

The Renco Group, Inc.

Claimant

v.

The Republic of Peru

Respondent

(UNCT/13/1)

PERU'S MEMORIAL ON WAIVER

10 July 2015



The Renco Group, Inc. v. The Republic of Peru

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The Renco Group, Inc. v The Republic of Peru

PERU'S MEMORIAL ON WAIVER

1. The Republic of Peru (“Peru” or “Respondent”) hereby submits its Memorial on Waiver pursuant to Article 23(3) of the UNCITRAL Arbitration Rules and Article 10.18.2 of the Peru-United States Trade Promotion Agreement (the “Treaty”), in accordance with the Tribunal’s Decision Regarding Respondent’s Request for Relief dated 2 June 2015 (“Decision”), and Procedural Orders Nos. 3 and 4 dated 20 June 2015 and 6 July 2015, respectively.

2. The Treaty entered into force on 1 February 2009. It requires at Article 10.18 that any claimant – and its local enterprise, where claims are submitted on behalf of the enterprise – submit a written waiver “of any right to initiate or continue . . . any proceeding with respect to any measure alleged to constitute a breach.”¹ The object and purpose of the waiver requirement is to prevent claimants and their enterprises from pursuing local litigation proceedings in parallel to the arbitration, in effect, giving them multiple bites at the same apple, to respondent’s prejudice. The particular waiver requirement in the Treaty even reflects a strengthening of the requirement compared to the version contained in certain prior treaties, as discussed below.

3. The Renco Group, Inc. (“Renco” or “Claimant”) violated and remains in violation of the Treaty waiver requirement, in both word and deed. Renco and Doe Run Peru S.R.LTDA (“DRP”), its wholly-owned local enterprise and alleged investment, initially submitted insufficient waivers at the time of their defective Notice of Arbitration and Statement of Claim dated 4 April 2011 (“Notice of Arbitration”).² DRP subsequently purported to withdraw its waiver,³ and Renco alone submitted a waiver—also insufficient—with its Amended Notice of Arbitration and Statement of Claim dated 9 August 2011 (“Amended Notice of Arbitration”).⁴

4. On its face, the wording of Renco’s purported waiver is insufficient. Renco states that its waiver “conforms *verbatim* to the waiver under Article 10.18(2) of the Treaty.”⁵ Renco is wrong. Indeed, its waiver even includes an impermissible reservation which states, “to the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, *Claimant reserves the right to bring such claims in another forum* for resolution on the merits.”⁶ Moreover, Renco has failed to submit a waiver on behalf of DRP, despite maintaining claims on DRP’s behalf under the Treaty.

5. In addition, through its deeds, Renco violated and continues to be in violation of the waiver requirement through the initiation and/or ongoing continuation of local proceedings through its subsidiaries concerning measures alleged to constitute a breach of the Treaty in this arbitration. The local proceedings relate to the creditor-controlled DRP bankruptcy proceedings and a credit of approximately US\$ 163 million held by the Ministry of Energy and Mines (the “MEM”) in connection with DRP’s environmental undertakings. The stated aim of the local proceedings is to challenge the

¹ Peru-United States Trade Promotion Agreement, entered into force 1 Feb. 2009 (the “Treaty”), Art. 10.18.2(b) (RLA-1).

² Notice of Arbitration and Statement of Claim dated 4 Apr. 2011 (“Notice of Arbitration”), ¶ 78.

³ Letter from DRP to Peru and its Counsel dated 5 Aug. 2011 (Exh. R-1).

⁴ Amended Notice of Arbitration and Statement of Claim (“Amended Notice of Arbitration”), ¶ 67.

⁵ Claimant’s Reply on Scope of Respondent’s Article 10.20(4) Objections dated May 7, 2014.

⁶ Amended Notice of Arbitration ¶ 67 (emphasis added).

recognition of the MEM credit by the Commission for Bankruptcy Proceedings of the National Institute for the Defense of Competition and Intellectual Property (“INDECOPI”). The local proceedings (“Local Proceedings”) include:

- *First Proceeding*: Just prior to the submission by Renco and DRP of their Notice of Intent,⁷ DRP filed a constitutional *amparo* suit in Peruvian court objecting to the recognition of the MEM credit. DRP lost in the first instance and on appeal.⁸ Then, in the month after the Amended Notice of Arbitration was filed, DRP filed a second appeal that remains pending.⁹
- *Second Proceeding*: DRP then commenced a contentious administrative action challenging the recognition of the MEM’s credit and seeking a permanent resolution of the issue.¹⁰ Doe Run Cayman Limited (“DRC”), a company wholly-owned by Renco, then intervened in the action, which remains pending.¹¹

6. The Local Proceedings are ongoing and no steps have been taken to discontinue them.

7. The implications of the violations of the Treaty are serious. Absent a waiver that fully complies with the Treaty, there is no consent to arbitration by the relevant State party to the Treaty, as discussed below. Accordingly, Renco’s formal and material failure to comply with the Article 10.18 waiver requirement violates the Treaty and precludes the existence of jurisdiction over Renco’s claims, which must be dismissed.¹²

8. This Memorial addresses below (I) the waiver requirement, (II) the non-conforming waivers, (III) the ongoing Local Proceedings, and (IV) the requested relief.

I. THE WAIVER REQUIREMENT

A. Ordinary Meaning

9. Renco has submitted its claim to arbitration under the Peru-United States Trade Promotion Agreement, which entered into force on 1 February 2009. Article 10.18 of the Treaty provides as follows:

(2) No claim may be submitted to arbitration under this Section unless: [...]

(b) the notice of arbitration is accompanied,

⁷ Claimant’s Notice of Intent to Commence Arbitration Under United States – Peru Trade Promotion Agreement (“Notice of Intent”) dated 29 Dec. 2010.

⁸ DRP Constitutional *Amparo* Action Complaint dated 22 Nov. 2010, at 3 (Exh. R-19); Lima, First Court Specialized on Constitutional Matters, Resolution No. 1 dated 11 Jan. 2011 (Exh. R-20); Superior Court of Justice, First Civil Chamber, Resolution N° 5 dated 18 Aug. 2011 (affirming the decision below) (Exh. R-22).

⁹ DRP Constitutional Grievance dated 14 Sept. 2011 (Exh. R-23).

¹⁰ DRP Request for Annulment of Administrative Decision, dated 16 Jan. 2012 (Exh. C-138).

¹¹ Notification by Right Business S.A. to Court in Administrative Law Action 368-2012 dated 12 June 2012 ¶ 3 (Exh. R-18); DRC Ltd. Request to Join the Proceedings of Administrative Law Action 368-2012 dated 23 May 2012 (Exh. R-17).

¹² Peru, as always, reserves all of its rights, including in regard to Renco’s claims in this arbitration, which are factually and legally meritless.

- (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and
- (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

- (3) Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration.¹³

10. Article 10.18 is clear:

- *Peru has not consented to arbitrate absent a sufficient waiver.* State consent to arbitration pursuant to the Treaty is expressly contingent on the claimant’s compliance with Article 10.18, which is titled “Conditions and Limitations on Consent of Each Party.”¹⁴ The words “[n]o claim may be submitted to arbitration under this Section unless,” make clear that the express conditions of Article 10.18.2 must be met for consent to exist.¹⁵
- *There is no consent absent waiver by the claimant, and also by its local enterprise, where claims are submitted on behalf of that enterprise.* Written waivers are required from the claimant for claims submitted by “the claimant, on its own behalf” under 10.16.1(a),¹⁶ and from the claimant and the enterprise for claims submitted by “the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.”¹⁷ Thus, when loss or damage to a local enterprise is claimed, the waiver must cover both the claimant and the local enterprise; otherwise, the investor could use its ownership or control to direct the local enterprise to initiate or continue proceedings that the investor itself would be barred from initiating or continuing pursuant to its own waiver under Article 10.18.2(b)(i).
- *There is no consent absent a waiver that fully complies with the Treaty.* The words “any right to initiate or continue,” “any administrative tribunal or court,” “the law of any Party, or other dispute settlement procedures,” “any proceeding,” and “any measure” make clear that the waiver must be comprehensive.¹⁸ A partial waiver is not sufficient for compliance with Article 10.18, and claimants may not waive only *some* rights to bring

¹³ Treaty, Art. 10.18 (emphasis added) (RLA-1).

