

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE MATTER OF AN ARBITRATION UNDER THE ICSID CONVENTION
AND THE DOMINICAN REPUBLIC-CENTRAL AMERICAN FREE TRADE AGREEMENT

ICSID Case No ARB/21/16

RIVERSIDE COFFEE, LLC

INVESTOR

v.

REPUBLIC OF NICARAGUA

RESPONDENT

**REPLY MEMORIAL ON MERITS AND
COUNTER-MEMORIAL ON JURISDICTION**

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A. Abbreviations

For this Reply Memorial:

- i. **“Action”** means the CAFTA arbitration initiated claim by the Investor against the Republic of Nicaragua via the Notice of Arbitration dated March 19, 2021 is currently pending before Arbitrators Veijo Heiskanen, Lucy Greenwood, and Philippe Couvreur.
- ii. **“APHIS”** means the United States Department of Agriculture Animal and Plant Health Inspection Service.
- iii. **“APPLICATION”** means the application for a protective order against Riverside made to court filed by the Attorney General of Nicaragua on November 30, 2021.
- iv. **“ARSIWA”** means the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts.
- v. **“CAFTA”** or **“DR-CAFTA”** means the Dominican Republic–Central American Free Trade Agreement (see also “Treaty”).
- vi. **“Counter-Memorial”** means the Respondent’s Counter-Memorial on the Merits, including Jurisdictional Objections, dated March 3, 2023 (Counter-Memorial or CM).
- vii. **“CETREX”** means the Nicaraguan government’s Center for Export Procedures.
- viii. **“COOPRANIC”** means the Cooperative of Avocado Producers of Nicaragua”.
- ix. **“Commercial Properties”** means all properties located in the Republic of Nicaragua used for business purposes, including, but not limited to agricultural cultivation, processing, warehousing, forestry, and other business operations.
- x. **“DCF”** means Discounted Cash Flow method of damages valuation.
- xi. **“FET”** means Fair and Equitable Treatment.
- xii. **“FPS”** means Full Protection and Security.
- xiii. **““Hacienda Santa Fé”** means the lands owned by INAGROSA located in Jinotega Department, Nicaragua, described in the Witness Statement of Carlos J. Rondón at, among other places, paragraphs 31-34 and known as Hacienda Santa Fé.

- xiv. **“HSF”** means Hacienda Santa Fé.
- xv. **“Hacienda Santa Fé Seizure Order”** means the Court Order issued by the Second Oral Court of the civil district of Jinotega Northern District on December 15, 2021 (C-0251-SPA-ENG).
- xvi. **“IBA Rules”** means the International Bar Association Rules on the Taking of Evidence international Arbitration of May 29, 2010.
- xvii. **“ICSID”** means the International Centre for the Settlement of Investment Disputes.
- xviii. **“ICSID Convention”** means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States
- xix. **“ILC”** means the United Nations International Law Commission.
- xx. **“IRS”** means the Internal Revenue Service of the United States of America.
- xxi. **“INAGROSA”** means Inversiones Agropecuarias, S.A.
- xxii. **“INAGROSA Management”** means the staff of INAGROSA involved in management activities, including but not limited to the administrative and corporate officers of INAGROSA described in the Witness Statement of Carlos J. Rondón at, among other places, paragraphs 63-64.
- xxiii. **“INAFOR”** means the National Forestry Institute of Nicaragua.
- xxiv. **“INAFOR Certificate”** means the Certificate issued by Orlando Jose Martinez, Director of the National Forest Registry Office of INAFOR, on January 25, 2023 (**R-0017-SPA-ENG**).
- xxv. **“INTA”** means the Institute of Agricultural Technology of Nicaragua.
- xxvi. **“INRA”** means the Institute of Agrarian Reform of Nicaragua.
- xxvii. **“Invasion”** or **“Invasions”** means the trespass of Hacienda Santa Fé by those other than the lawful owner of the property, commencing on June 16, 2018, and continuing after that. The continuation of the Invasion is referred to as the Occupation.
- xxviii. **“Investor”** means Riverside Coffee, LLC. (“Investor” or “Riverside”).
- xxix. **“Investment”** means all investments as defined in CAFTA Article 10.28 owned or controlled by Riverside, including but not limited to Inversiones Agropecuarias S.A. (“INAGROSA”).

- xxx. **“IPSA”** means the Institute of Agricultural Protection and Health of Nicaragua.
- xxxi. **“Judicial Order”** means the Court Order issued by the Second Oral Court of the civil district of Jinotega Northern District on December 15, 2021 (**C-0251-SPA-ENG**).
- xxxii. **“MAGFOR”** means the Ministry of Agriculture, Cattle-Rising, and Forestry of Nicaragua.
- xxxiii. **“MARENA”** means the Ministry of Environment and Natural Resources of Nicaragua
- xxxiv. **“Memorial”** means the Investor’s Memorial, dated October 21, 2022, unless otherwise explicitly referring to the Respondent’s Counter-Memorial, dated March 3, 2023.
- xxxv. **“NAFTA”** means the North American Free Trade Agreement
- xxxvi. **“National Police”** means the National Police of Nicaragua.
- xxxvii. **“Nicaraguan Resistance”** means the U.S.-backed rebel group that fought a decade-long civil war against the Government of Nicaragua in the 1980s, as referred to in, among other places, paragraph 6 of the Respondent’s Counter-Memorial.
- xxxviii. **“NIO”** means the Nicaraguan Cordoba.
- xxxix. **“OCCUPIERS” means the continuing trespass of Hacienda Santa Fé by those other than the lawful owner of the property, from June 16, 2018, and continuing after that. The ongoing activity of the Occupiers is referred to as the Occupation.**
- xl. **“OTR”** means the Office of Rural Title Registration of Nicaragua.
- xli. **“Respondent”** means the Republic of Nicaragua.
- xlii. **“Russian BIT”** means the 2012 Agreement between the Government of the Russian Federation and the Government of the Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments.
- xliii. **“SINAP”** means the National Protected Areas System Directorate of Nicaragua.
- xliv. **“SINIA”** means National Environmental Information System of Nicaragua.
- xlv. **“SNLF”** means the Sandinista National Liberation Front.

