

IN THE ARBITRATION UNDER CHAPTER TEN OF THE
UNITED STATES-PERU TRADE PROMOTION AGREEMENT
AND THE UNCITRAL ARBITRATION RULES, 2013

RENCO GROUP, INC.,

Claimant

-and-

GOVERNMENT OF PERU,

Respondent.

PCA CASE NO. 2019-46

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 10.20.2 of the United States-Peru Trade Promotion Agreement (“U.S.-Peru TPA” or “Agreement”), which authorizes a non-disputing Party to make oral and written submissions to a tribunal regarding the interpretation of the Agreement. The United States does not take a position on how the interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Article 10.18.1 (Limitations Period)

2. Article 10.18.1 of the U.S.-Peru TPA provides:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

3. Article 10.18.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.¹ As is made explicit by Article 10.18.1, the Parties did

¹ See, e.g., *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 280 (May

not consent to arbitrate an investment dispute if “more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach” and “knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage.” Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 10.18.1 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) an arbitration claim. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,² the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.³

4. This limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.”⁴ An investor or enterprise first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular “date.” Such knowledge cannot *first* be acquired on multiple dates or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the nearly identical limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA,⁵ subsequent transgressions by a Party arising from a

31, 2016) (finding that the tribunal lacks jurisdiction due to application of the time-bar); *Spence Int’l Invests., LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶¶ 235-236 (May 30, 2017) (“*Berkowitz Interim Award*”) (addressing the time-bar defense as a jurisdictional issue); *see also Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) (“*Resolute Decision on Jurisdiction and Admissibility*”) (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 “goes to jurisdiction”); *Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) (“*Apotex I & II Award*”) (parties treated the United States’ time-bar objection as a jurisdictional issue, and the tribunal expressly found that NAFTA Article 1116(2) deprived it of “jurisdiction *ratione temporis*” with respect to one of the claimant’s alleged breaches); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶ 18 (May 31, 2005) (finding that that “an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)” of the UNCITRAL Arbitration Rules (1976)).

² *Apotex I & II Award* ¶ 150. *See also Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) (“[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage”); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) (“*Mesa Award*”) (“It is for the Claimant to establish the factual elements necessary to sustain the Tribunal’s jurisdiction over the challenged measures.”); *see also Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that “if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional phase”); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding that claimant “has the burden of demonstrating that its claims fall within the Tribunal’s jurisdiction”); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof “required at the jurisdictional phase”).

³ *Berkowitz Interim Award* ¶¶ 163, 239, 245-246.

⁴ The nearly identical NAFTA Chapter Eleven limitations period has been described as “clear and rigid” and not subject to any “suspension, prolongation, or other qualification.” *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006) (“*Grand River Decision on Jurisdiction*”); *Resolute Decision on Jurisdiction and Admissibility* ¶ 153; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) (“*Feldman Award*”).

⁵ *See Grand River Decision on Jurisdiction* ¶ 81.

continuing course of conduct do not renew the limitations period once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby.⁶ To allow otherwise would permit an investor to evade the limitations period by basing its claim on the most recent transgression in that series, rendering the limitations provisions ineffective.⁷

5. With regard to knowledge of “incurred loss or damage” under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.⁸ Moreover, the term “incur” broadly means to “to become liable or subject to.”⁹ Therefore, an investor may “incur” loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.¹⁰

6. With regard to “knowledge of the breach alleged” under Article 10.18.1, a “breach” of an international obligation exists “when an act of th[e] State is not in conformity with what is required of it by that obligation.”¹¹ It is well-established that the international responsibility of States may not be invoked with respect to non-final judicial acts,¹² unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Thus, non-final judicial acts have not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless further recourse is obviously futile or manifestly ineffective.

7. In the context of a claim of denial of justice, therefore, the three-year limitations period set out in Article 10.18.1 will not begin to run until the date on which the investor or enterprise

⁶ See *Resolute* Decision on Jurisdiction and Admissibility ¶ 158 (“[W]hether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.”).

⁷ *Id.* ¶ 81. Thus, although a legally distinct injury can give rise to a separate limitations period, a continuing course of conduct does not extend the limitations period under Article 10.18.1. Moreover, while measures taken outside of the three-year limitations period may be taken into account as background or contextual facts, such measures cannot serve as a basis for a finding of a breach under Article 10 of the U.S.-Peru TPA. See *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 348 (June 8, 2009) (“*Glamis Award*”).

⁸ See *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) (“*Mondev Award*”) (“A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”).

⁹ “Incur,” Merriam-Webster Online Dictionary, available at <https://www.merriam-webster.com/dictionary/incur>; see also *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (finding that to “incur” means to “become liable or subject to” and that “a person may become ‘subject to’ an expense before she actually disburses any funds”).

¹⁰ *Grand River* Decision on Jurisdiction ¶ 77; see also *Berkowitz Interim Award* ¶ 213 (finding “the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred”).

¹¹ Articles on Responsibility of States for Internationally Wrongful Acts, art. 12.

¹² *Apotex*, Award ¶ 282 (“[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself.”); PAULSSON at 108 (“For a foreigner’s international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.”); Douglas at 28 (explaining that “international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.”).

first acquired, or should have acquired, knowledge that either the breach has occurred—*i.e.*, when all available domestic remedies have been exhausted, unless obviously futile or manifestly ineffective—or the claimant or enterprise has incurred loss or damage, whichever is later.

Article 10.1.3 (Non-Retroactivity)

8. Article 10.1.3 states: “[f]or greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.” The phrase “for greater certainty” signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent.¹³

9. A host State’s conduct prior to the entry into force of an obligation may be relevant in determining whether the State subsequently breached that obligation. Given the rule against retroactivity, however, there must exist “conduct of the State after that date which is itself a breach.”¹⁴ As the *Berkowitz* tribunal observed, “pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot . . . constitute a cause of action.”¹⁵ Further, “[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.”¹⁶

¹³ See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 115 U.N.T.S. 331, Article 28 (“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”). While the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the “authoritative guide” to treaty law and practice. See Letter from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, October 18, 1971, reprinted in 65 DEP’T ST. BULL. 684, 685 (1971). See also *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000) (“Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal’s jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.”) (“*Feldman Interim Decision*”).

¹⁴ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 70 (Oct. 11, 2002) (“*Mondev Award*”). As the *Mondev* tribunal also observed, “there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage.” *Id.* ¶ 58. See also *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 129 (Dec. 2) (Separate Opinion of Judge Fitzmaurice) (“An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one.”).

¹⁵ *Berkowitz Interim Award* ¶ 217 (noting in a footnote that it “took the same view with respect to pre-entry into force omissions”).

¹⁶ *Id.* at ¶ 222 (quoting *Mondev Award* ¶ 70 (reasoning “[a]ny other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility”).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa Grosh". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Lisa J. Grosh

Assistant Legal Adviser

Nicole C. Thornton

Chief of Investment Arbitration

Margaret E. B. Sedgewick

Attorney-Adviser

Office of International Claims and
Investment Disputes

UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

March 6, 2020