APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 23-1625

Sr. Kate Reid; Megan Heeney, as next friends of; A. O. A.; Meylith A. Caso Arroyo; Y. C. A.; A. C. C.; D. R. G.; J. R. G.; S. A. L.; Jean P. Quispe Morales; B. Q. M.

Plaintiffs - Appellees

v.

The Doe Run Resources Corporation, a New York Corporation; D. R. Acquisition Corp., a Missouri Corporation; Marvin K. Kaiser; Albert Bruce Neil; Jeffrey L. Zelms; The Renco Group, Inc.; Ira L. Rennert; Doe Run Cayman Holdings LLC, a Missouri limited liability company

Defendants - Appellants

National Mining Association; Associated Industries of Missouri; Chamber of Commerce of the United States of America; Missouri Chamber of Commerce and Industry; State of Missouri

Amici on Behalf of Appellant(s)

Former U.S. Diplomats and Government Officials; William S. Dodge; Maggie Gardner

Amici on Behalf of Appellee(s)

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: January 9, 2024
Filed: August 1, 2024

Before BENTON, ERICKSON, and KOBES, Circuit Judges.

ERICKSON, Circuit Judge.

This consolidated action comprises 40 cases and more than 1,420 individual plaintiffs who are Peruvian citizens alleging environmental injury by exposure to toxic substances from La Oroya Metallurgical Complex ("LOMC"), a smelting and refining complex in rural Peru. The defendants are United States-based entities consisting of Doe Run Resources Corporation, The Renco Group, Inc., and related companies and certain executives and directors at those companies (collectively "Doe Run") that purchased LOMC in 1997. In this latest appeal,

Doe Run argues the district court[1] erred by denying its motion to dismiss the appeal based on the doctrine of international comity. We affirm.

I. BACKGROUND

LOMC began operations in 1922 under the ownership of Cerro de Pasco Corporation in the remote village of La Oroya, which is located high in the Andes mountains of Peru. Using smelters and refineries, LOMC processed mined minerals into copper, lead, zinc, and other metals. In 1974, the government of Peru took control of LOMC and transferred the ownership and operations to a state-owned company, Centromin Peru S.A. Nearly two decades later, LOMC was offered for sale, and Doe Run emerged as a prospective buyer. Under Peruvian law, only a Peruvian company could purchase LOMC, so Doe Run created a Peru-based subsidiary, Doe Run Peru, and its direct parent company in Peru, Doe Run Mining.

On October 23, 1997, Doe Run purchased LOMC through a Stock Transfer Agreement executed by Doe Run Peru. At the time Doe Run acquired LOMC, the smelter and refinery operations were subject to an Environmental Remediation and Management Plan. LOMC operated continuously until it ceased operations in June 2009. Doe Run Peru initiated bankruptcy proceedings shortly thereafter.

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[1] The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

In 2007, Sister Kate Reid and Megan Heeney filed several common law tort lawsuits in Missouri state court against Doe Run as next friends on behalf of the injured Peruvian citizens, who were children at the time of the alleged harm. Plaintiffs claim that Doe Run Peru failed to sufficiently reduce lead emissions from LOMC, as required under the terms of the Environmental Remediation Management Plan, which resulted in unsafe lead levels in the air. The plaintiffs' case under Missouri law relies on a theory that Doe Run Peru was controlled from the United States by Doe Run, and that decision-making by Doe Run executives in the United States exposed the plaintiffs to lead poisoning and caused them to suffer persistent and irreversible cognitive impairments.

Many more Peruvian citizens have commenced actions through Reid and Heeney in Missouri state court, and each of those cases has been removed to federal court and consolidated with this current action.[2] Doe Run filed a motion to dismiss, which

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[2] The original case was removed to federal court and then remanded for lack of subject matter jurisdiction. An amended complaint was also removed but later dismissed without prejudice by the plaintiffs. Two more cases were filed in Missouri state court, removed to federal court, and remanded for lack of subject matter jurisdiction. In 2010, The Renco Group initiated arbitration proceedings, seeking indemnification against Peru. Doe Run again removed the pending cases to federal court, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 205. The district court denied the plaintiffs' motion to remand and Doe Run's motion to stay the proceedings pending arbitration. This Court affirmed

resulted in the dismissal of several claims and defendants. *See A.O.A. v. Rennert*, 350 F.Supp.3d 818 (E.D. Mo. 2018). The district court has permitted the substantive negligence-based claims to survive and has concluded that Missouri state law applies. Doe Run filed a motion for determination of foreign law, urging the district court to abstain based on the doctrine of international comity because, in its view, the lawsuits impacted Peru's sovereignty and were "inconsistent with the text and spirit" of the applicable Trade Promotion Agreement ("TPA") between the United States and Peru. The district court denied the motion.

After discovery, Doe Run filed motions for summary judgment and renewed its argument that Peruvian law should apply. Doe Run also renewed its motions for dismissal based on international comity. The district court denied the motion to apply Peruvian law, except to the extent that Doe Run seeks to apply Article 1971's "safe harbor" defense. The court denied summary judgment on the safe harbor defense and denied dismissal based on international comity. Rather than reaching the merits of the summary judgment motions, the district court certified its choice-of-law and comity rulings for interlocutory appeal, and we accepted the appeal.

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those denials in *Reid v. Doe Run Resources Corp.*, 701 F.3d 840 (8th Cir. 2012).

II. ANALYSIS

We review a district court's decision on international comity for abuse of discretion. *GDG Acquisitions, LLC v. Government of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014) (citation omitted); *see also City of Jefferson City, Mo. v. Cingular Wireless, LLC*, 531 F.3d 595, 599 (8th Cir. 2008) (abuse of discretion standard in cases involving whether to abstain where federal and state jurisdictions are involved). We will find an abuse of discretion when the district court relies on clearly erroneous factual findings or an error of law. *Dixon v. City of St. Louis*, 950 F.3d 1052, 1056 (8th Cir. 2020).

"International comity is an abstention doctrine that reflects 'the extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation.'" *GDG Acquisitions*, 749 F.3d at 1030 (quoting *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)). The doctrine of comity "is not a rule of law, but one of practice, convenience, and expediency." *Id.* (quoting *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)). "Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws." *Id.*

The defendants argue the doctrine of international comity compels abstention from adjudicating the plaintiffs' claims in United States courts. *See Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) ("[I]n some private international disputes the prudent and just action for a federal court is to abstain from the exercise of jurisdiction."). Specifically, they argue abstention is required based on the TPA, traditional comity factors, or principles of extraterritoriality.

A. Whether dismissal is required under the TPA

Treaty interpretations are questions of law that we review *de novo*. *Smythe v. U.S. Parole Com'n*, 312 F.3d 383, 385 (8th Cir. 2002). "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Golan v. Saada*, 596 U.S. 666, 676 (2022) (quoting *Abbott v. Abbott*, 560 U.S. 1, 10 (2010)).

The TPA is a trade agreement covering several diplomatic and trade-related issues across a wide range of topics, including, as examples, agriculture, textiles, and taxes. Specific to this litigation, Chapter 18 of the TPA addresses the environment—it encourages cooperation and collaboration between the United States and Peru to improve environmental protections and address environmental harms, while recognizing each nation's sovereign interests. The TPA emphasizes the importance of enforcing environmental laws, with both the United States and Peru providing for procedures to investigate and adjudicate alleged violations, along with providing appropriate and effective sanctions or other remedies.

See Chapter 18.4(3)-(4). In particular, Chapter 18.4(4) states:

> 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, which may include rights such as: (a) to sue another person under that Party's jurisdiction for damages under that Party's laws….

The litigation before us does not follow customary pleading practices—that is, the plaintiffs are suing for environmental harms in Peru allegedly caused by conduct that occurred in the United States, applying a legal theory of negligence under Missouri state law. The plaintiffs' specific claims and methods for relief are not explicitly addressed by the TPA, which contemplates more traditional mechanisms for environmental enforcement. But the plain language of Chapter 18.4(4) does provide a pathway for the plaintiffs to sue the defendants under Missouri law. *See United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 240-41 (1989) ("[T]here generally is no need for a court to inquire beyond the plain language of the statute."). Looking to the implementing statute, we find further support for the instant litigation in the following declaration by Congress: "No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the

provision or application is inconsistent with the [TPA] ...." *See* Pub. L. No. 110-138, 121 Stat. 1455, § 102(b)(1) (2007); 19 U.S.C. § 3805. On these facts and claims, the district court did not abuse its discretion in concluding that dismissal is not required under the TPA.

B. Whether traditional comity factors require dismissal

Typically, international comity is applied retrospectively, either out of respect for the judgment of a foreign tribunal or in deference to parallel foreign proceedings. *GDG Acquisitions*, 749 F.3d at 1030. Only in rare circumstances have courts applied international comity prospectively, without a conflicting foreign proceeding. "In such cases, 'domestic courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum.'" *Id.* (quoting *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004)).

While there is no consistent rule for how to evaluate the international comity doctrine prospectively, three guiding factors have emerged from precedent: "the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Id.*

Assuming without deciding that prospective international comity exists as an abstention doctrine, it must be reserved for those "rare (indeed often calamitous) cases in which powerful diplomatic interests of the United States and foreign sovereigns aligned in supporting dismissal." *GDG Acquisitions*, 749 F.3d at 1034. Here, the harm occurred in Peru, but Doe Run's alleged conduct occurred in Missouri. Neither the State Department nor the government of Peru has submitted a declaration of its position in this case, despite requests from the parties. Peru has had fifteen years while this matter has been in litigation to directly assert its sovereignty and it (and the State Department) has remained silent. In its brief, Doe Run takes issue with the district court's order on the first motion to dismiss that found some defendants were unwilling to submit to Peru's jurisdiction and now asserts that all defendants have consented to personal jurisdiction in Peru. While the timeliness of the consent can be debated, the record also contains letters from Peruvian officials suggesting there does not appear to be an adequate forum or remedy available to the plaintiffs under Peruvian law. Under the circumstances of this case, we do not have that rare case before us where application of prospective international comity may be warranted, and we find no abuse of discretion by the district court in the denial of abstention based on international comity.

C. Whether extraterritoriality principles warrant abstention

The defendants argue for dismissal of the complaint based on extraterritoriality concerns, citing

the Supreme Court's decision in *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021). However, this case differs from *Nestlé* in two important ways. First, *Nestlé* involved foreign application of a federal statute, whereas here we have domestic application of state common law. In addition, in *Nestlé*, extraterritorial application was ruled inappropriate because nearly all the alleged conduct occurred overseas. Not so here—the plaintiffs uniquely allege conduct that occurred within the United States as the basis for liability. *See RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 337 (2016). Further, the district court detailed the discovery that supported the allegations. It was not an abuse of discretion to determine the record sufficiently supported claims that decision-making in the United States caused the plaintiffs' injuries for purposes of summary judgment.

III. CONCLUSION

We affirm the judgment of the district court. The motion to strike is denied.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

A.O.A., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.
	)	4:11 CV 44 CDP
IRA L. RENNERT, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR APPLICATION OF PERUVIAN LAW AND SUMMARY JUDGMENT UNDER PERUVIAN LAW, OR, ALTERNATIVELY, DISMISSAL UNDER TRANSNATIONAL LAW DOCTRINES

Table of Contents

I. Introduction

Plaintiffs are numerous Peruvian citizens who allege that they were injured when they were exposed as children to toxic substances from the La Oroya Complex, a metallurgical smelting and refining complex operating in La Oroya, Peru. They claim that the defendants, several interrelated American companies and their executives and directors, acting from Missouri and New York, prioritized profit over safety by authorizing and directing the Complex to emit excessive levels of toxic substances into the La Oroya environment without proper safety protocols in place. Plaintiffs allege that defendants' Missouri conduct is responsible for their serious medical and developmental injuries from their exposure to lead and other toxic substances emitted from the Complex.

This Order addresses defendants' Motion for Application of Peruvian Law and Summary Judgment Under Peruvian Law, or, Alternatively, Dismissal under Transnational Law Doctrines. (ECF 1230.) In determining defendants' earlier motion to dismiss, I ruled that Missouri law would govern this dispute. *A.O.A. v. Rennert*, 350 F. Supp. 3d 818 (E.D. Mo. 2018). In that same Order, I rejected defendants' argument that the case should be dismissed on the basis of international comity. *Id.* Defendants now argue that the complete factual record developed through discovery shows that those conclusions should change and, further, that additional transnational doctrines warrant dismissal.

I continue to conclude, as I did before, that Missouri law applies to most of this case. But I agree with defendants that it is appropriate to apply Peruvian law to one issue: defendants' claim that they are immune from liability because of what they refer to as the "safe harbor" of Article 1971 of the Peruvian Civil Code. Even under Peruvian law, however, numerous genuine issues of material fact remain in dispute about whether Article 1971 precludes defendants' liability in this case.

I have also fully considered defendants' alternative motion to dismiss based on various transnational law doctrines. I again decline to abstain based on international comity, and I conclude that dismissal under the other transnational doctrines proffered by defendants is not warranted. I recognize, however, that reasonable jurists might disagree on those issues. Because decisions on whether to abstain and/or dismiss under transnational doctrines are governed by factors that present controlling questions of law on which there is substantial ground for difference of opinion, I will certify the issues for interlocutory appeal under 28 U.S.C. § 1292(b).

The many other motions filed by the parties remain pending.

II. Procedural History

The long and complicated history of this litigation began in 2007 when Sister Kate Reid and Megan Heeney began filing in Missouri state court several actions as next friends on behalf of plaintiffs, alleging

state tort claims against the defendant companies, executives, and directors. The first case filed in October 2007 was removed to this Court and then remanded for lack of subject-matter jurisdiction. (Case No. 4:07CV1874 CDP, ECF 61.) After amendment in state court, the case was again removed, but plaintiffs dismissed it without prejudice. (Case No. 4:08CV525 CDP, ECF 51.) Shortly thereafter, two additional cases were filed in state court; they were removed and then remanded, again for lack of subject-matter jurisdiction. (Case Nos. 4:08CV1416 CDP, ECF 19; 4:08CV1420 CDP, ECF 19.) After significant activity in the state court, one of the named defendants, The Renco Group, instituted an arbitration proceeding against Peru in 2010, seeking indemnification for these cases. Defendants again removed in 2011, this time based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, as implemented by 9 U.S.C. §§ 201, *et seq*. I denied the plaintiffs' motion to remand (ECF 45), and that denial as well as my denial of the defendants' motion to stay this consolidated case pending arbitration was affirmed by the Eighth Circuit Court of Appeals. *Reid v. Doe Run Res. Corp.*, 701 F.3d 840 (8th Cir. 2012).

Since that time, more Peruvian plaintiffs have filed Missouri state-court actions through next friends Reid and Heeney, and defendants removed those cases to this Court asserting the same jurisdictional basis. All cases filed through next friends Reid and Heeney are consolidated into this action for pretrial purposes. The consolidated action

presently comprises 40 cases and more than 1420 individual plaintiffs.[1] Sixteen of those plaintiffs are in a Discovery Cohort, and discovery has been fully worked up and completed as to those plaintiffs.

Plaintiffs' amended complaint filed February 21, 2017 (ECF 474) is the operative complaint before the Court. In October 2018, on defendants' motion to dismiss that complaint, I applied Missouri law and dismissed several claims and defendants. *See generally A.O.A.*, 350 F. Supp. 3d 818 (E.D. Mo. 2018). The remaining defendants have now filed a number of motions for summary judgment on all remaining claims arguing, *first*, that Peruvian law applies to all aspects of this case, under which they assert they are entitled to judgment as a matter of law on all claims and, *second*, that they are entitled to summary judgment on all claims even under Missouri law. Defendants also move to dismiss the case in its entirety arguing that various transnational doctrines require abstention. Finally, both sides have filed several motions to exclude or limit expert testimony.

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[1] Several years after this litigation began, Father Chris Collins filed a number of cases as next friend on behalf of additional Peruvian children, raising the same allegations against the same defendants. All cases filed through next friend Collins are consolidated into a separate action, which is pending before a different judge of this Court. *See J.Y.C.C., et al. v. Doe Run Res. Corp., et al.*, Case No. 4:15CV1704 RWS (E.D. Mo.). The plaintiffs in that consolidated case number more than a thousand as well. The attorneys who represent the plaintiffs in the Collins cases are not associated in any respect with plaintiffs' attorneys in this Reid/Heeney case.

For the reasons that follow, I will deny defendants' motion to apply Peruvian law to the remaining claims in this action except to the extent defendants seek to apply Article 1971's "safe harbor" defense, and I will deny their motion for summary judgment on that defense. I will also deny their motion to dismiss under transnational doctrines. The other motions for summary judgment and to exclude expert witnesses remain pending.