- xlvi. **“Treaty”** means the Dominican Republic–Central American Free Trade Agreement (DR-CAFTA or CAFTA).
- xlvii. **“UNAG”** means the National Union of Farmers and Ranchers of Nicaragua.
- xlviii. **“UPANIC”** means the Union of Agricultural Producers of Nicaragua.
- xlix. **“UNCITRAL”** means the United Nations Commission on International Trade and Law
 - I. **“UNCITRAL Rules”** means the UNCITRAL Arbitration Rules
 - li. **“USDA”** means the US Department of Agriculture.

B. Chronology of Events

1. **June 16, 2018:** Unlawful occupation of the upper part of Hacienda Santa Fé initiated. The invaders claim they were acting under directives from the government.
2. **July 16, 2018:** The invasion extends to the lower part of Hacienda Santa Fé, with the intruders alleging governmental orders for their actions, purportedly sent by Jinotega Mayor Leonidas Centeno.
3. **July 16 - 30, 2018:** A strategic assembly takes place at some point during involving Congressman Edwin Castro and the leaders of the occupation. Congressman Castro allegedly advised the occupiers to maintain their occupation over the property.
4. **August 10, 2018:** A meeting is reportedly convened by the order of Mayor Leonidas Centeno, involving Police Commissioner Castro and the heads of the invading group.
5. **August 11, 2018:** Many of the occupiers vacate temporarily, complying with an order issued by Mayor Centeno. Not all occupiers leave.
6. **August 14, 2018:** Police oversight is present during a one-day visit by INAGROSA to Casa Hacienda, despite the presence of some remaining occupiers.
7. **August 17, 2018:** The occupiers re-establish control over Hacienda Santa Fé.
8. **August 28, 2020:** Riverside submits a Notice of Intent to initiate a CAFTA claim.
9. **August 18, 2021:** Nicaragua acknowledges its physical and exclusive dominion over the lands, effectively dislodging the occupiers.

10. **September 9, 2021:** Official correspondence ensues between Nicaragua's counsel, marked by the exchange of the Reichler Letter and the Appleton Letter on the same day.
11. **November 15, 2021:** Nicaraguan authorities apply to court for protective order.
12. **December 15, 2021:** The court grants the Judicial Order.
13. **March 27, 2022:** Paul Reichler resigns from his position as the principal attorney representing Nicaragua, citing human rights violations by President Ortega and his administration (**C-0671-ENG**)

I. OVERVIEW

Brief Summary

- 1) The core issue in this international arbitration claim is Nicaragua's liability for the occupation of Hacienda Santa Fé (HSF) commencing in 2018. This occupation resulted in significant harm to Riverside's investments in Nicaragua, contravening provisions set out in Chapter Ten of the Central American Free Trade Agreement (CAFTA).
- 2) Nicaragua has manifestly misused its sovereign authority in ways that are arbitrary, discriminatory, and without reason. This Reply Memorial addresses a litany of internationally unlawful measures including numerous breaches of Treaty commitments, notably those related to Full Protection and Security (FPS), Fair and Equitable Treatment (FET), and obligations to offer treatment equivalent to the most favorable one provided to similar investments in Nicaragua in accordance with National Treatment and Most Favored Nation Treatment. These are in addition to Nicaragua's unlawful expropriation of Hacienda Santa Fé.
- 3) This Reply Memorial will address assertions by Nicaragua that are inconsistent with the record evidence. Riverside asserts that Nicaragua has not accurately represented the events leading up to and following the occupation of HSF. Rather than addressing the core issues, Nicaragua's response seems focused on discrediting Riverside's witnesses and presenting insinuations without substantive evidence.
- 4) Unfortunately, Nicaragua's approach in its Counter-Memorial is to rely upon groundless allegations and smear attacks. This approach is improper, and it needlessly requires the Tribunal to review irrelevant and fruitless avenues of defense that are untethered from the evidence. Rather than address the facts and law as it is, Nicaragua creates a counter-narrative, mostly designed to reduce its damages. But in so doing, Nicaragua engages in a lack of good faith towards this Tribunal and an abuse of process. Among these abusive actions:
 - a) Nicaragua founds its defense on a false theory that the invading occupiers of HSF were opponents of the State when the evidence shows exactly the contrary.
 - b) Most Nicaragua's witnesses address entirely groundless regulatory that were not relevant and not obstacles. Again, the evidence, including expert evidence brought along with the Reply, confirms exactly the contrary of Nicaragua's contentions.

- c) Nicaragua misleads this Tribunal about the conditions in Nicaragua at the time of the invasion and occupation of HSF. Nicaragua relies on a non-existent police sequestration order to justify its manifest failure to protect HSF. Not only does such an order not exist, but the evidence before this Tribunal demonstrates that the National Police were providing protective services to private landowners across Nicaragua and addressing unlawful occupations in the same conditions and at the very same time that Nicaragua claims that it was under a disability that prevented such actions from being extended to Riverside. The only conclusion to be taken from this evidence is that Nicaragua wantonly has misguided the Tribunal.
- d) Nicaragua relies on fabricated evidence before this Tribunal and in the local court proceedings it brought in connection with this arbitration. Expert evidence brought with this Reply confirms that these domestic actions were an abuse of rights under local law. The wholesale violation of the rule of law itself in these actions constitutes a violation of Fair and Equitable Treatment under international law.
- 5) Nicaragua has attempted to make much of the political and social context of Nicaragua in its defense, but Nicaragua has been selective in the presentation.
- 6) Nicaragua is used to being able to tell its story, no matter how farfetched, without challenge. Nicaragua has a captive domestic audience where it may distract and deny the truth with impunity. Nicaragua is now an autocratic state. Nicaragua's government has removed the free press, closed the universities, imprisoned faith leaders, eroded the independence of the judiciary, restrained foundational human rights, and detained dissenters without trial.¹ Those who speak truth to power put their physical safety on the line. This is controlled by the highest echelons of the Nicaraguan state. Nicaragua abuses its sovereign power as a state in non-conformity with international law. It is not surprising that Nicaragua is under international sanctions for its conduct, with its most senior government leaders (including some of these involved in the actions of this arbitration) under international sanctions.²
- 7) For Riverside, this arbitration is the only recourse to independent and impartial access to justice. This arbitration is based on the CAFTA and international law and is governed by the rule of law. This Tribunal must

¹ See the First Expert Statement of Prof. Justin Wolfe at ¶¶ 69-103 (**CES-02**) and the Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 8-26. (**CES-05**). Nicaragua provided no expert evidence to rebut the powerful statements contained in Prof. Wolfe's First Expert Statement on this topic.

