

Exhibit RWE-013

Expert Opinion of Judge Stephen Schwebel

December 20, 2014

**UNDER THE UNCITRAL ARBITRATION RULES AND SECTION B OF CHAPTER 10  
OF THE DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE  
TRADE AGREEMENT**

**Spence International Investments, LLC, Bob F. Spence,  
Joseph M. Holsten, Brenda K. Copher,  
Ronald E. Copher, Brett E. Berkowitz,  
Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion**  
*Claimants,*

v.

**Republic of Costa Rica**  
*Respondent.*

**ICSID Case No. UNCT/13/2**

**Expert Opinion of Judge Stephen M. Schwebel**

December 20, 2014

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## **I. Introduction & Qualifications**

1. I have been asked by counsel for the Republic of Costa Rica (“Respondent” or “Costa Rica”) in ICSID Case No. UNCT/13/2 to provide an expert opinion on certain jurisdictional questions discussed below. My qualifications to do so follow.
2. I have been a student, practitioner, professor, government official, international judge, and international arbitrator in fields of international law for some sixty-five years. I was graduated from Harvard College in 1950 with highest honors in government; as Harvard’s Knox Fellow, I studied international law with then Professor H. Lauterpacht at Cambridge University, and received an LL.B from Yale Law School in 1954. After five years of practice at White & Case in New York City concentrated on international arbitration, I taught international law and other subjects at Harvard Law School as an Assistant Professor of Law, and later, at the School of Advanced International Studies of The John Hopkins University as the Burling Professor of International Law. I served in the United States Department of State as an Assistant Legal Adviser, the Counselor on International Law, and a Deputy Legal Adviser. I was a member of the International Law Commission of the United Nations, 1977-1980.
3. In 1981, I began nineteen years of service as a Judge of the International Court of Justice. I was Vice-President of the Court 1994-1997, and President of the Court 1997-2000.
4. Particularly after retirement from the Court, I have acted and continue to act as an arbitrator in cases between States, between foreign investors and States, and in commercial arbitrations, having been named as chairman or arbitrator in some 65 proceedings. I have also acted as co-counsel or expert in numerous international arbitral proceedings. I served as President of the Administrative Tribunal of the International Monetary Fund 1993-2010, and I currently serve as President of the Administrative Tribunal of the World Bank.
5. I am a member of the Bars of the State of New York, the District of Columbia and the Supreme Court of the United States; a member of the Permanent Court of Arbitration and the *Institut de Droit International*; a member of the Panel of Arbitrators of the International Centre for Settlement of Investment Disputes; a member of the Neutrals Panel of the International Center for Dispute Resolution of the American Arbitration Association; a member of the board of directors of the American Arbitration Association; and an Honorary Bencher of Gray’s Inn, London.
6. I am the author of four books and some two hundred articles and book reviews on topics of international law and organization, international arbitration, and international relations.
7. I have read the pleadings of Spence International Investments LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brett E. Berkowitz, Trevor B.

Berkowitz, Aaron C. Berkowitz and Glen Gremillion (“Claimants”) and Respondent in this case. I have no independent knowledge of the facts of the case and, for the purposes of this opinion, accept the facts as alleged by Respondent, although I have taken into account the facts alleged by Claimants.