III. Background

In 1922, a private company founded and began operating the La Oroya Complex in La Oroya, Peru. The Complex consisted of smelters and refineries that processed minerals mined from the Andes mountains into copper, lead, zinc, and other metals. In 1974, the government of Peru expropriated the Complex and transferred its ownership and operations to Centromin Peru S.A., a Peruvian government-owned company. As part of Peru's plan to promote private investment, Centromin reorganized in 1996 and created subsidiary companies, which included establishing the La Oroya Complex as a subsidiary metallurgical company, Metaloroya, which was then marked for privatization and offered for sale in 1997. On October 23, 1997, defendants The Renco Group (Renco) and Doe Run Resources Corporation (DRR) purchased Metaloroya (*i.e.*, the Complex) from Centromin pursuant to a Stock Transfer Agreement (STA). Because terms of the bidding process required that sale of Metaloroya be to a Peruvian company, Renco and DRR formed "Doe Run Peru" (DRP) in Peru

for purposes of acquiring the Complex.[2] They also formed "Doe Run Mining" in Peru as DRP's direct parent company.

When the STA was executed in October 1997, the Complex was operating under a plan developed in January 1997 that required Centromin to incorporate measures to reduce or eliminate emissions from the Complex within ten years to bring the Complex into compliance with laws governing maximum allowable levels of emissions. The plan was developed in accordance with the Programa de Adecación y Manejo Ambiental (PAMA), which was a program established under Peruvian environmental protection laws that required every mining company to agree to an environmental remediation plan. Centromin's PAMA was developed after studies of the Complex's environmental impact on La Oroya and its surrounding area showed significant pollution of the environment, including lead contamination in the soil.

Pursuant to the STA, Centromin and Metaloroya/DRP[3] each agreed to assume certain

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[2] The heading of the STA identified and defined the contracting parties as Metaloroya (the "Company"), DRP (the "Investor"), and Centromin. (ECF 545-9.) Renco and DRR subscribed to the STA and warranted DRP's compliance with its terms. (*Id.* at hdr. p. 25, "Additional Clause.")

[3] Metaloroya formally merged into DRP in December 1997.

obligations under PAMA.[4] Centromin agreed to continue some environmental clean-up projects that it had begun, including remedying the environment around the La Oroya Complex. Centromin also agreed to assume all liability for any claims by third parties arising from toxic emissions released before the sale of the Complex. For its part, Metaloroya/DRP agreed to fulfill certain projects and clean-up efforts identified in the PAMA and be responsible to third parties for any damages it alone caused.

In accordance with its business plan, DRP began operating the Complex at maximum capacity to increase production and output. The Complex operated continuously until 2009. In early 2009, lenders severed their credit lines with DRP, and DRP ceased operations at the Complex in June of that year. It went into bankruptcy shortly thereafter.[5]

Plaintiffs are Peruvian citizens who allege that they were injured when they were exposed as children to toxic substances emitted from the Complex beginning October 24, 1997.[6] They bring their claims against the companies that purchased and invested in the Complex—Renco, D.R. Acquisition Corporation,

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[4] Centromin's original January 1997 PAMA was divided into the "Centromin PAMA" and the "Metaloroya PAMA" to reflect each entity's obligations.

[5] On the evidence and information before the Court, it appears that DRP's Peruvian bankruptcy proceedings continue to date.

[6] All plaintiffs were children when their respective cases were initially filed. Many have since reached majority age.

and DRR; the direct parent of DRP—Doe Run Cayman Holdings, LLC (Cayman Holdings); and certain executives and officers at these companies—Ira L. Rennert, Marvin K. Kaiser, Albert Bruce Neil, and Jeffrey L. Zelms. Plaintiffs allege that these defendants, acting from Missouri and New York, controlled the Complex in a manner that resulted in plaintiffs' exposure to lead and other toxic substances, causing serious medical and developmental injuries. They seek damages under state tort theories of negligence, including breach of assumed duties, negligent performance of an undertaking, and direct participation liability. For some of these claims, the defendants' liability rests upon plaintiffs' assertions of agency and control sufficient to pierce the corporate veil.

The claims that remain in this action are set out in seven counts of plaintiffs' amended complaint:

> Count I—Negligence against defendants Rennert, Renco, DRR, D.R. Acquisition, and Cayman Holdings;
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> Count II—Negligence against Rennert, Kaiser, Neil, and Zelms;
>
> Count VIII—Direct Liability for Breach of Assumed Duties Pertaining to Foreseeable Harms against DRR, Cayman Holdings, Kaiser, Neil, and Zelms;
>
> Count IX—Direct Liability for Breach of Assumed Duties Pertaining to Foreseeable Harms against Renco, D.R. Acquisition, and Rennert;

Count X—Negligent Performance of an Undertaking against DRR, Cayman Holdings, Kaiser, Neil, and Zelms;

Count XI—Negligent Performance of an Undertaking against Renco, D.R. Acquisition, and Rennert; and

Count XII—Direct Participation Liability against Renco and Rennert.

IV. The Defendants and Related Entities

Ira L. Rennert—Rennert resides in New York, is Chairman and Chief Executive Officer of Renco, and is the primary shareholder of Renco. He and several trusts he established for himself and his family own 97.9% of Renco. Rennert is also Director and Chairman of several other Renco-owned and affiliated companies and entities, including those named in this lawsuit as described below.

The Renco Group, Inc.—Renco is a private, family-owned investment holding company founded by Rennert in 1975. Renco was later incorporated in New York, and its principal place of business is in New York. Rennert controls Renco. Renco holds 100% of the shares of D.R. Acquisition.

D.R. Acquisition Corp.—D.R. Acquisition is a holding company incorporated in Missouri in 1994 and owned 100% by Renco. Its principal place of business is in Missouri. Rennert is Sole Director and Chairman of the Board of D.R. Acquisition and, in this

role, appoints its officers. D.R. Acquisition owns 100% of the shares of DRR.

Doe Run Resources Corp.—DRR is a natural resource company incorporated in New York with its principal place of business in Missouri. Its primary business is in mining, smelting, recycling, and fabrication of metals. It was acquired in 1994 by Renco-owned D.R. Acquisition. Since 1994, Rennert has served as DRR's Chairman of the Board. He served as its Sole Director from 1994 to 2002, was one of three Directors from 2002 to 2007, and has been Sole Director again since 2007. From 1997 to 2007, DRR held the primary ownership interest in Doe Run Cayman, Ltd., a non-party to this action.

(Non-parties) Doe Run Cayman, Ltd. and Doe Run Mining, S.R.L.—Doe Run Cayman and Doe Run Mining were incorporated on September 10, 1997. Doe Run Mining was formed in Peru as a holding company of wholly owned subsidiary DRP for purposes of acquiring Metaloroya. Doe Run Cayman was formed in the Cayman Islands as a holding company to acquire the stock of Doe Run Mining. Rennert was Chairman and Sole Director of Doe Run Cayman. Doe Run Cayman was a wholly owned subsidiary of DRR. Neither Doe Run Cayman nor Doe Run Mining had any independent operations.

Doe Run Mining merged into DRP in June 2001. With this merger, Doe Run Cayman became the direct parent of DRP.

Doe Run Cayman Holdings, LLC—Cayman Holdings is a Missouri limited liability company with its principal place of business in Missouri. It was formed in February 2007 by its Sole Member, D.R. Acquisition, to hold 100% interest in Doe Run Cayman. Shortly thereafter, in March 2007, D.R. Acquisition transferred the shares of Doe Run Cayman to Cayman Holdings pursuant to a Share Transfer Agreement approved and executed by Rennert. As a result, DRR no longer had an interest in Doe Run Cayman. Also in March 2007, D.R. Acquisition executed a dividend of its membership interest in Cayman Holdings to Renco, transferring 100% of its membership interest to Renco. Renco thus became the Sole Member of Cayman Holdings, the direct parent of DRP. Cayman Holdings has no independent operations.

(Non-party) Doe Run Peru—DRP was formed in Peru in September 1997 for the purpose of acquiring Metaloroya from Centromin. At the time, Doe Run Mining was the direct parent of DRP, owning more than 99% of its shares, with the remainder owned by DRP employees. With Doe Run Mining's merger into DRP in 2001, Doe Run Cayman became DRP's direct parent. In March 2007, through the transactions described above, Cayman Holdings became the direct parent of DRP. DRP ceased operating the Complex in June 2009 and has been in bankruptcy under Peruvian law since that time.

Jeffrey Zelms—During the period relevant to this litigation, Zelms was a Missouri resident[7] and held the following positions in several Doe-Run-affiliated organizations, having been appointed to those positions by Rennert:

- President and CEO of DRR from 1994 to 2006;
- Vice Chairman of DRR from 1999 to 2006;
- President and CEO of D.R. Acquisition from 1994 to 2005;
- President of Doe Run Cayman from 1997 to 2007.

From 1994 through his retirement, Zelms—in his various roles—reported directly to Rennert. Upon his retirement and continuing through 2013, Zelms was a paid consultant for DRR pursuant to an agreement executed by Rennert.

Marvin K. Kaiser—During the period relevant to this litigation, Kaiser held the following Doe-Run-affiliated positions:

- Vice President and CFO of DRR from 1994 to 2006;
- Vice President and CFO of D.R. Acquisition from 1994 to 2005;

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[7] On the evidence and information before the Court, Zelms continues to reside in Missouri.

- Vice President of Doe Run Cayman from 1997 to 2007;
- Finance Manager of Doe Run Mining from 1997 to 2000;
- Finance Manager of DRP from 1997 to 2001;
- Executive Vice President of DRP beginning 2002.

Kaiser resided in Missouri from 1994 to 2003. During his last few years as an officer of DRR, he commuted from Kentucky to Missouri for his work.

Albert Bruce Neil—Neil worked for DRR as General Manager of a smelting plant in Glover, Missouri. In 2003, Zelms transferred him from that plant to DRP and appointed him President and General Manager of DRP. During the period relevant to this litigation, Neil held the following positions:

- President and General Manager of DRP from 2003 to 2006;
- Vice President of DRR from 2004 to 2005;
- Vice Chairman, President, and CEO of DRR from 2006 to 2012 (appointed by Rennert);
- President of D.R. Acquisition from 2006 to 2011;
- President of Doe Run Cayman in 2007;

- President of Cayman Holdings from 2008 to at least 2009.

Neil lived in Peru from 2003 through 2005. During all other periods relevant to this litigation, Neil lived in Missouri. After assuming his officer and director roles with DRR in 2006, Neil acted with Rennert's approval as a consultant to DRP on an as-needed basis and was involved in apprising Rennert of DRP's status.

V. Choice of Law

In my October 2018 Order, I determined that Missouri law applied to this case, concluding that the laws of Peru and Missouri did not actually conflict in any significant, substantive way with regard to the claims in the case, and that the allegations of the amended complaint were sufficient to state claims under either forum's laws. *A.O.A.*, 350 F. Supp. 3d at 847-48. In their current motion, defendants contend that the summary judgment record requires me to take a fresh look at the choice-of-law issue because, according to defendants, the record now establishes that plaintiffs cannot recover against them under Peruvian law. Defendants assert that this circumstance shows that the relevant Missouri and Peruvian laws conflict and that, under choice-of-law rules on the facts of this case, I must apply Peruvian law. And under Peruvian law, defendants argue, they are entitled to judgment as a matter of law.

Defendants raise three specific arguments to support their assertion: 1) that testimony from plaintiffs' proffered experts shows that plaintiffs

cannot recover for negligence because defendants complied with relevant government regulations; 2) that expert testimony shows that plaintiffs cannot recover from the upstream defendants on their veil-piercing and agency theories of liability for DRP's alleged negligent conduct; and 3) that, because of 1 and 2 above, plaintiffs' claims cannot survive under Articles 1971 and 1981 of the Peruvian Civil Code, respectively. These arguments are largely based on a very restricted reading of the testimony of plaintiffs' standard-of-care expert witness, Dr. Jack Matson, and of plaintiffs' financial expert witness, Kyle Ann Midkiff. Defendants interpret Dr. Matson's testimony as limiting plaintiffs' claims to DRP's delay in completing four discrete projects relating to fugitive lead emissions, and as admitting that the projects were completed timely under PAMA. They interpret both Dr. Matson's and Ms. Midkiff's testimony as showing that DRP was never inadequately capitalized and that defendants never exercised control over DRP. Defendants also attribute statements to their own Peruvian law expert, Keith S. Rosenn, that he did not make.

For the following reasons, I continue to conclude that there is no conflict between the relevant Missouri and Peruvian laws as they apply to plaintiffs' asserted claims in this action and that Missouri law applies to the claims. Defendants' "safe harbor" immunity *defense* under Article 1971, however, is different. Because there is no Missouri analogue to this defense, an actual conflict exists between Missouri and Peruvian law on the issue. Applying Missouri's choice-of-law analysis, I conclude that Peru has the

most significant relationship to this defense and therefore apply Peruvian law to that issue alone. But because genuine issues of material fact exist on the Article 1971 defense, that is, whether defendants were acting "in the regular exercise of a right," defendants are not entitled to summary judgment under Peruvian law.

A. Legal Standard

As indicated above, federal subject-matter jurisdiction in this action lies with defendants' invocation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* 9 U.S.C. § 203 ("An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."). Although the case arises under the laws and treaties of the United States, it raises only state-law claims. In *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502 (2022), the Supreme Court recently held that in a case upon which federal subject-matter jurisdiction is based on the laws and treaties of the United States, but which raises only non-federal claims "(relating to property, torts, contracts, and so forth)" that turn only on state law and have no substantive federal component, the district court should apply the forum State's choice-of-law rule instead of a federal one. *Id.* at 1507-08, 1509 (case brought under Foreign Sovereign Immunities Act raising non-federal property-law claims). Noting that the forum State's choice-of-law rule would apply if the state-law suit was filed in state court, or in federal court under diversity-of-citizenship jurisdiction, the Court saw no

reason for federal law to supplant an otherwise applicable rule. *Id.* at 1509. *See also California Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, 54 F.4th 1078, 1089 (9th Cir. 2022) (Supreme Court in *Cassirer* dispelled uncertainty in which choice-of-law rule to apply in federal question and other cases in which jurisdiction not grounded in diversity). I therefore apply Missouri's choice-of-law rules to this action.

Under Missouri law, the first step in a choice-of-law analysis is to examine whether the different states' laws at issue actually conflict. *Nestlé Purina Petcare Co. v. Blue Buffalo Co.*, 129 F. Supp. 3d 787, 790 (E.D. Mo. 2015). If there is such a conflict, then I must determine which law applies. *Id.* at 791. If there is no conflict, I need not undergo a choice-of-law analysis; I apply the forum State's law, provided that that State has significant contact or aggregate contacts to the parties and occurrence at issue, creating State interests, "such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981). *See also In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Pracs. Litig.*, No. 16-02709-MD-W-GAF, 2019 WL 1418292, at *4 (W.D. Mo. Mar. 21, 2019) (class action) (same).

The parties appear to dispute what constitutes an actual conflict for choice-of-law purposes. Defendants cite Second Circuit precedent stating that an actual conflict does not require demonstration that the choice of which rule to apply *will* be outcome determinative, but instead only requires different substantive rules that have a "significant *possible*

effect on the outcome of the trial." *Finance One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005). Plaintiffs, in a footnote, suggest that I look to "whether 'a person subject to regulation by two states can comply with the laws of both.'" (ECF 1275 at hdr. p.[8] 18 n.37 (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993)).) Last year, the United States District Court for the Western District of Missouri articulated that "[u]nder Missouri law, a conflict of laws does not exist unless the interests of the two states cannot be reconciled." *Rey v. General Motors LLC*, No. 4:19-CV-00714-DGK, 2021 WL 4786469, at *3 (W.D. Mo. Oct. 13, 2021) (internal quotation marks and citation omitted) (appeal pending). Applying that standard to the circumstances of that case, the court appeared to adopt the test urged by the defendants here by finding an actual conflict where application of each forum's law was "*potentially* outcome determinative." *Id.* (emphasis added).

I will apply the standard urged by defendants and used by the Western District in *Rey* and look to whether the relevant law of each forum is potentially outcome determinative on the issues raised. Under the principle of "*dépéçage*," I apply this test individually to each particular issue. *In re Nuvaring® Prods. Liab. Litig.*, 957 F. Supp. 2d 1110, 1113 (E.D. Mo. 2013) (citing *Glasscock v. Miller*, 720 S.W.3d 771,

[8] Given the inconsistent pagination of the briefs and several thousand pages of exhibits submitted in this action, I will refer to the page number identified in the ECF header of a filed document when citing to that document.

