

PCA CASE N° 2019-46

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE
TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PERU AND THE
UNITED STATES OF AMERICA**

- and -

THE UNCITRAL ARBITRATION RULES 2013

- between -

THE RENCO GROUP, INC.

- and -

THE REPUBLIC OF PERU

DISSENTING OPINION OF J. C. THOMAS QC

30 June 2020

Introduction

1. The main issue before the Tribunal concerns the application of the limitation period prescribed by Article 10.18 of the Peru-United States Trade Promotion Agreement (the “**TPA**” or the “**Treaty**”). I regret to say that I cannot agree with the decision reached by my distinguished colleagues. I believe that they have erred by focusing on the wrong question.¹
2. As the Decision recounts, the present proceeding is not the first time in which the two parties have been in dispute. In a prior proceeding (“*Renco I*”), initiated in 2011, a tribunal found that the Claimant failed to comply with the second condition expressed in Article 10.18 of the Treaty (which requires a claimant to file a waiver of other remedies at the time the claim is submitted to arbitration).² The Tribunal held that, “if no compliant waiver is served with the notice of arbitration, Peru’s offer to arbitrate has not been accepted; there is no arbitration agreement; and the Tribunal is without any authority whatever.”³ The claim was therefore dismissed.
3. By the time that the *Renco I* tribunal rendered its Partial Award, over four years had elapsed since the purported submission of the claim to arbitration. Given the Treaty’s three-year limitation period, this posed an obvious difficulty for the Claimant. A new claim would raise serious questions as to what measures alleged to breach the Treaty could be put before the new tribunal. Recognizing this, the *Renco I* tribunal stated that while it “cannot prevent Peru from exercising in the future what it considers to be its legal rights,” if the claim were to be submitted to a new tribunal, the Respondent should bear in mind “Renco’s submission that Peru’s conduct with

¹ To be clear, this dissent is concerned solely with the majority’s treatment of the limitation period.

² Article 10.18.2 states:

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(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 *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1 (“*Renco I*”), Partial Award on Jurisdiction, 15 July 2016 (L. Yves Fortier, Toby T. Landau, Michael J. Moser (President)), ¶ 158 (C-3/R-8/RLA-24).

respect to the late raising of the waiver objection constitutes an abuse of rights.”⁴ The tribunal found no abuse by Peru by its having raising the waiver objection in that proceeding, but said it was troubled by what it considered to be the late raising of the objection. Accordingly, “justice would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011.”⁵

4. After *Renco I*'s dismissal, settlement discussions were held pursuant to a “Consultation Agreement” and then a “Framework Agreement”.⁶ The parties agreed, without prejudice to their respective positions as to the effect of the effluxion of time since the commencement of the *Renco I* arbitration, that the time taken up by such negotiations would not be held against either party:

The Parties waive their respective rights to assert any statute of limitations, laches or other limitations argument or defense based on the passage of time between 10 November 2016 and the end of the Consultation Period with respect to the claims asserted in each of the respective Notices. For clarity, this waiver is strictly limited as set forth herein and is only prospective, and does not impact the timeliness, or untimeliness, of any claims as of the date hereof or other rights or defenses, temporal or otherwise, except as set forth herein.⁷

5. After negotiations failed, on 23 October 2018, the Claimant filed two new claims: (i) a new Treaty claim; and (ii) a contract claim with which this Tribunal is not concerned.⁸

The Issue Before the Tribunal

6. Article 10.17.1 of the Treaty, entitled, “*Consent of Each Party to Arbitration*”, limits a State Party’s consent to a claim which is submitted “to arbitration under this Section *in accordance with this Agreement...*”. [Emphasis added.]
7. The next article, Article 10.18, “*Conditions and Limitations on Consent of Each Party*” underscores the conditional nature of the consent: a would-be claimant must comply with the prescribed conditions and limitations in order to perfect the State’s offer to arbitrate and thereby form an arbitration agreement. Failure to comply with the conditions and limitations on a would-be respondent’s consent deprives the tribunal of the whole or part of its jurisdiction, depending

⁴ *Id.*, ¶ 188.

⁵ *Id.*

⁶ Dated 10 November 2016 and 14 March 2017, respectively.

⁷ Framework Agreement, ¶ 2(c) (**R-10**).

⁸ The two proceedings are separate proceedings (registered as PCA Case No. 2019-46 and PCA Case No. 2019-47). The parties to each dispute decided to appoint the same arbitrators to hear each case.

upon the circumstances of the case. This is well established and, as noted above at paragraph 2, was accepted to be the case by the *Renco I* tribunal.⁹

8. The Decision rests on my colleagues' analysis of what they see as the effect of the initiation of the *Renco I* arbitration on the jurisdiction of the present Tribunal.¹⁰ I see the issue quite differently. While *Renco I* provides important background to the present arbitration, my main interest is in how that tribunal interpreted and applied Article 10.18 of the Treaty to arrive at its conclusion that it was without jurisdiction.¹¹
9. Insofar as the *present* Tribunal's jurisdiction is concerned, I have endeavoured to apply the Treaty, as written, to the *present* claim. I do not believe that the Treaty allows this Tribunal to relax the jurisdictional limitations that govern the claim because of what transpired in a prior proceeding. Thus, much of the majority's reasoning is, in my respectful opinion, not relevant to the narrow issue which is before this Tribunal.
10. That issue is this: on 23 October 2018, the Claimant filed a new Notice of Arbitration and Statement of Claim (including a waiver to which no objection has been taken). Given the three-year limitation period specified by the Treaty, is it open to the Claimant to proceed in this new claim before this new Tribunal on the basis that this Tribunal has the temporal jurisdiction to consider measures dating back to 1 February 2009 – as the *Renco I* tribunal could have considered, had it been properly established? Or is the Claimant precluded from alleging breaches that fall outside of the three-year cut-off period specified by the TPA?

⁹ *Renco I*, Partial Award, ¶ 158.

¹⁰ Decision, ¶ 208: “In addition, it is undisputed between the Parties that between the conclusion of *Renco I* and the filing of the Notice of Arbitration in the present case, only three days elapsed in respect of which the Parties had not agreed on a suspension of the prescription period. These three days do not make any material difference because the notices of arbitration in *Renco I* were filed several months before the three-year period elapsed. Therefore, unless Peru is precluded from invoking Article 10.18.1 due to an abuse of rights, the decisive question is whether the prescription period was suspended in relation to the Claimant's FET and indirect expropriation claims during the pendency of *Renco I*. If it was not, the claim resting on MEM's refusal to grant an extension would have become prescribed on 11 March 2012. The same holds true for all other claims resting on breaches alleged to have occurred before 13 November 2013 (i.e. the cut-off date calculated by the Respondent).” [Emphasis added.]

¹¹ I note that the *Renco I* tribunal was careful to confine its comment on the limitation period to the Respondent and rightly made no attempt to bind any future tribunal in respect of its independent duty to ascertain the extent of its jurisdiction and to act within it; it would have been wrong for it to attempt to do so. In particular, the tribunal made no attempt to bind the parties to a view of the suspension of the running of time. Whether one calls that proceeding a nullity or by some other term, juridically, the tribunal did not exist as it explicitly found in its “boot straps” analysis (¶ 158 (and 172)): “To put it colloquially, the Tribunal would be ‘pulling itself up by its own bootstraps’ in order to create jurisdiction when none existed. In the Tribunal's considered opinion, this would be entirely unprincipled and obviously impermissible.”