## II. Executive Summary

8. Counsel for Respondent has asked for a legal opinion addressing Respondent’s objections to jurisdiction *ratione temporis* advanced by it in this case. This case turns on the Central America-Dominican Republic-United States Free Trade Agreement (“CAFTA”).<sup>1</sup> In this opinion, I use the term “Parties” to refer collectively to Claimants and Respondent.
9. Respondent objects to the Tribunal’s temporal jurisdiction over Claimants’ claims on the grounds that (i) Claimants’ claims are barred by the three-year statute of limitations provided in Article 10.18(1) of CAFTA; and (ii) Claimants’ claims involve disputes that arose before CAFTA entered into force. I agree with Respondent’s objections.
10. Respondent’s first objection correctly invokes the statute of limitation provided under CAFTA, which acts as a limitation on its consent to arbitrate. Claimants’ claims are time-barred as their claims of expropriation occurred more than three years before they knew or should have known of the alleged breaches and their loss. Respondent’s second objection correctly invokes the date of CAFTA’s entry into force as the starting point for the tribunal’s jurisdiction. International law and the text of CAFTA make it clear that CAFTA does not apply retroactively. As the alleged expropriatory acts occurred before CAFTA’s entry into force, those acts fall outside the Tribunal’s jurisdiction.
11. Nor are Claimants’ allegations cured by trying to characterize the alleged expropriation as constituting a “continuing” or “composite” act. While there are circumstances in which a tribunal may assert jurisdiction over so-called “continuing” or “composite” acts where such acts fall within its jurisdiction *ratione temporis*, there is no support for a tribunal to assert jurisdiction over an act which is completed before any obligation under a particular treaty exists or where the act has occurred outside the treaty’s statute of limitations.
12. Finally, Claimants’ derivative fair and equitable treatment claims similarly fall outside the Tribunal’s jurisdiction. To the extent that claims of expropriation are time-barred, so too are claims regarding whether such expropriations were conducted in accordance with standards of fair and equitable treatment

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<sup>1</sup> See Free Trade Agreement between the Dominican Republic, Central America and the United States (“CAFTA”), chapter 10, January 1, 2009 [Exhibit C-1a].

### III. Summary of Facts

13. Assuming the facts as pleaded by the Respondent are true, my understanding of the relevant facts in this dispute are as follows. Respondent created *Las Baulas* National Park in 1991 to protect the nesting grounds of the endangered leatherback sea turtles. The Decree that created the Park set out the boundaries of the Park, including 125 meters inland from the mean high tide line. In 1995, Respondent passed a law authorizing the expropriation of private property within the Park's borders, but erroneously referred to the 125 meters as "seaward" rather than "inland." Respondent at various times clarified the Park boundaries as in fact covering 125 meters inland. Claimants' properties (or portions thereof) fall within the scope of the 125 meters from the mean high tide line and, thus, fall within the boundaries of the Park. On December 16, 2008, Costa Rica's Supreme Court ordered the suspension of all environmental assessment permits and construction permits for land inside the park, including Claimants' properties.<sup>2</sup>
14. Claimants filed their Notice of Arbitration on June 10, 2013, alleging that Respondent breached CAFTA's expropriation and fair and equitable treatment provisions. Claimants detail in their Memorial on the Merits measures taken by Respondent that allegedly affected their property rights.<sup>3</sup>
15. According to Claimants, Respondent indirectly expropriated seventeen of Claimants' properties on or about March 19, 2010 "when [the Ministry of Environment, Energy, Mines and Telecommunications ("MINAE")] officials ordered [the National Environmental Technical Secretariat ("SETENA" in Spanish)] to terminate environmental assessments for lots, such as those of the Claimants,"<sup>4</sup> which fell within the Park's boundaries. Respondent denies that Claimants' properties have been illegally expropriated, but contends that if the Tribunal were to accept Claimants' argument, the date of indirect expropriation is, instead, December 16, 2008, when SETENA halted the processing of environmental assessment permits inside the Park in response to a Supreme Court decision of that same date.<sup>5</sup>
16. Claimants allege that Respondent directly expropriated nine of Claimants properties when Acts of Dispossession were issued by the State. Those Acts were issued on March 12, 13, and 14 2008 and December 9, 2008.<sup>6</sup> Again, Respondent denies that it has

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<sup>2</sup> See Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, July 15, 2014, paras. 21-40 and 51-52 (hereinafter "Respondent's Counter-Memorial").

<sup>3</sup> See Claimants' Memorial on the Merits, April 26, 2014 (hereinafter "Claimants' Memorial").

<sup>4</sup> Claimants' Memorial at para. 221.

<sup>5</sup> See Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, July 15, 2014, at para. 135 (hereinafter "Respondent's Counter-Memorial").

