18.3 that “*A Party shall not fail to effectively enforce its environmental laws, and its laws, regulations, and other measures to fulfil its obligations under the covered agreements, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement. [...] The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties.*”

In a recent statement, John Ruggie, the former Special Representative of the UN Secretary General on Business and Human Rights, referring to arguments put forward by Shell before the US Supreme Court in the Kiobel case,⁹³ questioned the litigation strategy and tactics of multinational corporations which may appear in contradiction with their responsibility to respect human rights.⁹⁴ In the present case, using international arbitration against Peru rather than responding to a court of law in the United States about the facts at stake is particularly questionable. By using this avenue, the Renco Group is clearly impeding victims’ rights to an effective remedy. The Renco Group is not denying that victims may suffer from contamination and from interference

91. Ibid, Principle 23.

92. Ibid, Principle 22.

93. Kiobel v. Royal Dutch Petroleum (10-1491) (U.S. Supreme Court, January 27, 2012).

94. John G. Ruggie, Kiobel and Corporate Social Responsibility, 4 September, 2012.

with their right to health; the company is simply negating its own liability for these abuses, and as a consequence, restraining the ability of victims to access an effective remedy. It is noteworthy that the Free Trade Agreement between the United States and Peru clearly acknowledges the right to a remedy in its Art. 18.4: *“Each Party shall provide persons with a legally recognized interest under its law in a particular matter appropriate and effective access to remedies for violations of that Party’s environmental laws or for violations of a legal duty under that Party’s law relating to the environment or environmental conditions affecting human health”*.

The clause of the Stock Transfer Agreement according to which Centromin and the State of Peru granted immunity to Doe Run Peru for any third party claim arising in the period of implementation of the PAMA may also intrinsically contradict the human rights obligations of Peru to regulate private actors and take all necessary measures to make sure they do not harm human rights. The absence of liability for Doe Run, arising from this agreement, may have encouraged the company to disregard human rights.

Furthermore, the individual criminal responsibility of Doe Run’s executives could also be pursued before the Peruvian criminal courts under domestic law, in particular Art. 304 of the Criminal Code relating to the crime of “pollution of the environment”, which provides for 4 to 6 years imprisonment and fine.

Recommendations

To the Peruvian State

FIDH recommends for the State of Peru to:

- Closely monitor the operations of the Metallurgical Complex of La Oroya to make sure the population is not exposed to emissions of harmful substances exceeding national requirements through continued monitoring of the quality of air and water in the area around La Oroya;
- Make sure adequate investments are made before granting authorization to actual or future operators of the complex for restarting additional circuits of the metallurgical complex (lead and copper circuits);
- Make sure environmental and human rights protection is a key element in the international competitive bidding process and that no waiver or immunity is granted to the new operator;
- Immediately take measures to remediate the soil of La Oroya as originally provided for in the PAMA;
- Comply fully and integrally with the precautionary measures as requested by the Inter-American Commission on Human Rights;
- Launch a wide epidemiological study in La Oroya to assess the health condition of the population;
- Provide for specialized medical care for those affected by respiratory affections, and contamination by heavy metals, in particular lead. Children should be given the priority;
- Consider strengthening the legal framework for holding private actors accountable for human rights and environmental harm, including the possibility to suspend the operations of companies to prevent harm to the environment and human rights;
- Carefully review investment contracts and agreements as well as free trade agreements in light of Peru’s international human rights obligations;

- Ensure protection of human rights defenders, and respect the right to freedom of expression and peaceful assembly of those protesting against the adverse impacts of investment projects; and
- Support further standard-setting at the international and regional level with a view to establishing binding legal norms to ensure the protection of human rights in the context of corporate activities, including mechanisms to ensure corporate accountability.

To private actors

FIDH calls on The Renco Group to:

- Refrain from seeking compensation from the State of Peru through an international arbitration tribunal in relation to La Oroya metallurgic complex;
- Refrain from trying to escape liability before US Courts by pursuing international arbitration; and
- Make a public commitment in favour of human rights, integrate respect for human rights into the strategy of the company and review all its activities in light of its corporate responsibility to respect human rights.

FIDH calls on business partners of the Renco company worldwide to :

- Use their leverage to require The Renco Group to respect human rights and in particular to refrain from seeking compensation through international arbitration against the State of Peru linked to environmental and human rights harm caused by the metallurgical complex of La Oroya; and suspend their commercial relationship with the Renco Group if no measures are taken by the company in that direction.

Regarding the international arbitration process

FIDH calls upon the arbitration tribunal to include at least one human rights expert in any panel it would constitute under the Renco/Peru arbitration claim if the process goes forward;

FIDH also calls upon this arbitration panel:

- To duly take into account the international human rights conventions ratified by Peru, as well as the corporate responsibility to respect human rights, as set out in particular in the UN Guiding Principles;
- To give due consideration to the provisions on the protection of the environment included in the Free Trade Agreement between the US and Peru; and
- To accept third party opinions from human rights NGOs and experts.

To the US Government

- FIDH calls upon the United States of America to refrain from providing any support to the Renco Group in the arbitration and to publicly denounce the legal tactic of the Renco Group as being contrary to its corporate responsibility to respect human rights.

To the European Union

- Within the framework of its Free-trade agreement with Peru, monitor the implementation by Peru of the roadmap on the environment and human rights, as requested in a resolution of the European Parliament on 13 June 2012, and in particular the effectiveness of measures taken to protect the environment and human rights from the negative impact of extractive industries ; and
- make sure future EU investment treaties are in conformity with international human rights law.

Establishing the facts

investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

Supporting civil society

training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level

Mobilising the international community

permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

Informing and reporting

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FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.

FIDH
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and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive

ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 164 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

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Find information concerning FIDH's 164 member organisations on **www.fidh.org**