² First Expert Statement of Prof. Justin Wolfe at ¶ 67 (**CES-02**); Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 62-67 (**CES-05**).

scrutinize Nicaragua's measures to prevent a party from relying on its own wrongdoing to succeed in this international arbitration.

- 8) This Reply Memorial addresses these and other issues. The gravity of Nicaragua's extensive groundless allegations requires an extensive Reply Memorial to address these needless arguments. The full extent of Nicaragua's misbehavior and misrepresentation is a matter that this Tribunal will need to consider seriously in determining costs.
- 9) A hallmark of Nicaragua's defense in its Counter-Memorial on the merits revolves around its denial of any association with the individuals who occupied HSF. This is important because Nicaragua openly admits, as it must, the unlawful character of the invasion and occupation of HSF.³ Riverside attributes this conduct to the Republic of Nicaragua. However, in arguments first presented in Nicaragua's Counter-Memorial, Nicaragua characterizes the leaders of the occupiers as constituting a significant threat to the State. It identifies most of the occupation leaders as being armed former members of the Nicaraguan Resistance. In this way, Nicaragua attempts to evade state responsibility for the occupation that created significant damage to Riverside. However, this is grossly misleading.

1. The occupiers were associated with Nicaragua.

- 10) Nicaragua commences its Counter-Memorial by making unfounded claims about the occupiers, casting them as "enemies of the state," while evidence shows that, instead, the occupiers operated under government direction and received government support. Nicaragua portrays the occupiers as antagonists when evidence indicates that they acted under governmental direction, with some even documenting their allegiance to President Daniel Ortega's Sandinista government.
 - a) The sources upon which Nicaragua relies for its defense lack objectivity and credibility, and mostly emanate from government-affiliated entities. Professor Wolfe reports that independent international experts from the Organization of American States and the UN Human Rights Committee have concluded that the justifications and explanations Nicaragua advances are not credible.⁴ The evidence paints an occupation that was orchestrated by individuals aligned with the Nicaraguan Government and President Daniel Ortega, rather than being driven by forces opposed to the government. This fact is substantiated by documented

³Counter-Memorial at ¶ 5 (p.2).

⁴Reply Expert Statement of Prof. Justin Wolfe at ¶ 124 (CES-05). Prof. Wolfe says "As can be seen from the responses to the serious human rights concerns raised by the UN Human Rights Council and the Organization of American States experts, Nicaragua has provided justifications of events that lack balance, candor, and credibility. In these circumstances, this Tribunal may require the application of extra scrutiny in its consideration of unsupported statements arising from the Republic of Nicaragua."

communications during the occupation, where the occupiers explicitly acknowledged their allegiance to the government and its control.

- b) The evidence indicates that the occupation was facilitated by allies of the Nicaraguan Government, with documented meetings between the occupiers and elected government officials. Notably, a senior Nicaraguan State official, in the aftermath of the complete occupation in July 2018, acknowledged the illegal nature of the occupation of private property. However, instead of rectifying the situation, the official instructed the occupiers to remain, revealing a concerted effort to legitimize the occupation for potential state acquisition.
 - c) There is compelling evidence of collusion between the occupiers and various government bodies, including National Assembly delegates and local Sandinista municipal councilors, all actively supporting and enabling the illegal occupation.⁵
- 11) Of the numerous officials implicated, Nicaragua only presented two, both police officers. Remarkably, these officers lack any contemporaneous records supporting their assertions. Nicaragua presents none of the other government actors named in the allegations to provide testimony.
 - 12) The public political alliance is manifest between the former members of the Nicaraguan Resistance and the Sandinista National Liberal Front government under President Daniel Ortega's leadership. This collaboration is highlighted by announcements from the Sandinista National Liberation Front's congressional leaders and supported by the party's official documents. This relationship can be traced back to 2006 and is widely recognized. Prof. Justin Wolfe offers an insightful and comprehensive review of the political partnership between the former Nicaraguan Resistance and the Nicaraguan government in his Reply Expert Statement filed with this Reply Memorial **(CES-05)**.
 - 13) The disputing parties in this arbitration diverge sharply on whether the Occupation of HSF was carried out by individuals affiliated with or acting on behalf of the Government or unrelated local persons formerly affiliated with the Nicaraguan Resistance.
 - 14) Riverside does not dispute that some of the leadership of the occupiers have a background in the former Nicaraguan Resistance. However, in this Reply Memorial, Riverside demonstrates that the former Nicaraguan Resistance movement is part of the integral governing alliance with the Sandinista-led government of Nicaragua. Thus, there is no inconsistency between having a

⁵Reply Expert Statement of Prof. Justin Wolfe at ¶ 125 **(CES-05)**.

former Nicaraguan Resistance background and acting on behalf of the government of Nicaragua.

- 15) This position is supported by contemporaneous documents where the individuals in question note their background both in the former Nicaraguan Resistance and their current Government affiliation, including stating that they take direction from Nicaraguan President Daniel Ortega and his wife, Vice President Rosario Murillo.
- 16) Riverside does not dispute that those concerned in the Occupation of HSF were, in fact (in large part) formerly affiliated with the former Nicaraguan Resistance movement, but rather to fill in the political picture by demonstrating that the former Nicaraguan Resistance movement is now in alliance with the Government.
- 17) Professor Justin Wolfe is a history professor at Tulane University with an extensive focus on Nicaragua and Latin American. He filed a cogent and well-referenced Expert Statement. (**CES-02**). Nicaragua did not adduce expert evidence contrary to Prof. Wolfe's First Expert Report in its Counter-Memorial.
- 18) Professor Wolfe's First Expert Report identified the presence of solid evidence that there exists in Nicaragua a phenomenon whereby individuals acting on behalf of the Government engage in government-supported land invasions. In such invasions, the occupiers take over private land at the direction of the state.⁶ As clarified in Prof. Wolfe's Reply Expert Report, the state can use such invasions to benefit its supporters⁷ and such government directed invasions are not restricted to the voluntary police *per se*.⁸
- 19) Professor Wolfe did not address matters dealing with the former Nicaraguan Resistance in his First Expert Statement, as the role of the former Nicaraguan Resistance was raised for the first time in the Counter-Memorial (and its accompanying witness statements and exhibits). In his Reply Expert Statement filed by Riverside with its Reply Memorial (CES-05), Professor Wolfe has offered expert evidence on the relationship of the former Nicaraguan Resistance and its alliance with the Sandinista National Liberation Front government through the Alianza Unida Nicaragua Triunfa.
- 20) In his Reply Expert Statement, Professor Wolfe expresses his views considering the contemporaneous documents going to the events at Hacienda Santa Fé, including the communications from those concerned and the police files. Professor Wolfe concludes that features of the invasion of

⁶ First Expert Statement of Prof. Justin Wolfe at ¶¶ 57-65 (**CES-02**).