¹⁴ Treaty, Art. 10.18 (emphasis added) (RLA-1).

¹⁵ Treaty, Art. 10.18 (emphasis added) (RLA-1).

¹⁶ Treaty, Art. 10.16.1(a) (RLA-1).

¹⁷ Treaty, Art. 10.16.1(b) (emphasis added) (RLA-1).

¹⁸ Treaty, Art. 10.18.2 (emphasis added) (RLA-1).

some proceedings. Article 10.18.3, which provides the single, limited exception to the waiver requirement, does not apply in the instant case, as discussed below.

11. Because the State's consent to arbitrate under the Treaty is conditioned on compliance with Article 10.18, failure to comply with the waiver requirement is fatal to a claimant's claims. Claims must be dismissed for lack of jurisdiction if claimants and/or enterprises fail to comply with the waiver requirement, as arbitral tribunals have held when considering analogous provisions of other treaties. The tribunal in *Detroit International Bridge Company*, for instance, dismissed claims brought under The North American Free Trade Agreement ("NAFTA") for lack of jurisdiction upon finding that the written waivers were insufficient.¹⁹ As that tribunal explained, "[t]he lack of a valid waiver preclude[s] the existence of a valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprive[s] the Tribunal of the very basis of its existence."²⁰ Similarly, having found that waivers were insufficient under the Dominican Republic-Central America-United States Free Trade Agreement ("DR-CAFTA"), the *Commerce Group* tribunal concluded that "[i]f the waiver is invalid, there is no consent."²¹

B. Object And Purpose

12. The waiver requirement encourages foreign investors to seek to resolve their disputes before local courts before internationalizing the dispute, while at the same time protecting the State from facing an endless multiplicity of proceedings.²² Article 10.18.2 thus does not preclude claimants from pursuing domestic or other remedies before initiating treaty arbitration, as is the case with fork-in-the-road clauses.²³ Rather, claimants may pursue remedies in local courts, but, if they then decide to submit their claim to international arbitration under the Treaty, they must discontinue those claims and agree not to initiate any other claims before the local courts. This is often referred to as a "no U-turn" provision.²⁴

13. The purpose of Article 10.18.2 is confirmed by analogous provisions in other treaties, including the similar waiver requirement in the NAFTA,²⁵ and the identical waiver requirements in the DR-CAFTA²⁶ and other agreements based upon the 2004 and 2012 U.S. Model Bilateral Investment

¹⁹ *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 340 (RLA-100).

²⁰ *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 321 (RLA-100).

²¹ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶ 115 (holding that there was no jurisdiction) (RLA-22).

²² L. M. Caplan and J. K. Sharpe, "United States" in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013) 755, at 829 (RLA-96).

²³ Cf. Treaty, Art. 10.18.4 (providing that the election to pursue claims for breach of an investment agreement or authorization before other fora shall be definite) (RLA-1); Treaty, Annex 10-G (providing that the election by investors of the United States to pursue breach of an obligation under Section A of the Treaty before a court or administrative tribunal of Peru "shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B") (RLA-1).

²⁴ L. M. Caplan and J. K. Sharpe, "United States" in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013) 755, at 829 (commenting on the identical waiver provision of the 2012 US Model BIT and noting that provisions such as Article 10.18 present the "claimant with a one way path to investor-State arbitration under Section B") (RLA-96); J. Thornton, "The Modified Waiver Provision in CAFTA-DR Article 10.18.2" in C. Giorgetti (ed.), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (2012), at 500 n. 58 (explaining that Article 10.18.2 of the CAFTA is a no U-turn provision) (RLA-97).

²⁵ North American Free Trade Agreement (NAFTA), Chapter Eleven, Art. 1121 (CLA-11).

²⁶ The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), Chapter 10, Art. 10.18 (CLA-15).

Treaties (“US Model BIT”).²⁷ For example, in the NAFTA context, tribunals have explained that the waiver requirement serves “to achieve finality of decision and to avoid multiplicity of proceedings,”²⁸ and to “prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.”²⁹

14. Likewise, the principal focus of Article 10.18.2 is avoiding a multiplicity of proceedings. Notably, Article 10.18.2 requires the waiver to encompass “any proceeding,”³⁰ and not only actions involving the payment of damages. This shows that the objectives of the Treaty’s waiver requirement go beyond preventing double redress. Whereas Article 1121.2(b) of the NAFTA, for example, allows concurrent proceedings “for injunctive, declaratory or other extraordinary relief, not involving the payment of damages,”³¹ Article 10.18.3 of the Treaty (like the identical provisions in the DR-CAFTA and the US Model BITs) allows only concurrent actions that seek interim injunctive relief and that, moreover, are “brought for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration.”³²

C. Formal And Material Compliance

15. Article 10.18 requires compliance, both in form and action, by the claimant and, where applicable, the enterprise submitting the waiver.³³ As the *Commerce Group* tribunal explained, the waiver requirement in the DR-CAFTA “requires Claimants to file a formal ‘written waiver’, and then materially ensure that no other legal proceedings are ‘initiated’ or ‘continued’.”³⁴ Accordingly, both the formal and material requirements must be observed for the waiver to be valid and for the State to have granted its consent to arbitrate.

- *Formal component.* The first condition is that the claimant satisfy the waiver requirement in word, *i.e.*, that a written waiver accompany the notice of arbitration and that the text of its waiver complies with the Treaty’s language. In the words of the *Waste Management* tribunal, “[w]hatever the case, any waiver must be clear, explicit and categorical,”³⁵ and

²⁷ 2012 U.S. Model Bilateral Investment Treaty (2012 US Model BIT), Art. 26 (RLA-95); 2004 U.S. Model Bilateral Investment Treaty (2004 US Model BIT), Art. 26 (RLA-15).

²⁸ *Waste Management Inc. v. United Mexican States II* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal concerning Mexico’s Preliminary Objection concerning the Previous Proceedings dated 26 Jun. 2002 ¶ 27 (RLA-103).

²⁹ *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Award dated 26 Jan. 2006 ¶ 118 (CLA-19); *see also Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 27 (RLA-102).

³⁰ The only exception to this is set forth in Article 10.18.3 and concerns interim injunctive relief.

³¹ North American Free Trade Agreement (NAFTA), Chapter Eleven, Article 1121, (CLA-11).

³² Treaty, Art. 10.18.3 (RLA-1). With regard to the identical provisions of the DR-CAFTA, the tribunal in *Railroad Development Corporation* observed that “[a]s to the argument that it is unlikely that the Claimant would receive any payment for damages under the domestic arbitrations, this is not the issue under Article 10.18. It is the fact that two domestic arbitration proceedings exist and overlap with this arbitration as determined by the Tribunal that triggers the defect in the waiver.” *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5 dated 17 Nov. 2008 ¶ 54; *see also* ¶ 53 (RLA-20).

³³ *See Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 20 (holding that compliance with the waiver requirement demands “a formal and material act on the part of the person tendering same.”) (RLA-102).

³⁴ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶ 84 (RLA-22).

³⁵ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 18 (RLA-102).

the tribunal's task, therefore, is to "ascertain whether [the claimant] did indeed submit the waiver in accordance with the formalities envisaged."³⁶

- *Material component.* The second condition is that the claimant satisfy the waiver requirement in deed, *i.e.*, that it does not take action or inaction in other proceedings in violation of its written waiver. Article 10.18 precludes a claimant and its local enterprise, where claims are submitted on behalf of that enterprise, from initiating or continuing other legal proceedings. As the *Commerce Group* tribunal explained, "a waiver must be more than just words; it must accomplish its intended effect."³⁷ Likewise, the *Waste Management* tribunal noted that the tribunal's task is to "ascertain whether [the claimant] [...] has respected the terms of same through the material act of either dropping or desisting from initiating parallel proceedings before other courts or tribunals."³⁸ As observed by the tribunals in *Waste Management*,³⁹ *Railroad Development Corporation*,⁴⁰ *Commerce Group*,⁴¹ and *Detroit International Bridge Company*,⁴² this means that other proceedings must be discontinued before the submission of the notice of arbitration and no new proceedings may be initiated.