775 (Mo. Ct. App. 1986)); *Johnson v. Avco Corp.*, No. 4:07CV1695 CDP, 2009 WL 4042747, at *3 (E.D. Mo. Nov. 20, 2009).

If I find a conflict between the relevant laws, I must apply the most-significant-relationship test as set forth in the Restatement (Second) of Conflict of Laws to determine the applicable law. *See Reid v. Doe Run Res. Corp.*, 74 F. Supp. 3d 1015, 1023-24 (E.D. Mo. 2015); *A.O.A.*, 350 F. Supp. 3d at 847. "When tort claims are at issue, the applicable law is 'the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties.'" *Nestlé Purina Petcare*, 129 F. Supp. 3d at 791 (quoting *Thompson by Thompson v. Crawford*, 833 S.W.2d 868, 870 (Mo. banc 1992)). *See also* Restatement (Second) of Conflict of Laws § 145 (1971). To determine which state has the most significant relationship, Missouri courts must consider: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. *Id.* at § 145(2). "These contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.*

Against this backdrop, I turn to defendants' claim that Articles 1971 and 1981 of Peru's Civil Code conflict with Missouri law on the relevant issues and that consideration of the Restatement factors dictates that Peruvian law applies.

B. Article 1971 and Negligence

Article 1971.1 of Peru's Civil Code provides that there can be no civil liability for one who acts "in the regular exercise of a right." Defendants interpret this to mean that they are immune from liability for any personal injury or environmental damage caused by any actions they or DRP may have taken *so long as* they complied with their obligations under the PAMA. Because Missouri law provides no such immunity, defendants argue an actual conflict exists. And, defendants argue, because the summary judgment record shows that they complied with PAMA regarding the four projects they claim plaintiffs' experts concede are the only bases for plaintiffs' negligence claims, they are entitled to judgment as a matter of law under Article 1971.

1. *Actual Conflict*

Defendants argue that Dr. Matson's testimony effectively limited plaintiffs' negligence claims to the alleged delay in completing four projects at the Complex that would have reduced fugitive lead emissions. Defendants contend that when this testimony is juxtaposed with Ms. Midkiff's that DRP was not undercapitalized at the time plaintiffs claim the projects should have been completed, defendants cannot be found liable for DRP's failure to implement the projects earlier than it did because 1) they lacked the necessary control over DRP, and 2) Dr. Matson agreed that the four projects were timely completed under PAMA.

Plaintiffs' evidence of negligence, however, is not limited to the testimony of Dr. Matson cited by defendants, and their evidence of upstream control is not limited to the testimony of Ms. Midkiff.

Dr. Matson stated he agreed with plaintiffs' prior expert, Dr. Cheremisinoff, who is now deceased, that defendants did not exercise reasonable care when they failed to apply practices and implement controls recognized by industry and authoritative sources to reduce emissions.[9] Dr. Matson testified that defendants had knowledge of the harmful effects of lead emissions, that they knew fugitive emissions were a major source of contamination that could cause injury, and that the PAMA did not prevent them from taking necessary remedial actions. Plaintiffs also cite to defendants' own documents that show that even after completion of certain enclosure projects they undertook later, defendants still expected dangerous levels of fugitive lead emissions. Contrary to defendants' assertions, Dr. Matson's testimony does not show that plaintiffs could not recover under Peruvian law on their negligence claims; nor is there anything in the evidence that shows that the laws of Missouri and Peru conflict on the torts alleged in the amended complaint. The summary judgment record does not show that my earlier ruling on the application of Missouri law to plaintiffs' asserted claims should be changed.

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[9] Plaintiffs indicate that they believe some of Dr. Cheremisinoff's deposition testimony may be admissible at trial, but they did not submit any of that testimony in response to this motion.

But defendants' immunity *defense* under Article 1971 is different. Defendants argue that Article 1971 provides a "safe harbor" or immunity from liability so long as they complied with the requirements of the PAMA. Missouri law provides no such immunity.[10] And they argue Dr. Matson's testimony that the four fugitive emissions projects were timely completed under PAMA entitles them to this defense. Because which law applies to this defense is potentially outcome determinative, I conclude that an actual conflict between Peruvian and Missouri law exists on this issue, but on this issue alone.[11]

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[10] The government contractor defense recognized in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), seems somewhat analogous, but upon examination is not. That defense is a creation of federal common law for products liability cases and imposes different requirements than Article 1971: it requires that the government approved precise specifications for whatever equipment caused the injury, that the equipment conformed to the specifications, and that the supplier warned the government about risks from the product that were known to the supplier but not the government. *See In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2:18-mn-2873-RMG, 2022 WL 4291357 (D.S.C. Sept. 16, 2022).

[11] Plaintiffs argue that Peru's environmental laws are more specific than Article 1971 and render 1971 inapplicable here. On the earlier motion to dismiss, both sides argued about whether Section 142.2 of the General Environment Act (GEA) rendered Article 1971 inapplicable to a mining operation. Plaintiffs continue to make this argument, but in their reply brief to the instant motion for summary judgment, defendants point out that the GEA was not passed until 2005 (ECF 843-12), so it could not apply to actions taken before that date. The provisions of the

2. *Peruvian Law Applies to the Immunity Defense*

Having concluded that an actual conflict exists between Missouri and Peruvian law on defendants' immunity defense, I look to Missouri's choice-of-law rule to determine which forum's law applies to the issue.

Consideration of the § 145 Restatement factors governing tort claims as set out above leads me to a neutral conclusion as to which law applies. While plaintiffs' injuries occurred in Peru, the conduct that plaintiffs claim caused the injuries is alleged to have largely occurred in Missouri through the overarching decisions and actions of the defendants taken here. Likewise, although the nationalities of the parties are diverse, the defendants are incorporated and/or have their principal place of business here, reside here, and/or conducted substantial business here directly related to this cause of action. Finally, the relationship between the parties is centered in Peru, given that plaintiffs' connection to the Complex is in Peru and their exposure to the toxins emitted by the Complex occurred there.

Consideration of additional factors as set out in § 146 of the Restatement, however, leads me to conclude that the law of Peru, and specifically Article 1971 of its Civil Code, applies. Section 146 of the

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previous Environmental and Natural Resources Code, passed in 1990, are far more general (ECF 843-6), and neither party has addressed how those provisions interact with Article 1971.

Restatement (Second) of the Conflict of Laws governs actions for personal injury and creates a presumption in favor of applying the law of the jurisdiction where the injury occurred. *Dorman v. Emerson Elec. Co.*, 12 F..3d 1354, 1359 (8th Cir. 1994). That presumption may be rebutted, however, if "with respect to the particular issue, some other state has a more significant relationship[.]" Restatement (Second) of the Conflict of Laws § 146. In determining which state has a more significant relationship, § 146 directs that I look to the principles stated in § 6 of the Restatement. Those principles are:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and,
>
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of the Conflict of Laws § 6.

Here, for several reasons, Peru has the most significant relationship with regard to the particular issue of defendants' Article 1971 immunity defense. First and foremost, plaintiffs' injuries occurred in Peru, so I start with the presumption that Peruvian law applies. Moreover, Article 1971 states a policy of Peru to provide immunity to parties who are exercising a "right" given to them by the government. In the context of this case, that immunity would deprive injured Peruvian citizens of compensation that would otherwise be available to them. This may reflect a policy decision by Peru that economic interests may override the interests of compensating injured persons, although the Article is not specific to mining situations. Additionally, and especially when considered in light of PAMA, Peru has a strong interest in the certainty, predictability, and uniformity of result for claims related to PAMA. Accordingly, Article 1971 applies to defendants' "safe harbor" immunity defense.

3. *Summary Judgment Not Warranted*

Assertion of this immunity defense under Article 1971, of course, is not the same as proving entitlement to summary judgment thereon.[12] Defendants argue

[12] Summary judgment must be granted when the pleadings and proffer of evidence demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). I

that Article 1971 absolves them from all liability on plaintiffs' claims because the work at the Complex was the result of their assumption of obligations under PAMA and because they complied with the PAMA timeline regarding the four fugitive emissions projects they assert constitute the only remaining bases for plaintiffs' negligence claims.[13]/[14]

This protection is not as broad as defendants urge. On the earlier motion to dismiss, both sides presented expert witnesses who testified about this provision of Peru's Civil Code. Mr. Rosenn, defendants' expert, described Article 1971 as follows: "*If* Doe Run Peru complied with the environmental obligations it assumed under the La Oroya PAMA and the STA, it would come within the principle of non-

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must view the evidence in the light most favorable to the nonmoving party and accord it the benefit of all reasonable inferences. *Scott v. Harris*, 550 U.S. 372, 379 (2007). My function is not to weigh the evidence but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

[13] As discussed above, the summary judgment record shows that plaintiffs' viable claims are not so limited.

[14] Notably, defendants now argue that this is an element of plaintiffs' case and not an affirmative defense despite their position taken earlier in this litigation that Article 1971 provided them a "defense." (*See* ECF 909, Defts.' Reply Memo. re Appl. of Foreign Law, at hdr. p. 80—referring to whether defendants could "successfully utilize the Article 1971 defense"; *id.*—referring to their "simple argu[ment] that the defense is available"; *id.* at hdr. p. 81—referring to whether defendants "will later successfully establish immunity under Article 1971.")

liability created by Article 1971 of the Civil Code." (ECF 150-1 at hdr. p. 26, ¶ 57. Emphasis added.) He went on to state that under Peruvian law, whether DRP did or did not meet the criteria for exclusion from liability is a "factually dense question." (*Id.* at hdr. p. 28, ¶ 60.)

This factually dense question must remain for trial, as genuine disputes remain on the issue. Whether defendants fully complied with PAMA is itself disputed. Although the evidence is extremely confusing about which PAMA projects DRP was obligated to perform versus those retained by Centromin, the parties agree at least as to one of the projects that DRP did not complete: building new sulfuric acid plants. But plaintiffs assert that completion of the specific "projects" listed in PAMA is not all that was required to comply with Peruvian law, given that PAMA's purpose was to reduce emissions to levels at or below Peru's environmental standards. In the currently pending arbitration between Peru and Renco, Peru itself asserts that defendants had not met all PAMA obligations at the time they shut down the smelter. And there is evidence that defendants had internal discussions about whether the substantial payments DRP was obligated to send to DRR were limiting DRP's ability to make further environmental improvements.[15] From the contested evidence, a jury could also conclude that defendants acted recklessly or maliciously, which certainly would not be insulated

[15] *See* discussion *post* at Section VI.A.

by PAMA. These "factually dense" questions cannot be resolved on summary judgment, as the material facts remain genuinely contested.

Accordingly, while Peruvian law applies to defendants' Article 1971 immunity defense, defendants are not entitled to summary judgment on the defense.

C. Article 1981 and Vicarious Liability of the Upstream Defendants

In my October 2018 Order, I set out the substantive law of Missouri and Peru on veil-piercing and agency theories of liability and determined that there was no actual conflict between the two forums' laws. *A.O.A.*, 350 F. Supp. 3d at 836-40, 847. And I found that plaintiffs' allegations fell squarely within the relevant laws of both fora and, if proven, could provide a basis to impose liability on defendants under those theories. *Id.* at 836-40. In their current motion here, defendants do not challenge those earlier findings nor ask that I revisit them. Instead, defendants assert a new argument that Article 1981 of Peru's Civil Code precludes plaintiffs from pursuing their veil-piercing and agency claims in the circumstances of this case, whereas Missouri law does not.[16] Given this actual conflict, defendants argue, I must apply Peruvian law to plaintiffs' claims and

[16] Defendants aver that because plaintiffs' direct liability claims rely on the same facts and factors as the veil-piercing/agency claims, they determined to address only the vicarious liability theories here. (ECF 1231 at hdr. p. 16, n.4.)

dismiss them under Article 1981. For the following reasons, I continue to conclude that no actual conflict exists and that Missouri law applies to plaintiffs' theories of vicarious liability.

1. *No Actual Conflict*

Under Peruvian law, when a subordinate relationship exists and the subordinate acts on behalf of the parent and causes damage, then the parent may be liable for the acts of the subordinate. (ECF 871-121, Espinoza Report at ¶ 5.24.) This type of relationship is a low bar, only requiring a "causal relationship" between the parties. (*Id.* at ¶ 5.25.) Thus, if it is possible to exercise power over a party, then a subordinate relationship is present because of the mere existence of the relationship and the exercise of control. Accordingly, the relationships between defendants, their agents, and DRP as their alter-ego could qualify as "subordinate" relationships if plaintiffs can prove their veil-piercing or agency allegations. And liability under Peruvian law is established when there is the mere existence of a relationship between the principal and agent. (*Id.* at ¶ 5.26.) When a party directs another to act, and the latter causes damages while performing those duties, then the "direct principal and the vicarious principal are subject to joint liability." (*Id.* at ¶ 5.27.) This is not substantively different from the law of Missouri.

Regarding this vicarious liability, defendants contend that Article 1981 of Peru's Civil Code requires that, in order for a principal to be liable for a subordinate's conduct, there must have been an

actual adjudication of the subordinate's liability in a prior judicial proceeding. And they assert that expert testimony establishes that that adjudication must have been made in a prior *separate* judicial proceeding. But the experts do not say that. Instead, the experts agree that for there to be liability of the principal, liability of the subordinate must simply be proven. This, of course, is no different from what Missouri law requires. The experts also agree that there must be a "judicial determination" of the subordinate's liability before the principal is determined to be liable, but none of the experts say that that must take place in a separate judicial proceeding.[17] It is not at all uncommon in Missouri and federal courts to hold bifurcated trials or to ask the jury to answer special interrogatories, either of which could easily accomplish this prior determination requirement. Thus, Article 1981 does not preclude plaintiffs' claims to the extent they rest on veil-piercing or agency theories of liability, and there remains no conflict between the substance of Missouri and Peruvian law on these issues.

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[17] Defendants' expert, Mr. Rosenn, says it is not uncommon for a criminal case against an agent/employee to be followed by a civil case against the principal/employer. (ECF 843-17 at hdr. p. 17, ¶ 39.) While it may be not uncommon in that context, neither Mr. Rosenn nor any other expert says two different proceedings are required for the type of civil liability alleged here.

2. *Missouri Law Applies to Vicarious Liability Claims*

With no conflict, I apply Missouri law to plaintiffs' veil-piercing and agency claims given the State's significant contacts with the defendants, their challenged conduct, and the occurrences giving rise to this cause of action, creating State interests. *Hague*, 449 U.S. at 313; *In re Dollar Gen. Corp.*, 2019 WL 1418292, at *4. Several significant contacts are set out in my October 2018 Order on defendants' motion to dismiss. *See A.O.A.*, 350 F. Supp. 3d at 848. And evidence adduced through discovery and presented on summary judgment further shows Missouri's significant contacts as they relate to plaintiffs' veil-piercing and agency claims.

a. Significant Contacts re Piercing the Corporate Veil

Defendants argue that the testimony of plaintiffs' relevant experts shows that DRP was not undercapitalized and that defendants lacked the requisite control over DRP and thus that plaintiffs cannot demonstrate that any liability-inducing conduct occurred in Missouri.[18] I disagree. As

[18] To pierce the corporate veil under Missouri law, plaintiffs must show defendants' dominant control of DRP, that the control was used to commit a fraud or wrong or breach of a duty, and that the control and breach of duty proximately caused plaintiffs' injury. *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. Ct. App. 1986). In this motion, defendants challenge plaintiffs' evidence on the first *Collet* factor, *i.e.*, control, and

described above, defendants read the testimony of plaintiffs' experts too narrowly, and plaintiffs have presented sufficient evidence beyond expert testimony that shows relevant aggregate contacts with Missouri.

i. Undercapitalization

Defendants strenuously argue that plaintiffs cannot demonstrate that DRP was undercapitalized and, on that basis alone, cannot proceed on their veil-piercing claim. But undercapitalization is not required to be shown in order to pierce the corporate veil, although it can be used to show that control of a subordinate entity was used for an improper purpose. *Radaszewski by Radaszewski v. Telecom Corp.*, 981 F.2d 305, 307-08 (8th Cir. 1992). The Midkiff testimony defendants point to on capitalization therefore does not end the analysis. And even on this point, there is sufficient evidence that pivotal decisions regarding DRP's capitalization were made in Missouri and directly affected Missouri corporations.