11. In essence, the Claimant argues that although *Renco I* was dismissed, it is nevertheless entitled to seize this Tribunal with jurisdiction reaching back to 1 February 2009 because the Respondent was put on notice of its claims (as they stood at the time¹²) and the temporal jurisdiction of that tribunal, had it been properly established, would have reached back to the date of the treaty's entry into force of 1 February 2009. The Claimant argues further, invoking in this respect the *Renco I* tribunal's admonition quoted above, that any attempt by Peru to enforce the three-year cut-off limitation would be abusive.
12. For its part, the Respondent asserts that the presumptive cut-off date of the present Tribunal's temporal jurisdiction is 23 October 2015 (three years dating back from 23 October 2018), but owing to the Framework Agreement's provision, quoted above, there is what Peru has termed an "Adjusted Treaty Prescription Date," which lengthens this Tribunal's temporal jurisdiction to 13 November 2013.¹³ Any measure that occurred prior to that date is said to fall outside of the Tribunal's temporal jurisdiction.
13. A valid submission to arbitration would have suspended the running of time for the *Renco I* tribunal because the claim was submitted to arbitration in April 2011 and therefore the events occurring as of the date of the entry into force of the Treaty would fall well within the three-year limitation period applicable to the *Renco I* proceeding. That would have been the case had the *Renco I* tribunal been established properly. But that did not occur due to the defective waiver which the Claimant granted in both its original Notice of Arbitration and Statement of Claim and in its Amended Notice of Arbitration and Statement of Claim of 11 August 2011.
14. Does that mean that the limitation period for the present claim is the same as what the *Renco I* tribunal's temporal jurisdiction would have been had a proper waiver been filed? For the majority, the answer is yes. They focus on the effect of submitting a claim to arbitration under the Treaty and hold that once a claim is submitted, the running of time is suspended. They therefore find:

The Contracting Parties could have drafted Article 10.18.1 in a way that requires more than a claim being "submitted to arbitration" (which term necessarily refers back to Article 10.16.4) for the prescription period to be suspended, thereby expressly departing from general principles of law in this regard. However, they chose not to do so. The Tribunal is not prepared to conclude that a claim "submitted to arbitration" within the meaning of Article 10.16.4 does not suspend the prescription period merely because the Contracting Parties made coinciding submissions to the effect that Article 10.18.1 is a "clear and rigid" requirement that is not subject to any "suspension, prolongation or other qualification", in circumstances where (i) the Contracting Parties themselves qualify this general statement;

¹² It is common ground that the claims have evolved due to actions taken by Peru since April 2011.

¹³ Memorial on Preliminary Objections, ¶¶ 34-36.

(ii) the plain language of the Treaty does not address the issue of suspension at all and suggests that the prescription period is satisfied by a claim that meets the requirements set out in the UNCITRAL Rules; (iii) if at all, the context and object and purpose of the treaty militate in favor of such a suspension of the prescription period, in particular to avoid manifestly unreasonable results in case an arbitral award is annulled; and (iv) general principles of law, which are to be read into the Treaty pursuant to Article 31(3)(c) of the VCLT, provide for such a suspension.¹⁴

15. There are quite a few points packed into this paragraph, but the key points for present purposes are: (i) the focus on the suspension of the running of time *when the Renco I claim was submitted to arbitration*; (ii) the attempt to reconcile the idea of the suspension of the running of time with the statements made by the two States Party to the Treaty that the limitation period is a “clear and rigid” requirement that is *not* subject to any “suspension, prolongation or other qualification”; (iii) the contention that the Treaty does not address whether the submission of a claim to arbitration suspends the running of time (and hence the suggestion that the answer to that question is to be found in the UNCITRAL Rules); and (iv) that the running of time must be taken to have been suspended because the context and object and purpose of the treaty militate in favour of such an interpretation, particularly “to avoid manifestly unreasonable results” in the event of annulment. They then resort to general principles of international law, which they “read into” the Treaty in order to find that the running of time was suspended back in 2011.
16. It can be seen, therefore, that the focus of their analysis is on what happened when the first claim was submitted to arbitration before the *Renco I* tribunal and a desire to avoid what is regarded to be a manifestly unreasonable result as a consequence of that claim’s dismissal.
17. This is not what the Tribunal has to decide. I well understand the sentiment which has driven the majority’s analysis, but it is *not* legally relevant to an ascertainment of the temporal jurisdiction of *this* Tribunal. Limitation periods are, by definition and intention, categorical in their application and when applied in the facts of a particular case can be seen to produce harsh consequences for a claimant. But they reflect the choices of legislatures, in the context of municipal law, and the agreement of the State Parties, in the context of an international treaty.
18. Before turning to the limitation period clause contained in the Treaty, I have one final introductory remark: I note that the majority does not base its decision on abuse of right. I therefore put that issue to one side.

¹⁴ Decision, ¶ 236.

The Applicable Treaty Provision

19. The vast majority of bilateral investment treaties and other investment protection treaties do not contain a limitation period and therefore the issue did not arise before the late 1990s. Limitation periods were introduced in what might be called ‘second’ and ‘third generation’ treaties. By the former, I refer to the NAFTA, which signaled a sea change in terms of the amount of detail prescribed by the State Parties when it came to the jurisdictional and procedural aspects of initiating and conducting an arbitration under NAFTA’s Chapter Eleven. Unlike bilateral investment treaties in force at the time of NAFTA’s drafting which, except to specify one or more sets of available rules, typically said little about the conduct of arbitrations arising thereunder, some 24 articles were negotiated by the NAFTA Parties to govern investor-State arbitrations conducted under that treaty.¹⁵ NAFTA was thus the first treaty to introduce a three-year limitation period and a requirement that the claimant file a waiver, pursuant to which it undertook not to initiate or continue other remedies once its claim was submitted to NAFTA arbitration.¹⁶
20. By ‘third generation’ treaties, I refer to even more detailed treaties that subsequently have been negotiated by the NAFTA Parties (individually with other States), but also more latterly by other pairs and groupings of States, which reflect the lessons of NAFTA arbitration. The TPA is such a ‘third generation’ treaty.
21. Article 10.18.1 of the Treaty states:
1. 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 10.60.1 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.¹⁷
22. It warrants taking a moment to consider the phrasing of this provision. Four points can be made:

¹⁵ See Section B of Chapter Eleven which sets out a series of articles dealing with several aspects of the conduct of investor-State arbitrations under the NAFTA. In contrast, some treaties simply left it to tribunals to determine what rules would be applied.

¹⁶ The NAFTA contained an exception to the prohibition on the initiation or continuance of other remedies, namely, “proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party”, that is broader than that used in subsequent treaties such as that applicable in the instant case. The TPA, consistent with post-NAFTA US treaty-making practice, has a more narrowly focused exception. See Article 10.18.3.

¹⁷ The third deals with the class of claims dealing with alleged breaches of investment authorizations or investment contracts and the relationship between such claims and other dispute settlement procedures.

- a. It is clearly worded.
 - b. Its opening words are phrased in peremptory and definitive terms: “*No claim may be submitted...*”.
 - c. It does not express any exceptions to the three-year rule and thus the natural ordinary meaning of the clause is “three years means three years”.
 - d. Of critical importance, it confers no power of any type on a tribunal to vary its application depending upon the circumstances of a particular case.
23. One would have to work very hard indeed to find any ambiguity whatsoever in this clause because it is plain on its face.¹⁸ As Caplan and Sharpe noted in their commentary on the 2012 US Model BIT, which contains virtually identical language, the provision “establishes *the outermost time limit for submitting a claim to arbitration.*”¹⁹
24. I observe further from my reading of the majority’s decision that they do not appear to consider Article 10.18.1 to be ambiguous. (The words “ambiguous” or “ambiguity” are not used in the course of their reasons.) I agree with the majority in this respect.
25. Article 10.18.1 binds not only a would-be claimant, but also the tribunal established to hear a claim. This is well established in the cases; the tribunal’s role in construing and applying a limitation period is confined to determining whether measures alleged to breach obligations

¹⁸ The CAFTA-DR equivalent was described as follows in *Corona Materials*:

191. Having regard to the ordinary meaning of the terms, read in their context and in light of the Agreement’s object and purpose, the DR-CAFTA Parties have plainly conditioned their consents to arbitration. If a claimant does not comply with the conditions and limitations established in Article 10.18, its claim cannot be submitted to arbitration.

192. The present proceeding concerns the Claimant’s compliance, or not, with the three-year limitation period prescribed by Article 10.18.1. **The limitation period clause is written in plain terms and does not contemplate the suspension or “tolling” of the three-year period. In this regard, it is consistent with the approach taken in other treaties such as the North American Free Trade Agreement.** The relevant subparagraphs of Articles 1116 and 1117 of that Agreement are worded similarly and, as pointed out by the Respondent and by the intervenor, the United States of America, **NAFTA tribunals have described NAFTA’s limitation period as “clear and rigid” and not subject to any “suspension, prolongation, or other qualification.”** [Emphasis added.]

¹⁹ Lee M. Caplan & Jeremy K. Sharpe, “United States” in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013), p. 829 (RLA-19).

contained in the Treaty fall *within* or *without* the three-year period. It does not extend to purporting to vary the period.