⁷ Reply Expert Statement of Prof. Justin Wolfe at ¶ 87 (**CES-05**).

⁸ Reply Expert Statement of Prof. Justin Wolfe at ¶ 78 (**CES-05**).

HSF appear consistent with the patterns of state-directed land invasions that he describes in his First Expert Statement.⁹ In addition, Professor Wolfe concludes that this specific land incursion at HSF was part of that pattern.¹⁰

- 21) In coming to this conclusion, Professor Wolfe notes the following in paragraph 86 of his Reply Expert Statement:

...this particular land invasion at Hacienda Santa Fé appears to be consistent with the patterns of land invasions described in Section B of the First Expert Statement. In particular:

- a) There was limited to no activity taken by the Police to confront the unlawful occupiers for nearly two months.
- b) The victim was a business that was known to be unsupportive of the FSLN Government.
- c) The occupiers were self-identified former Nicaraguan Resistance followers of the FSLN or active supporters of the FSLN.
- d) There were indications that local mayors instructed the invasions.
- e) There were considerable interactions between the occupiers and senior officials from the FSLN government.¹¹

- 22) With respect to the invasion and occupation of HSF, the structure of Riverside's case is that

- a) there are State-sponsored land takeovers in Nicaragua.
- b) Hacienda Santa Fé was fully taken over in July 2018.
- c) Nicaragua is responsible for that take-over.

- 23) As noted above, Professor Wolfe's evidence in his First Expert Statement confirms the first element.¹² His expert evidence in his Reply Expert Statement touches on the crucial final step in establishing government liability for Nicaragua.¹³

⁹ Reply Expert Statement of Prof. Justin Wolfe at ¶ 86 (CES-05).

¹⁰ Reply Expert Statement of Prof. Justin Wolfe at ¶ 119, Prof. Wolfe says, "Assessing the evidence leads to the reasonable conclusion that the occupation was not carried out by opponents of the State but by those controlled by or affiliated with the government of Nicaragua." (CES-05).

¹¹ Reply Expert Statement of Prof. Justin Wolfe at ¶ 86 (footnotes omitted) (CES-05).

¹² First Expert Statement of Prof. Justin Wolfe at ¶¶ 57-65 (CES-02).

¹³ Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 78-95 (CES-05).

- 24) Nicaragua portrays the occupiers as antagonists of the State. Documentation indicates ties between the leaders of the occupiers and the Nicaraguan government. This evidence indicates that they were under governmental direction, with the leadership of the Cooperative El Pavón documenting their allegiance to, and control by, President Daniel Ortega's Sandinista government.
- 25) Nicaragua's principal defense, as presented in its Counter-Memorial, diverges significantly from the facts. Nicaragua consistently has presented this distorted narrative in its submissions and witness evidence to the Tribunal. Such behavior suggests a lack of commitment to a good faith arbitration process and raises significant concerns about the existence of abuse of process by Nicaragua, with the effect to mislead this Tribunal.

2. Grossly Irrelevant Regulatory Contentions

- 26) Nicaragua falsely implies that Riverside committed systematic regulatory breaches spanning phytosanitary, land use, environmental, and border control systems, rendering INAGROSA's operations illicit. The needless submission of five witness statements to this Tribunal by Nicaragua, which level these baseless regulatory criticisms, is meticulously countered by the Expert Witness Statement of Nicaraguan lawyer, Renaldy J. Gutierrez. Mr. Gutierrez corroborates INAGROSA's adherence to local regulations, further substantiated by official documents showing the absence of any regulatory reprimands or infraction notices against INAGROSA. Expert Gutierrez concludes that there is no basis to the regulatory and permit allegations Nicaragua raised in Section II of its Counter-Memorial and in the five witness statements Nicaragua filed.¹⁴
- 27) It appears that the sole purpose of these irrelevant arguments is to buttress damages reduction arguments that Nicaragua's valuation experts argue. They suggest that the damages methodology applied by Riverside's damages expert should not be followed due to supposed foundational illegality or regulatory headwinds risk to INAGROSA.¹⁵ This approach has the tail wagging the dog. Nicaragua's damages reduction theory appears to be driving the substantive defense into irrelevant and immaterial areas, wasting the time and resources of this Tribunal. Damages theory follows the events in the case, it is entirely improper for damages theory to drive the events.

3. The National Police were actively protecting others.

¹⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 183-188. **(CES-06)**.

¹⁵Credibility International Report at ¶¶ 25, 99, 125, 202, 207 **(RER-02)**.

- 28) Riverside presents a clear and detailed chronology of when the local authorities were informed of the various risks and the points at which the authorities failed to take reasonable steps.
- 29) Nicaragua contends that given the overall unrest, political turbulence, and violence in the country at the time, including in the local area, and the limited numbers of police, it took all the steps it could reasonably have done in the circumstances.
- 30) Riverside pleads concrete steps which the police could reasonably have taken in the circumstances, based on comparison with (a) what happened previously at HSF itself and (b) the police response to other land invasions.
- 31) The evidence demonstrates that there was more that the police could and should reasonably have done in response to the threat of the Occupation. This obligation is heightened by the fact that the Police admit that they were aware in advance of the risk to HSF.
- 32) Nicaragua admits that its National Police did not provide protection at HSF in June, July, and the beginning of August 2018. Nicaragua justifies this inaction due to a supposed executive order from the President that the police were to remain in their barracks and not go out in public to facilitate “peace talks.” Nicaragua claims that the police were ordered to remain in their barracks between May and sometime in July 2018.¹⁶
- 33) INAGROSA notified the police on June 16, 2018, that armed intruders had invaded its property by. This put the police on notice of risk to INAGROSA’s property including risk of violence, trespass, and physical damage. In response, the local police chief did not send any police to INAGROSA that day. The next day, the National Police sent out an inspector who simply advised management to evacuate due to fire risk. Otherwise, Nicaragua confirms that they took no action at HSF for nearly eight weeks, until August 11, 2018.¹⁷
- 34) Nicaragua initially justifies the suspension of police protective powers on the basis that there was a mandatory national order upon the National Police not to leave their barracks that was put in place by President Daniel Ortega. Nicaragua cannot produce any written orders of such an order from the President, nor is there any notation of such an order in the police files. Indeed, there is evidence that the police continued their activities throughout this period.