First, the financing structure for DRP's purchase of Metaloroya was arranged by Renco and implemented by Zelms and Kaiser in their executive roles with DRR. This structure included a $125 million capital contribution to Metaloroya that was

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argue that undercapitalization is required to meet the second factor. For purposes of this motion, I address only those arguments and do not undertake an exhaustive analysis of all three *Collet* factors.

immediately "loaned" back from Metaloroya to Doe Run Mining and never directed to DRP. This financing decision implemented by decisionmakers in Missouri thus deprived DRP of its own purported capital. Indeed, evidence shows that DRP was structured from its inception to be undercapitalized as a stand-alone entity, especially regarding its ability to comply with its environmental obligations. *Cf. Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. Ct. App. 1986) (veil-piercing analysis focuses on the "transaction attacked").

Evidence also shows that Renco and DRR arranged for DRP to be a guarantor on DRR's debts to DRR's bondholders despite DRP's difficulties meeting its own obligations. Moreover, the upstream Renco/Doe Run entities caused substantial monies to be transferred to themselves from DRP through service and management contracts, fees, and other methods, which decreased DRP's on-hand capital needed to meet its environmental obligations. Indeed, evidence shows that Eric Peitz, DRP's Treasurer, warned his superiors at DRR as early as 1998 that DRP would not be able to afford to undertake additional environmental remediation as long as it was burdened with the upstream payments.

ii. Control

Plaintiffs have also produced evidence showing that defendants controlled DRP from Missouri.[19]

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[19] *Collet*, 708 S.W.2d at 284, sets out eleven factors to consider when measuring the degree of control exercised by a dominant corporate entity/shareholder over a subordinate:

> (1) The parent corporation owns all or most of the capital stock of the subsidiary.
>
> (2) The parent and subsidiary corporations have common directors or officers.
>
> (3) The parent corporation finances the subsidiary.
>
> (4) The parent corporation subscribes to all of the capital stock of the subsidiary or otherwise causes its incorporation.
>
> (5) The subsidiary has grossly inadequate capital.
>
> (6) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
>
> (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
>
> (8) In the papers of the parent corporation or the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility isreferred to as the parent corporation's own.
>
> (9) The parent corporation uses the property of the subsidiary as its own.

First, defendants Renco and DRR caused DRP's incorporation. DRP's ownership is directly traceable to and dependent upon the panoply of Renco/Doe Run upstream companies, including companies incorporated in and managed from Missouri by their executives, including their Director, Rennert.

Evidence also shows significant overlap of officers and directors throughout the Renco/Doe Run entities, including DRP. The individual defendants (including some Missouri citizens) simultaneously held executive and board positions among the various entities (including Missouri corporate citizens): Zelms was President, CEO, and Vice Chairman of DRR at the same time he was President and CEO of D.R. Acquisition, and at the same time he was President of Doe Run Cayman, DRP's direct parent. Likewise, Kaiser was Vice President and CFO of DRR at the same time he was President of D.R. Acquisition and Doe Run Cayman, which overlapped with his time as Finance Manager of both Doe Run Mining and DRP and as Executive Vice President of DRP. As for Neil, he was Vice President of DRR at the same time he was President and General Manager of DRP and later was Vice Chairman, President, and CEO of DRR while simultaneously serving as President of Doe Run Cayman/Cayman Holdings, DRP's direct parent. And

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(10) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation and the latter's interest.

(11) The formal legal requirements of the subsidiary are not observed.

although Rennert did not hold the title of "Director" or "Chairman" with DRP directly, he nevertheless was Director and Chairman of all other entities who themselves exerted control over DRP, and he established policies under which he "controlled [DRP] in a manner similar to other Renco companies (normally by [himself] in [his] capacities as shareholder and director)[.]" (ECF 640-10, Mar. 13, 1998 Memo to Zelms from Rennert.) Finally, evidence before the Court shows that other individuals likewise held officer and/or director positions simultaneously in the Renco/Doe Run entities, including but not limited to Kenneth R. Buckley (DRP, Doe Run Mining, and DRR), Dennis A. Sadlowski (Doe Run Cayman and DRR), and John Binko (Renco and DRR).

Plaintiffs have also presented evidence that salaries and bonuses of some DRP executives and employees, including DRP General Managers and Presidents Buckley and Neil, were paid exclusively by DRR in Missouri pursuant to employment agreements with DRR and compensation packages arranged and signed by Rennert. In addition, several DRR employees acted as advisors and/or consultants to DRP to establish policies and protocols in safety, sales, financial operations, environmental issues and more, and to participate in discussions and negotiations with the Peruvian government regarding DRP's PAMA obligations. Several intercompany agreements required DRP to pay several million dollars each year to DRR and Renco for these services, and other agreements required DRP to pay millions

of dollars upstream in "flat fees."[20] And as further evidence of the overlap of executive duties, Buckley signed these agreements in his capacity as an officer of DRP, Doe Run Mining, *and* DRR. Kaiser also signed a bond indenture on behalf of DRR as issuer and on behalf of Doe Run Cayman, Doe Run Mining and DRP, as guarantors.

There is also evidence that DRP took orders from DRR, which itself was directed by Renco and Rennert in its dealings with DRP. For instance, although Buckley was part of the due diligence team regarding the purchase of the Complex and was appointed General Manager of DRP upon its purchase, DRR nevertheless counseled Buckley as to which employees to retain at the smelter; and it was DRR, not DRP, that awarded the contract for upgrades to the Complex. Dan Vornberg, Director of Environmental Affairs at DRR, oversaw the environmental issues at the Complex because DRP did not have anyone capable of performing such work. Evidence also shows that DRR and Renco negotiated contracts with third parties for the Complex to process and provide certain refined metals. DRP was not involved in these negotiations and indeed was deliberately excluded from the conversations. (*See* Chaput Dep., ECF 1277-56 at hdr. pp. 10-11, dep. pp. 272-74.) In addition, when Peitz sounded the alarm that DRP's financial health and PAMA obligations were in peril in part because of the millions of dollars

[20] When DRP sought extensions from the Peruvian government to meet its PAMA obligations, the government conditioned its approval on DRP stopping these upstream money transfers.

being sent upstream to DRR, DRR continued to demand—and DRP continued to pay—the upstream payments.[21] And when Vornberg repeatedly informed Zelms in 2000 and 2001 of DRP's immediate need to move forward on the zinc-ferrites project to address profitability issues and environmental concerns, Zelms did not act upon it. (*See* ECF 640-2, June 14, 2017 Zelms Dep. at hdr. pp. 35-37, dep. pp. 133-44.) Follow-up requests for permission to move forward on the project went unanswered, which financial personnel described as "incredible." (*See* ECF 1279-38.)[22]

Finally, plaintiffs have presented evidence showing that Renco, DRR, and their executives described, referred to, and publicly acknowledged DRP as a department or division of Renco/DRR and not an independent entity. Such evidence includes but is not limited to DRP being described as the "Peruvian operations" of DRR, as one of DRR's "facilities," as DRR's "fifth division," as one of Renco's "locations," and as an "expansion" of DRR. (*E.g.*, Blinko Dep., ECF 1277-54; DRR Corporate Profile, ECF 1277-64; Renco Investment Booklet, ECF 640-58.) Organizational charts identified executive roles at DRP as positions over DRR's "Peru Operations." (*E.g.*, Neil Dep., ECF 1277-60 at hdr. pp. 7-8, dep. pp. 70-74.) Zelms, as President and CEO of DRR, referred to DRR and DRP

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[21] Evidence shows that Peitz had these concerns and shared them as early as 1998. (ECF 640-77.)

[22] Actual work on the ferrites project began in June 2005. (ECF 1277-72.)

jointly when referring to profitability of operations and implementation of projects. Memoranda originating from Kaiser as DRR's CFO referred to "the Peruvian activities" of DRR. (*E.g.*, Kaiser Memo., ECF 640-37.) Indeed, despite holding executive positions for several years at Doe Run Cayman, Doe Run Mining, and DRP, Kaiser identifies his professional work during this time as being performed on behalf of DRR only. (*See* Kaiser Resumé, ECF 1277-78.)

b. Significant Contacts re Agency

In their motion, defendants appear to conflate the elements of veil-piercing and agency, arguing that plaintiffs' failure to provide evidence of complete control and undercapitalization defeats their claims based on both theories. But agency liability and veil-piercing are based on different factors.

Unlike piercing the corporate veil, "[c]omplete domination or control of the agent by the principal … is not required to establish an agency relationship." *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 380 (Mo. Ct. App. 2014). "A traditional agency theory focuses on the arrangement between the parent and the subsidiary, the authority given in that arrangement, and the relevance of that arrangement to the plaintiff's claim." *Id.* There are three essential elements of an agency relationship:

> 1) that an agent holds a power to alter legal relations between the principal and a third party;

> 2) that an agent is a fiduciary with respect to matters within the scope of the agency; [and]
>
> 3) that a principal has the right to control the conduct of the agent with respect to matters entrusted to the agent[.]

Id. at 382-83. A power of attorney creates a principal-agent relationship. *See Randall v. Randall*, 497 S.W.3d 850, 855 (Mo. Ct. App. 2016); *Arambula v. Atwell*, 948 S.W.2d 173, 176 (Mo. Ct. App. 1997). And a corporation can act only through its agents. *State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 495 (Mo. banc 2019).

In their various motions for summary judgment, defendants address plaintiffs' agency theory of liability only as it pertains to DRP as an agent acting on behalf of the defendants. (*See* ECF 1233 at hdr. p. 93; ECF 1242 at hdr. pp. 40-41.) Defendants do not address plaintiffs' theory as to any other alleged agent-actor, other than generally asserting in a cursory manner that plaintiffs' agency claims fail. (*See* ECF 1301 at hdr. pp. 47-48.) In response, plaintiffs abandon their corporate agency theory of liability as to DRP acting as an agent of defendants. (*See* ECF 1276 at hdr. p. 13, n.1; hdr. p. 149.)

Throughout the amended complaint, however, and indeed in each of the remaining Counts, plaintiffs plainly allege that Missouri citizen DRR as well as Renco and/or Rennert committed tortious conduct "by and through" their agents or that they "and their agents" committed such conduct. The amended

complaint plainly identifies the individual defendants (all who lived and conducted business in Missouri during the relevant time) and others as agents on behalf of the Missouri corporate defendants and related entities, as well as the bases on which those individuals achieved agent status, including holding powers of attorney to act on behalf of the relevant principal-entities in relation to the transactions at issue in this case. These allegations go unchallenged by defendants, and they are sufficient to show Missouri's significant contacts to plaintiffs' agency claims.

Accordingly, because there is no conflict between Article 1981 and Missouri law on plaintiffs' veil-piercing and agency claims, and because Missouri has significant contacts creating State interests on the claims, I continue to find that Missouri law governs the claims. I will therefore deny defendants' motion to apply Peruvian law to these theories of liability. Because Peruvian law does not apply, defendants' contention that they are entitled to summary judgment on the claims under Article 1981 of Peru's Civil Code is without merit and will be denied.

VI. International Comity and Transnational Law Doctrines

Defendants alternatively move to dismiss this action under the doctrine of international comity as well as various other transnational doctrines. Defendants argue that dismissal of this action is warranted under those doctrines because proceeding on plaintiffs' claims in this Court would transgress

"bedrock principles of transnational law and sovereignty." (ECF 1231 at hdr. p. 36.)

International comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). "Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation." *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971). Rather, it "is a discretionary rule of practice, convenience, and expediency." *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (internal quotation marks and citations omitted).

The doctrine has been variously described as amorphous, fuzzy, and elusive. *JP Morgan*, 412 F.3d at 423 (quoting Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 281 (1982)); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). But courts generally understand international comity to encompass two distinct doctrines. *See, e.g, Mujica v. AirScan Inc.*, 771 F.3d 580, 598-99 (9th Cir. 2014). The first is prescriptive comity, "the respect sovereign nations afford each other by limiting the reach of their laws." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J.,

dissenting). "That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted." *Id.* The second is adjudicatory comity, which is referred to as a "comity among courts" and viewed as "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state[.]" *In re Maxwell Commc'n Corp. plc by Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996).

Defendants argue that both prescriptive and adjudicatory comity require dismissal of plaintiffs' claims. First, they argue that adjudicatory comity requires that I decline to exercise jurisdiction over this action because Peru has the greater interest, thereby making Peru the more appropriate forum for adjudication of plaintiffs' claims. I previously rejected this argument in ruling defendants' earlier motion to dismiss. *A.O.A.*, 350 F. Supp. 3d at 848-53. But "comity is a fluid doctrine that can change in the course of the litigation[,]" *Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 569 (9th Cir. 2020) (internal quotation marks and citation omitted), and defendants contend that legal and factual changes merit reconsideration of my earlier decision. Second, defendants argue that the presumption against extraterritoriality, a prescriptive comity doctrine, requires dismissal of plaintiffs' claims because Missouri common law does not apply to conduct in Peru. Third, they argue that dismissal is also required under the act of state doctrine, another prescriptive comity doctrine, because adjudicating plaintiffs' claims will necessitate ruling on the validity of acts

taken by Peru within its own territory. Finally, defendants invoke the foreign affairs doctrine to argue that adjudicating plaintiffs' state-law claims will encroach upon the federal government's exclusive power over foreign affairs.

For the following reasons, defendants' arguments fail, and I will deny their alternative motion to dismiss under transnational law doctrines.

A. Adjudicatory Comity, or International Comity Abstention

"Federal courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred upon them." *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). But in some private international disputes, principles of adjudicatory comity counsel courts to refrain from exercising that jurisdiction. *Id.* Thus, adjudicatory comity is an abstention doctrine. The task for a court evaluating a request for dismissal on adjudicatory comity grounds "is not to articulate a justification *for* the exercise of jurisdiction, but rather to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction." *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 93 (2d Cir. 2006). Because there is no clear test for identifying such exceptional circumstances in the adjudicatory comity context, "courts have been left to cobble together their own approach[.]" *Mujica*, 771 F.3d at 603 (quoting Donald Earl Childress III,

Comity as Conflict: Resituating International Comity as Conflict of Laws, 44 U.C. Davis L. Rev. 11, 51 (2010)) (internal quotation marks omitted).

In their earlier motion to dismiss, defendants argued that both prescriptive and adjudicatory comity were implicated here and that consideration of the factors set out in § 403(2) of the Restatement (Third) of Foreign Relations Law required dismissal of plaintiffs' claims.[23] In response, plaintiffs argued that

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[23] Those factors are:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;

defendants' prescriptive comity defense failed because there was no true conflict between Missouri and Peruvian law. (*See* ECF 640 at hdr. pp. 78-79.) As to adjudicatory comity, plaintiffs recognized that the Eighth Circuit had not yet spoken on its prospective application—that is, in the absence of a foreign judgment or parallel foreign proceeding—and argued that neither the Restatement factors nor other tests articulated by other circuit courts warranted abstention. (*Id.* at hdr. pp. 79-92 (citing *In re: Vitamin C Antitrust Litig.*, 837 F.3d 175, 184 (2d Cir. 2016)[24]; *Mujica*, 771 F.3d at 603-08.) Looking at both the Restatement and the test described by plaintiffs, which required me to assess the strength of the United States' interest in using a foreign forum, the strength of Peru's interests, and the adequacy of the alternative forum, *see Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004);

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

[24] After briefing closed on the earlier motion to dismiss, the Supreme Court vacated and remanded *In re: Vitamin C. See Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865 (2018).

Mujica, 771 F.3d at 603,[25] I concluded that abstention was inappropriate in the circumstances of this case.

In reaching my conclusion, I reasoned that, under either test urged by the parties, the most important factor was the interests of each sovereign. *A.O.A.*, 350 F. Supp. 3d at 850. I noted that neither the United States nor Peru adopted a specific position on this litigation: the State Department was silent on the issue, and plaintiffs and defendants presented letters from Peruvian officials asserting contradictory positions. I also determined that there was no true conflict between the relevant Missouri laws and their Peruvian analogues. I concluded that a comparable form of relief existed under Peruvian law for each of plaintiffs' plausible claims and that defendants could have complied with the laws of both Missouri and Peru. *Id.* at 851-52. The location of the conduct, the nationality of the parties, and the character of the conduct in question did not support dismissal either. Plaintiffs are Peruvian children injured in Peru, but they chose to sue United States defendants in the United States for defendants' alleged decisions and actions taken in the United States. While Peru has an interest in providing a forum for redressing the

[25] *Mujica* also considers several factors outlined in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976), to assess each sovereign's interest: "(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the [countries], and (5) any public policy interests." *Mujica*, 771 F.3d at 603-04. *See also Cooper*, 960 F.3d at 566 (applying the three-factor *Ungaro-Benages* test and the five-factor *Timberlane* test).

injuries of its citizens, the United States also has a "significant interest in providing a forum for those harmed by the actions of its corporate citizens." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1232 (9th Cir. 2011) (addressing California's interest in its resident corporations). *Cf. CL-Alexanders Laing & Cruickshank v. Goldfeld*, 709 F. Supp. 472, 481 (S.D.N.Y. 1989) (addressing motion to dismiss on grounds of *forum non conveniens*, court noted that a cognizable state interest exists when a United States corporation executes securities fraud abroad). I determined that the remaining factors were neutral. *A.O.A.*, 350 F. Supp. 3d at 852. Finally, I determined that Peru was not an adequate alternative forum because it was likely unable to exercise jurisdiction over defendants. *Id.*

Because neither the United States nor Peru clearly opposed the Court's exercise of jurisdiction, the strength of Peru's interest in providing a forum for the litigation did not outweigh the United States' interest, and it was not clear that Peru provided an adequate alternative forum, I declined to surrender my "virtually unflagging obligation" to exercise jurisdiction and denied defendants' motion to dismiss on international comity grounds. *A.O.A.*, 350 F. Supp. 3d at 853. Where, as here, there is no parallel foreign proceeding, abstention "requires a serious problem that would be created by federal court proceedings but that would not be present if the matter were adjudicated abroad." *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1032-33 (11th Cir. 2014). Defendants failed to show such a problem.