16. In order for jurisdiction to vest in the Tribunal, both the formal and material requirements must be met at the time the notice of arbitration is filed: if an ineffective waiver is later sought to be corrected after the notice of arbitration by the filing of a new waiver or the discontinuance or conclusion of local proceedings, this cannot restore the tribunal's jurisdiction, which never vested. As the *Detroit International Bridge Corporation* tribunal thus remarked, "the Tribunal does not consider that the submission of such documents could retroactively validate several months of proceedings during which the Tribunal wholly lacked jurisdiction but had some kind of potential existence that might have been realized if it had acquired jurisdiction at some subsequent date."⁴³ Likewise, the *Railroad Development Corporation* tribunal concluded that "the Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. It is for a respondent and not a tribunal to waive any deficiency under Article 10.18

³⁶ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 20 (RLA-102); *see also Methanex Corporation v. United States of America* (UNCITRAL) Final Award on Jurisdiction and Merits dated 3 Aug. 2005, Part II – Ch. F ¶ 25 (noting with respect to Methanex's attempt to amend its claim for which no waiver had been submitted, that waivers made in May 2001 and written in the present tense could not be construed to cover possible future claims. In this regard, the tribunal remarked that "[t]o construe these past waivers otherwise, as Methanex contends, would introduce a large degree of uncertainty where absolute certainty, as to what the investor claimant was or was not waiving, is procedurally essential for both the investor and the NAFTA Respondent Party." (emphasis added) (RLA-12).

³⁷ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶ 80 (RLA-22).

³⁸ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 20 (RLA-102).

³⁹ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 19-20, 27-30 (RLA-102).

⁴⁰ *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5 dated 17 Nov. 2008 ¶¶ 47-52 (RLA-20).

⁴¹ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶¶ 80, 99-100, 107, 115 (RLA-22).

⁴² *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 321 (RLA-100); *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Separate Dissenting Jurisdictional Statement of Michael Chertoff ¶ 2 (RLA-101).

⁴³ *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 321 (RLA-100).

or to allow a defective waiver to be remedied.”⁴⁴ In this case, as shown below, Renco has violated the waiver requirement in both word and deed; Renco has not remedied these violations and, in any event, Peru has not agreed to waive any deficiency.

II. THE INSUFFICIENT WAIVERS

17. Renco has failed to comply with the formal component of Article 10.18, because it has never submitted a waiver that complies with the Treaty’s requirements. Renco has submitted written waivers twice: with its original, deficient Notice of Arbitration filed on behalf of Renco and DRP and with its Amended Notice of Arbitration, pursuant to which Renco is now advancing its claims. Neither waiver complied with the Treaty:

Waiver Accompanying Notice of Arbitration	Waiver Accompanying Amended Notice of Arbitration
<p>“Finally, as required by Article 10.18(2) of the Treaty, Renco and its affiliate DRP waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimants reserve the right to bring such claims in another forum for resolution on the merits.”⁴⁵</p>	<p>“Finally, as required by Article 10.18(2) of the Treaty, Renco and its affiliate DRP waive their<u>waives its</u> right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, except for proceedings for interim injunctive relief, not involving payment of monetary damages, before a judicial or administrative tribunal of Peru. To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimants reserve<u>Claimant reserves</u> the right to bring such claims in another forum for resolution on the merits.”⁴⁶</p>

18. Like the initial waiver, Renco’s current waiver is insufficient pursuant to the Treaty, because, on its face, it does not comply with the requirements of Article 10.18.2. Specifically, (a) Renco’s waiver is not comprehensive as required by Article 10.18.2, and (b) it does not include the requisite waiver on behalf of DRP, as discussed below.

A. Renco Impermissibly Has Qualified Its Waiver

19. Renco has failed to waive “*any right to initiate or continue [...] any proceeding,*” as expressly required by Article 10.18.2.⁴⁷ Not only has Renco never provided a waiver as to “any

⁴⁴ *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5 dated 17 Nov. 2008 ¶ 61 (RLA-20).

⁴⁵ Notice of Arbitration ¶ 78.

⁴⁶ Amended Notice of Arbitration ¶ 67.

⁴⁷ Treaty, Art. 10.18.2(b) (emphasis added) (RLA-1).

right,”⁴⁸ Renco impermissibly included the following qualification at the end of the waivers in both the Notice of Arbitration and the Amended Notice of Arbitration:

To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, *Claimant reserves the right to bring such claims in another forum* for resolution on the merits.⁴⁹

20. Article 10.18 does not permit Renco to reserve this right. Renco’s inclusion of the reservation of rights shows that it has not waived “any right to *initiate* or continue [...] *any proceeding*,” as is required by Article 10.18. Indeed, the very inclusion of the reservation demonstrates that the proceedings that Renco reserves the right to commence otherwise would fall within the scope of the waiver.

21. Nor is Renco’s reservation made pursuant to Article 10.18.3, which provides that a claimant and its enterprise “may initiate or continue an action that seeks interim injunctive relief *and* does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, *provided that* the action is brought for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration.”⁵⁰ Renco’s reservation of its right to initiate proceedings “in another forum for resolution on the merits” is not “an action that seeks injunctive relief and the payment of monetary damages,” nor could it be “for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration,” because the reservation itself is premised on the Tribunal’s dismissal of Renco’s claims for lack of jurisdiction or admissibility.

22. The inclusion in written waivers of reservations of rights and carve-outs, except for those expressly allowed by the relevant treaty, consistently has been held by tribunals to invalidate the waivers and to deprive the tribunal of jurisdiction. For example, the tribunal in *Waste Management* found that the claimant had qualified the two written waivers submitted in the course of the arbitration with the following carve-outs:

This waiver does not apply, however, to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico.⁵¹

Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico.⁵²

23. In that case, the claimant sought to justify these qualifications on its purportedly good faith interpretation of Article 1121 of the NAFTA (the waiver provision), according to which the waiver requirement would not encompass local proceedings in which no allegations of violation of the

⁴⁸ See Notice of Arbitration ¶ 78 (referring to “their right”); Amended Notice of Arbitration ¶ 67 (referring to “its right”).

⁴⁹ Amended Notice of Arbitration ¶ 67 (emphasis added).

⁵⁰ Treaty, Art. 10.18.3 (emphasis added) (RLA-1).

⁵¹ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 4 (RLA-102).

⁵² *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 5 (RLA-102).

NAFTA were made.⁵³ The tribunal rejected that argument, correctly finding that the claimant had “issued a statement of intent different from that required in a waiver pursuant to NAFTA Article 1121,” and thus concluded that the waiver was invalid.⁵⁴

24. Recently, the tribunal in *Detroit International Bridge Corporation*, similarly held that the following carve-out made by the claimant and its enterprise in their waivers violated Article 1121 of the NAFTA:

For the avoidance of doubt, this waiver does not and shall not be construed to extend to or include any of the claims included in the Complaint filed on or about March 22, 2010, in the action titled *Detroit International Bridge Company et al. v. The Government of Canada et al.*, in the United States District Court for the District of Columbia.⁵⁵

25. In that case, the claimant had argued that the qualification was permissible, because the local action carved out of the waiver did not relate to measures at issue in the NAFTA arbitration.⁵⁶ The tribunal disagreed, finding that the local litigation concerned the same measures alleged to constitute breaches of the NAFTA, rendering the carve-out impermissible.⁵⁷ Because the local action did not fall under the NAFTA exception for “injunctive, declaratory or other extraordinary relief, not involving the payment of damages,” the tribunal concluded that the waiver was insufficient and rendered the tribunal without jurisdiction.⁵⁸

26. In the same manner, Renco’s reservation necessarily relates to measures at issue in this arbitration because it carves out “any claims asserted herein” from the waiver. Indeed, as was the case in *Waste Management*, the very fact that Renco qualified its waiver shows that Renco also understood that in the absence of such qualification the waiver required by Article 10.18.2(b) would prohibit it from initiating new proceedings in another forum in the event its claims were dismissed for lack of jurisdiction or admissibility.⁵⁹

27. Finally, Renco’s reservation of rights also contravenes the very object and purpose of Article 10.18. Article 10.18 of the Treaty is a *no U-turn* provision, as explained above. It allows claimants to pursue domestic or other remedies for up to three years – counted from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge of the loss or damage – *before* they file a notice of arbitration.⁶⁰ After the notice of arbitration is filed

⁵³ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 (RLA-102).