¹⁶ Counter-Memorial at ¶¶ 29, 31, 299, 318, 331 and 334.

¹⁷Counter-Memorial at ¶¶ 35-36.

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- 35) Nicaragua's claim of a National Police 'Shelter Order' lacks empirical evidence. Documentation from that period disproves the existence of such an order, further eroding Nicaragua's credibility. Documented National Police actions during 2018 directly contradict Nicaragua's claim that the police were incapacitated by a Shelter Order due to civil unrest.
 - 36) Evidence of what the National Police did during that time in 2018 shows more than a dozen documented examples of police actions, including investigations, expulsions of unlawful occupants, and other protective steps at that very same time. Of course, this ongoing National Police Activity during a time when Nicaragua claimed it was undergoing such severe civil unrest that its police were restricted to their barracks to protect their weapons is entirely unexplained. This evidence contradicts Nicaragua's assertion of incapacitation of their police due to the Shelter Order resulting from civil unrest.
 - 37) The National Police's failure to share vital information about the impending invasion with Riverside's investment and its lack of decisive action compared to similar cases involving private landowners further highlight the bias.
 - 38) Nicaragua also justifies its lack of effort based on overall civil protests. The evidence Nicaragua produces in the form of National Report No. 5 to the United Nations Human Rights Council contends that there was a *coup d'etat* attempt that the government defeated in April 2018.¹⁸ The Reply Expert Statement of Prof. Justin Wolfe reviewed the investigations of independent experts from the United Nations who concluded that the peaceful protests about social security reforms which started in April 2018 were not a *coup d'etat* attempt.¹⁹
 - 39) Similarly, the evidence demonstrates a different story about the activities of the National Police during the summer of 2018. Evidence obtained from Nicaragua in this arbitration underscores that concurrent to the occupation of HSF, the National Police proactively initiated investigations and effectuated the eviction of illegal encroachers upon private lands from as many as eighteen separate locations across the country. A comprehensive analysis of these instances is discussed in the Full Protection and Security and "National Treatment" sections within Part VIII of the Reply Memorial.²⁰
 - 40) Significantly, in none of these documented instances where the National Police were restrained or inhibited due to any ostensible presidential order to confine the police force to their barracks. The evidence is clear that the

¹⁸Nicaraguan National Report submitted in accordance with paragraph 5 of the Annex to Human Rights Council resolution 16/21, January 28, 2019, pp. 3-4 (R-0019).

¹⁹Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 73-77 (CES-05).

²⁰Report from Police Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 (C-0326-SPA).

National Police were carrying out duties in Nicaragua to investigate and protect private landowners from trespass, threats of violence, and property damage arising from unlawful invasions and occupations. However, such similar measures were not provided by the national police at HSF in June, July, and the beginning of August 2018, when such measures could have had a significant impact on preventing or reducing the irreparable damages that arose.

4. Events leading to P.O. No. 4

- 41) On November 13, 2022, Riverside wrote to the Tribunal seeking discretionary relief concerning the discovery that Nicaragua had taken legal actions before its courts concerning the property at HSF. This discovery occurred after Riverside's October 21, 2022 filing of its Memorial. Riverside's Memorial did not address this significant event as Riverside had not been served with the Judicial Order nor notified of the application. Riverside only discovered the existence of the order days before its urgent notification to the Tribunal on November 13th.
- 42) Riverside sought discretionary relief from the Tribunal due to its concerns about taking measures before its local courts, which Riverside considered to be inconsistent with the terms of the ICSID Convention and the orderly operation of this arbitration. The Judicial Order referenced the evidence Nicaragua's Attorney General relied upon to obtain the Judicial Order, which Riverside considered false. Riverside also had significant concerns in light of the use of such fabricated evidence and Nicaragua's failure to apply in advance of the judicial proceeding that Riverside did not have access to the materials put before the local court,
- 43) In *Procedural Order No. 4*, the Tribunal declined to order discretionary relief. However, the Tribunal found that Nicaragua failed to follow due process by not giving timely notice to Riverside of the Judicial Order, as mandated in the terms of the Judicial Order. In paragraph 37, the Tribunal noted:

it appears undisputed that the Court Order was not formally served on the Claimant, which is not in accordance with due process ²¹
- 44) The Tribunal granted permission to Riverside be able to amend its claims, including those on quantum, in the Reply Memorial ²² The Tribunal did not consider it necessary in the discretionary relief application to rule on the issue of the fabricated evidence. ²³

²¹ Riverside Coffee *Procedural Order No. 4* at ¶ 37.

²² Riverside Coffee *Procedural Order No. 4* at ¶ 39.

²³ Riverside Coffee *Procedural Order No. 4* at ¶ 34.

- 45) Within the Reply Memorial, Riverside has amended the scope of its claim to include the subsequent conduct of Nicaragua during the pendency of this arbitration in relation to the subject of this arbitration. That amended scope addresses Nicaragua's failure to:
- a) provide fair and equitable treatment to Riverside with respect to the application for the preventative measure, the hearing of the application, the Judicial Order, and the implementation of the Judicial Order.
 - b) Provide compensation for the de jure and de facto expropriation of HSF arising from Judicial Order.
- 46) The testimony provided by Renaldy J. Gutierrez, a Nicaraguan legal expert, is particularly illuminating on this matter. In his Expert Witness Statement, Expert Gutierrez articulates numerous egregious due process violations that cumulatively amount to an abuse of process within the context of this arbitration.²⁴ He delineates the failure of Nicaraguan authorities to adhere to local law in implementing the Judicial Order.²⁵ Further, Mr. Gutierrez expounds upon the de jure alteration of land titles²⁶ and the de facto consequences of such actions, which have severely compromised the fundamental attributes of property ownership.²⁷
- 47) When the Tribunal initially considered the application for discretionary relief, it did so in the absence of specialized knowledge concerning Nicaraguan law. Now armed with Expert Gutierrez's expert legal analysis, as particularly reflected in his answer to Question 2 within his Expert Witness Statement (**CES-06**), the Tribunal can appreciate a more profound interpretation of the measures enacted by Nicaragua. It becomes conspicuously apparent through the expert's discourse that Riverside has been subjected to a flagrant infringement of its rights, especially about its legitimate invocation of protections under the CAFTA framework.²⁸