26. Accordingly, if a claimant alleges breach(es) of the Treaty, all of which have occurred within the three-year period, all such measures will fall within the tribunal's temporal jurisdiction. However, sometimes – and a number of tribunals have considered this situation – a claimant will allege treaty breaches which are said to have occurred within the three-year period, but upon examination it is found that some measures fall *within* and others *without* the limitation period. In such circumstances, because the operation of the limitation period clause is so plain and straightforward, tribunals routinely hold that they have jurisdiction to consider the former measures, but not the latter.²⁰ And, of course, it is conceivable that a claimant could allege treaty breaches which are said to all fall within the three-year period, but which are ultimately found to have all occurred outside of that period. Such a case must be dismissed in its entirety.²¹
27. In my opinion, the present Tribunal is presented with the second of the three possible categories: the Claimant is alleging treaty breaches which fall within and without the Tribunal's temporal jurisdiction.
28. The plain meaning of Article 10.18.1 should be sufficient to dispose of the issue. The short answer is that this Tribunal's temporal jurisdiction cannot reach back to 1 February 2009 and thereby cannot be extended to encompass what would have been the temporal jurisdiction of the *Renco I* tribunal.

²⁰ See, for example, *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (Clifford M. Davidson, Fern M. Smith, Toby Landau (President)) (**CLA-26**) and *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (Mark Kantor, Raúl E. Vinuesa, Daniel Bethlehem (President)) (**RLA-36**).

²¹ The *Corona Materials* tribunal, applying identical language from the CAFTA-DR Agreement stated, ¶ 200:

The second step in applying DR-CAFTA Article 10.18.1 requires the Tribunal to determine the date on which the Claimant “*first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.1 6.1 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.*” A comparison of that date with the ‘critical date’ will then enable the Tribunal to decide whether it is competent to hear the claims in this proceeding: **Should the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and of the corresponding damage be earlier than the critical date, the Tribunal would have to conclude that the Claimant’s Request for Arbitration was submitted after the expiration of the limitation date and, as a consequence, the Tribunal would have no jurisdiction to hear the Claimant’s claims.** [Emphasis added.]

29. However, in the interests of a fuller explanation of my position, and given the fact that my learned colleagues have found it necessary to summon rules of treaty interpretation in aid of their conclusion that Article 10.18.1 does not contemplate the situation which is before the present Tribunal and therefore the solution is to be found in general international law, it is appropriate to place the issue into historical context and to consider in some detail the way in which limitation period clauses have been interpreted.

The Understanding of the Limitation Period Provision at the Time of the TPA's Conclusion

30. The *Vienna Convention* Article 31 analysis focuses on the relations between the two States party to the treaty. In this case, it so happens that the limitation period clause which was included in the Treaty has a history, and one of the two States party to this Treaty has consistently included such provisions in its treaties dating back to the NAFTA in 1994. For reasons which will become clear, I do not see the fact that only one of the two States Party to the Treaty had this prior experience to be a bar to considering it. As shall be seen, tribunals comprising highly experienced arbitrators considered such provisions and their view of the clause's meaning was clear before the TPA was signed and ratified and that view has been maintained consistently up to the present day.
31. I note in this regard that in considering the waiver objection, the *Renco I* tribunal also relied on NAFTA jurisprudence which it found helpful to its interpretation and application of Article 10.18.2. The NAFTA cases on the treatment of jurisdictional issues have been considered by tribunals to be directly relevant to the interpretation of post-NAFTA treaties such as the CAFTA-DR and the present Treaty.²²
32. This leads me to a key point: By the time of the entry into force of this Treaty, on 1 February 2009, the operation of virtually identical limitation periods clauses was well established in the case law and, I submit, known to one of the State Parties and clearly knowable to the other. By this I mean that as of the date of the conclusion of the Peru-United States Trade Promotion Agreement, if hypothetically the United States were to be asked whether the limitation period clause was plain in its meaning and effect, the answer would be 'yes'. Obviously, as a proponent of this very treaty model with extensive prior experience with NAFTA arbitration, the United

²² See, for example, *Corona Materials 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, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)) (**RLA-23**) and *Commerce Group and San Sebastian Gold Mine, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (Horacio Grigera Naón and J. Christopher Thomas, Albert Jan van den Berg (President)), and of course, *Renco I*.

States well understood what it was doing with Article 10.18. As for Peru, which may not have had prior experience with this sort of treaty model, if it were similarly to be asked, it would have been able to ascertain how the clause had been interpreted and applied in prior cases.

33. I can say this with confidence because it was demonstrably the case as of 1 February 2009.

34. First, I note what NAFTA provided in Article 1116(2):

An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.²³

35. The thrust of this provision is the same as in Article 10.18.1 of the TPA, although the latter is phrased in slightly more peremptory terms. Two differences can be discerned between the NAFTA and the TPA. First, while NAFTA used the phrase “*make a claim*”, which had engendered some confusion in some early NAFTA cases, the Treaty employs the phrasing “*submitted to arbitration*” in the interests of clarifying when an arbitration is initiated for limitation period purposes.²⁴ Second, while the NAFTA limitation period was included in the two articles which permitted the filing of claims (analogous to Article 10.16, “*Submission of a Claim to Arbitration*” of the present Treaty²⁵), in the TPA the limitation period is located in the “*Conditions and Limitations on Consent*” provision, a provision which has no analogue in the NAFTA. This provision was introduced in US (and Canadian) treaty-making practice as experience with the arbitral consideration of NAFTA was gained.²⁶

²³ A similar limitation period was included in NAFTA, Article 1117(2), which applies to a claim made by an investor on its own behalf; the same condition applies to a claim made by an investor upon behalf of an enterprise which it owns or controls.

²⁴ Lee M. Caplan & Jeremy K. Sharpe, “United States” in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013) (RLA-19), notes in this regard at footnote 290:

The text is clear that ‘submitted’ refers to submission of a notice of arbitration pursuant to Art 24 [of the US Model BIT]. The language improves on Chapter 11 of the NAFTA, which refers to ‘make a claim’: *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1, Submission of the United States of America on Preliminary Issues (pursuant to Article 1128) of 6 October 2000, pp 4-6, paras 16-18 (explaining that ‘make a claim’ means submit a notice of arbitration and was included in the NAFTA to accommodate Mexican law).

²⁵ Articles 1116 and 1117.

²⁶ Caplan and Sharpe observed in this respect:

The 2012 Model BIT also adopts the innovations of the 2004 Model BIT that improve the process of investor-State arbitration for both States and investors. The recalibrated approach of the 2004 Model BIT, now reflected in the 2012 Model BIT, draws its inspiration from two

36. In the years between NAFTA's entry into force and the TPA's entry into force, two important NAFTA arbitrations considered the limitation period provision, specifically whether it could be relaxed or tempered by the circumstances of the case.²⁷ (A third proceeding, the *Methanex* case, also raised limitation issues, but ultimately it was unnecessary for that tribunal to render a decision, for reasons which will be explained below at paragraphs 51-52.)
37. As at 1 February 2009, the date of the TPA's entry into force, NAFTA tribunals agreed with the NAFTA Parties that the limitation period prescribed in that treaty was "*clear and rigid*" and "*not subject to any suspension ..., prolongation or other qualification*". This was the express finding of the *Feldman* tribunal made in 2002 in a claim against Mexico.²⁸ That award was then in turn relied upon by the United States when defending a claim in the *Grand River* case.²⁹ And the

principal sources: the US Government's experiences as respondent in investor-State arbitration claims under NAFTA Chapter 11, and the FTA negotiating objectives of the US Bipartisan Trade Promotion Authority Act of 2002.

(Lee M. Caplan & Jeremy K. Sharpe, "United States" in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013), pp. 755-756 (RLA-19).)

- ²⁷ The two cases were *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)) (RLA-6) and *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (James Anaya, John R. Crook, Fali S. Nariman (President)) (RLA-10).
- ²⁸ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)) (RLA-6).
- ²⁹ The United States' Objections to Jurisdiction in *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, available at: <https://2009-2017.state.gov/documents/organization/57842.pdf>, p. 28 and footnote 25:

See, e.g., *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) (characterizing the NAFTA's limitations provision as a "clear and rigid . . . defense"); *United States of America v. Islamic Republic of Iran*, Case No. B/36, Award No. 574-B36-2 ¶ 61 (Dec. 3, 1996) ("The provision of Article 8 of the 1974 U.N. Convention that 'the limitation period shall be four years' is . . . a provision of treaty law binding on the Parties"); J.L. SIMPSON AND HAZEL FOX, INTERNATIONAL ARBITRATION LAW AND PRACTICE 123 (1959) ("Treaties have imposed express time limits barring claims not made or presented within a certain time."); BIN CHENG, GENERAL PRINCIPLES OF LAW 376 (1987) ("Prescription is, therefore, the principle underlying municipal rules of limitation [This] rule is essentially practical and, moreover, binding.") (internal quotation and citation omitted); THOMAS OEHMKE, INTERNATIONAL ARBITRATION § 6:5 (1990) ("If the parties have contractually imposed a 'statute of limitations' on themselves, the courts will uphold this."). [Emphasis added.]