⁵⁴ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶¶ 30-31 (RLA-102).

⁵⁵ *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 297 (RLA-100).

⁵⁶ *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 232 (RLA-100).

⁵⁷ *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 312 (RLA-100).

⁵⁸ NAFTA, Art. 1121.2(b) (CLA-11); *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶¶ 313-314, 320 (RLA-100).

⁵⁹ See *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 28 (RLA-102) (“If the Claimant, upon formulating its waiver, had clearly adopted the interpretation it now maintains, it would not have conditioned its waiver with the terms as it did, because under said interpretation, it would have been able to take parallel actions in domestic courts or tribunals without expressly invoking NAFTA provisions and without thereby affecting these arbitral proceedings.”).

⁶⁰ Treaty, Art. 10.18.1, Art. 10.18.2 (RLA-1).

together with the written waiver, however, the door to domestic or other remedies closes and cannot be reopened. This structure is intended to encourage investors to resolve disputes through the regular means of local courts and other contractually-agreed dispute settlement procedures, and to use treaty arbitration as a last resort. Renco's reservation of rights would turn this structure on its head and would undermine the Treaty's object and purpose, because claimants, as Renco has done here, could initiate arbitration under the Treaty and then, if the arbitration is unsuccessful, resort to local courts. Indeed, if Renco's reservation of rights were permissible, it could lead to a rush to treaty arbitration in order for claimants to take advantage of the usually longer domestic statute of limitations.

28. Accordingly, as the tribunal in *Waste Management* concluded, the "Tribunal [in this case] cannot deem as valid the waiver tendered by the Claimant in its submission of the claim to arbitration, in view of its having been drawn up with additional interpretations, which have failed to translate as the effective abdication of rights mandated by the waiver."⁶¹ This means, as elaborated above, that Peru has not granted its consent to arbitrate, and that there is no "valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprive[s] the Tribunal of the very basis of its existence."⁶² Renco's reservation of rights renders its waiver insufficient and the Tribunal without jurisdiction to decide this case, which must thus be dismissed in its entirety.

B. Renco Impermissibly Has Failed To Waive DRP's Rights

29. Renco also has failed to submit a conforming waiver on behalf of its "enterprise," *i.e.*, DRP, which renders this Tribunal without jurisdiction to hear its claims. Renco's Notice of Arbitration was filed pursuant to Article 10.16 of the Treaty "on its own behalf [Article 10.16.1(a)] and on behalf of its affiliate Doe Run Peru S.R.LTDA [Article 10.16.1(b)]."⁶³ When claims are submitted under Article 10.16.1(b), Article 10.18.2(b)(ii) requires the notice of arbitration to be accompanied by a written waiver not only by the claimant, but also by the enterprise. In the absence of such waivers, "[n]o claim may be submitted to arbitration."⁶⁴

30. Recognizing the existence of the requirement imposed by Article 10.18.2(b)(ii), Renco's Notice of Arbitration included a waiver by DRP – albeit, as elaborated above, an insufficient one – stating, in part: "as required by Article 10.18(2) of the Treaty, Renco and its affiliate DRP waive their right to initiate or continue [...]."⁶⁵ In contrast, the Amended Notice of Arbitration did not include any waiver from DRP.⁶⁶ In fact, four days before the submission of the Amended Notice of Arbitration, DRP purported to withdraw its previously submitted waiver by letter to Peru and its counsel dated 5 August 2011, stating: "Doe Run Peru hereby withdraws its waiver under Article 10.18(2)(b)(ii)."⁶⁷

⁶¹ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 31 (RLA-102).

⁶² *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 321 (RLA-100); *see also Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶ 115 (RLA-22).

⁶³ Notice of Arbitration ¶ 1; *see also id.* ¶ 60 (making a claim on behalf of DRP for violation of an investment agreement pursuant to Article 10.16.1(b)(i)(C)).

⁶⁴ Treaty, Art. 10.18.2 (RLA-1).

⁶⁵ Notice of Arbitration ¶ 78.

⁶⁶ Amended Notice of Arbitration ¶ 67 (Renco's waiver states in relevant part that "as required by Article 10.18(2) of the Treaty, Renco waives its right to initiate or continue [...]").

⁶⁷ Letter from DRP to Peru and its Counsel dated 5 Aug. 2011 (Exh. R-1).

31. Despite the absence of a written waiver from DRP and the purported removal of Article 10.16.1(b) as a basis for its claims in the Amended Notice of Arbitration, Renco continues to assert Treaty claims on behalf of its enterprise, DRP, in this arbitration. As the following table shows, Renco’s claims in the Notice of Arbitration and the Amended Notice of Arbitration are the same for all relevant purposes.

Notice of Arbitration	Amended Notice of Arbitration
<p>Article 10.5: Minimum Standard of Treatment</p> <p>“Peru has engaged in a pattern of conduct of unfair and inequitable treatment in violation of Article 10.5 of the Treaty by, <i>inter alia</i>, imposing on DRP additional environmental projects and requirements, which increased the amount of time and money that DRP was required to spend, while simultaneously and improperly refusing to timely grant DRP the needed additional time to fulfill these new obligations.” (¶ 49).</p>	<p>Article 10.5: Minimum Standard of Treatment</p> <p>“Peru has engaged in a pattern of conduct of unfair and inequitable treatment in violation of Article 10.5 of the Treaty by, <i>inter alia</i>, imposing on DRP additional environmental projects and requirements, which increased the amount of time and money that DRP was required to spend, while simultaneously and improperly refusing to timely grant DRP the needed additional time to fulfill these new obligations.” (¶ 46).</p>
<p>Article 10.3: National Treatment</p> <p>“Peru’s unfair treatment of DRP is in direct contrast to its treatment of Centromin/Activos Mineros, a company owned by Peru, in violation of Article 10.3 of the Treaty.” (¶ 55).</p>	<p>Article 10.3: National Treatment</p> <p>“Peru’s unfair treatment of DRP is in direct contrast to its treatment of Centromin/Activos Mineros, a company owned by Peru, in violation of Article 10.3 of the Treaty.” (¶ 52).</p>
<p>Article 10.7: Expropriation and Compensation</p> <p>“Peru’s unfair treatment of DRP continues and has the potential to culminate in an expropriation of the Complex, in violation of Article 10.7 of the Treaty.” (¶ 61).</p>	<p>Article 10.7: Expropriation and Compensation</p> <p>“Peru’s unfair treatment of DRP continues and has the potential to culminate in an expropriation of the Complex, in violation of Article 10.7 of the Treaty.” (¶ 58).</p>
<p>Article 10.16(1)(b)(i)(C): Investment Agreement</p> <p>“Peru has failed to observe its obligations to Renco under the Stock Transfer Agreement and the Guaranty, which were executed as part of a single transaction and together are investment agreements, by failing to, <i>inter alia</i>, (1) appear in and defend the Lawsuits; (2) assume responsibility and liability for any damages that the plaintiffs may recover in the Lawsuits; (3) indemnify, release, protect and hold Renco and its affiliates harmless from those third-party claims; and (4) remediate the soil in and around the town of La Oroya [which] constitutes a breach of [...] Article 10.16(1)(b)(i)(C) of the Treaty.” (¶¶ 59-60).</p>	<p>Article 10.16(1)(a)(i)(C): Investment Agreement</p> <p>“Peru has failed to observe its obligations to Renco under the Stock Transfer Agreement and the Guaranty, which were executed as part of a single transaction and together are investment agreements, by failing to, <i>inter alia</i>, (1) appear in and defend the Lawsuits; (2) assume responsibility and liability for any damages that the plaintiffs may recover in the Lawsuits; (3) indemnify, release, protect and hold Renco and its affiliates harmless from those third-party claims; and (4) remediate the soil in and around the town of La Oroya, <u>and (5) honor the force majeure clause in the Stock Transfer Agreement by granting DRP reasonable and adequate extensions of time to fulfill the PAMA</u>, [which] constitutes a breach of [...] Article 10.16(1)(b)<u>(a)</u>(i)(C) of the Treaty.” (¶¶ 56-57).</p>