5. The Fictional Refusal

- 48) A fourth area arises from the alleged Riverside "refusal" of Nicaragua's September 9, 2018 offer, which formed the basis of the November 2021 application and the December 15, 2021 Judicial Order.
- 49) Nicaragua contends that there was a lack of action to follow up on a letter of September 9, 2021 where Nicaragua offered to return the land subject to proof of title and the fulfillment of other unspecified conditions, other than a

²⁴ Expert Witness Statement of Renaldy J. Gutierrez, Question 2 at ¶ 104 and ¶ 107 (**CES-06**).

²⁵ Expert Witness Statement of Renaldy J. Gutierrez, Question 2 at ¶ 104 and ¶ 107 (**CES-06**).

²⁶ Expert Witness Statement of Renaldy J. Gutierrez Question 2 at ¶¶ 96-98 (**CES-06**).

²⁷ Expert Witness Statement of Renaldy J. Gutierrez Question 2 at ¶¶ 99-101 (**CES-06**).

²⁸ Expert Witness Statement of Renaldy J. Gutierrez, Question 2 at ¶ 104 and ¶ 107 (**CES-06**).

response by Riverside of the same day. In this Reply, Riverside has provided a fuller picture of the contacts that followed between the disputing parties, which makes evident that there was no inaction on Riverside's part. This record indicates that Nicaragua has been evasive as to its intentions in relation to the land and raises a question of whether they have any good faith intention of returning it.

- 50) The correspondence from September 9 2021, admits that Nicaragua established complete control of HSF in 2021, more than two years after the start of the occupation. Nicaragua's letter referenced non-specific potential conditions for the return of HSF. At that juncture, it is undisputed that Nicaragua had taken full governmental control over INAGROSA's property. In seeking clarity on the conditions for the return, Riverside wrote back to Nicaragua within hours. Riverside's letter sought clarification on the meaning of the offer but received no substantive feedback from Nicaragua for a span nearing eighteen months until April 2023.
- 51) Riverside never refused Nicaragua's offer in September 2021. Contrary to Riverside's genuine inquiry, Nicaragua mischaracterized the request for further details about its non-specific conditions as refusing its offer. Nicaragua never issued any communication terming Riverside's request for information as constituting a refusal. It appears that Nicaragua had what it wanted from the September 9 communications. Rather than respond in good faith, Nicaragua went to its courts with a fictitious rejection, not contained in the written communications. That rejection was entirely false. This application was essentially *ex parte*. While Riverside was noted as the opponent on the application, Nicaragua never notified Riverside of the proceeding. Nicaragua's perjured evidence on the alleged refusal went unchallenged before the court as Nicaragua gave no notice of the judicial application to Riverside. Indeed, Nicaragua gave no notice of the hearing, nor even served the Judicial Order on the affected parties. Without effective rights of audience for the affected parties (Riverside and INAGROSA), the local court accepted the fabricated statements from the Nicaraguan Attorney General in its subsequent Judicial Order. All these actions constituted abuses of rights and an abuse of process under Nicaraguan law.²⁹ As discussed below in this Reply Memorial, these acts were consistent with the Fair and Equitable treatment standard of good faith under international law. They also evidence an abuse of process in this arbitration by Nicaragua.

²⁹This matter is detailed in the Expert Statement on Nicaraguan legal questions of Renaldy J. Gutierrez. After reviewing the record, Mr. Gutierrez concludes that there was an abuse of rights and legal process under the law of Nicaragua due to the absence of notice, notice of hearing, and failure to serve the Judicial Order. See Expert Witness Statement of Renaldy J. Gutierrez in Question 2 – the conclusions are in ¶¶ 104-107 (CES-06).

- 52) Nicaragua contends that there was a lack of action to follow up on a letter of September 9, 2021 where Nicaragua offered to return the land subject to proof of title and the fulfillment of other unspecified conditions, other than a response by Riverside of the same day. In this Reply, Riverside has provided a fuller picture of the contacts that followed between the disputing parties, which makes evident that there was no inaction on Riverside's part. This record indicates that Nicaragua has been evasive as to its intentions in relation to the land and raises a question of whether they have any good faith intention of returning it.
- 53) This ill-conceived legally insignificant offer and the fictitious "refusal" appears to have been tailored with an ulterior motive, which appears aimed at influencing the litigation damages in this ongoing arbitration, as well as providing cover for Nicaragua's *de jure* seizure of HSF, including modifying the legal title of the property to add Nicaragua to the property title.³⁰ This strategy became particularly evident given the arbitration's timeline in relation to the issuance of the September 9, 2021 letter.
- 54) The reliance on that fabricated evidence (upon which Nicaragua also relies in this arbitration) demonstrates a lack of commitment to a good-faith arbitration process and raises significant concerns about the existence of abuse of process by Nicaragua in this arbitration.
- 55) In summary, the approach, and actions of Nicaragua in relation to the "offer," the Judicial Order, and Nicaragua's reliance on materially false evidence, warrant serious scrutiny, given the egregious deviations from legal norms and the mischaracterizations of communications.
- 56) Nicaragua's narrative is fundamentally flawed. These patterns in Nicaragua's witness testimonies, pleadings, and correspondence before this Tribunal illustrate troubling foundational inconsistencies. Nicaragua's conduct demonstrates a lack of commitment to a good-faith arbitration process.
- 57) Cumulatively, such behaviors exemplify abuse of process and a potentially deceitful approach towards this Tribunal.³¹

6. The International Community warnings.

- 58) The International Community and international organizations all caution this Tribunal in how it evaluates evidence from Nicaragua. This Tribunal must be careful considering these warnings and should not grant a margin of appreciation to Nicaragua

³⁰Expert Witness Statement of Renaldy J. Gutierrez in Question 2 – especially ¶¶ 74-79 (CES-06).

³¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 105 (CES-06).