Feldman tribunal's formulation of the meaning and operation of the limitation period was explicitly accepted in terms by the *Grand River* tribunal in 2006:

29. Since Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification – the Tribunal decided to bifurcate the time limitation issue for trial as a preliminary issue...³⁰ [Emphasis added.]

38. Thus, by the time that the TPA entered into force on 1 of February 2009, there was a clear understanding with respect to the operation of the limitation period clause which comported with its plain terms as discussed above at paragraph 22. These decisions were publicly available.
39. Indeed, that clear understanding has persisted since the TPA's entry into force. As shall be seen in the review of the cases and non-disputing Party submissions, the *Feldman* tribunal's interpretation of the limitation period's meaning and effect has been repeated again and again by tribunals and non-disputing Parties – including in the United States' Non-Disputing Party Submission filed before the Tribunal in the present case.
40. I turn now to the way in which tribunals and State Parties have described the effect of a treaty's limitation period.

The Treatment of Limitation Periods in the Cases

41. Disputes over the application of treaty limitation periods go back at least to the year 2000 when the *Feldman* Decision on Jurisdiction was issued.³¹ The limitation period cases have focused on establishing the date when the claimant first acquired (whether on a subjective or objective basis) knowledge of breach and knowledge of loss or damage in order to determine whether the measure(s) alleged to breach the treaty fell within or without the tribunal's temporal jurisdiction. This has sometimes proved difficult.
42. Insofar as the basic operation and effect of the limitation period is concerned, to my knowledge in all the cases decided to date, *no* tribunal has ever claimed a power to vary or otherwise relax the three-year period. No decision to that effect has been put before this Tribunal.

³⁰ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (James Anaya, John R. Crook, Fali S. Nariman (President)), ¶ 29 (RLA-10).

³¹ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)) (RLA-6).

43. This not because a claimant has not sought to advance such arguments. *Feldman* itself dealt with a claimant's attempt to extend the limitation period beyond three years so as to capture alleged breaches of NAFTA Chapter Eleven which fell outside of that period. The tribunal rejected the attempt.³² So too did the *Apotex* tribunal when a similar attempt was made.³³
44. Virtually every tribunal that has considered the limitation period issue has recited the *Feldman* formulation. The interventions of non-disputing State parties, principally the United States in various non-NAFTA cases (and Canada, Mexico, and the United States in NAFTA cases), have also consistently done so.³⁴
45. To begin with statements pertaining to the tribunal's lack of power to vary to operation of a limitation period clause, I note *Corona Materials*, where the United States stated:

A tribunal constituted under CAFTA-DR Chapter Ten is bound by the terms of the agreement. Article 10.18.1 expressly requires a claimant to submit a claim to arbitration

³² My colleagues attach importance to a statement made by the *Feldman* tribunal: "230. ... that very tribunal expressly found it possible, in the same paragraph of its award referred to by the US, that the prescription period provided for at Articles 1116(2) and 1117(2) of NAFTA (which is analogous to Article 10.18.1) is 'interrupted', i.e. suspended, under certain circumstances." Decision, ¶ 230.

In my respectful submission, this was merely an effort by that tribunal not to rule out the possibility that in some circumstances – not present in the case before it – it might be possible for a limitation period to be varied if an agreement or clear understanding was reached between the disputing parties. Indeed, as shall be seen below, the cases do recognize that it is possible that a respondent can allow an otherwise defective arbitration claim to be prosecuted. *But the existence of such a power vested in a respondent is not to be equated to that power being vested in the tribunal.* To the contrary, it is the tribunal's duty to respect and apply the jurisdictional confines prescribed by the States Party to the Treaty. Moreover, notwithstanding the statement on which my colleagues rely, in the decisive point in that case the *Feldman* tribunal held that the NAFTA's limitation period was "*clear and rigid*" and "*not subject to any suspension..., prolongation or other qualification.*" It is this latter statement that the subsequent tribunals and non-disputing Parties have cited as correctly stating the law.

³³ *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (Clifford M. Davidson, Fern M. Smith, Toby Landau (President)), ¶¶ 310-311 (CLA-26):

310. The FDA decision was administrative in nature, and so not subject to any duty to exhaust judicial remedies. Critically, it occurred more than three years before Apotex brought its Pravastatin Claim under the NAFTA, and is therefore time-barred.

311. **Although Apotex seeks to toll the limitation period by linking the FDA measure to later court actions, NAFTA Chapter Eleven tribunals have consistently rejected such efforts as contrary to the plain language of the agreement.** The FDA measure thus falls outside the Tribunal's jurisdiction. [Emphasis added.]

³⁴ Obviously, prior awards in proceedings to which Renco and Peru were not parties are not binding upon them, but where the jurisprudential trend is as clear and unmistakable as this one is, a tribunal should be loath to depart from it.

within three years of the date on which the claimant “first acquired, or should have first acquired” knowledge of breach and loss.³⁵ [Emphasis added.]

46. Note the opening words of this finding: a tribunal is *bound* by the terms of the agreement. It has no power to vary the Treaty’s terms or their operation. The *Corona Materials* tribunal shared this understanding.
47. The United States, citing *Corona Materials* and other cases to the same effect, has made the same point to the present Tribunal:

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. [Footnote reference to *Corona Materials*] **As is made explicit by Article 10.18.1**, the Parties did 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.

4. This limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.” [Citing *Grand River, Berkowitz and Feldman*]

And at footnote 7:

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.** [Citing *Glamis Gold*]³⁶ [Emphasis added.]

48. Paragraph 3 of the US Submission filed in the present case is identical to the statement made in a 21 June 2019 Non-Disputing Party Submission filed by the United States in the *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* case. The sentence quoted above from paragraph 4 of the Submission is also identical to the *Gramercy* submission.³⁷

³⁵ *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, 11 March 2016, ¶ 4 (**RLA-22**).

³⁶ NDP Submission, ¶¶ 3-4.

³⁷ *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the US, 21 June 2019, ¶¶ 2-3 (**R-13**).

It goes virtually without saying that Peru has expressly agreed with the United States interpretation.³⁸

49. While it has been well understood by prior tribunals that they have no power to modify a treaty's jurisdictional limits and conditions, tribunals have recognized that a respondent, as the beneficiary of the waiver, for example, could accept a claimant's non-compliance with a condition or limitation specified in the treaty. This is an important point, because the majority places some weight on the fact that there could conceivably be a variation in the application of the limitation period.³⁹ But upon closer examination of the cases, the basis for such a variation is clear.
50. The point was made in *Railroad Development v Guatemala* (a CAFTA-DR case cited by *Renco I*):

The Tribunal considers that the Claimant's understanding of the Respondent's position is a fair reading of the Respondent's statement in its Reply. In fact, the Respondent even requested the Tribunal to issue an order to permit the Claimant to remedy the defective waiver. But it is also clear from subsequent submissions, confirmed during the hearing, that the Respondent retracted this concession and there is no basis on which the Tribunal could hold that it was precluded from doing so. **This being a matter pertaining to the consent of the Respondent to this arbitration, 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 the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied, as the United States did in Methanex.**⁴⁰ [Emphasis added.]

51. The *Railroad Development* tribunal's reference to *Methanex* was correct. In that case, the tribunal found that the original claim could not be sustained, but that it was open to the claimant to file a fresh pleading on a narrower basis. The United States reserved its right to assert limitation period objections to measures challenged in such a claim. The United States, faced with what it considered to be a non-compliant waiver, stated that:

if this Tribunal were to dismiss Methanex's claim on jurisdictional grounds solely for failure to submit waivers in accordance with Article 1121, Methanex would be free to refile its claim upon the submission of complying waivers. If that were to occur, these proceedings would take longer to conclude... Recognizing this, in the interests of efficiency, if Methanex finally supplies the United States with waivers that fully comply with the requirements of Article 1121, **the United States consents in advance to the reconstitution of this Tribunal to be composed of its current members — on the condition that this Tribunal issue an order**

³⁸ See Respondent's Comments on NDP Submission generally.