32. Moreover, that Renco continues to make claims on behalf of DRP, *i.e.*, for “loss or damage” to DRP,⁶⁸ also is evident from its Amended Notice of Arbitration and its Memorial, in which Renco claims that Peru has violated Articles 10.3, 10.5, and 10.7 of the Treaty, and the alleged investment agreements by, *inter alia*, “imposing on DRP” requirements “which increased the amount of time and money that DRP was required to spend;”⁶⁹ treating DRP unfairly;⁷⁰ “extracting key concessions from Doe Run Peru as a precondition to granting an extension based upon economic force majeure as provided in the Stock Transfer Agreement;”⁷¹ “failing to grant Doe Run Peru an effective extension to finish one of the three sub-projects comprising its ninth and final PAMA project;”⁷² treating “Doe Run Peru’s extension requests less favorably than it treated Centromin’s extension request;”⁷³ forcing “Doe Run Peru to undergo an extremely lengthy and expensive process with respect to its request for an extension of its PAMA deadline;”⁷⁴ increasing the “cost and complexity of Doe Run Peru’s environmental obligations;”⁷⁵ requiring “Doe Run Peru to channel 100 percent of its revenues into a trust account;”⁷⁶ insisting on being able “to foreclose on the guarantees if Doe Run Peru did not obtain financing and restart operations by July 27, 2010;”⁷⁷ asserting “a baseless US\$ 163 million claim against Doe Run Peru in the INDECOPI Bankruptcy Proceedings;”⁷⁸ and “opposing Doe Run Peru’s restructuring plan.”⁷⁹

33. The alleged measures of Peru that Renco argues constitute a violation of the Treaty are measures that were taken against DRP (not Renco) and allegedly caused loss or damage to DRP. Renco is not claiming damages for its proportionate share of damage sustained by DRP, as a shareholder of DRP, because Renco owns 100% of DRP. Accordingly, Renco’s claims are *de facto* claims made on behalf of DRP pursuant to Article 10.16.1(b) for which Renco was required to submit a written waiver covering DRP under Article 10.18.2(b)(ii) of the Treaty. Renco cannot be allowed to circumvent an express condition to Peru’s consent to arbitration and to the jurisdiction of the Tribunal by simply removing any reference to Article 10.16.1(b) from its Amended Notice of Arbitration and its Memorial, while maintaining the exact same claims that it made with its original Notice of Arbitration, which was correctly submitted pursuant to Articles 10.16.1(a) and (b). Such result would be contrary to the very concept of State consent, which is the cornerstone of the investor-State arbitration system.

34. Moreover, if a claimant, such as Renco, which owns or controls a local enterprise, such as DRP, were permitted to arbitrate under the Treaty without having its enterprise file a waiver when its claims are based on loss or damage to that enterprise, the waiver requirement would be rendered meaningless.⁸⁰ This is because the investor could use its control of the local enterprise, as in

⁶⁸ Treaty, Art. 10.16.1(b) (RLA-1).

⁶⁹ Amended Notice of Arbitration ¶ 46 (emphasis added).

⁷⁰ Amended Notice of Arbitration ¶¶ 52, 58.

⁷¹ Claimant’s Memorial on Liability ¶ 307 (emphasis added); *see also id.* ¶¶ 328-331, 412(ii).

⁷² Memorial ¶ 307 (emphasis added); *see also id.* ¶¶ 355-357, 362, 365-367, 388-389, 409, 412(i), (iii).

⁷³ Memorial ¶ 368 (emphasis added); *see also id.* ¶¶ 370-379.

⁷⁴ Memorial ¶ 371 (emphasis added).

⁷⁵ Memorial ¶ 321 (emphasis added).

⁷⁶ Memorial ¶ 332 (emphasis added); *see also id.* ¶¶ 359-360.

⁷⁷ Memorial ¶ 335 (emphasis added); *see also id.* ¶ 412(iv).

⁷⁸ Memorial ¶ 340 (emphasis added); *see also id.* ¶¶ 381, 388, 391, 409, 412(v).

⁷⁹ Memorial ¶ 341 (emphasis added); *see also id.* ¶¶ 381, 388, 391, 412(v).

⁸⁰ *The Corfu Channel Case* (Merits), 1949 ICJ Reports, at 24 (“It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.”) (RLA-99); *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope as to

fact Renco has done in this case, to initiate or continue local proceedings that it itself could not initiate or continue without violating the terms of its own waiver pursuant to Article 10.18.2(b)(i).

35. Renco cannot be allowed to render Articles 10.18.2(b) and 10.26.2, meaningless: it is the basis of Peru's consent to arbitrate disputes under the Treaty and, therefore, goes to the heart of the Tribunal's jurisdiction over Renco's claims.

36. Finally, allowing this arbitration to proceed without a written waiver for DRP also allows Renco to have two bites at the apple, because it enables Renco to make claims in this Treaty arbitration based on the Share Transfer Agreement (the "Contract")⁸¹ and the Guaranty Agreement (the "Guaranty"),⁸² through Article 10.16.1(a)(i)(C) (breach of an investment agreement)⁸³ and Article 10.5 (fair and equitable treatment) for failure to grant DRP a *force majeure* extension pursuant to Clause Fifteenth of the Contract,⁸⁴ for failure "to assume liability for third-party claims and damages," and for "refusing to defend and indemnify the Renco Consortium members and related entities and individuals in the personal injury St. Louis Lawsuits,"⁸⁵ as allegedly required under the Contract and the Guaranty – while preserving DRP's right to pursue the same claims in accordance with the dispute resolution clauses in the Contract and the Guaranty.⁸⁶

37. Accordingly, the absence of a waiver on behalf of DRP in the Amended Notice of Arbitration violates the condition to Peru's consent set forth in Article 10.18(2)(b)(ii) of the Treaty. Renco's claims thus must be dismissed in their entirety, because Article 10.18.2 is clear that "[n]o claim may be submitted to arbitration [...] unless" the claimant complies with all of the conditions set forth in its subparagraphs.⁸⁷

III. THE ONGOING LOCAL PROCEEDINGS

38. In addition to its violations of Article 10.18 in *word*, Renco also has violated the waiver requirement in *deed*, because the enterprise on whose behalf it submitted a claim to arbitration, *i.e.*, DRP, failed to discontinue local proceedings in Peru. Specifically, since this arbitration began, DRP has continued a constitutional *amparo* action ("First Proceeding") and initiated administrative action 368-2012 ("Second Proceeding," and together with The First Proceeding, the "Local Proceedings"), as illustrated by the timeline in Annex A.⁸⁸

39. The Local Proceedings constitute a material breach of the Treaty insofar as the Local Proceedings (a) concern measures alleged to constitute a breach of the Treaty in this arbitration;

the Respondent's Preliminary Objections under Article 10.20.4 dated 18 Dec. 2014 ¶ 177 ("The Tribunal also notes that the principle of effectiveness (*effet utile*) is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that 'every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or *inutile*).'" (quoting OPPENHEIM'S INTERNATIONAL LAW 1280-81 (R. Jennings & A. Watts eds., 9th ed. 1996).

⁸¹ Contract of Stock Transfer, Capital Stock Increase and Stock Subscription of Empresa Metalurgica La Oroya S.A. "Metaloroya S.A." (the "Contract") dated 23 Oct. 1997 (Exh. C-2).

⁸² Guaranty Agreement dated 21 Nov. 1997 (Exh. C-3).

⁸³ Memorial ¶¶ 239-293, 365-367.

⁸⁴ Memorial ¶¶ 309-317, 345-349.

⁸⁵ Memorial ¶ 413; *see also id.* ¶¶ 303-306.

⁸⁶ Contract, Clause Twelfth (Exh. C-2); Guaranty, Clause Third (Exh. C-3).

⁸⁷ Treaty, Art. 10.18.2 (emphasis added) (RLA-1).

⁸⁸ The Figure is for illustrative purposes and is not intended to be comprehensive.

(b) have been initiated or continued after the commencement of this arbitration; and (c) do not fall within the sole exception to the waiver requirement.