<sup>6</sup> See Lot A40 Act of Dispossession, March 14, 2008 [Exhibit C-16f]; Lot SPG1 Act of Dispossession, December 9, 2008 [Exhibit C-20fl]; Lot SPG2 Act of Dispossession, December 9, 2008 [Exhibit C-21fl]; Lot B1 Act of

illegally expropriated Claimants' property, but it does not dispute the aforementioned dates as constituting the dates on which the Acts of Dispossession were issued.<sup>7</sup>

17. Accordingly, the relevant dates are as follows. The alleged expropriatory acts occurred on March 23, 2008 and December 9, 2008 (for direct expropriation) and December 16, 2008 (for indirect expropriation). The statute of limitations prescribed by CAFTA limits Claimants' claims to those arising in the three years prior to filing their Notice of Arbitration – that is, no sooner than June 10, 2010. Finally, CAFTA came into force on January 1, 2009.

#### **IV. Claimants' Claims Were Not Timely Filed**

18. An arbitral tribunal derives its jurisdiction to hear and pass upon a case from the consent of the parties to the arbitration. The requirement of consent delineates the scope of matters subject to arbitration.<sup>8</sup> Article 10.18 of CAFTA is entitled, "Conditions and Limitations on Consent of Each Party." The article thus makes it clear that the State parties to CAFTA expressly restricted their consent to arbitrate pursuant to the limitations provided therein. Specifically, unless Claimants fulfill the requirements set forth in Article 10.18, Costa Rica does not consent to arbitrate under CAFTA, and the Tribunal lacks jurisdiction to hear Claimants' claims.
19. Article 10.18(1) of CAFTA applies this principle of consent by limiting the scope of consent to those disputes that satisfy a three-year statute of limitations. Specifically, Article 10.18(1) provides that "[n]o 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 . . . and knowledge that the claimant . . . has incurred loss or damage."<sup>9</sup> Thus, Costa Rica has limited its consent to arbitrate to those claims that have been submitted to arbitration within three years of a claimant's knowledge (or deemed knowledge) that a breach has occurred and that it has incurred loss or damages.
20. As noted above, I understand that Claimants filed their Notice of Arbitration on June 10, 2013. If so, then for the acts about which Claimants complain to fall within the Tribunal's jurisdiction *ratione temporis*, any such acts must have occurred after June 10,

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Dispossession, March 12, 2008 [Exhibit C-23fl]; Lot B3 080313 Act of Dispossession, February 20, 2008 [Exhibit C-24fl]; Lot B5 Act of Dispossession, March 13, 2008 [Exhibit C-25fl]; Lot B6 Act of Dispossession, March 13, 2008 [Exhibit C-26fl]; Lot B7 Act of Dispossession, March 13, 2008 [Exhibit C-27fl]; Lot B8 Act of Dispossession, March 12, 2008 [Exhibit C-28fl].

<sup>7</sup> See Respondent's Counter-Memorial at paras. 137-138.

<sup>8</sup> See Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY 191-92, 234 (2001) [Exhibit RLA-0290].

<sup>9</sup> CAFTA, Art. 10.18(1) [Exhibit C-1a].

2010. Any acts about which Claimants complain that occurred *before* that date are time-barred under the Treaty.

21. Statutes of limitation in investment treaties are not idle provisions which may be cast aside when expedient for an interested party. As the tribunal stated in *Vanessa Ventures Ltd. v. Bolivian Republic of Venezuela*, “[T]he purpose of such a statute of limitation provision is to require diligent prosecution of known claims and insuring that claims will be resolved when evidence is reasonably available and fresh, therefore to protect the potential debtor from late actions.”<sup>10</sup> A strict application of statutes of limitations is therefore required in order to give effect to this purpose.
22. As the tribunal in *Feldman v. Mexico* stressed in the context of a dispute under the North American Free Trade Agreement (“NAFTA”), “[L]ike 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 . . . , prolongation or other qualification.”<sup>11</sup> That is, the timetable cannot be expanded, tolled or otherwise manipulated to reach claims that fall outside the State’s consent to arbitration.
23. Based on a review of Claimants’ pleadings, it appears that all of the events on which Claimants base their claims and, thus, have given rise to the disputes between Claimants and Respondent occurred more than three years before Claimants filed their Notice of Arbitration. By their own admission, Claimants accept that indirect expropriation occurred no later than March 19, 2010<sup>12</sup> and direct expropriation on March 23, 2008 and December 9, 2008.<sup>13</sup> After that point in time, only the lingering or prolonged effects of the expropriation continued, which I discuss below. As Claimants filed their Notice of Arbitration on June 10, 2013 and as the acts about which Claimants complain occurred more than three years prior to that date – that is, before June 10, 2013 – Claimants’ claims fall outside the Tribunal’s jurisdiction.