³⁹ Decision, ¶ 232.

⁴⁰ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008 (Stuart E. Eizenstat, Professor James Crawford, Andrés Rigo Sureda (President)), ¶ 61 (Ex. B), cited in *Renco I* at footnote 5.

deeming the arbitration to be duly commenced only as of the date that Methanex submits the effective waivers.⁴¹ [Emphasis added.]

52. When the claimant filed its fresh pleading in *Methanex*, it dropped one of the principal measures which it had previously challenged (the California “Senate Bill 521”). That measure would have fallen outside of the cut-off date associated with the revised claim.⁴²
53. *Renco I* similarly found that it was the respondent *only* who could accept a defective waiver during the course of an arbitration:
152. In the present case, however, the jurisdictional defect (Renco’s non-compliance with Article 10.18(2)(b)) remains uncured. This jurisdictional defect could only be cured (a) if Renco took the positive step of withdrawing the reservation of rights, or submitting a new waiver without the reservation of rights, and Peru consented to this by way of a variation of Article 10.18(2)(b) of the Treaty, or (b) if Renco commenced a new arbitration together with a waiver without any reservation of rights.
153. **Option (a) here does not arise, in the absence of consent by Peru.**⁴³ [Emphasis added.]
54. I will come back to the *Renco I* tribunal’s discussion of its ‘option (b)’ later in this opinion.
55. For present purposes, putting to one side the right of a respondent to waive non-compliance with the treaty’s jurisdictional requirements, insofar as prior awards are concerned, I am not aware of *any* tribunal’s finding that it even had such a power to exercise jurisdiction over measures occurring outside of the three-year limitation period.
56. The following is an illustrative list of where tribunals and non-disputing Parties have made the point. Note the consistent repetition of the *Feldman* formulation of the meaning and operation of

⁴¹ *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, 13 November 2000, p. 77. https://www.italaw.com/sites/default/files/case-documents/italaw9111_0.pdf

⁴² *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, Partial Award (William Rowley, Warren Christopher, V.V. Veeder (President)), ¶ 93, noting the agreement between the Parties with respect to the United States’ reservation of rights:

2. Although it continues to maintain that the waivers it previously submitted complied with the Article’s requirements, Methanex does not now claim in this proceeding that California Senate Bill 521 is a measure that violates the NAFTA...

⁴³ *Renco I*, Partial Award, ¶¶ 152-153. See also *Resolute Forest Products, Inc. v. Government of Canada, v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Ronald A Cass, Céline Lévesque, Judge James R Crawford (President)), ¶ 153.

the limitation period: view of a “clear and rigid” requirement is not subject to any “suspension,” “prolongation,” or “other qualification” by a tribunal:

a. Marvin Roy Feldman v. United Mexican States:

58. **In substance, in view of the Tribunal, such suspension or ‘tolling’ of the period of limitation is unwarranted.** NAFTA Article 1117(2) does not provide for any suspension of the three-year period of limitation...

63. ...the Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a **clear and rigid limitation defense which, as such, is not subject to any suspension** (see supra, para. 58), **prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years, and does so in full knowledge of the fact that a State, i.e., one of the three Member Countries, will be the Respondent, interested in presenting a limitation defense...**⁴⁴ [Emphasis added.]

b. Grand River v. United States of America, Grand River Enterprises Six Nations, Ltd., et al. v. United States of America:

29. **Since Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification** – the Tribunal decided to bifurcate the time limitation issue for trial as a preliminary issue...⁴⁵ [Emphasis added.]

c. Apotex v. United States of America:

324. Accordingly, the Tribunal accepts the Respondent’s submission that by reason of NAFTA Article 1116(2), all claims based exclusively upon the FDA decision of 11 April 2006 are time-barred, and so must be dismissed.

325. **Apotex cannot avoid this conclusion by asserting that the FDA measure is part of a “continuing breach” by the United States, or “part of the same single, continuous action,” in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period** for the earlier FDA measure.

326. **As the Respondent has forcefully argued, nothing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA’s limitation period in this way.**

327. **On the contrary, the rule in NAFTA Article 1116(2) has been described as a:**

“clear and rigid limitation defense, which . . . is not subject to any suspension, prolongation or other qualification.”

⁴⁴ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 (Jorge Covarrubias Bravo, David A. Gantz, Konstantinos D. Kerameus (President)), ¶¶ 58, 63 (RLA-6).

⁴⁵ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (James Anaya, John R. Crook, Fali S. Nariman (President)), ¶ 29 (RLA-10).

328. Further, there is support in previous NAFTA decisions for the proposition that the limitation period applicable to a discrete government or administrative measure (such as the FDA decision of 11 April 2006) is not tolled by litigation, or court decisions relating to the measure. For example:

(a) In *Mondev*, the tribunal rejected an attempt by the claimant to toll the limitation period through a court action against the underlying measures. At issue in that case were actions of the City of Boston and the Boston Redevelopment Agency (“BRA”) concerning the development of commercial real estate in Boston, as well as subsequent litigation involving those actions. The tribunal declined to consider actions of the City of Boston and the BRA, as those actions had arisen before 1 January 1994, when the NAFTA entered into force. Relevantly for present purposes, the tribunal noted that: “if *Mondev*’s claims concerning the conduct of the City and BRA had been continuing NAFTA claims as at 1 January 1994, they would now be time-barred...”⁴⁶

d. Corona Materials LLC v. Dominican Republic:

191. Having regard to the ordinary meaning of the terms, read in their context and in light of the Agreement’s object and purpose, **the DR-CAFTA Parties have plainly conditioned their consents to arbitration. If a claimant does not comply with the conditions and limitations established in Article 10.18, its claim cannot be submitted to arbitration.**

192. The present proceeding concerns the Claimant’s compliance, or not, with the three-year limitation period prescribed by Article 10.18.1. **The limitation period clause is written in plain terms and does not contemplate the suspension or ‘tolling’ of the three-year period.** In this regard, it is consistent with the approach taken in other treaties such as the North American Free Trade Agreement. The relevant subparagraphs of Articles 1116 and 1117 of that Agreement are worded similarly and, as pointed out by the Respondent and by the intervenor, the United States of America, **NAFTA tribunals have described NAFTA’s limitation period as ‘clear and rigid’ and not subject to any ‘suspension, prolongation, or other qualification.’**⁴⁷ [Emphasis added.]

e. The Non-Disputing Party submission of the United States of America in Corona Materials:

4. **A tribunal constituted under CAFTA-DR Chapter Ten is bound by the terms of the agreement.** Article 10.18.1 expressly requires a claimant to submit a claim to arbitration within three years of the date on which the claimant “first acquired, or should have first acquired” knowledge of breach and loss.⁴⁸ [Emphasis added.]

⁴⁶ *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (Clifford M. Davidson, Fern M. Smith, Toby Landau (President)), ¶¶ 324-328 (CLA-26).

⁴⁷ *Corona Materials 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, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶¶ 191-192 (RLA-23).