40. Consequently, the conditions for Peru's consent to arbitrate under the Treaty are not met, and the Tribunal must dismiss Renco's claims for lack of jurisdiction independently of Renco's failure to submit written waivers in accordance with the requirements of Article 10.18.2, as discussed above. As the *Commerce Group* tribunal emphasized, "a waiver must be more than just words; it must accomplish its intended effect."⁸⁹ The *Railroad Development Corporation* tribunal similarly remarked: "[i]t is the fact that two domestic arbitration proceedings exist and overlap with this arbitration as determined by the Tribunal that triggers the defect in the waiver."⁹⁰

A. The Local Proceedings Concern Measures That Allegedly Breach the Treaty

41. As set forth above, the Local Proceedings both concern the recognition of an approximate US\$ 163 million credit in favor of the Ministry of Energy and Mines ("MEM") corresponding to DRP's unfulfilled Environmental Remediation and Management Program ("PAMA") investments⁹¹ by INDECOPI.⁹² The PAMA is an instrument required by Peruvian law that outlines actions and investments necessary to achieve compliance with applicable environmental regulations.⁹³ DRP failed to comply with its specific promises and obligations under the PAMA, as required, and, after DRP was placed into bankruptcy, the MEM filed a claim for the debt occasioned by DRP's failure to fulfill those promises and obligations.

- In the First Proceeding, DRP alleges that the recognition of the MEM's credit threatens DRP's property, enterprise, and due process rights.⁹⁴ DRP argues that the PAMA obligations are not quantifiable credits as contemplated under Peruvian bankruptcy provisions; that the MEM is not expressly authorized to request credits; and that the MEM could become the dominant creditor and gain impermissible control over DRP's future, if the credit is recognized.⁹⁵
- In the Second Proceeding, DRP and DRC seek the annulment of INDECOPI's recognition of the MEM's credit on 16 January 2012,⁹⁶ arguing that the MEM should not be a creditor, because DRP's obligation is to comply with environmental regulations, not

⁸⁹ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶¶ 80, 84 (RLA-22).

⁹⁰ *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5 dated 17 Nov. 2008 ¶ 54 (RLA-20).

⁹¹ On 13 January 1997, the MEM approved the PAMA for the La Oroya Facility, which contained obligations to implement projects aimed at remediating, mitigating, and preventing environmental degradation. On 23 October 1997, Doe Run Peru S.R.Ltda ("DRP") executed the Contract to purchase the La Oroya Facility. DRP undertook to implement the PAMA therein. See Memorial ¶ 47, 49.

⁹² INDECOPI Resolution No. 9340-2011/CCO-INDECOPI dated 21 Dec. 2011 (Exh. C-137); see also INDECOPI Resolution regarding Recognition of Credits Unfounded dated 23 Feb. 2011 (Exh. C-130); INDECOPI Resolution, Recognition of Credits - Mandate of the Court for Defense of Competition No. 1 dated 21 Dec. 2011 (Exh. C-137); Memorial ¶ 196.

⁹³ Supreme Decree No. 016-93-EM concerning Regulations for Environmental Protection in Mining and Metallurgy dated 28 Apr. 1993, Art. 2 (Exh. C-37). The Ministry of Energy and Mines ("MEM") is in charge of reviewing and approving the PAMA for mining activities. *Id.*, Art. 4.

⁹⁴ DRP Constitutional *Amparo* Action Complaint dated 22 Nov. 2010, at 3 (Exh. R-19).

⁹⁵ DRP Constitutional *Amparo* Action Complaint dated 22 Nov. 2010, at 3, 17, 41 (Exh. R-19).

⁹⁶ DRP's Request for Annulment of Administrative Decision, dated 16 Jan. 2012 (Exh. C-138).

to perform the investments outlined in the PAMA to achieve compliance, and because the only legal consequences of a PAMA breach are the imposition of sanctions and/or the forced shut down of operations; DRP and DRC further argue that the completion of the PAMA does not create a quantifiable obligation nor qualify as a credit in favor of the MEM.⁹⁷

42. The subject matter of the Local Proceedings also forms the basis of Renco's claims in this arbitration. In this arbitration, Renco alleges that the recognition of the MEM's credit constitutes a breach of the Treaty. Specifically, Renco claims in the Notice of Arbitration and Amended Notice of Arbitration that recognition of the credit constitute a breach of the fair and equitable treatment obligation and an expropriation.⁹⁸

- *Fair and Equitable Treatment.* According to Renco, "the Peruvian Government's improper injection of itself into the INDECOPI proceedings formed part of the pattern of gross and unfair conduct resulting in Renco's loss of its investment."⁹⁹ Specifically, Renco complains that "the Ministry of Energy & Mines asserted a baseless US\$ 163 million claim against Doe Run Peru in the INDECOPI Bankruptcy Proceedings" and that, through this, "the Peruvian Government became Doe Run Peru's largest creditor and has been able to greatly influence, if not completely control, the Bankruptcy process."¹⁰⁰
- *Expropriation.* According to Renco, "Peru violated the Treaty because it 'directly or indirectly' expropriated Renco's investments through its pattern of conduct including [...] the assertion of a baseless claim by the Ministry of Energy & Mines in the INDECOPI Bankruptcy Proceedings resulting in its ability to influence the Bankruptcy proceeding and approve Doe Run Peru's restructuring plans."¹⁰¹

43. Accordingly, Renco has made claims in this arbitration that relate "very much to the same 'measures' as those at issue" in the Local Proceedings.¹⁰² As set forth above, Article 10.18.2 of the Treaty requires the waiver to encompass "*any proceeding* with respect to *any measure* alleged to constitute a breach" of the Treaty. No matter the forum or legal basis of the action, there can be no parallel proceedings concerning a measure at issue in the treaty arbitration.¹⁰³ The initiation and continuation of these Local Proceedings by Renco's enterprise DRP, thus violates the waiver requirement, and renders this Tribunal without jurisdiction over Renco's claims.

44. This plain meaning interpretation of the waiver requirement was confirmed by the *Waste Management* tribunal more than fifteen years ago in a case in which the claimant argued, unsuccessfully, that the initiation and continuation by its enterprise (Acaverde) of local proceedings concerning measures at issue in the NAFTA arbitration did not constitute a violation of the waiver

⁹⁷ DRP's Request for Annulment of Administrative Decision, dated 16 Jan. 2012, at 38-44 (Exh. C-138).

⁹⁸ Notice of Arbitration ¶ 64; Amended Notice ¶ 61.

⁹⁹ Memorial ¶ 340.

¹⁰⁰ Memorial ¶ 340.

¹⁰¹ Memorial ¶ 391.

¹⁰² *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶ 101 (RLA-22).

¹⁰³ See J. Thornton, "The Modified Waiver Provision in CAFTA-DR Article 10.18.2" in C. Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (2012) at 500-501 (explaining that the same conclusion applies to the waiver requirement of the CAFTA) (RLA-97).

requirement, because the local proceedings concerned violations of domestic law, rather than the NAFTA.¹⁰⁴ In rejecting this argument, the tribunal stated that the requirement that the waiver encompass any proceeding with respect to any measure means that “when both legal actions have a legal basis derived from *the same measures*, they can no longer continue simultaneously.”¹⁰⁵ Because Acaverde continued, and even initiated, new proceedings concerning the same measures after the NAFTA arbitration had been commenced, the tribunal dismissed the case for lack of jurisdiction owing to the breach of the waiver requirement.¹⁰⁶

45. Similarly, in *Commerce Group*, the tribunal determined that the existence of two cases filed by the claimant and its enterprise in El Salvador’s courts relating “very much to the same ‘measures’ as those at issue in [the treaty] proceedings” – *i.e.*, “the revocation of the environmental permits” – meant that the waiver that accompanied the notice of arbitration was “invalid as it lack[ed] effectiveness.”¹⁰⁷ This, in turn, led the *Commerce Group* tribunal to dismiss the arbitration for lack of jurisdiction.¹⁰⁸ For the same reason, the initiation and continuation of the Local Proceedings violates the waiver requirement in the Treaty and deprives this Tribunal of jurisdiction over the dispute.