## **V. Claims Based on Completed Acts Pre-Dating CAFTA’s Entry into Force Are Outside the Tribunal’s Jurisdiction**

24. CAFTA entered into force on January 1, 2009, and the treaty makes clear that its investment provisions do not apply retroactively. In particular, Article 10.1(3) of CAFTA clarifies that “[f]or greater certainty, this Chapter does not bind any Party in

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<sup>10</sup> *Vanessa Ventures Ltd. v. Bolivian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/06, Decision on Jurisdiction, August 22, 2008, p. 31 [Exhibit RLA-030].

<sup>11</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, para. 63 [Exhibit RLA-031].

<sup>12</sup> See Claimants’ Memorial on the Merits at para. 231.

<sup>13</sup> See Respondent’s Counter-Memorial at para. 137.

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.”<sup>14</sup>

25. This provision is consistent with general principles of international law. Thus, by way of notable example, the Vienna Convention on the Law of Treaties provides that:

[u]nless 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.<sup>15</sup>

26. This international law principle is further explained in the International Law Commission’s Articles on State Responsibility (“ILC Articles”). Article 13 reads: “An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”<sup>16</sup>

27. Under international law, an expropriatory act is readily classified as a completed act. According to the ILC Commentary on Article 14, “Where an expropriation is carried out by legal process, with the consequences that title to the property concerned is transferred, the expropriation itself will then be a completed act.”<sup>17</sup> A similar finding was made by the tribunal in *Mondev*, of which I was a member. In that case, *Mondev International Ltd.*, a Canadian real estate company, alleged that its option to purchase land had been expropriated without compensation because of a contractual breach. The contractual breach occurred before the applicable law – in that case, NAFTA – entered into force. Thus, the question before the *Mondev* Tribunal was whether the alleged breach of NAFTA that resulted from the State’s action was an act of a continuing character or a completed act. We found that the alleged expropriation was a completed act, even if it continued to have lingering effects.

28. Applying that interpretation to the case at hand, it is clear that the acts about which Claimants complain constitute an alleged illegal expropriation (direct or indirect) were completed in 2008 *before* CAFTA came into force. Thus, it follows that those acts are beyond the Tribunal’s jurisdiction *ratione temporis*.

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<sup>14</sup> CAFTA, Art. 10.1(3) [Exhibit C-1a].

<sup>15</sup> Vienna Convention on the Law of Treaties, Art. 28, May 23, 1969, 1155 U.N.T.S. 331 (hereinafter “Vienna Convention”) [Exhibit RLA-001].

<sup>16</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002) (hereinafter “ILC Articles”), p. 131 (Art. 13) [Exhibit RLA-005].

<sup>17</sup> ILC ARTICLES at p. 136 (Art. 14, cmt. (4)) [Exhibit RLA-005].

## VI. Continuing Effects of an Expropriation Do Not Constitute a Continuing Breach

29. Claimants try to avoid both of CAFTA's temporal restrictions by arguing that the acts about which they complain constitute a continuing breach rather than a breach that occurred at one point in time. In particular, Claimants argue that the State's alleged failure to pay prompt, adequate, and effective compensation as required under CAFTA caused the alleged expropriations to "continue" forward into the time period when CAFTA came into force and when the statute of limitations did not debar their claims.<sup>18</sup> I do not agree that any lack of compensation gives rise to a continuing breach. More accurately, they constitute lingering or prolonged effects of completed acts, as I discuss below.
30. The ILC Commentary to Article 14 specifically addresses compensation for expropriated properties as an example of non-continuing acts which nonetheless have prolonged consequences:

The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. It does not, however, entail that the breach itself is a continuing one.<sup>19</sup>

31. The ILC Articles do not stand on their own in this discussion of continuing and non-continuing acts. Such acts were discussed, along with the ILC Articles, in the *Pac Rim v. El Salvador*.<sup>20</sup> That case also involved a dispute brought under CAFTA concerning certain concession rights that were not granted to the foreign investor. For the tribunal, the issue turned on whether the legal nature of the act changed over time—in that case, the non-granting of the permits and concessions was deemed to be a continuing offense. The tribunal distinguished that case from an expropriation:

The Tribunal bears in mind that, in the case of one-time completed acts, the mere fact that earlier conduct has gone un-remedied when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction

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<sup>18</sup> See Claimants' Memorial at para. 232.

<sup>19</sup> ILC Articles at p. 136 (Art. 14, cmt. (6)) [Exhibit RLA-005].

<sup>20</sup> See *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, June 1, 2012 (hereinafter "*Pac Rim*") [Exhibit RLA-032].

between breach and reparation which underlies international law on State responsibility.<sup>21</sup>

32. In *Mondev*, discussed above, the tribunal similarly confronted *ratione temporis*, specifically whether the acts in question constituted continuing conduct.<sup>22</sup> In that case, the tribunal agreed with the parties that NAFTA did not apply retroactively, but also agreed “that an act, initially committed before NAFTA entered into force, might in certain circumstances continue to be of relevance after NAFTA’s entry into force, thereby becoming subject to NAFTA obligations.”<sup>23</sup> In the *Mondev* decision, we emphasized that “there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage.”<sup>24</sup> The case specifically dealt with allegations that the United States had effectively expropriated certain contract rights. The tribunal found that the expropriation was a completed act.<sup>25</sup> This was true even if it continued to have detrimental effects. According to the tribunal, “The mere fact that earlier conduct has gone unremedied or unrepressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.”<sup>26</sup>

## **VII. Continuing Effects of an Expropriation Do Not Constitute a Composite Breach**

33. Claimants’ effort to avoid CAFTA’s jurisdictional bars by characterizing the alleged indirect expropriation as a composite breach<sup>27</sup> is similarly without precedential or principled support. The ILC Articles define breaches consisting of composite acts as follows: “the breach of an international obligation as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.”<sup>28</sup> The Commentary provides examples such as genocide, apartheid, crimes against humanity and systematic acts of discrimination.<sup>29</sup> These examples are conduct where one event does not, on its own, constitute the breach, but rather the cumulative nature of the offenses forms the breach. This is not the case with an

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<sup>21</sup> *Pac Rim* at para. 2.79 [Exhibit RLA-032].

<sup>22</sup> See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 (“*Mondev*, Award”) at para. 57 [Exhibit RLA-018].

<sup>23</sup> *Mondev* at para. 58 [Exhibit RLA-018].

<sup>24</sup> *Mondev* at para. 58 [Exhibit RLA-018].

<sup>25</sup> See *Mondev* at para. 70 [Exhibit RLA-018].

<sup>26</sup> *Mondev* at para. 70 [Exhibit RLA-018].

<sup>27</sup> See Claimants’ Memorial at paras. 5, 194.

<sup>28</sup> ILC Articles at p. 141 (Art. 15(1)) [Exhibit RLA-005].

<sup>29</sup> See ILC Articles at p. 141 (Art. 15 cmt. (2)) [Exhibit RLA-005].

expropriation where the treatment turns on one event—*i.e.*, the direct or indirect taking of property.

34. In this case, Claimants have identified specific action that they believe was sufficient, when taken together, to constitute a breach of Respondent’s obligations under CAFTA. In particular, Claimants allege that a series of acts occurred that, when taken together, constituted an indirect expropriation of their property. According to Claimants, the point when the alleged breach crystallized was on March 19, 2010.<sup>30</sup> I understand that Respondents argue that the underlying event about which Claimants complain—*i.e.*, the inability to obtain an environmental assessment permit—actually occurred when the Supreme Court in Costa Rica issued a decision in December 2008 imposing a permanent restriction on environmental assessments for property located in the National Park.<sup>31</sup> If that is the case, then the culminating act which caused the alleged composite breach occurred before CAFTA entered into force and outside the statute of limitations period. As such, the fact that the act is a composite act does not assist Claimants to bring their claim within the scope of the Tribunal’s jurisdiction.