Defendants now argue that I need to reevaluate that conclusion in light of the summary judgment record, asserting specifically that the record shows 1) a true conflict between Missouri and Peruvian law; 2) the alleged wrongful conduct took place in Peru, with no nexus between defendants' conduct in the United States and the relevant conduct in Peru; and 3) that foreign interests embodied in the United States-Peru Trade Promotion Agreement, or TPA, dictate that adjudication of plaintiffs' environmental claims must take place in Peru.

1. *True Conflict*

Defendants rely on their factual averments made in relation to their choice-of-law analysis to argue that a true conflict exists between Missouri and Peruvian law, thus warranting abstention. If the analysis were that simple, I would deny this argument for the reasons set out in Section V above. But determining whether a true conflict of law exists for purposes of abstaining under international comity principles is not so straightforward.

First of all, the Eighth Circuit has not determined whether adjudicatory comity requires a true conflict of law. And other courts have taken diverse positions, primarily differing in their treatment of the Supreme Court's "true conflict" analysis in *Hartford Fire*. In *Hartford Fire*, when determining whether the district court should have declined to exercise jurisdiction over Sherman Act claims against London reinsurers, the Supreme Court noted that "[t]he only substantial question in this litigation is whether 'there is in fact

a true conflict between domestic and foreign law.'" 509 U.S. at 798 (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)). The Court explained that "[n]o conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'" *Id.* at 799 (quoting Restatement (Third) of Foreign Relations Law § 403, Comment *e*). Because there was no true conflict between British law and the law of the United States, the Court reasoned that there was "no need … to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.*

The Tenth Circuit has interpreted this language to require a true conflict to invoke adjudicatory comity. *See United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1223 (10th Cir. 2000). And the Third Circuit views the language as requiring a true conflict of law in the absence of a foreign judgment or ongoing proceeding in a foreign tribunal. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006). The Ninth Circuit, however, does not require proof of a true conflict. *Mujica*, 771 F.3d at 602. Because *Hartford Fire* did not address the "other considerations" bearing on comity, and other courts have generally required proof of such a conflict only when prescriptive comity was at issue, the Ninth Circuit concluded that, "[a]t least in cases considering adjudicatory comity, we will consider whether there is a conflict between American and foreign law as one factor in, rather than a

prerequisite to, the application of comity." *Id.* at 600-02.[26]

Whether a true conflict is an absolute requirement or merely a factor to consider, none

[26] The court noted that the Second, Eleventh, and Federal Circuit Courts had also not required proof of a true conflict when considering adjudicatory comity. *Mujica*, 771 F.3d at 600-01 (citing *JP Morgan*, 412 F.3d at 424; *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006); *Ungaro-Benages*, 379 F.3d at 1238; *Int'l Nutrition v. Horphag Rsch. Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001)). After the Ninth Circuit decided *Mujica*, the Second Circuit explained that it did not consider the presence of a true conflict as sufficient to warrant dismissal; but it did not decide, as the Ninth Circuit did in *Mujica*, that a showing of "true conflict" is merely a factor, rather than a threshold requirement, for abstention. *In re: Vitamin C Antitrust Litig.*, 837 F.3d 175, 185 (2d Cir. 2016), *vacated and remanded sub nom. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865 (2018). Though it noted an earlier case in which it did not require a true conflict in an adjudicatory comity context, the court did not decide whether abstention requires a true conflict because there was a true conflict before it. *Id.* at 186. In its opinion after remand, the Second Circuit noted that the Supreme Court did not disturb that portion of its previous decision, and it therefore applied the same approach. *See In re: Vitamin C Antitrust Litig.*, 8 F.4th 136, 145 n.11 (2d Cir. 2021), *cert. denied sub nom. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 143 S. Ct. 85 (2022). While acknowledging *Hartford Fire*'s explanation that "to warrant dismissal on the basis of international comity, the two countries' legal demands must be irreconcilable," 8 F.4th at 144 (citing *Hartford Fire*, 509 U.S. at 799), the Second Circuit nevertheless described a true conflict as "merely 'an important criterion for a comity dismissal.'" *Id.* at 145 (quoting *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 391 (2d Cir. 2011)). The Second Circuit's position thus appears to be more ambiguous than as ascribed by the *Mujica* court.

exists here "for these purposes" to warrant abstention. As they did in their conflicts/choice-of-law argument, defendants again take a narrow view of Dr. Matson's testimony, and specifically his testimony that "Doe Run Peru could satisfy Peruvian environmental standards for air quality and yet not satisfy the standard of care." (ECF 1231-3, Matson Dep., hdr. p. 9, dep. p. 131.) Defendants contend that this statement shows that Peruvian and Missouri environmental standards differ and thus are in conflict for comity purposes. But Dr. Matson does not purport to be an expert on Peruvian law, and plaintiffs do not offer his opinion for this reason. In any event, under Federal Rule of Civil Procedure 44.1, the determination of foreign law is a ruling on a question of law made by the Court, not by Dr. Matson. And, as noted above and in my October 2018 Order, the relevant Peruvian and Missouri laws governing plaintiffs' asserted claims do not conflict. But even accepting Dr. Matson's statement as true, the relevant inquiry in the comity analysis is not whether it is possible to comply with the law of one sovereign and not the other. Rather, it is whether "a person subject to regulation by two states can comply with the laws of both." *Hartford Fire*, 509 U.S. at 799 (internal quotation marks and citation omitted). Defendants do not argue that, with regard to the standard of care, it was impossible to comply with both Missouri and Peruvian law. Under *Hartford Fire*, therefore, there is no true conflict for international comity purposes.

2. *Place of Wrongful Conduct*

Defendants again return to Dr. Matson's and Ms. Midkiff's testimony to argue that any alleged misconduct took place only in Peru and not in the United States. Reasserting their claim that the four fugitive emission projects are all that remain of plaintiffs' case, defendants assert that both experts agreed that DRP itself had enough capital to complete the projects within the first two years of operating the Complex, that neither expert identified any instance where Renco or Rennert prohibited DRP from completing a necessary environmental project, and that neither expert could identify a circumstance where a parent company of DRP denied an expenditure request for environmental projects. Defendants argue that this testimony shows that the relevant decisions regarding environmental projects were made by DRP in Peru and not by any other actor elsewhere. Therefore, defendants contend, "all that is left" to support plaintiffs' claims against them are typical activities common to a domestic corporation, which is not enough under *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021), to create a nexus between DRP's conduct in Peru and defendants' domestic conduct sufficient to maintain jurisdiction in this forum. For the following reasons, this argument is unavailing.

In *Nestlé*, the plaintiffs sought a judicially-created cause of action under the Alien Tort Statute (ATS) to recover damages from two companies based in the United States who allegedly aided and abetted the plaintiffs' enslavement by providing technical and

financial resources to their enslavers in Ivory Coast. 141 S. Ct. at 1935. To determine whether the plaintiffs sought an impermissible extraterritorial application of the ATS, the Court analyzed whether the "conduct relevant to the statute's focus occurred in the United States." *Id.* at 1936 (quoting *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 337 (2016)) (internal quotation marks omitted). Even though plaintiffs alleged that "every major operational decision by both companies [was] made in or approved in the U.S.," the Court determined that nearly all the conduct allegedly aiding and abetting forced labor—"providing training, fertilizer, tools, and cash to overseas farms"—occurred in Ivory Coast. *Id.* at 1937. Because making "operational decisions" is an "activity common to most corporations," the Court reasoned that "generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct." *Id.* at 1937.

Defendants argue that the Court's reasoning in *Nestlé* should apply here because, as the Ninth Circuit has noted, "the guiding principle of [the Supreme Court's ATS] cases applies equally in the context of adjudicatory comity: the weaker the nexus between the challenged conduct and U.S. territory or U.S. parties, the weaker the justification for adjudicating the matter in U.S. courts and applying U.S. federal or state law." *Mujica*, 771 F.3d at 605-06. Defendants contend that, like in *Nestlé*, there is no nexus between the challenged conduct—DRP's operations in Peru—and defendants' corporate decision-making in the United States.

I agree with defendants that the nexus between the challenged conduct and the United States is critical in the adjudicatory comity analysis, and that the location of the relevant conduct is a salient factor when assessing that nexus. *See Mujica*, 771 F.3d at 605 ("*Kiobel* [*v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)] and the lower-court decisions that have followed in its wake confirm the importance of" the location of the conduct and nationality of the parties). I also agree that, as in *Nestlé*, many important facts in this case concern conduct abroad—here, the operation of the La Oroya Complex. But the similarities with *Nestlé* end there.

In their amended complaint, plaintiffs do not merely make generic allegations that defendants made general operational decisions in the United States. Plaintiffs assert instead that defendants exerted complete control over DRP from their offices in Missouri and New York, which included making decisions that caused DRP to emit toxins and other harmful substances at levels harmful to plaintiffs, despite knowing of such harm. Plaintiffs also claim that despite their knowledge of their ability to rectify the harm, defendants failed to implement measures to do so, failed to take various actions to protect plaintiffs, and/or actively concealed evidence of the harm they caused. Plaintiffs allege that defendants made these decisions and took these actions in the United States so as to make substantial profit for their United States companies at the expense of plaintiffs' health. (ECF 474, Amd. Compl.) Unlike in *Nestlé*, the plaintiffs here allege more domestic activity than general decision-making. They allege

that the specific decisions to engage in the conduct that forms the bases of their claims were made in the United States. And decisions to engage in tortious conduct cannot be considered activities "common to most corporations."

Much of the evidence that has now been developed during discovery supports plaintiffs' claims. For instance, plaintiffs have submitted evidence that:

- Defendants dominated and controlled DRP;[27]

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[27] *See supra* Section V.C.2(a)(ii). Despite defendants' insistence that DRP was wholly responsible for its operations, they have stated elsewhere that DRP was subject to their control or relied on their expertise. For example, in its 1998 Senior Note Offering, DRR explained that "Doe Run and the Guarantors are indirect subsidiaries of Renco, of which Mr. Ira Leon Rennert is the controlling shareholder. As a result of his indirect ownership of Doe Run and the Guarantors, Mr. Rennert is, and will continue to be, able to direct and control the policies of Doe Run and the Guarantors, including mergers, sales of assets and similar transactions." (ECF 1229-16, Doe Run Senior Notes Offering Memorandum, at hdr. p. 215.) As noted above, DRP was one of the Guarantors. And when SUNAT, the Peruvian tax authority, initiated an audit in 2003 to determine the true market value of the services provided by DRR to DRP under the intercompany agreements, DRR instructed its employees to emphasize that American DRR executives controlled DRP's day-to-day operations: "The key decision makers in Peru, and the ones who control the day to day services from the United States, are Ken Buckley, Ken Hecker, Eric Peitz, Tony Worcester in the Lima office, and Bob Roscoe in the Cobriza facility." (ECF 1279-35, Technical, Managerial and Professional Services Agreement for Services Performed Partially Within and Partially Outside of

- As part of the financing structure that was arranged by Renco and implemented by Zelms and Kaiser, DRP financed nearly all of its original purchase price and was a Guarantor of $255 million to $355 million on DRR Senior Notes;[28]

- DRP transferred over $100 million to DRR and Renco through intercompany agreements and interest payments on its acquisition loan between 1998 and 2008;[29]

Peru Memorandum, at hdr. p. 3.) They also encouraged DRP employees to reiterate to SUNAT that "reliance on US personnel for technical, managerial and professional assistance" was "critical" to DRP's "continued success in operations." (*Id.* at hdr. p. 4.)

[28] *See* ECF 871-21, March 12, 1998 Indenture Agreement; ECF 871-19, October 23, 1997 Promissory Note, at hdr. pp. 4-5; ECF 871-14, June 28, 2017 Kaiser Dep. at hdr. pp. 3-5, dep. pp. 95-101; ECF 871-3, June 14, 2017 Zelms Dep. at hdr. pp. 11-12, 14, dep. pp. 158-63, 202; ECF 871-25, April 2, 1998 Working Capital Facility Letter.

[29] *See, e.g.*, ECF 640-29, March 20, 1999 Doe Run Peru Financial Statements; ECF 640-30, March 9, 1998 Technical, Managerial and Professional Services Agreement; ECF 640-32—640-36 (Service Agreements); ECF 640-41 (detailing $86,018,977 in intercompany fees from 1998 to 2007); ECF 871-23, December 22, 2008 Email from Gary Mard to Dennis Sadlowski and Neil ("The combined total of cash received from Peru is $125,390,157.").

- Defendants knew that these upstream payments and financial structure hampered DRP's ability to meet its PAMA obligations;[30]

- Defendants knew that DRP could not finance its PAMA projects out of its cash flow[31] and that DRP's financial distress was attributable,

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[30] *See* ECF 871-42, January 29, 2001 Email from Ken Hecker to Kaiser at hdr. p. 2 ("Doe Run Peru has been requested to transfer $3.0 million to Doe Run Resources (U.S.) this week. In my opinion, Doe Run Peru's financial condition precludes any such transfer of funds until commercial circumstances change significantly. As you know, Doe Run Peru's heavy interest burden and reduced commercial environment have reduced our liquidity and brought into question our ability to meet PAMA requirements and complete necessary capital investments."); ECF 871-44, December 28, 2005 Email from Dante Circi to Wayne Rich re DRP's transfer of $333,000 to DRR ("Increasing your liquidity is obviously reducing our liquidity, and is putting in danger the objective to extend the PAMA."); ECF 871-43, July 27, 2017 Peitz Dep. at hdr. p. 5, dep. pp. 273-74 (DRR had an adverse effect on DRP's ability to complete environmental-related projects to control emissions), hdr. p. 2, dep. p. 78 ("[D]uring the time you were at [DRP], then, as a result of this undercapitalization, was there difficulty with [DRP] having sufficient funds to pay for environment—environmental improvements including modernizing the facility?" "Yes.").

[31] *See* ECF 871-38, December 31, 1998 Memo from Vornberg to Chaput ("We are expected to finance [the PAMA projects] out of cash flow. We CANNOT finance all of the PAMA projects (as a separate question from revenue generating process projects) out of cash flow, especially the acid plant, but maybe the wastewater projects as well.").

in part, to its debt financing and intercompany payments;[32]

- DRR/Renco employees handled efforts to seek outside financing, but the institutions they approached expressed concern over DRP's financial obligations to DRR;[33]

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[32] *See* ECF 871-40, September 4, 2000 Strategy Memo from Buckley and Hecker to Zelms, at hdr. pp. 3-4 ("All of the above illustrate that Doe Run's business model—100% debt financing—is flawed …. DRP, for example, has financed all of its purchase price, embarked on a major capital investment program, and sent large intercompany payments north. That is simply not a reasonable expectation, and we are unaware of any company, in any industry, that has managed a similar feat…. The handling of the $125 million capital contribution when La Oroya was purchased in 1997 has created a potentially difficult situation in light of DRP's current liquidity problems."); ECF 871-44.

[33] *See* ECF 871-26, June 30, 2000 Email from Credit Lyonnais to Kaiser; ECF 871-27, July 4, 2000 Email from Credit Lyonnais to Peitz; ECF 871-28, December 1, 2000 Memo from WestLB to Peitz; ECF 871-29, September 5, 2000 Email from Credit Lyonnais to Peitz and Kaiser; ECF 871-53, October 11, 2005 Presentation from financial strategist to Kaiser, Neil, Peitz, Chaput, at hdr. p. 4 ("No bank will proceed with arranging financing for Doe Run Peru until they are assured that adequate collateral will be available to back up the new Facility. *If they want Doe Run Peru to have access to the Financing, Renco and the Note Holders will have to agree that the new lenders have first and unencumbered access to Doe Run Peru's cash and assets*.").