B. The Local Proceedings Were Initiated And/Or Continued In Violation Of The Waiver Requirement

46. The initiation and continuation of the Local Proceedings through Renco’s enterprise DRP after the commencement of this arbitration is in violation of Article 10.18.2 of the Treaty, which, as explained above, required both the claimant Renco and its enterprise DRP to submit conforming waivers, as explained above. Renco’s statement that “the Peruvian legal proceedings [...] were not filed by the party that is the Claimant in the arbitration,” is irrelevant, because Renco has asserted and maintains claims on behalf of DRP.¹⁰⁹ Notably, Renco recognized the inappropriateness of its actions, by attempting to unilaterally withdraw the waiver that DRP had filed with the initial Notice of Arbitration—which was defective, as Peru previously had noted—and then filing an Amended Notice of Arbitration that did not contain any such waiver.

47. Article 10.18.2 is clear in that the waiver must (i) accompany the notice of arbitration, and (ii) encompass a waiver of the right to “*initiate or continue* [...] any proceeding.” Accordingly, compliance with the waiver requirement must start with the notice of arbitration and extend throughout the treaty arbitration. In dismissing the claimant’s claims for failure to comply with the waiver requirement owing to the initiation of new proceedings and continuation of existing ones, the *Waste*

¹⁰⁴ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶¶ 24-28 (RLA-102).

¹⁰⁵ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 27 (emphasis added) (RLA-102); *see also* *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25) Award on Jurisdiction dated 2 Apr. 2015 ¶ 303 (where the Tribunal noted the following with respect to the NAFTA waiver requirement “ ‘[...] in contrast to the formulations in ‘fork in the road’ clauses, or in Article 26 of ICSID, the formulation in Article 1121 focuses on the State measure – the governmental act – which has given rise to the dispute, and not on the claims to which such a measure may give rise.’ For instance, if a discriminatory licensing denial gives rise to distinct legal claims under NAFTA and under a domestic law, both claims relate to the same measure, regardless of the legal cause of action under the respective laws.”) (RLA-100).

¹⁰⁶ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶¶ 30-31 (RLA-102).

¹⁰⁷ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶¶ 101, 115 (RLA-22).

¹⁰⁸ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶¶ 115, 140 (RLA-22).

¹⁰⁹ Email from E. Kehoe to the Tribunal dated May 8, 2015.

Management tribunal remarked that it was from the date that the notice of arbitration was submitted to the ICSID Secretary-General “onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.”¹¹⁰ Similarly, it was the “Claimants’ failure to discontinue the proceedings before the El Salvador courts” before filing the notice of arbitration that led the *Commerce Group* tribunal to conclude that the claimants “did not act in accordance with the requirements of the Waiver Provision.”¹¹¹

48. As the record establishes, Renco and DRP failed to comply with the waivers that were submitted with the initial Notice of Arbitration of 4 April 2011 by failing to discontinue The First Proceeding, which had been underway since November of the prior year.¹¹² In fact, DRP filed an appeal in The First Proceeding in February 2011,¹¹³ which remained pending until it was rejected by the Peruvian Superior Court of Justice in August 2011.¹¹⁴ This failure to discontinue The First Proceeding, when DRP had submitted a waiver indicating that it would discontinue any local proceedings challenging the same measures at issue in the arbitration, constitutes a clear breach of the waiver submitted with Renco’s Notice of Arbitration and requires dismissal of the claims.

49. Furthermore, as explained above, four months after presenting the Notice of Arbitration, DRP informed Peru that it was withdrawing the waiver it previously had submitted,¹¹⁵ and, Renco did not include a waiver on behalf of DRP in the Amended Notice of Arbitration dated 9 August 2011, in violation of Article 10.18.2. As demonstrated above, however, Renco was obligated to submit a waiver from DRP with its Amended Notice of Arbitration, because that Amended Notice of Arbitration maintained the same claims brought on behalf of DRP in the initial Notice of Arbitration, and DRP, as the enterprise, could not pursue parallel actions without violating the Treaty. Specifically, in accordance with the express requirements of Articles 10.16.1 and 10.18.2, any actions taken by DRP to initiate or continue local proceedings challenging the measures at issue in this arbitration also constitute a violation of the Treaty’s waiver requirement and require dismissal of Renco’s claims.

50. Indeed, Renco and DRP violated the waiver requirement by continuing The First Proceeding.¹¹⁶ In fact, DRP filed a second appeal in The First Proceeding on 14 September 2011 after

¹¹⁰ *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award dated 2 Jun. 2000 ¶ 19 (RLA-102).

¹¹¹ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award dated 14 Mar. 2011 ¶ 107, 115; *see also id.* ¶¶ 96-100 (noting that compliance with the waiver requirement must be determined from the date of the filing of the request for arbitration, rather than the date on which the tribunal was constituted) (RLA-22).

¹¹² Before the arbitration was filed, DRP initiated the Amparo Action on 22 November 2010. DRP Constitutional Amparo Action Complaint dated 22 Nov. 2010, at 3 (Exh. R-19). The Peruvian court of first instance found DRP’s claim to be unfounded. Lima, First Court Specialized on Constitutional Matters, Resolution No. 1 dated 11 Jan. 2011 (Exh. R-20).

¹¹³ DRP Appeal, Constitutional Amparo Action dated 3 Feb. 2011 (Exh. R-21).

¹¹⁴ Superior Court of Justice, First Civil Chamber, Resolution N° 5 dated 18 Aug. 2011 (affirming the decision below) (Exh. R-22).

¹¹⁵ Letter from DRP to Peru and its Counsel dated 5 Aug. 2011 (Exh. R-1). The Treaty does not refer to the withdrawal of a waiver submitted thereunder.

¹¹⁶ DRP could have terminated the Amparo Action under Peruvian law. *See* Peru, Civil Code, Art. 340 (“[W]ithdrawal may be of the proceeding or a procedural act; and of the claim”); Art. 342 (“[W]ithdrawal of the proceeding or the procedural act may be before the procedural situation being waived has taken effect”); Art. 343 (“The withdrawal of the proceeding terminates the proceeding without affecting the claim. When formulated after notice to the defendant, it requires the defendant’s express agreement within three days of notification, or its opposition. If such there is an objection, the withdrawal will not be effective, and the proceeding shall continue. The waiver of any procedural act, whether a means of

the filing of the Amended Notice of Arbitration on 9 August 2011.¹¹⁷ The First Proceeding is currently pending before Peru's Constitutional Court,¹¹⁸ which is the ultimate appellate authority for *amparo* actions.¹¹⁹

51. In addition, Renco and DRP violated the waivers by initiating The Second Proceeding. DRP filed The Second Proceeding on 16 January 2012.¹²⁰ On 23 May 2012, the day after the liquidator assumed the legal representation of DRP in DRP's bankruptcy proceedings,¹²¹ Renco's wholly-owned subsidiary DRC intervened in The Second Proceeding, asserting that the MEM's participation diluted its interest on the Creditors' Board and interfered with its ability to control DRP's future.¹²²

52. DRP has taken no steps to terminate The Second Proceeding and has continued to pursue the proceeding with DRC, in violation of Article 10.18.¹²³ After the Peruvian court of first instance upheld INDECOPI's recognition of the MEM's credit,¹²⁴ DRP and DRC appealed the decision before the Superior Court of Justice on 29 October, 2012.¹²⁵ After that appeal was rejected,¹²⁶ DRP and DRC filed a cassation appeal before the Supreme Court of Peru in August 2014.¹²⁷ Recently, on 26 March 2015, DRC requested a ruling from the Supreme Court of Peru regarding the cassation appeal.¹²⁸

challenge, means of defense or another, the favorable legal situation of the claimant is without effect. If the withdrawal is a means of challenge, its effect is to make firm the contested measure, unless adhesion was brought.") (RLA-104).

¹¹⁷ DRP Constitutional Grievance dated 14 Sept. 2011 (Exh. R-23).

¹¹⁸ Constitutional Court File Report, File No. 26919-2010-0-1801-JR-CI-01, dated 9 July 2015 (R-24).

¹¹⁹ Peruvian Code of Constitutional Procedure, Arts. 18, 202(2) (RLA-91).

¹²⁰ DRP's Request for Annulment of Administrative Decision, dated 16 Jan. 2012 (Exh. C-138).

¹²¹ See Notification by Right Business S.A. to Court in Administrative Law Action 368-2012 dated 12 June 2012 ¶ 3 (Exh. R-18).