#### **VIII. Claimants’ Derivative Fair and Equitable Treatment Claims Similarly Fall Outside the Tribunal’s Jurisdiction**

35. Claimants allege Respondent breached its duty to afford fair and equitable treatment, found in CAFTA at Article 10.5, through “the manner in which it has employed its municipal expropriation with respect to the Claimants’ investments, and the manner in which it has held all of their investments hostage to the caprice of political and bureaucratic infighting over the past five years. . . .”<sup>32</sup> Claimants are pointing to the very same facts and acts alleged in their expropriation claims. They are dressing up the lingering effects of the expropriation as a fair and equitable treatment claim. But they cannot avoid CAFTA’s jurisdictional bars so easily. As I explain above, it is my opinion that the act of expropriation was completed outside CAFTA’s statute of limitation (before June 10, 2010) and before CAFTA’s entry into force (January 1, 2009). To the extent that claims of expropriation are time-barred, so too are claims regarding whether such expropriations were conducted in accordance with standards of fair and equitable treatment.
36. Put another way, Respondent had no international obligation to afford Claimants the protections under CAFTA before CAFTA came into force, including those governing expropriation. Respondent thus had no international obligation to expropriate Claimants’

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<sup>30</sup> See, *e.g.*, Claimants’ Memorial at para. 192.

<sup>31</sup> See Respondent’s Counter-Memorial at para. 135.

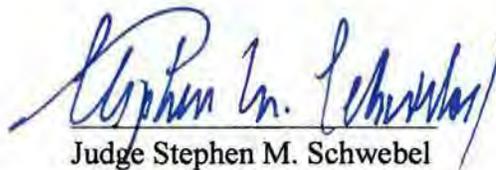
<sup>32</sup> See Claimants’ Memorial at para. 196.

investments in accordance with the fair and equitable treatment provision in CAFTA before CAFTA entered into force.

**IX. Conclusion**

37. In conclusion, it is my opinion that Claimants' claims are time-barred by the three-year statute of limitations provided in Article 10.18(1) of CAFTA. It appears from the facts that I assume to be true that the expropriatory acts occurred before June 10, 2010—the date at which point claims would be time-barred. In addition, it is my opinion that, given the facts I assume to be true, the alleged expropriatory acts occurred before January 1, 2009, and, therefore, are outside of the Tribunal's jurisdiction.
38. Claimants' attempt to characterize Respondent's alleged expropriatory acts as continuing in nature is to no avail. According to international law, expropriation constitutes a completed act, not one that is continuing in nature. This is true even if there are lingering or prolonged effects related to an expropriation (*e.g.*, failure to pay adequate compensation).
39. Nor does Claimants' effort to characterize the alleged indirect expropriation as a composite series of acts place the expropriation after CAFTA's entry into force or within its statute of limitations. The mere fact that there may be a composite breach, as Claimants allege, is insufficient to bring Claimants' claim into the Tribunal's jurisdiction if that composite breach pre-dated the entry into force of CAFTA and occurred outside the three-year statute of limitations, as appears to be the case here.
40. Claimants' derivative fair and equitable treatment claims similarly fall outside the Tribunal's jurisdiction. To the extent that claims of expropriation are time-barred, so too are claims regarding whether such expropriations were conducted in accordance with the fair and equitable treatment provision.
41. Based on the above, in my opinion, the Tribunal lacks *ratione temporis* over Claimants' claims relating to the expropriation and fair and equitable treatment provisions under CAFTA.

This opinion is based on my professional expertise, and I certify that its contents are in accordance with my sincere beliefs.

A handwritten signature in blue ink, reading "Stephen M. Schwebel". The signature is written in a cursive style with a large initial 'S' and 'M'.

Judge Stephen M. Schwebel

December 20, 2014