- DRR/Renco continued to demand the payments anyway,[34] and DRP continued to guarantee DRR's debt until 2007;[35]

- DRR employees Buckley, Neil, Vornberg, and Zelms managed DRP's environmental and modernization projects;[36]

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[34] *See* ECF 871-42; ECF 871-44.

[35] *See* ECF 871-56, December 18, 2006 DRR Memo.

[36] *See, e.g.*, ECF 871-3, June 14, 2007 Zelms Dep. at hdr. pp. 5-6, dep. pp. 115-19 (Vornberg assigned to handle environmental matters and provided environmental reports to Buckley and Zelms), hdr. p. 7, dep. pp. 123-24 (hiring decisions and communications with NGO task force), hdr. pp. 8-9, dep. pp. 128-29 (Vornberg reported to Zelms on all important projects affecting Complex); hdr. p. 9, dep. p. 132 (Zelms agreeing that he was "instrumental in environmental improvements over the La Oroya complex," which was "one of [his] responsibilities as president of [DRR]"), hdr. p. 10, dep. pp. 137-38 (Zelms felt need for monthly reports from Vornberg on environmental projects), hdr. p. 20, dep. p. 269-70 (Vornberg established agenda for Rennert re environmental portion of executive meeting). *See also, e.g.*, ECF 871-39, June 9, 2017 Buckley Dep. at hdr. p. 2, dep. p. 71; hdr. p. 7, dep. pp. 230-32.

See also, *e.g.*, ECF 871-65, November 1, 1999 Peru Environmental Tracking Report from Vornberg to Zelms and Buckley; ECF 871-71, March 23, 2005 DRR Board Meeting Minutes (Neil asked to lead long-term lead abatement plan). DRP personnel were encouraged to reiterate to SUNAT that assistance from "senior US environmental people" was specifically needed in the environmental area, described as "one of the key areas" where it made economic sense to rely on "the

- Defendants received regular reports about the pollution control projects at DRP and addressed the environmental affairs during monthly meetings in Missouri that were attended by Rennert and DRR's top executives;[37]

- Beginning in 1999, DRP's expenditures for environmental remediation projects exceeding $10,000 required approval from Rennert and several DRR executives or their delegates[38]; and by 2004, Rennert required AFEs for all expenditures exceeding $5000;[39]

- Defendants knew before they purchased the Complex that "ambient concentrations in the region around La Oroya" were "exceedingly

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expertise of US personnel in Doe Run." (ECF 1279-35 at hdr. p. 5.)

[37] *E.g.*, ECF 871-3, June 14, 2017 Zelms Dep. at hdr. pp. 8-9, dep. pp. 128-29; hdr. p. 10, dep. pp. 137-38; hdr. p. 18-19, dep. pp. 262-68; hdr. p. 20, dep. pp. 269-70.

See also, *e.g.*, ECF 871-14, June 28, 2017 Kaiser Dep. at hdr. p. 11, dep. p. 201; ECF 871-39, June 9, 2017 Buckley Dep. at hdr. pp. 3-4, dep. pp. 196-98; ECF 1279-36, February 10, 2004 Vornberg email to Kaiser on Neil's PAMA Presentation on Rennert.

[38] ECF 640-22, June 9, 1999 Spending Authorization Procedure.

[39] ECF 871-3, June 14, 2017 Zelms. Dep. at hdr. p. 17, dep. p. 244; ECF 640-23 at hdr. pp. 15-16, February 11, 2004 Binko Letter to Zelms.

high" and required controlling fugitive and secondary stack emissions;[40]

- Defendants knew that fugitive emissions were a significant source of contamination that was not being controlled under the PAMA, with effects on air quality eight times greater than stack emissions;[41]

- By February 2004, no comprehensive fugitive metal emissions inventory had been performed;[42]

- DRP's articulated goal for its first year of operating the Complex was to operate at maximum capacity with minimum investment;[43]

- DRP's business plan provided that operations of the copper, lead, and zinc smelters and refineries would immediately increase to

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[40] ECF 1233-15, 1996 Knight Piésold report at hdr. pp. 28, 39-43. *See also* ECF 871-48, Sept. 20, 2017 Neil Dep. at hdr. p. 2, dep. p. 120; hdr. pp. 3-4, dep. pp. 124-25; hdr. p. 5, dep. p. 138.

[41] ECF 871-48, Sept. 20, 2017 Neil Dep. at hdr. p. 2, dep. p. 120; hdr. pp. 3-4, dep. pp. 124-25; hdr. p. 5, dep. p. 138. *See also* ECF 1233-66, Feb. 17, 2004 Letter from Neil o/b/o DRP to Peru's Ministry of Energy and Mines, at hdr. p. 7.

[42] *See* ECF 871-48, Sept. 20, 2017 Neil Dep. at hdr. p. 6, dep. p. 152.

[43] ECF 909-24, Business Plan & Budget 1998, prepared Oct. 31, 1997.

maximum capacity in order to produce several additional tons of products;[44] and

- In March 2005, more than seven years after Renco and DRR purchased the Complex, Rennert recognized that defendants needed to develop a long-term plan regarding lead abatement.[45]

From the evidence submitted on the record, a factfinder could conclude that defendants exerted control over DRP to such a degree that the tortious conduct committed at the Complex was the act of defendants themselves—born out of their conduct and decisions made in the United States. There is a sufficient nexus, therefore, between defendants' conduct in the United States and DRP's operations in Peru to maintain jurisdiction here over plaintiffs' claims.

3. *United States-Peru Trade Promotion Agreement*

In my October 2018 Order, I rejected defendants' contention that exercising jurisdiction would frustrate the goals or provisions of the TPA. I interpreted Chapter 18.4 paragraph four of the TPA to allow this litigation, finding that it provides that "each party … must provide remedies 'for violations

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[44] *Id.*

[45] ECF 871-71, March 23, 2005 DRR Board Meeting Minutes, at hdr. p. 5.

of a legal duty under that Party's law relating to the environment or environmental conditions affecting human health, which may include rights such as: to sue another person under that Party's jurisdiction for damages under that Party's laws.'" *A.O.A.*, 350 F. Supp. 3d at 852 (quoting ECF 545-12, TPA Ch. 18, at hdr. p. 4)[46] (emphasis removed). In their current motion here, defendants argue that I essentially construed Article 18.4(4) of the TPA to be a mini-ATS provision when I determined that it provided for the citizens of one country to seek remedies for violations of the environmental laws of another. They claim that the TPA instead requires remedies for violations of a country's laws relating to the environment to be heard in that country's own courts.

I continue to disagree with defendants' contention that the TPA forbids this Court's jurisdiction. When defendants raised the same claim in their earlier motion to dismiss, they omitted language from the TPA to reach a more favorable interpretation. They claimed that Article 18.3(5) "commits the United States to refrain from 'undertak[ing] environmental law enforcement activities in [Peru].'" (*See* ECF 545 at hdr. p. 38 (quoting TPA, art. 18.3(5)).) But Article 18.3(5) is not an interdiction; it merely provides that "[n]othing in this Chapter shall be construed to *empower* a Party's authorities to undertake

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[46] Defendants attached Chapter 18 of the TPA as Exhibit 10 to its memorandum supporting its motion to dismiss. It is docketed at ECF 545-12. In *A.O.A.*, I errantly cited this document as "ECF 545-10." I correctly cite it here and provide this explanation in order to avoid any confusion.

environmental law enforcement activities in the territory of another Party[.]" (ECF 545-12 at hdr. p. 3. Emphasis added.) And the United States is not undertaking law enforcement activities in Peru.

Likewise, defendants asserted that Article 18.4(4) "obligates Peru to … provide its citizens with 'effective access to remedies for violations of [Peru's] environmental laws or for violations of a legal duty under [Peru's] law relating to the environment or environmental conditions affecting human health.'" (ECF 545 at hdr. p. 38 (quoting TPA, art. 18.4(4)).) I agree that it does so, but defendants altered some of the original language to suggest that the TPA *requires* such claims to be litigated in Peru. Unadulterated, Article 18.4(4) provides that:

> 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 plain language of the Article appears to provide for this Court's exercise of jurisdiction over plaintiffs' claims in this litigation, that is, that United States defendants violated Missouri law relating to environmental conditions affecting human health. Given this plain language, I decline defendants' invitation to examine the legislative history behind the TPA to construe its meaning. *See Gemsco v.*

Walling, 324 U.S. 244, 260 (1945) ("The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.").

Nevertheless, defendants do not identify any provision in the TPA that shows a United States foreign policy interest in resolving these claims in Peru. Even though the TPA "recognize[s] the sovereign right of each Party to establish its own levels of domestic environmental protection" (ECF 545-12 at hdr. p. 2, TPA art. 18.1), and requires Peru to provide citizens with effective remedies for violations of its laws, defendants do not explain how this Court's exercise of jurisdiction in this action impedes these rights or requirements.

Accordingly, I continue to conclude that application of the TPA does not warrant dismissal of this action.

4. *Consideration Given to Letters from Peruvian Officials*

In their motion here, defendants mention that my October 2018 decision to deny international comity abstention was based in part on my conclusion that neither the United States nor Peru had issued an express position on whether this litigation should proceed in Missouri. (*See* ECF 1231 at hdr. p. 36.) That conclusion was based in part on competing letters that the parties submitted from Peruvian

officials purporting to reflect the view of the Peruvian government. *See A.O.A.*, 350 F. Supp. 3d at 850-51. Although in the present motion defendants do not relitigate the treatment I gave those letters, they state in a footnote that they wish to preserve that issue for appeal. (ECF 1231 at hdr. p. 37 n.10.) I will therefore revisit the issue myself.

As summarized in my October 2018 Order, the letters submitted by the parties reflected different views on the propriety of plaintiffs' claims being litigated in this forum. Plaintiffs provided two letters dated August 2017 from Peruvian Congressmen directed to Peru's Ministry of Finance that spoke favorably of these cases proceeding in Missouri. (ECF 640-85, 640-86.) Defendants presented two letters—one dated October 2007 and the other dated April 2017—both from the Peruvian Minister of Economy and Finance directed to divisions of the Department of State.[47] The 2007 letter expressed the opinion that this case should be heard in Peru and requested that the Department of State notify the relevant Missouri court that the lawsuit must be filed in Peru and, further, "take such other steps" so that any court of the United States will refuse to review the case. (ECF 545-13.) The April 2017 letter was sent pursuant to Article 10.21 of the TPA in relation to arbitration proceedings brought by Renco and DRR against Peru wherein the petitioners argued that Peru should

[47] The 2007 letter was directed to the U.S. Ambassador to Peru. (ECF 545-13.) The 2017 letter was directed to the Chief of Investment Arbitration, Office of the Legal Advisor. (ECF 545-3.)

appear in or assume liability for this action. That letter outlined Peru's understanding of Article 18 of the TPA and its interests thereunder, and it referred to the 2007 letter that strongly suggested that Peruvian authorities hear and resolve this dispute. (ECF 545-3.) Because the letters from each side were contradictory and were obtained for purposes of this litigation, I did not find either set to be persuasive regarding Peru's sovereign interest in this matter. *A.O.A.*, 350 F. Supp. 3d at 851. And because the April 2017 letter did not *expressly* advocate for dismissal of this action on the basis of international comity and appeared equivocal on whether this litigation *may* affect Peru's sovereignty, I weighed this apparent lack of express interest heavily against dismissal. *Id.*

Upon reflection, I may have been too dismissive of the representations made in the April 2017 letter, especially given its lengthy recitation of Peru's sovereign interests under the TPA and its own laws, as well as the effect extraterritorial determination of claims involving its policies regarding public health, the environment, and natural resources could possibly have on its sovereign interests, which the letter claims would run counter to the "text and spirit" of the TPA. Even with more thoughtful consideration, however, and assuming that the positions articulated in that letter reflect the official policy of Peru, my conclusion remains the same that the sovereign interests of the United States and Peru do not warrant abstention in the circumstances of this case.

As noted by the Eleventh Circuit, abstention in the absence of a parallel foreign proceeding is

reserved for "rare (indeed often calamitous) cases in which powerful diplomatic interests of the United States and foreign sovereigns aligned in supporting dismissal." *GDG Acquisitions*, 749 F.3d at 1034. Defendants have not demonstrated that the interest of the United States supports dismissal, and I am not persuaded that the TPA reveals a policy of litigating these claims in Peru. Moreover, while the April 2017 letter may articulate relevant Peruvian policy, including a preference that the issues in this action that touch upon such policy be litigated in Peru, I note that the Republic of Peru does not take this position in the Renco/DRR arbitration.[48] Indeed, Peru recently acknowledged in that proceeding that "a federal court *will hear* the Missouri Plaintiffs' claims" and "*will apply* either Missouri negligence law or Peruvian negligence law to determine the substantive claims."[49] Notably absent is any advocation for a Peruvian forum to hear these claims or an articulation that its sovereign interests are jeopardized by this Court's exercise of jurisdiction over them. There is nothing before the Court showing that the powerful diplomatic interests of the United States and Peru are aligned in supporting dismissal of this case.

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[48] *See The Renco Group, Inc. & Doe Run Resources, Corp. v. The Republic of Peru & Activos Mineros S.A.C.*, Case No. 2019-47 (Perm. Ct. Arb.) (Respondents' Counter-Memorial, Apr. 1, 2022), *available at* https://pcacases.com/web/sendAttach/35805.

[49] *Id.* at .pdf p. 138, brief p. 123. (Emphasis added.)

Finally, the State Department has thus far remained silent in this case. I agree that this silence does not equal indifference, and I am sure there are a variety of reasons the State Department may have elected not to file a statement of interest here. But where there is no true conflict between the laws of the United States and a foreign sovereign, and there is no parallel proceeding affronted by this Court's exercise of jurisdiction, a showing by the United States that it is interested in dismissal is critical to justifying the surrender of this Court's "virtually unflagging obligation" to exercise the jurisdiction granted to it. *See Colorado River*, 424 U.S. at 817. Without such a statement, "simply because foreign relations might be involved" does not diminish this obligation. *Gross*, 456 F.3d at 394.

5. *Abstention Not Warranted*

As demonstrated above, defendants overstate the factual and legal changes since my ruling on their earlier motion to dismiss. But *even if* 1) the location of most of the relevant conduct took place in Peru, 2) the October 2007 and April 2017 letters assert the official policy of Peru opposing this Court's jurisdiction, and 3) the TPA does not explicitly contemplate this kind of litigation to go forward—in short, even if Peru has a strong interest in using a Peruvian forum to litigate plaintiffs' claims—defendants have nevertheless failed to identify "exceptional circumstances" justifying what would be a rare surrender of jurisdiction.

Moreover, judicial economy and fairness to the parties weigh against abstention. *See Lawson v. Klondex Mines Ltd.*, 450 F. Supp. 3d 1057, 1076-77 (D. Nev. 2020) (noting the *Mujica* factors are non-exhaustive and judicial economy and fairness to the parties relate to the interest of the United States). Plaintiffs have pursued their claims in this Court for more than a decade. The parties have *inter alia* established an initial trial pool, identified several plaintiffs as members of a discovery cohort, engaged and examined several expert witnesses, completed extensive discovery, and submitted dispositive motions. To abstain now would simply be unfair to plaintiffs and substantially postpone resolution of their claims.

Accordingly, because 1) there is no true conflict of laws or a parallel foreign proceeding on plaintiffs' claims, 2) Missouri and New York have an interest in the conduct of its corporate citizens abroad, 3) there has been no showing of aligned sovereign interests in dismissal, 4) there has been no showing of the United States' official position on dismissal of this proceeding, and 5) abstention would postpone resolution of plaintiffs' already long-litigated claims, I will again deny defendants' motion to abstain on international comity principles.

B. The Presumption Against Extraterritoriality

Defendants next argue that the presumption against extraterritoriality forecloses the application of Missouri common law to conduct in Peru. The presumption against extraterritoriality is a canon of

statutory construction derived, in part, from international comity principles. *Hartford Fire*, 509 U.S. at 817 (Scalia, J., dissenting), *cited approvingly in F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). It provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none[.]" *Kiobel*, 569 U.S. at 115 (quoting *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010)) (internal quotation marks omitted) (second alteration added). The presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters[,]" *Morrison*, 561 U.S. at 255, and "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). *See also RJR Nabisco, Inc.*, 579 U.S. at 335.