¹²² Request by DRC Ltd. to Join the Proceedings of Administrative Law Action 368-2012 dated 23 May 2012 ("The illegality of MINEM's credit harms us as a recognized creditor in DRP's bankruptcy proceeding, No. 33-2010/CCO-INDECOPI, given that the illegal MINEM credit should not have been recognized because it is not a debt, reducing our participation percentage in the proceeding, which is decisive at the time of voting.") (Exh. R-17).

¹²³ DRP could have terminated the Administrative Action under Peruvian law. See Peru, Civil Code, Art. 340 ("[W]ithdrawal may be of the proceeding or a procedural act; and of the claim"); Art. 342 ("[W]ithdrawal of the proceeding or the procedural act may be before the procedural situation being waived has taken effect"); Art. 343 ("The withdrawal of the proceeding terminates the proceeding without affecting the claim. When formulated after notice to the defendant, it requires the defendant's express agreement within three days of notification, or its opposition. If such there is an objection, the withdrawal will not be effective, and the proceeding shall continue. The waiver of any procedural act, whether a means of challenge, means of defense or another, the favorable legal situation of the claimant is without effect. If the withdrawal is a means of challenge, its effect is to make firm the contested measure, unless adhesion was brought.") (RLA-104).

¹²⁴ Lima's Superior Court of Justice, Resolution No. 24 dated 18 Oct. 2012 ¶¶ 11-21 (finding that DRP had breached a quantifiable obligation owed to MEM under the PAMA pursuant to applicable law) (Exh. C-139).

¹²⁵ DRC Appeal Submission dated 29 Oct. 2012 (Exh. R-25); DRP Appeal Submission dated 5 Nov. 2012 (Exh. R-26).

¹²⁶ The Eighth Court Specialized in Administrative Contentious Matters of the Lima Superior Court of Justice dated 25 Jul. 2014 (Exh. R-27).

¹²⁷ DRP Cassation Appeal Submission dated 20 Aug. 2014 (Exh. R-28); DRC's Cassation Appeal Submission dated 21 Aug. 2014 (Exh. R-28).

¹²⁸ See Report of Proceedings of Administrative Law Action 368-2012 dated 1 Apr. 2015 (Exh. R-16); see also Letter from Renco to the Tribunal dated 10 June 2015 (describing the attached Request from DRC to the Supreme Court of Peru dated 26 Mar. 2015 as a "simple and routine filing in a local litigation . . . a bare, half-page letter that merely seeks the resolution of a case . . ."). As a matter of Peruvian law, such filings are only available to the parties, their lawyers, and their agents. See Peruvian Regulations of the Code of Civil Procedure, Art. 138 ("The parties, their lawyers and their agents may examine the court records that are maintained locally and can take note of its contents.") (RLA-92).

C. The Local Proceedings Do Not Fall Within The Exemption From The Waiver Requirement

53. The Local Proceedings do not fall within the scope of Article 10.18.3, which provides the sole exception to the waiver requirement. Pursuant to Article 10.18.3, a parallel action in another forum may only be initiated or continued, without violating the waiver requirement, if that action (i) “seeks interim injunctive relief,” and (ii) “is brought for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration.”¹²⁹ The Local Proceedings meet none of these conditions.

54. The Local Proceedings do not seek interim injunctive relief. Interim injunctive relief—“medidas cautelares” in the Spanish version of the Treaty—is temporary relief intended to prevent a petitioner from suffering irreparable harm.¹³⁰ As a matter of Peruvian law, the action [*proceso cautelar*] for interim injunctive relief [*medidas cautelares*] is governed by Title IV of the Code of Civil Procedure,¹³¹ and relief may only be granted when a petitioner demonstrates the need for a preventive decision to avoid endangerment.¹³² In contrast, both of the Local Proceedings are distinct actions pursuant to distinct legal norms, and brought to seek permanent relief.

- *Amparos do not constitute a form of interim relief.* As a matter of Peruvian law, *amparo* actions are intended to annul actions affecting constitutional rights, such as free speech, property, and due process.¹³³ DRP’s Amparo Action seeks a declaration that would render null INDECOPI’s recognition of the MEM’s credit, which DRP asserts violates its right to enterprise, property, and due process.¹³⁴
- *Contentious administrative actions do not constitute a form of interim relief.* As a matter of Peruvian law, administrative actions are proceedings on the merits in a judicial court to challenge a final decision of an administrative entity.¹³⁵ Remedies available under contentious administrative actions include a declaration of nullity and monetary

¹²⁹ Treaty, Art. 10.18.3 (RLA-1).

¹³⁰ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2425 (Kluwer 2014) (explaining that “national legislatures and courts have developed means for granting interlocutory or interim provisional measures designed to safeguard parties from serious injury caused by delays in the litigation process.”) (RLA-105); *see also* Peruvian Code of Civil Procedure, Art. 612 (“An interim measure gives prejudgment that is temporary, instrumental and variable.”) (RLA-89).

¹³¹ *See* Peruvian Code of Civil Procedure, Arts. 608-687 (RLA-89).

¹³² *See* Peruvian Code of Civil Procedure, Art. 611 (RLA-89).

¹³³ *See* Peruvian Code of Constitutional Procedure, Law No. 28237 dated 31 May 2004, Chapter I, Art. 37. (RLA-91).

¹³⁴ DRP Constitutional *Amparo* Action Complaint dated 22 Nov. 2010, at 3 (“It is requested that the actions of the MINISTRY OF ENERGY AND MINES to obtain the recognition of bankruptcy credits in DOE RUN PERÚ S.R.L. be declared unconstitutional.”) (Exh. R-19); Peruvian Code of Constitutional Procedure, Law No. 28237 dated 31 May 2004, Art. 1 (“Finality of Proceedings.- The proceedings to which this title refers are intended to protect constitutional rights, reestablishing the situation prior to the violation or threatened violation of a constitutional right, or arranging to comply with legal mandate or an administrative act.”) (RLA-91).

¹³⁵ *See* Peru, Constitution, Art. 148 (“Final administrative decisions are susceptible to challenge through the administrative contentious action.”) (RLA-90).

damages.¹³⁶ In the Second Proceeding, Renco’s subsidiaries seek to nullify INDECOPI’s recognition of the MEM’s credit.¹³⁷

55. Nor are the Local Proceedings brought to preserve Renco’s or DRP’s rights during the pendency of the arbitration. As a matter of Peruvian Law, *amparo* proceedings and administrative actions are intended to provide permanent relief.¹³⁸

IV. REQUEST FOR RELIEF

56. For the foregoing reasons, Renco is in violation of the Treaty and has failed to establish the requirements for Peru’s consent to arbitrate under the Treaty. Renco’s claims accordingly must be dismissed for lack of jurisdiction.

57. The Republic of Peru respectfully requests that the Tribunal render an award dismissing Renco’s claims, with an award of costs in favor of Peru.

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10 July 2015

¹³⁶ Peru, Law No. 27584, “Law that Regulates the Contentious Administrative Procedure,” dated 29 Aug. 2008. Art. 5 (RLA-94); *id.* Art. 41 (“The decision declaring as founded the complaint may decide according to the claim: The invalidity, in whole or in part, or inefficiency of the administrative act in question, according to what is requested . . . The amount of the compensation for the damages caused.”) (RLA-94).

¹³⁷ DRP’s Request for Annulment of Administrative Decision, dated 16 Jan. 2012, at 2 (“To declare the TOTAL NULLITY of Resolution No.1743-2001/SC1-INDECOPI dated 18 November 2011”) (Exh. C-138).

¹³⁸ Peru, Law No. 27584, “Law that Regulates the Contentious Administrative Procedure,” dated 29 Aug. 2008. Art. 41 (explaining that a ruling in favor of petitioner may result in the annulment of the administrative act and an order reestablishing petitioner’s rights) (RLA-94); Peruvian Code of Constitutional Procedure, Law No. 28237 dated 31 May 2004, Art. 55 (“The decision declaring the [amparo] complaint as founded contain one or more of the following rulings: 1) Identification of the constitutional right violated or threatened; 2) declaration of invalidity of the decision, act or resolution that prevented the full exercise of constitutional rights protected with determination, and where appropriate, the extent of its effects; 3) Restitution or restoration of the victim in the full enjoyment of their constitutional rights by ordering things back to the state it was in before the violation.”) (RLA-91).