⁴⁸ *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, 11 March 2016, ¶ 4 (RLA-22).

f. *Resolute Forest Products, Inc. v. Government of Canada:*

153. The relevant language of Articles 1116(2) and 1117(2) is identical: ‘if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage. The triggering event is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result. **The Tribunal agrees with the Respondent, and with the other NAFTA Parties in their Article 1128 submissions, that this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period, and there is no question here of any waiver on the part of the Respondent.**’⁴⁹ [Emphasis added.]

g. *Mobil Investments Canada, Inc. v. Canada:*

146. The Tribunal considers that the requirement, in Articles 1116(2) and 1117(2), that any claim in respect of a breach of Section A of Chapter Eleven must be brought within three years of the investor (or enterprise) first acquiring knowledge of the alleged breach and first acquiring knowledge that it has suffered loss or damage as a result of that breach plays an important role within the scheme of Chapter Eleven. By preventing claims being brought against a NAFTA Party after more than three years, it guarantees for all three States a degree of certainty and finality. **Their submissions in several earlier NAFTA arbitrations make clear the importance which they attach to that guarantee while the awards themselves highlight that the limitation period is ‘clear and rigid.’**

147. Moreover, the Tribunal accepts Canada’s argument that the fact that the limitation period begins to run when a would-be claimant first acquires (or should first have acquired) the requisite knowledge is significant; as Canada points out, an investor cannot first acquire knowledge of the same matter on more than one occasion.⁵⁰ [Emphasis added.]

h. *Berkowitz et al v. Republic of Costa Rica:*

162. The Claimants face formidable jurisdictional hurdles. On the face of it, the conduct of which they complain has deep roots in the period before the CAFTA entered into force between Costa Rica and the United States on 1 January 2009. Article 10.1.3 makes it clear that a cause of action under the CAFTA cannot arise in relation to any act or fact that took place or any situation that ceased to exist before the CAFTA entered into force. **The limitation period of Article 10.18.1, which would exclude any claim in respect of which a claimant first acquired, or is deemed to have first acquired, knowledge of the alleged breach and loss before 10 June 2010, presents an equally daunting challenge.**

And:

211. For purposes of Article 10.18.1, the relevant date is when the claimant first acquired knowledge not simply of the breach but also that they incurred loss or damage as a result thereof. The Tribunal agrees with the observation of the tribunal in *Corona Materials* that “knowledge of the breach in and of itself is insufficient to trigger the limitation period’s

⁴⁹ *Resolute Forest Products, Inc. v. Government of Canada, v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (Ronald A Cass, Céline Lévesque, Judge James R Crawford (President)), ¶ 153.

⁵⁰ *Mobil Investments Canada, Inc. v. Canada*, (Sir Christopher Greenwood, GBE, CMG, QC, President, J. William Rowley, QC and Dr Gavan Griffith, QC, Co-arbitrators) Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/15/6, ¶¶ 146-147.

running; subparagraph 1 requires knowledge of breach and knowledge of loss or damage.” While the text of Article 10.18.1 does not state in terms that the loss or damage in question must be as a consequence of the breach that is alleged, the Tribunal considers that this necessarily follows. **It is a trite observation that a tribunal established under Chapter Ten of the CAFTA does not have competence to award monetary damages other than in respect of a breach that comes within its jurisdiction.** It follows that the apprehension of loss or damage required by Article 10.18.1 concerns loss or damage that is incurred as a result of an alleged breach that falls within the tribunal’s jurisdiction. This point has a wider relevance as the converse necessarily follows, namely, that a tribunal does not have competence to award damages arising from a breach in respect of which it does not have jurisdiction. **This is relevant in time-bar circumstances in which a series of associated actions may be divided up into those that meet the time-bar requirement, and are thus justiciable, and those that do not meet the time bar requirement, and are thus not justiciable.** In such cases, the Tribunal considers that its jurisdiction to award damages will be necessarily linked to and constrained by the breach of which it is seised and over which it has jurisdiction.⁵¹ [Emphasis added.]

57. The cases and the statements of States party to the treaties from this illustrative list are thus consistent: the tribunal has no power to suspend or otherwise vary the operation of the limitation period.⁵²
58. It follows, therefore, that the present Tribunal’s temporal jurisdiction is limited to three years, although with the Respondent’s consent given in an agreement with the Claimant, it is further extended for the period of time that elapsed during the pendency of that agreement.
59. The foregoing analysis is, in my view, sufficient to dispose of the limitation period issue. However, it might be of assistance to further discuss the way in which the waiver objection raised in the previous proceeding was considered by the *Renco I* tribunal and how certain findings made by that tribunal are relevant to the issue before the present Tribunal.

A Question of Terminology

60. It appeared to me as I studied the majority’s opinion further, that it may well be that a difference in terminology clouded our exchanges and obscured the fact that we have focused on two different issues. At paragraph 228 of the Decision, the majority state:

Moreover, despite the US and, subsequently, Peru submitting that the limitation period is “clear and rigid”, not to be modified by any “suspension, prolongation or other qualification”, the Tribunal considers that this does not give the terms of the Treaty an ordinary meaning to the effect that a suspension of the prescription period of Article 10.18.1 requires, in addition

⁵¹ *Berkowitz et al v. Republic of Costa Rica*, ICSID Case UNCT/13/2, Interim Award (Corrected), ¶¶ 162, 211 (RLA-26).

⁵² To my knowledge, there are more non-Party submissions to the same effect.

to a claim being “submitted to arbitration” pursuant to Article 10.16.4, the presence of a waiver complying with Article 10.18.2(b).⁵³

61. I confess that I struggled to understand what was meant by this sentence. I found it to verge upon a *non sequitur*. That is, how could the majority quote the United States’ and Peru’s statements repeating that the cases had found that the three-year period is “*clear and rigid*” and cannot be modified by “*suspension...*” and then turn around and say that this does not “give the terms of the Treaty an ordinary meaning to the effect that a *suspension* of the prescription period of Article 10.18.1 requires, in addition to a claim being ‘submitted to arbitration’ pursuant to Article 10.16.4, the presence of a waiver complying with Article 10.18.2(b)”?
62. On reflection, it seems to me that the Decision uses the words “*suspension*” in a different sense than the NAFTA and CAFTA-DR cases and the State Parties involved in those cases have used it.
63. I believe that the majority’s thinking goes to the idea that, when *Renco I* was initiated, that tribunal’s temporal jurisdiction reached back to 1 February 2009 (the date of the Treaty’s entry into force) and therefore there was no question of the limitation period specified by the Treaty not being *satisfied*.⁵⁴ The idea appears to be that the Respondent was put on notice of the claims advanced in *Renco I* and that this suspends the running of time up to the submission of the present claim.⁵⁵ This, I believe, explains their focus on what took place in *Renco I* and their discussion of whether that claim could be said to have been “submitted” to arbitration because of the defective waiver,⁵⁶ and their finding that “the States parties must be taken to accept that Article 10.18.1 *does allow for the prescription period to be suspended for the pendency of an arbitration*”.⁵⁷ Here

⁵³ Decision, ¶ 228.

⁵⁴ Decision, ¶ 249: “On the basis of the foregoing, the Tribunal finds that the Claimant’s notice of arbitration and statement of claim in *Renco I* suspended the prescription period of Article 10.18.1 – notwithstanding the fact that the Claimant was found, almost five years later, to have submitted a defective waiver.”

⁵⁵ Decision, ¶ 209: “As a matter of course, the arbitral proceedings in *Renco I* could only have suspended the prescription period in relation to the Claimant’s FET and indirect expropriation claims if these same claims were already submitted in *Renco I*.”

⁵⁶ Decision, ¶ 249: “In this vein, what matters is that the notice of arbitration and statement of claim in *Renco I* met the requirements of Articles 3 and 20 of the UNCITRAL Rules and, therefore, amounted to a submission to arbitration within the (identical) meaning of both Articles 10.16.4 and Article 10.18.1.”

⁵⁷ Decision, ¶ 233: “In addition, the Tribunal has no reason to doubt that the Contracting Parties would agree that, if an arbitral award rendered under the Treaty is annulled for reasons of improper composition of the tribunal or a violation of due process, the claimant would not be prevented from re-filing the same claim again even though that (re-)‘submission to arbitration’ will hardly ever take place within three years of the alleged breach. Therefore, despite their general statement that the prescription period is ‘clear and rigid’ and not subject to any ‘suspension’, the States parties must be taken to accept that Article 10.18.1 does allow for the prescription period to be suspended for the pendency of an arbitration, despite its wording not

they are clearly referring to the suspension of the “prescription period” during the pendency of the *Renco I* arbitration.

64. Their analysis thus is bound up with the initiation of the *previous* arbitration which ultimately was dismissed. In contrast, my analysis is bound up with the initiation of the *present* arbitration.
65. In contrast to the majority, when I have used the word “*suspension*”, I have used in the sense that the NAFTA and CAFTA-DR case law and the States party to the various treaties have used it. That is, when establishing *this* Tribunal’s jurisdiction to consider measures alleged to breach the TPA, the Tribunal can only work back three years to reach the “outer limit” of its temporal jurisdiction (leaving aside the Respondent’s agreement to an adjusted date).⁵⁸ What the other tribunals and the Non-Disputing Party in this case are saying when they use the word “*suspension*” is that the three-year period is fixed by the Treaty. No power vests in this Tribunal to pronounce upon any measure that occurred before that temporal limit and more importantly, that limit cannot be changed, i.e. suspended, prolonged, tolled, qualified, etc. based on what a tribunal might see to be extenuating circumstances. But that is precisely what my colleagues are seeking to do here.
66. For this reason, I rather doubt the following finding made by my learned colleagues:

...the Tribunal has no reason to doubt that the Contracting Parties would agree that, if an arbitral award rendered under the Treaty is annulled for reasons of improper composition of the tribunal or a violation of due process, the claimant would not be prevented from re-filing

expressly saying anything to this effect. To hold otherwise would not only create perverse incentives for a respondent State to elicit grounds for setting aside, it would frustrate a claimant’s due process rights: a successful vindication of those rights would be rewarded with a prescribed claim. Such a manifestly unreasonable result—which flies in the face of the object and purpose of the Treaty under Article 31(1) of the VCLT—also confirms the Tribunal’s interpretation under Article 32(b) of the VCLT.”