59) The evidence filed with the Memorial and with this Reply Memorial is replete with material from international experts from the United Nations, the Organization of American States, and international non-governmental organizations, all attesting to the fact that the rule of law does not function in Nicaragua ruled by the Ortega Sandinista National Liberation Front government since April 2018.³²

60) The experts filing reports before this tribunal have provided evidence of a lack of independence of the judiciary or other parts of the state. As noted by Prof. Justin Wolfe:

124) Factual statements made by the Republic of Nicaragua regarding its motivations and actions in connection with the events arising since April 2018 need to be carefully examined for consistency and trustworthiness. As can be seen from the responses to the serious human rights concerns raised by the UN Human Rights Council and the Organization of American States experts, Nicaragua has provided justifications of events that lack balance, candor, and credibility. In these circumstances, this Tribunal may require the application of extra scrutiny in its consideration of unsupported statements arising from the Republic of Nicaragua.³³

61) Professor Wolfe also notes that some of the officials providing testimony before this Tribunal also are likely to be an integral part of the autocratic government ruling Nicaragua:

123) It is unreasonable to believe that senior Nicaraguan government members would regularly interact with opponents of the Nicaraguan Regime who have invaded private lands in Jinotega. Senior members of the Nicaraguan Regime would include regional attorneys general, local mayors and senior police commissioners and sub-commissioners. To be appointed to such a position, these office holders would be active supporters of the Sandinista National Liberal Front (or the Alianza Unida) to serve in such senior positions.³⁴

62) As noted above, the Tribunal already ruled on one small part of this unfair process, finding in *Procedural Order No. 4* that there was a breach of due process on Nicaragua's failure to serve the Judicial Order against Riverside in 2021.³⁵

63) Nicaragua's defense strategy, marked by manipulation, deception, and a casual disregard for established policies, underscores its aim to obfuscate

³² Reply Expert Witness Statement of Prof. Justin Wolfe at ¶¶ 69-92, 99 (CES-02).

³³ Reply Expert Witness Statement of Prof. Justin Wolfe at ¶ 124 (CES-05).

³⁴ Reply Expert Witness Statement of Prof. Justin Wolfe at ¶ 123 (CES-05).

³⁵ Riverside Coffee *Procedural Order No. 4* at ¶ 37.

the truth. Thankfully, CAFTA serves as a bulwark against such transgressions.

- 64) Riverside's account, corroborated even by some of Nicaragua's witnesses, is consistent and supported by historic records, while Nicaragua's narrative is fraught with contradictions.

7. What is in this Reply Memorial?

- 65) In its claim, Riverside addresses the following four foundational claims that this Tribunal must consider, notably:
- a) The breach of expropriation obligations regarding Nicaragua's direct involvement in ordering the invasion and occupation of HSF.³⁶
 - b) The breach of fair and equitable treatment in connection with Nicaragua's instructions that the invaders continue the occupation of HSF.³⁷
 - c) The breach of the Full Protection and Security Obligation arising from Nicaragua's failure to act diligently with respect to the operations of Nicaragua's protective services (such as the police and armed services, as well as prosecutorial services).³⁸
 - d) Nicaragua's failure to provide National Treatment and MFN Treatment due to its failure to provide treatment to INAGROSA as favorable in Nicaragua at that given to other investments unlawfully invaded at the same time in 2018.³⁹

³⁶Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42 and 73 (**CWS-02**); Witness Statement of Jaime Cruz – Memorial – SPA at ¶ 16 (**CWS-06**); Witness Statement of Carlos J. Rondón– Memorial – ENG at ¶¶ 76 and 80 (**CWS-01**).

³⁷Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42 and 73 (**CWS-02**); Witness Statement of Jaime Cruz – Memorial – SPA at ¶ 16 (**CWS-06**); Witness Statement of Carlos J. Rondón– Memorial – ENG at ¶¶ 76 and 80 (**CWS-01**).

³⁸Witness Statement of Luis Gutierrez -Reply – SPA at ¶¶ 62-63, 72, 82, 152-156 (**CWS-10**); Witness Statement of Domingo Ferrufino -Reply – SPA at ¶¶ 90-94.

³⁹Certificate of Handover of Rural Land to Elvis Delgadillo, Raquel Torrez and Benita Garcia by the Leon National Police Delegation, October 12, 2018 (**C-0327-SPA-ENG**); Certificate of Handover of Rural Land to MANGOSA and MELONICSA issued by the Leon National Police Delegation October 24, 2018 (**C-0328-SPA-ENG**); Certificate of Handover of Rural Land to Banco de Fomento a la Produccion issued by the Leon National Police Delegation October 18, 2018 (**C-0329-SPA-ENG**); Certificate of Handover of Rural Land to Angel Rafael Chavez and Alejandro Chavez issued by the Leon National Police Delegation October 16, 2018 (**C-0330-SPA-ENG**); Certificate of Handover of Rural Land to Evenor Blanco issued by the Leon National Police Delegation October 18, 2018 (**C-0331-SPA-ENG**); and Certificate of Handover of Rural Land to Mauricio Pallais and Jose Rodriguez issued by the Leon National Police Delegation October 22, 2018 (**C-0332-SPA**).

- 66) This Reply Memorial is organized as follows.
- Part I provides an Overview of the Reply Memorial.
 - Part II addresses the Invasion.
 - Part III addresses the Offer and the Judicial Seizure of HSF.
 - Part IV addresses the Ownership of INAGROSA.
 - Part V addresses Permits and Approvals
 - Part VI addresses INAGROSA's Business.
 - Part VII addresses Control over INAGROSA.
 - Part VIII addresses international law issues including State Responsibility for internationally wrongful acts.
 - Part IX addresses Damages.
 - Part X contains the Counter-Memorial on Jurisdiction.
 - Part XI addresses Relief.
- 67) Riverside submits together with its Reply Memorial the following witness statements:
- a) The Reply Witness Statement of Melva Jo Winger de Rondón (**CWS-08**), the owner of 100% of the member units of Riverside. As noted in her Reply witness statement, Riverside had invested over \$9.5 million in INAGROSA debt (99% of the overall debt of INAGROSA).⁴⁰ Riverside also had agreed in March 2018 to provide US\$ 17.5 million in additional equity funding and interest relief to INAGROSA for its Hass avocado expansion plans.⁴¹ In addition to financial control, INAGROSA had effective voting control over the equity shares of INAGROSA since at least 2013, five years prior to the Invasion.
 - b) The Reply Witness Statement of Carlos J. Rondón (**CWS-09**), INAGROSA's Chief Operating Officer. Mr. Rondón addresses operational matters raised by Nicaragua in its Counter-Memorial.
 - c) The Reply Witness Statement of Luis Gutierrez (**CWS-10**), Inagrosa's Chief Agronomist and administrator. Mr. Gutierrez addresses operational matters in connection with INAGROSA and his knowledge of the seizure of HSF. Mr. Gutierrez addresses issues about the conditions at HSF, the Hass avocado, coffee and standing forest operations, as well as other matters that fit within his role as administrator of INAGROSA.
 - d) The Witness Statement of Russell "Russ" Welty (**CWS-11**), the US-based external financial officer who addresses operational matters regarding the Hass Avocado expansion raised by Nicaragua in its Counter-Memorial.