Defendants reason that because the presumption against extraterritoriality would foreclose application of Missouri statutes abroad, the result should be the same for Missouri common law claims. But defendants do not explain why. The presumption against extraterritoriality guides courts as they determine what a legislature has done; it is silent as to the common law. *See* Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 Geo. L.J. 301, 334 (2014) ("To date, the presumption against extraterritoriality has been applied to curb geographical extension of statutes but not the common law. The presumption has been justified as an expression of implied legislative intent rather than an implied limit on

legislative authority or power."); Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank*, 92 B.U. L. Rev. 535, 574 (2012) ("[B]ecause [the presumption] is first and foremost an interpretive canon, it has little to say about common law that poses no issue of legislative intent."). Other courts have concluded the same. *See Armada (Singapore) Pte Ltd. v. Amcol Int'l Corp.*, 244 F. Supp. 3d 750, 758 (N.D. Ill. 2017); *Leibman v. Prupes*, No. 2:14-CV-09003-CAS, 2015 WL 3823954, at *6 (C.D. Cal. June 18, 2015) ("[T]he presumption is limited to statutes by its terms.").

Citing *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), defendants contend that the presumption also applies to common law claims. But in *City of New York*, the Second Circuit opined "that foreign policy concerns foreclose New York's proposal here to recognize a federal common law cause of action targeting emissions emanating from beyond our national borders." *Id.* at 101 (emphasis added). By contrast, this Court is not being asked to recognize or extend a new federal cause of action—it is only being asked to apply existing state common law. Defendants cite no law limiting the reach of Missouri common law. Nor do they identify any court that has found that state common law does not apply extraterritorially. I will therefore deny defendants' extraterritoriality argument as well.

C. Act of State Doctrine

Defendants next argue that the act of state doctrine warrants dismissal of plaintiffs' claims. That doctrine requires that "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).[50] Defendants claim that adjudicating plaintiffs' claims will necessarily require me to second-guess the validity of Peru's actions. Specifically, they claim that it will require me to evaluate which of plaintiffs' injuries are attributable to DRP and which are attributable to Peru's state-owned entities. They also argue that I will have to evaluate whether Peru's environmental demands as contained in the PAMA adequately addressed environmental concerns in the community and Complex.

Defendants' arguments are meritless. "The act of state doctrine is not some vague doctrine of abstention but a '*principle of decision* binding on federal and state courts alike.'" *W.S. Kirkpatrick & Co.*, 493 U.S. at 406 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964)) (emphasis in *W.S. Kirkpatrick & Co.*). "Act of state issues only arise

[50] The act of state doctrine has been described as "closely related" to or a "manifestation" of international comity. *See In Re: Vitamin C*, 8 F.4th at 162 n.44; *William S. Dodge, International Comity in American Law*, 115 Colum. L. Rev. 2071, 2092 (2015). *But see W.S. Kirkpatrick & Co.*, 493 U.S. at 404 ("This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years.").

when a court *must* decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *Id.* Here, I am not asked to decide the legality of the operation of Peru's state-owned entities or any Peruvian law. Even if adjudication of plaintiffs' claims requires me to evaluate whether Peru's state-owned entities caused some of plaintiffs' injuries or the efficacy of Peru's environmental protections, the *legality* of those actions is not a question that must be decided. "Accordingly, 'the factual predicate for application of the act of state doctrine does not exist' here because '[n]othing in the present suit requires the Court to declare invalid, and thus ineffective as a rule of decision for the courts of this country the official act of a foreign sovereign.'" *In Re: Vitamin C*, 8 F.4th at 162 n.44 (quoting *W.S. Kirkpatrick & Co.*, 493 U.S. at 405) (alteration in *In Re: Vitamin* C).

D. Foreign Affairs Doctrine

Finally, defendants argue that plaintiffs' claims must be dismissed under the foreign affairs doctrine. Under that doctrine, state laws that intrude into the federal government's exclusive authority over foreign affairs are preempted. *See United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (Oregon statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.").

Federal courts generally understand the foreign affairs doctrine to preempt state laws through either conflict preemption or field preemption. *See Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 213 (4th Cir. 2022); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071-72 (9th Cir. 2012); *see generally Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419-20 (2003). Under conflict preemption, state law must yield when there is a "sufficiently clear conflict" with federal foreign policy. *Garamendi*, 539 U.S. at 420. Courts consider "the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Id.* But even in the absence of an express policy, under field preemption, a state law is preempted when a state "attempts to 'establish its own foreign policy' … [or] 'has more than some incidental or indirect effect in foreign countries.'" *Mayor & City Council of Balt.*, 31 F.4th at 213 (quoting *Zschernig*, 389 U.S. at 431, 434). *See also Movsesian*, 670 F.3d at 1072 (citing *Deutsch v. Turner Corp.*, 324 F.3d 692, 709 n.6 (9th Cir. 2003)). A state law has more than some incidental effect in foreign countries when it "disturb[s] foreign relations," *Zschernig*, 389 U.S. at 441, or has "great potential for disruption." *Id.* at 435.

Defendants argue that plaintiffs' claims would "undoubtedly conflict" with the express foreign policy laid out in the TPA for the same reasons they argue that maintaining jurisdiction conflicts with the TPA, that is, because plaintiffs' claims would undermine Peru's "sovereign right to 'establish its own levels of domestic environmental protection and

environmental development priorities,'" and would call into question the TPA's broader policies of respecting Peruvian regulatory and legal systems and allowing United States companies to do business in Peru under Peruvian law. (ECF 1231 at hdr. pp. 44-45 (quoting TPA art. 18.1).)

But this argument fails for the same reasons described above. Though the TPA recognizes Peru's sovereign ability to set its own environmental standards and priorities, plaintiffs' claims do not hinder Peru's ability to do so. To the extent plaintiffs' claims are directed to defendants' conduct in the United States that touches upon activity in Peru, there is no conflict of laws on plaintiffs' asserted claims. And to the extent Peru's relevant laws and regulations may provide a defense to plaintiffs' claims, *e.g.*, Article 1971, this potential for a defense under Peruvian law and defendants' ability to invoke it here furthers Peru's policies and does not thwart them. Accordingly, the TPA's general policies of respecting Peru's legal systems and allowing United States companies to conduct business in Peru under Peruvian law are not frustrated by litigating plaintiffs' claims here.

In any event, these ostensible conflicts are insufficiently clear to preempt a state law in "an area of 'traditional competence' for state regulation—tort law," *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1187 (C.D. Cal. 2005), which seeks to hold Missouri and New York corporate citizens accountable for the harm they cause to others. *Ning Xianhua v. Oath Holdings, Inc.*, 536 F. Supp. 3d 535,

558 (N.D. Cal. 2021) (rejecting preemption argument in part because of California's "strong interest in the conduct of its corporations," and because the decision to violate California law allegedly occurred from defendants' California headquarters).

To the extent defendants' argument can be read to assert that plaintiffs' claims are subject to field preemption, this contention fails as well. Missouri has not attempted to "establish its own foreign policy" through its negligence law. And defendants have not argued, let alone shown, that plaintiffs' claims will "disturb foreign relations" or have "great potential for disruption." This litigation has been pending in courts in the United States for more than 15 years; such disruption would have become apparent by now. I will accordingly deny defendants' motion to dismiss on this basis as well.

VII. Certification for Interlocutory Appeal

Under 28 U.S.C. § 1292(b), a district judge may certify an otherwise unappealable order for immediate appeal if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" I find that these criteria are met in this case.

I recognize that interlocutory appeals are discouraged and should be authorized only sparingly and in extraordinary cases. *Union Cty., Iowa v. Piper Jaffray & Co.*, 525 F.3d 643, 646 (8th Cir. 2008). In

my more than 32 years as a judge in the district court, I have considered several requests to certify orders for interlocutory appeal under § 1292(b). I recall granting only two of those requests, and on both occasions the Eighth Circuit granted appellants permission to appeal the orders. *See Bolon v. Rolla Pub. Sch.*, 917 F. Supp. 1423, 1434 (E.D. Mo. 1996), permission to appeal granted in part, Misc. Case No. 96-8031 (8th Cir. Oct. 1, 1996) (order); *Munroe v. Cont'l W. Ins. Co.*, No. 4:10CV1942 CDP, 2012 WL 6553952, at *1 (E.D. Mo. Dec. 14, 2012), permission to appeal granted, Misc. Case No. 12-8031 (8th Cir. Feb. 11, 2013) (order). The issues addressed in this Order represent another rare and extraordinary circumstance where interlocutory review by the appellate court is warranted.

Central to the Court's analysis on defendants' alternative motion to dismiss are controlling questions of law dispositive of the issues in this case: First, whether under transnational doctrines, including the doctrine of prospective adjudicatory comity, it is appropriate to adjudicate in this forum a foreign citizen's claims that tortious conduct allegedly committed in the United States by a United States citizen caused them to sustain personal injury wholly within the borders of a foreign sovereign.[51] Key to this

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[51] *See, e.g., Movsesian*, 670 F.3d at 1071 (§ 1292(b) interlocutory appeal on question of application of foreign affairs doctrine); *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011) (§ 1292(b) interlocutory appeal on international comity questions); *Philipp v. Fed. Republic of*

issue is what role a "true conflict," the presence or absence of a parallel foreign proceeding, and the foreign policy of the United States play in application of the doctrines. Second, whether the TPA renders the claims nonjusticiable in this forum given that the claims are intertwined with Peru's environmental laws and/or legal duties under Peru's laws relating to the environment or environmental conditions affecting human health.

There are also substantial grounds for difference of opinion. Substantial grounds exist when

> (1) the question is difficult, novel and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions; (2) the question is one of first impression; (3) a difference of opinion exists within the controlling circuit; or (4) the circuits are split on the question.

Alternative Med. & Pharmacy, Inc. v. Express Scripts, Inc., No. 4:14 CV 1469 CDP, 2016 WL 827934, at *1 (E.D. Mo. Mar. 3, 2016) (internal quotation marks and

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Ger., 253 F. Supp. 3d 84, 87 (D.D.C. 2017) (foreign policy preemption questions and issues of international comity appropriate for interlocutory appeal), permission to appeal granted, Misc. Case No. 17-8002 (D.C. Cir. Aug. 1, 2017) (order) (per curiam); *Crystallex Int'l Corp. v. Petróleos De Venezuela, S.A.*, No. CV 15-1082-LPS, 2016 WL 7440471, at *2 (D. Del. Dec. 27, 2016) (international comity implications warrant immediate appeal), permission to appeal granted, Misc. Case No. 17-8001 (3d Cir. Jan. 25, 2017) (order).

citations omitted). The difference of opinion must arise out of genuine doubt as to the correct legal standard. *Id.* As described in this Memorandum and Order, genuine doubt exists as to the correct legal standard to be applied to each question. For purposes of this Order, I resolved the questions based on my interpretation of the law, but there is doubt as to which law applies and indeed as to what the law actually is. As to international comity and transnational doctrines, the correct resolution of the difficult and novel questions is not substantially guided by previous decisions, the Eighth Circuit has not yet addressed this area of the law, and the various circuits that have weighed in are split in their resolution with differing definitions and applications of the controlling law. The TPA question is likewise difficult and novel, has little if any precedent, and is one of first impression in this circuit.

Moreover, conclusively resolving the questions would greatly advance the termination of this litigation. If, as defendants contend, transnational doctrines require me to abstain from exercising jurisdiction over this action or the TPA precludes me from exercising jurisdiction, this litigation will be over—at least in courts of the United States. But if, as plaintiffs contend and as I have found, neither the asserted abstention doctrines nor the TPA requires me to dismiss this case, then I will proceed to determine the substantive motions for summary judgment on the merits of plaintiffs' claims, and the parties and I will prepare for hybrid jury and non-jury trials as well as anticipated litigation over appropriate remedies. And discovery will continue—

and in most cases will commence—on the more than 1400 plaintiffs who are not yet part of a Discovery Cohort. *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam) ("The legislative history of subsection (b) of section 1292 … indicates that it was to be used only in extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation."), *cited approvingly in Union Cty.*, 525 F.3d at 646; *see also Alternative Med. & Pharmacy*, 2016 WL 827934, at *1 (same). I understand that the parties have already put in great time and expense, but without resolution of these novel, difficult, and case-dispositive legal questions, this litigation will go on years into the future at even greater expense—possibly unnecessarily so.

Finally, this is an exceptional case. As described above, it contains novel controlling issues of law, is a consolidation of 40 lawsuits, and involves the claims of more than 1420 plaintiffs of whom only 16 have had discovery completed on their specific claims. *See Union Cty.*, 525 F.3d at 647 (for § 1292(b) analysis, a case that is a consolidation of "approximately 40 cases" is "extraordinary"); *United States Rubber Co.*, 359 F.2d at 785 (§ 1292(b) reserved for extraordinary cases where decision on appeal may avoid protracted and expensive litigation). Under no circumstance can it be said that this is a typical case with typical questions not worthy of consideration for interlocutory appeal. *Cf. Union Cty.*, 525 F.3d at 647.

For these reasons, I will certify this Order under 28 U.S.C. § 1292(b) for immediate appeal.[52] Any party wishing to appeal has ten days from the date of this Order within which to apply to the Eighth Circuit for permission to appeal.

Accordingly,

IT IS HEREBY ORDERED that defendants' Motion for Application of Peruvian Law and Summary Judgment Under Peruvian Law, or, Alternatively, Dismissal Under Transnational Law Doctrines [1230] is **GRANTED in part and DENIED in part** as follows:

- Defendants' motion for application of Peruvian law is granted only as to their "safe harbor" defense under Article 1971 of Peru's Civil Code. In all other respects, the motion for application of Peruvian law is denied.

- Defendants' motion for summary judgment under Peruvian law is denied.

- Defendants' alternative motion for dismissal under transnational doctrines is denied.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 1292(b), this Memorandum and Order is

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[52] I am aware that because § 1292 permits interlocutory appeals from an "order," the Eighth Circuit may address "any issue fairly included within the certified order," including an issue not particularly certified. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).

certified for immediate appeal. Any party wishing to take an appeal must apply to the Eighth Circuit Court of Appeals within ten (10) days of the date of this Order.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES
DISTRICT JUDGE

Dated this 20th day of January, 2023.

APPENDIX C

Chapter Eighteen

Environment

Objectives

Recognizing that each Party has sovereign rights and responsibilities with respect to its natural resources, the objectives of this Chapter are to contribute to the Parties' efforts to ensure that trade and environmental policies are mutually supportive, to promote the optimal use of resources in accordance with the objective of sustainable development, and to strive to strengthen the links between the Parties' trade and environmental policies and practices, which may take place through environmental cooperation and collaboration.

Article 18.1: Levels of Protection

Recognizing the sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall strive to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve its respective levels of environmental protection.

Article 18.2: Environmental Agreements[1]

A Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under the multilateral environmental agreements listed in Annex 18.2 ("covered agreements").[2]

Article 18.3: Enforcement of Environmental Laws

1. (a) A Party shall not fail to effectively enforce its environmental laws, and its laws, regulations, and other measures to fulfill 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.

   (b) (i) The Parties recognize that each Party retains the right to exercise prosecutorial

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[1] To establish a violation of Article 18.2 a Party must demonstrate that the other Party has failed to adopt, maintain, or implement laws, regulations, or other measures to fulfill an obligation under a covered agreement in a manner affecting trade or investment between the Parties.

[2] For purposes of Article 18.2: (1) "covered agreements" shall encompass those existing or future protocols, amendments, annexes, and adjustments under the relevant agreement to which both Parties are party; and (2) a Party's "obligations" shall be interpreted to reflect, *inter alia*, existing and future reservations, exemptions, and exceptions applicable to it under the relevant agreement.

discretion and to make decisions regarding the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws and all laws, regulations, and other measures to fulfill a Party's obligations under the covered agreements, a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable, articulable, *bona fide* exercise of such discretion, or results from a reasonable, articulable, *bona fide* decision regarding the allocation of such resources.

(ii) The Parties recognize the importance of the covered agreements. Accordingly, where a course of action or inaction relates to laws, regulations, and other measures to fulfill its obligations under covered agreements, that shall be relevant to a determination under clause (i) regarding whether an allocation of resources is reasonable and *bona fide*.

2. 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.

3. Paragraph 2 shall not apply where a Party waives or derogates from an environmental law pursuant to a provision in law providing for waivers or derogations, provided that the waiver or derogation is not inconsistent with the Party's obligations under a covered agreement.[3]

4. Annex 18.3.4 sets out additional provisions with respect to forest sector governance.

5. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party other than as specifically provided in Annex 18.3.4.

Article 18.4: Procedural Matters

1. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws, and that each Party's competent authorities shall give such requests due consideration in accordance with its law.

2. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings are available

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[3] Paragraph 3 does not apply with respect to any law of Peru with respect to the forest sector.

under its law to provide sanctions or remedies for violations of its environmental laws.

(a) Such proceedings shall be fair, equitable, and transparent and, to this end, shall comply with due process of law, and be open to the public except where the administration of justice otherwise requires.

(b) Tribunals that conduct or review such proceedings shall be impartial and independent and shall not have any substantial interest in the outcome of the matter.

3. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter shall have appropriate access to the proceedings referred to in paragraph 2.

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, which may include rights such as:

(a) to sue another person under that Party's jurisdiction for damages under that Party's laws;

(b) to seek injunctive relief where a person suffers, or may suffer, loss, damage, or injury

as a result of conduct by another person subject to that Party's jurisdiction;

(c) to seek sanctions or remedies such as monetary penalties, emergency closures, temporary suspension of activities, or orders to mitigate the consequences of such violations; or

(d) to request a tribunal to order that Party's competent authorities to take appropriate action to enforce its environmental laws in order to protect the environment or to avoid environmental harm.

5. Each Party shall provide appropriate and effective sanctions or remedies for violations of that Party's environmental laws that:

(a) take into consideration, as appropriate, the nature and gravity of the violation, any economic benefit the violator has derived from the violation, the economic condition of the violator, and other relevant factors; and

(b) may include administrative, civil, and criminal remedies and sanctions, such as compliance agreements, penalties, fines, imprisonment, injunctions, closure of facilities, or requirements to take remedial action or pay for the cost of containing or cleaning up pollution.

Article 18.5: Mechanisms to Enhance Environmental Performance

1. The Parties recognize that flexible, voluntary, and incentive-based mechanisms can contribute to the achievement and maintenance of environmental protection, complementing the procedures set out in Article 18.4, as appropriate, and in accordance with its law and policy, each Party shall encourage the development and use of such mechanisms, which may include:

(a) mechanisms that facilitate voluntary action to protect or enhance the environment, such as:

(i) partnerships involving businesses, local communities, non-governmental organizations, government agencies, or scientific organizations,

(ii) voluntary guidelines for environmental performance, or

(iii) voluntary sharing of information and expertise among authorities, interested parties, and the public concerning: methods for achieving high levels of environmental protection, voluntary environmental auditing and reporting, ways to use resources more efficiently or reduce environmental impacts, environmental monitoring, and collection of baseline data; or

(b) incentives, including market-based incentives where appropriate, to encourage conservation, restoration, sustainable use, and protection of natural resources and the environment, such as public recognition of facilities or enterprises that are superior environmental performers, or programs for exchanging permits or other instruments to help achieve environmental goals.

2. As appropriate and feasible and in accordance with its law, each Party shall encourage:

(a) the maintenance, development, or improvement of performance goals and standards used in measuring environmental performance; and

(b) flexible means to achieve such goals and meet such standards.

Article 18.6: Environmental Affairs Council

1. The Parties hereby establish an Environmental Affairs Council (Council). Each Party shall designate a senior level official with environmental responsibilities to represent it on the Council and an office in its appropriate ministry or government entity to serve as its contact point for carrying out the work of the Council.

2. The Council shall:

(a) consider and discuss the implementation of this Chapter;

(b) provide periodical reports to the Free Trade Commission regarding the implementation of this Chapter;

(c) provide for public participation in its work, including by:

(i) establishing mechanisms to exchange information and discuss matters related to the implementation of this Chapter with the public,

(ii) receiving and considering input in setting the agenda for Council meetings, and

(iii) receiving public views and comments on the issues the public considers relevant to the Council's work and requesting public views and comments on the issues the Council considers relevant to its work;

(d) consider and discuss the implementation of the environmental cooperation agreement (ECA) signed by the Parties, including its work program and cooperative activities, and submit any comments and recommendations, including comments and recommendations received from the public, to the Parties and to the Environmental Cooperation Commission established under the ECA;

(e) endeavor to resolve matters referred to it under Article 18.12.4; and

(f) perform any other functions as the Parties may agree.

3. The Council shall meet within the first year after the date of entry into force of this Agreement and annually thereafter, unless the Parties otherwise agree.

4. All decisions of the Council shall be taken by consensus except as provided in Article 18.9.2 and 18.9.7. All decisions of the Council shall be made public, unless the Council decides otherwise.

5. Unless the Parties otherwise agree, each meeting of the Council shall include a session in which members have an opportunity to meet with the public to discuss matters related to the implementation of this Chapter.

Article 18.7: Opportunities for Public Participation

1. Each Party shall promote public awareness of its environmental laws by ensuring that information is available to the public regarding its environmental laws, enforcement, and compliance procedures, including procedures for interested persons to request a Party's competent authorities to investigate alleged violations of its environmental laws.

2. Each Party shall seek to accommodate requests from persons of any Party for information or to exchange views regarding the Party's implementation of this Chapter.

3. Each Party shall provide for the receipt of written submissions from persons of that Party that concern matters related to the implementation of specific provisions of this Chapter. A Party shall respond in writing, except for good cause, to each such submission that states that it is made pursuant to this Article. Each Party shall make such submissions and responses available to the public in a timely and easily accessible manner.

4. Each Party shall convene a new, or consult an existing, national consultative or advisory committee, comprising persons of the Party with relevant experience, including experience in business and environmental matters. Each Party shall solicit the committee's views on matters related to the implementation of this Chapter including, as appropriate, on issues raised in submissions the Party receives pursuant to this Article.

5. Each Party shall solicit public views on matters related to the implementation of this Chapter including, as appropriate, on issues raised in submissions it receives and shall make such views it receives in writing available to the public in a timely and easily accessible manner.

6. Each time it meets, the Council shall consider input received from each Party's consultative or advisory committee concerning implementation of this Chapter. After each meeting, the Council shall provide the public a written summary of its discussions on these matters and shall, as appropriate, provide recommendations to the

Environmental Cooperation Commission on such matters.

Article 18.8: Submissions on Enforcement Matters

1. Any person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with a secretariat or other appropriate body (secretariat) that the Parties designate.[4]

2. The secretariat may consider a submission under this Article if the secretariat finds that the submission:

(a) is in writing in either English or Spanish;

(b) clearly identifies the person making the submission;

(c) provides sufficient information to allow the secretariat to review the submission, including any documentary evidence on which the submission may be based and identification of the environmental laws of which the failure to enforce is asserted;

[4] The Parties shall designate the secretariat and provide for related arrangements through an exchange of letters or understanding between the Parties.

(d) appears to be aimed at promoting enforcement rather than at harassing industry;

(e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and

(f) is filed by a person of a Party, except as provided in paragraph 3.

3. The Parties recognize that the *North American Agreement on Environmental Cooperation* (NAAEC) provides that a person or organization residing or established in the territory of the United States may file a submission under that agreement with the Secretariat of the NAAEC Commission for Environmental Cooperation asserting that the United States is failing to effectively enforce its environmental laws.[5] In light of the availability of that procedure, a person of the United States who considers that the United States is failing to effectively enforce its environmental laws may not file a submission under this Article. For greater certainty, a person of a Party other than the United States who considers that the United States is failing to

[5] Arrangements will be made for the United States to make available in a timely manner to the other Parties all such submissions, U.S. written responses, and factual records developed in connection with those submissions. At the request of any Party, the Council shall discuss such documents.

effectively enforce its environmental laws may file a submission with the secretariat.

4. Where the secretariat determines that a submission meets the criteria set out in paragraph 2, the secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the secretariat shall be guided by whether:

(a) the submission is not frivolous and alleges harm to the person making the submission;

(b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Chapter and the ECA, taking into account guidance regarding those goals provided by the Council and the Environmental Cooperation Commission established under the ECA;

(c) private remedies available under the Party's law have been pursued; and

(d) the submission is drawn exclusively from mass media reports.

Where the secretariat makes such a request, it shall forward to the Party a copy of the submission and any supporting information provided with the submission.

5. The Party shall advise the secretariat within 45 days or, in exceptional circumstances and on

notification to the secretariat, within 60 days of delivery of the request:

(a) whether the precise matter at issue is the subject of a pending judicial or administrative proceeding, in which case the secretariat shall proceed no further; and

(b) of any other information the Party wishes to submit, such as:

(i) whether the matter was previously the subject of a judicial or administrative proceeding,

(ii) whether private remedies in connection with the matter are available to the person making the submission and whether they have been pursued, or

(iii) information concerning relevant capacity-building activities under the ECA.

Article 18.9: Factual Records and Related Cooperation

1. If the secretariat considers that the submission, in light of any response provided by the Party, warrants developing a factual record, the secretariat shall so inform the Council and provide its reasons.

2. The secretariat shall prepare a factual record if any member of the Council instructs it to do so.

3. The preparation of a factual record by the secretariat pursuant to this Article shall be without prejudice to any further steps that may be taken with respect to any submission.

4. In preparing a factual record, the secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific, or other information:

(a) that is publicly available;

(b) submitted by interested persons;

(c) submitted by national advisory or consultative committees;

(d) developed by independent experts; or

(e) developed under the ECA.

5. The secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter.

6. The secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council.

7. The secretariat shall make the final factual record publicly available, normally within 60 days following its submission, if any member of the Council instructs it to do so.

8. The Council shall consider the final factual record in light of the objectives of this Chapter and the ECA. The Council shall, as appropriate, provide recommendations to the Environmental Cooperation Commission related to matters addressed in the factual record, including recommendations related to the further development of the Party's mechanisms for monitoring its environmental enforcement.

9. The Council shall, after five years, review the implementation of this Article and Article 18.8 and report the results of its review, and any associated recommendations, to the Commission.

Article 18.10: Environmental Cooperation

1. The Parties recognize the importance of strengthening their capacity to protect the environment and of promoting sustainable development in concert with strengthening their trade and investment relations.

2. The Parties are committed to expanding their cooperative relationship on environmental matters, recognizing it will help them achieve their shared environmental goals and objectives, including the development and improvement of environmental protection, practices, and technologies.

3. The Parties are committed to undertaking cooperative environmental activities pursuant to the ECA, including activities related to implementation of this Chapter. Activities that the Parties undertake pursuant to the ECA will be coordinated and reviewed by the Environmental Cooperation Commission

established under the ECA. The Parties also acknowledge the importance of environmental cooperation activities in other fora.

4. Each Party shall take into account public comments and recommendations it receives regarding cooperative environmental activities undertaken pursuant to this Chapter and the ECA.

5. The Parties shall, as appropriate, share information on their experiences in assessing and taking into account environmental effects of trade agreements and policies.

Article 18.11: Biological Diversity

1. The Parties recognize the importance of the conservation and sustainable use[6] of biological diversity and their role in achieving sustainable development.

2. Accordingly, the Parties remain committed to promoting and encouraging the conservation and sustainable use of biological diversity and all its components and levels, including plants, animals, and habitat, and reiterate their commitments in Article 18.1.

3. The Parties recognize the importance of respecting and preserving traditional knowledge and practices of indigenous and other communities that

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[6] For purposes of this Chapter, sustainable use means non-consumptive or consumptive use in a sustainable manner.

contribute to the conservation and sustainable use of biological diversity.

4. The Parties also recognize the importance of public participation and consultations, as provided by domestic law, on matters concerning the conservation and sustainable use of biological diversity. The Parties may make information publicly available about programs and activities, including cooperative programs, it undertakes related to the conservation and sustainable use of biological diversity.

5. To this end, the Parties will enhance their cooperative efforts on these matters, including through the ECA.

Article 18.12: Environmental Consultations and Panel Procedure

1. A Party may request consultations with another Party regarding any matter arising under this Chapter by delivering a written request to a contact point designated by the other Party for this purpose.

2. The consultations shall begin promptly after delivery of the request. The request shall contain information that is specific and sufficient to enable the Party receiving the request to respond.

3. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter and may seek advice or assistance from any person or body they deem appropriate in order to fully examine the matter at issue. If the matter arises under Article 18.2, or under both that Article and

another provision of this Chapter, and involves an issue related to a Party's obligations under a covered agreement, the Parties shall endeavor to address the matter through a mutually agreeable consultative or other procedure, if any, under the relevant agreement, unless the procedure could result in unreasonable delay.[7]

4. If the consulting Parties fail to resolve the matter pursuant to paragraph 3, a consulting Party may request that the Council be convened to consider the matter by delivering a written request to the contact point of each of the other consulting Parties.[8]

5. (a) The Council shall promptly convene and shall endeavor to resolve the matter expeditiously, including, where appropriate, by consulting governmental or outside experts and having recourse to such procedures as good offices, conciliation, or mediation.

(b) When the matter arises under Article 18.2, or under both that Article and another provision of this Chapter, and involves an issue relating

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[7] The Parties understand that for purposes of paragraph 3, where a covered agreement requires a decision to be taken by consensus, such a requirement could create an unreasonable delay.

[8] For purposes of paragraphs 4, 5, and 6, the Council shall consist of senior level officials with environmental responsibilities of the consulting Parties or their designees.

to a Party's obligations under a covered agreement, the Council shall:

(i) through a mechanism that the Council establishes, consult fully with any entity authorized to address the issue under the relevant agreement; and

(ii) defer to interpretative guidance on the issue under the agreement to the extent appropriate in light of its nature and status, including whether the Party's relevant laws, regulations, and other measures are in accordance with its obligations under the agreement.

6. If the consulting Parties have failed to resolve the matter within 60 days of a request under paragraph 1, the complaining Party may request consultations under Article 21.4 (Consultations) or a meeting of the Commission under Article 21.5 (Intervention of the Commission) and, as provided in Chapter Twenty-One (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter. The Council may inform the Commission of how the Council has endeavored to resolve the matter through consultations.

7. No Party may have recourse to dispute settlement under this Agreement for a matter arising under this Chapter without first seeking to resolve the matter in accordance with paragraphs 1 through 5.

8. In a dispute arising under Article 18.2, or under both that Article and another provision of this

Chapter, that involves an issue relating to a Party's obligations under a covered agreement, a panel convened under Chapter Twenty-One (Dispute Settlement) shall in making its findings and determination under Articles 21.13 (Initial Report) and 21.14 (Final Report):[9]

(a) consult fully, through a mechanism that the Council establishes, concerning that issue with any entity authorized to address the issue under the relevant environmental agreement;

(b) defer to any interpretative guidance on the issue under the agreement to the extent appropriate in light of its nature and status, including whether the Party's relevant laws, regulations, and other measures are in accordance with its obligations under the agreement; and

(c) where the agreement admits of more than one permissible interpretation relevant to an issue in the dispute and the Party complained against relies on one such interpretation, accept that interpretation for purposes of its

[9] For greater certainty, the consultations and guidance in this paragraph are without prejudice to a panel's ability to seek information and technical guidance from any person or body consistent with Article 21.12 (Role of Experts).

findings and determination under Articles 21.13 and 21.14.[10]

Article 18.13: Relationship to Environmental Agreements

1. The Parties recognize that multilateral environmental agreements to which they are all party, play an important role globally and domestically in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives thereof. The Parties further recognize that this Chapter and the ECA can contribute to realizing the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party.

2. To this end, the Parties shall consult, as appropriate, with respect to negotiations on environmental issues of mutual interest.

3. Each Party recognizes the importance to it of the multilateral environmental agreements to which it is a party.

4. In the event of any inconsistency between a Party's obligations under this Agreement and a covered agreement, the Party shall seek to balance its

[10] The guidance in subparagraph (c) shall prevail over any other interpretative guidance.

obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.[11]

Article 18.14: Definitions

For purposes of this Chapter:

environmental law means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

(a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto;

(c) the protection or conservation of wild flora or fauna, including endangered species, their

[11] For greater certainty, paragraph 4 is without prejudice to multilateral environmental agreements other than covered agreements.

habitat, and specially protected natural areas;[12] or

(d) for Peru, the management of forest resources,

in areas with respect to which a Party exercises sovereignty, sovereign rights, or jurisdiction, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

laws, regulations, and all other measures to fulfill its obligations under a covered agreement means a Party's laws, regulations, and other measures at the central level of government.

For the United States, **statute or regulation** means an act of Congress or regulation promulgated pursuant to an act of Congress that is enforceable by action of the central level of government.

For Peru, **statute or regulation** means a law of Congress or Decree or Resolution promulgated by the central level of government to implement a law of Congress that is enforceable by action of the central level of government.

For Peru, **indigenous and other communities** means those communities which are defined in Article 1 of Andean Decision 391.

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[12] The Parties recognize that such protection or conservation may include the protection or conservation of biological diversity.