⁵⁸ A concrete example of this form of analysis can be seen in *Corona Materials* where, after reviewing the record evidence on when the alleged breach arose, the tribunal decided:

It derives from the evidence reviewed above that Claimant concluded well before the critical date that DR-CAFTA had been effectively breached and that such breach had produced substantial loss or damage. As a matter of fact, the Claimant did not submit its Request for Arbitration until June 10, 2014, which is 3 years, 3 months, and 19 days later. As a consequence, its claims are time-barred by DR-CAFTA Article 10.18.1. [Emphasis added.]

This is how all of the cases have approached the analysis.

(*Corona Materials 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, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶ 238 (RLA-23))

the same claim again even though that (re-)“submission to arbitration” will hardly ever take place within three years of the alleged breach.⁵⁹ [Emphasis added.]

67. I would say that that is rather unlikely given what both State Parties have said to the Tribunal. In my view, given the consistent way in which tribunals have treated the issue, the way in which the United States has repeatedly expressed its view on the point, and how Peru has argued the present objection, if measures in the “re-submitted” claim fall outside the three-year outer limit. It is rather more likely that the Contracting Parties would *not* agree that such measures fall within the tribunal’s jurisdiction and instead maintain the long-standing position that there is no power vested in the tribunal to extend the limitation period to encompass measures that were taken outside of that period. I base my opinion on: (i) the plain meaning of Article 10.18.1; (ii) on the uniform case law to date; and (iii) the United States’ consistent interpretation in both its own defences (*Grand River*, *Methanex*, and *Apotex*) and in its interventions as a non-disputing Party (in *Corona Materials*, *Gramercy*, and the present case). In short, the analysis must proceed – not from whatever happened starting in 2011 – but rather from the date of the submission of the claim in the instant case.
68. This is the sense in which the decided cases – and the State Parties – have applied the term “*suspension*” (and “prolongation”, “tolling”, etc.).
69. To this, I would add that quite apart from the interaction of Articles 10.17 and 10.18 discussed earlier, it is clear that the Treaty’s drafting shows that when the State Parties wished to confer discretionary powers on tribunals established under Chapter Ten, they knew how to do so. For example, a tribunal has the discretion to grant certain types of interim measures of protection, it has the power to determine whether to accept *amicus curiae* interventions, and so on.⁶⁰ In contrast, Article 10.18 prescribes a three-year limitation period, full stop. Thus, I am unpersuaded by the majority’s attempt to graft a power to suspend the *Renco I* prescription period into the Treaty’s operation by reference to a “general principle of international law” in an attempt to overcome the rigour of Article 10.18.1.⁶¹
70. In my respectful view, in “reading in” a power to undo the operation of the limitation period, the majority has engaged in an excess of jurisdiction by arrogating for itself a power which it clearly

⁵⁹ Decision, ¶ 233.

⁶⁰ See in this respect Articles 10.20.3 and 10.20.8.

⁶¹ Decision, ¶¶ 235-236.

does not hold and the resulting holding that the Tribunal's temporal jurisdiction runs back some 11 years is in error.

71. Under Article 10.22, the Treaty's "*Governing Law*" clause, the tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Obviously, this invites an analysis of the interaction between the Agreement and applicable rules of international law, but the primacy of the former over the latter – *as between the United States and Peru for the matters governed by this Treaty* – is clear. I have already adverted to the interaction of Articles 10.17 and 10.18 and have pointed out that the consent is limited to a claim which is submitted "to arbitration under this Section *in accordance with this Agreement*" not "in accordance with this Agreement and applicable rules of international law" and "*in accordance with this Agreement*" is in turn a reference to all of the requirements stipulated in Section B of Chapter Ten, especially the "conditions and limitations" on consents stipulated in Article 10.18."⁶² The point was made in *Corona Materials*, where having quoted the equivalent language in the CAFTA-DR, it noted:

Consent is thus expressly conditioned on the claimant's submission of the claim in accordance with the terms of the Agreement. In this respect, the invocation of the investor-State arbitration clause is governed by a *lex specialis*.⁶³

72. In my respectful opinion, therefore, only measures taken after 13 November 2013 (the "Adjusted Treaty Prescription Date") culminating in the November 2015 decision of the Supreme Court of Peru, which is alleged to have denied justice to the Claimant, can fall within the Tribunal's temporal jurisdiction. All other measures which occurred prior to 13 November 2013 fall outside of the Tribunal's jurisdiction.

⁶² NDP Submission, ¶ 3:

As is made explicit by Article 10.18.1, the Parties did 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...**

⁶³ *Corona Materials 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, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶ 188 (RLA-23).

73. Before completing this opinion, I want to take note of certain findings of the *Renco I* tribunal that are relevant to, and consistent with, my analysis.

The *Renco I* Waiver

74. As noted, the limitation period issue is presented in the present case because of the dismissal of the *Renco I* claim. The Claimant filed its first Notice of Arbitration and Statement of Claim on its own behalf and on behalf of its Peruvian enterprise, Doe Run Peru, on 4 April 2011. It then filed an amended Notice of Arbitration and Statement of Claim on 9 August 2011 wherein it formally dropped Doe Run Peru as a claimant. It provided a waiver on its own behalf, but because its Peruvian affiliate had been dropped from the claim, it did not provide a waiver from the affiliate. It is common ground that after the filing of the Amended Notice of Arbitration and Statement of Claim, Doe Run Peru engaged in administrative and legal proceedings in Peru. Indeed, decisions taken by those bodies have become measures which are now alleged to breach the TPA.
75. A comparison of the original Notice of Arbitration and Statement of Claim with the amended version reveals that modest modifications were made in in the wording of the second notice. This formed the basis of one of the Respondent’s objections to the waiver. It asserted that although Doe Run Peru was no longer a claimant in a formal sense, the claim remained unchanged and a waiver was still required from the Peruvian affiliate.⁶⁴ Without attempting to pass upon the merits of that argument, it can be said that this was an arguable point, given that Renco maintained the contractual claim (reformulated in the Amended Statement of Claim as an alleged breach of an “investment agreement” rather than as a breach of contract *per se*) as well as the alleged breaches of the substantive obligations contained in Section A of Chapter Ten.
76. The waivers contained in both the original Notice and the Amended Notice were defective. The problematical text is reproduced below in bolded text. In its first Notice of Arbitration and Statement of Claim, the Claimant stated:

⁶⁴ At the Hearing, counsel for Peru stated in respect of the Amended Notice of Arbitration and Statement of Claim:

We also objected on the ground that Renco should have included a waiver for DRP. And the basis was that their claim they originally filed did not change from their claim that they filed—the amended claim other than the named Parties. The substance of the Claim did not change. And we argued that that meant that the Claim would still be made on behalf of the Investment DRP and, therefore, they should have submitted a waiver for DRP.

(Hearing Transcript, 13 June 2020, 230:16-24)

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 entitled to 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.**⁶⁵ [Emphasis added.]

77. In its Amended Notice of Arbitration and Statement of Claim, the Claimant stated:

Finally, as required by Article 10.18 (2) of the Treaty, Renco ~~and its affiliate DRP~~ waives ~~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 entitled to 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 reserves the right to bring such claims in another forum for resolution on the merits.**⁶⁶ [Emphasis added.]

78. In the first sentence of both waivers, the Claimant tracked the language of Article 10.18.2(b) of the Treaty. However, no doubt due to the fact that the Claimant was involved in legal proceedings in the United States and its Peruvian affiliate was contesting the MEM's assertion of a claim in the Peruvian bankruptcy proceedings, the Claimant hedged by adding the second sentence to the waivers.⁶⁷

79. On 15 July 2016, the *Renco I* tribunal issued a Partial Award finding that the Claimant had failed to comply with Article 10.18.2. In doing so, the tribunal then spelled out the consequences of non-compliance:

158. Under Article 10.18, the submission of a valid waiver is a condition and limitation on Peru's consent to arbitrate. **This is a precondition to the initial existence of a valid arbitration agreement and as such leads to a clear timing issue: if no compliant waiver is served with the notice of arbitration, Peru's offer to arbitrate has not been accepted; there is no arbitration agreement; and the Tribunal is without any authority whatsoever...** [Emphasis added.]

⁶⁵ *Renco I*, Partial Award, ¶ 58.

⁶⁶ *Id.* Edits of the original Notice of Arbitration and Statement of Claim reflected in this text

⁶⁷ No criticism of the Claimant or its counsel is intended by the use of the word "hedged". The concern to maximize Renco's freedom of action was obvious in the circumstances which it faced at the time of the submission of the *Renco I* claim to arbitration.

80. At paragraph 53 above, I noted the *Renco I* tribunal's recognition that a defective waiver could be accepted by a respondent ('option (a)'). The tribunal then considered whether it had the power to cure the situation by itself ('option (b)').
81. In this respect, the Claimant had directed the tribunal's attention to the *Case of the Mavrommatis Palestine Concessions*, a decision of the Permanent Court of International Justice, in support of the proposition that with the waiver amended to remove the offending qualification, it would be open to the tribunal to accept that and carry on the arbitration.⁶⁸
82. However, the tribunal found it was *not* possible for it to cure the defect, giving two reasons for this. First, it considered (as I do) that Article 10.18 forms a *lex specialis* that precludes resort to general principles of international law that are inconsistent with its terms. The tribunal stated in this regard:

157. the Tribunal is faced with an apparent conflict between the interpretation of Article 10.18 adopted by the United States and Peru and the jurisprudence of the International Court of Justice as evidenced in the *Mavrommatis* doctrine. **Having given careful consideration to the matter, the Tribunal has felt constrained to conclude that the clear and express language of Article 10.18 of the Treaty, as well as its object and purpose, establishes a *lex specialis* which must prevail over, or in any event precludes, the *Mavrommatis***

⁶⁸ *Renco I*, Partial Award, ¶¶ 145-146:

145. *Renco* places reliance upon the decision of the Permanent Court of International Justice in the *Case of the Mavrommatis Palestine Concessions*. In this case, Greece had commenced proceedings against the United Kingdom under the Treaty of Lausanne before the Treaty had been ratified by the States Parties. The Treaty was subsequently ratified shortly after proceedings were commenced. However, the United Kingdom contended that the Permanent Court lacked jurisdiction at the time when proceedings were commenced.
146. The Court rejected the submission of the United Kingdom and held as follows:

Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.

doctrine. (This conclusion is made by a majority of the Tribunal as one member is not persuaded that Renco could not unilaterally cure its defective waiver.)⁶⁹ [Emphasis added.]

83. This finding is consistent with my view of the *lex specialis* nature of Chapter Ten of the Treaty.⁷⁰ Just as the *Renco I* tribunal considered that it was not appropriate to look to approaches taken in general international law because of the detailed provisions of the applicable Treaty, I too do not subscribe to the view that it is appropriate to refer to a general principle of international law or to a decision of an international court or tribunal which has decided a limitation issue in the context of a different treaty framework.⁷¹

84. Second, citing the *Detroit International Bridge* decision, the *Renco I* tribunal found that, as a matter of fundamental logic, the agreement to arbitrate had not been formed and the tribunal therefore did not exist in a juridical sense. If it did not exist, it could not cure the defect:

158. If the Tribunal applied the *Mavrommatis* doctrine, the Tribunal would be exercising powers it simply does not have (because there is no arbitration agreement, and so the Tribunal is not a tribunal). **In effect, it would be creating, retrospectively, an arbitration agreement for the Parties when no agreement had ever come into existence. To put it colloquially, the Tribunal would be “pulling itself up by its own boot-straps” in order**

⁶⁹ *Renco I*, Partial Award, ¶ 157.

⁷⁰ The same view was expressed by the *Corona Materials* tribunal:

188. The DR-CAFTA’s “*Investor-State Dispute Settlement*” section (Section B) contains the consent of each DR-CAFTA Party to this form of arbitration. Article 10.17, “*Consent of Each Party to Arbitration*”, provides in relevant part:

“1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement [...]” [Emphasis added.]

Consent is thus expressly conditioned on the claimant’s submission of the claim in accordance with the terms of the Agreement. In this respect, the invocation of the investor-State arbitration clause is governed by a *lex specialis*.”

(*Corona Materials 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, 31 May 2016 (Fernando Mantilla-Serrano, J. Christopher Thomas, Pierre-Marie Dupuy (President)), ¶ 188 (RLA-23))

⁷¹ Majority Decision, ¶ 213. The majority’s reference to the statement of Umpire Ralston in the *Gentini* Case, for example, that “the presentation of a claim to competent authority within proper time will interrupt the running of prescription” does not advance the analysis. I agree that had Renco submitted its first claim in compliance with Article 10.18, it would have interrupted the running of time, but it is a fact, determined by the *Renco I* tribunal, that due to the Claimant’s non-compliance with the waiver requirement the tribunal was not competent to hear the claim. Likewise, the majority’s references, at paragraphs 214-215, to Article 13 of the 1974 *United Nations Convention on the Limitation Period in the International Sale of Goods* and Article 10.5 of the *UNIDROIT Principles on International Commercial Contracts* are similarly inapposite to the interpretation and application of the Treaty which governs this proceeding.

to create jurisdiction when none existed. In the Tribunal’s considered opinion, this would be entirely unprincipled and obviously impermissible.

159. The Tribunal observes that the conclusion it has reached is consistent with the decision in *Detroit International Bridge Company v Canada*. In this case, the claimant’s waiver expressly carved out claims pending between the parties in the so-called “Washington Litigation”. The tribunal found that the claims in the Washington Litigation covered the same grounds as the measures challenged in the NAFTA arbitration. The claimant’s waiver was therefore held to be defective. The claimant then withdrew its claim for damages in the Washington Litigation and filed a second waiver but still purported to carve out the Washington Litigation from the scope of its waiver. The tribunal found that the submission of the new waiver could not:

... 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. **The lack of a valid waiver precluded the existence of a valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprived the Tribunal of the very basis of its existence.**

160. For all of the reasons set out above, therefore, the Tribunal has concluded that Renco cannot unilaterally cure its defective waiver by withdrawing the reservation of rights. (This conclusion is made by a majority of the Tribunal as one member is not persuaded that Renco could not unilaterally cure its defective waiver.)⁷² [Emphasis added.]

85. I agree with both propositions articulated by *Renco I*: (i) Article 10.18 is a *lex specialis* conditioning and limiting of consent – in my view not only for the waiver provision, but for the limitation period provision as well – and it is not open to a tribunal to use decisions of other courts and tribunals established under other treaties or general rules of international law to attempt to dislodge the plain meaning of that text; and (ii) just as the *Renco I* and the *Detroit International Bridge* tribunals were governed by the Treaty’s jurisdictional terms and had no power to vary them, so too is the present Tribunal.
86. The States Party to this Treaty included Articles 10.17 and 10.18, and their titles, precisely to give would-be claimants and tribunals textual guidance as to what the Parties considered to be the critical importance of compliance with such conditions.⁷³
87. In the end, in my respectful opinion, Article 10.18 says what it says and there is simply no warrant for departing from it. It follows that the “Adjusted Treaty Prescription Date” which redounds to the Claimant’s benefit by lengthening the Tribunal’s temporal period further to 13 November

⁷² *Renco I*, Partial Award, ¶¶ 158-160.

⁷³ I note that at footnote 289 of the Decision, the majority, in connection with its application of Article 31(3)(a) and (b) of the *Vienna Convention on the Law of Treaties*, notes that the Treaty “expressly allows the Contracting Parties to the Treaty to adopt, through the Free Trade Commission, interpretations that are expressly binding upon the Tribunal.” It is of course open to the States Party to the Treaty to agree an interpretation at any time.

2013 defines the temporal jurisdiction of the Tribunal. Any measure that occurred prior to that date falls outside of the Tribunal's jurisdiction.



Mr. J. Christopher Thomas QC
Arbitrator