⁴⁰ Richter Reply Expert Damages Report at Chart 4 (**CES-04**).

⁴¹ Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (**C-0287-ENG**).

Serving as INAGROSA's external Chief Financial Officer, Mr. Welty provides insights into the company's contemporaneous business strategies. Being the principal drafter of these business plans, Mr. Welty actively participated in discussions with both financial experts and avocado technical specialists. His testimony elucidates the dynamics of the Hass avocado export industry, as represented in the projections. Through his evidence, it becomes apparent that the avocado enterprise was poised for profitability, which was unfortunately thwarted by the events at HSF in 2018, deemed internationally wrongful.

- e) The Witness Statement of Domingo Ferrufino (**CWS-12**), a former INAGROSA Security Team employee who was present at HSF during the invasions. Mr. Ferrufino has direct first-hand testimony about the invasion and occupation of HSF. He had direct discussions with the leaders of the occupation during the invasion. The invaders beat Mr. Ferrufino during the occupation due to his unwillingness to join their cause. In addition to witnessing the invasion and occupation, Mr. Ferrufino was present at HSF in 2003 and 2017.
- f) The Richter Reply Expert Damages Report of certified business valuator Vimal Kotecha (**CES-04**) from Richter Inc. on the valuation of damages arising from Nicaragua's internationally wrongful actions. In the Reply Expert Damages Report, Vimal Kotecha carefully considers points raised by Nicaragua in its Counter-Memorial and by its expert witnesses. Mr. Kotecha presents a revised damages model considering information provided by Nicaragua and documents obtained after filing his First Expert Damages Report (CES-001). Mr. Kotecha presents damages with respect to the internationally unlawful acts at HSF applying an income-based model. He also assesses an asset-based model as an alternative approach advocated by Nicaragua's damages experts in the Reply Expert Damages Report.⁴²
- g) The Reply Expert Statement of Tulane University Professor Justin Wolfe (**CES-05**) on the longstanding political alliance between the former Nicaraguan Resistance and the Sandinista National Liberation Front. His Reply Report also addresses the lack of independence of the National Police and Judiciary from the apparatus of the Nicaraguan state. Professor Wolfe comments on the facts of the invasion of HSF and its striking similarities to other state directed land invasions in Nicaragua.
- h) The Expert Statement of Renaldy J. Gutierrez (**CES-06**). Expert Gutierrez is a Harvard-educated Nicaraguan attorney and former law professor in Managua. He was a partner in a legal practice in Managua and later moved to the United States, where he practices law in Miami, Florida.

⁴² Richter Reply Expert Damages Report at ¶ 3.2 (**CES-04**).

Expert Gutierrez comments on various issues including the lawfulness of INAGROSA's business, which did not have material regulatory obstacles to its operations. He also reviews the legal documents, procedures and practices related to the application for a protective order by the Attorney General in 2021. Expert Gutierrez concludes that there were multiple deeply troubling rule of law issues arising in connection with the measures of the Attorney General. He concludes that such measures constitute an abuse of rights in the legal process against Riverside and INAGROSA as a matter of the law of Nicaragua.

A. Executive Summary

- 68) On March 3, 2023, the Republic of Nicaragua submitted a defense to this claim, articulating the following points:
- a) Nicaragua denies any culpability, asserting no involvement with the individuals who unlawfully occupied the HSF property, alleging that these individuals were in opposition to the Sandinista-led government.
 - b) Nicaragua also argues that it was unable to take any police action due to an alleged order requiring the National Police to remain in their barracks. The Republic claims that, upon lifting of this order, its law enforcement took appropriate actions to safeguard Riverside's property.
 - c) Lastly, Nicaragua suggests that it was compelled to undertake *ex parte* protective measures over HSF due to Riverside's outright rejection of an offer made in correspondence dated September 9, 2021.
- 69) Nicaragua's defense portrays the invasion as an event entirely disconnected from any government activity or direction.⁴³ Nicaragua claims that HSF fell prey to individuals wholly autonomous from state governance,⁴⁴ attempting to depict itself as a mere passive observer.
- 70) Expounding on its defense, Nicaragua attributes the HSF invasion to the "Nicaraguan Resistance"—counter-revolutionary factions historically allied with the US administration under former President Ronald Reagan.⁴⁵ Remarkably, Nicaragua depicts the invaders' leadership as: heavily armed remnants of the Resistencia Nicaragüense or Contras, the insurgent faction historically supported by the U.S. during the Nicaraguan civil conflicts of the 1980s.⁴⁶

⁴³Counter-Memorial at ¶ 16 (p.24).

⁴⁴Counter-Memorial at ¶ 24.

⁴⁵Counter-Memorial at ¶ 6 (p.2).

⁴⁶Counter-Memorial at ¶ 6.

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- 71) Nicaragua contends that the government had no role in the invasion and that the invasion of Hacienda Santa Fe was “the latest iteration of a decades-long land dispute between INAGROSA and Cooperative El Pavón”.
- 72) Nicaragua claims that the invaders were not a part of the state, nor assisted or directed by it. To support this counternarrative, it relies on the following:
- a) Statement of Jose Lopez, a resident living outside of HSF who was not present during the invasion but claimed that the invaders were not connected to the government.
 - b) The Statement of Jinotega Attorney General Diana Gutierrez, who was not in that office at the time of the invasion.
 - c) The Statement of Jinotega Police Commissioner Marvin Castro, who was not at HSF in June or July 2018 but claims that the paramilitary leaders were mainly unfavorable to the government.
- 73) Contrarily, the evidence presented by Nicaragua only affirms Riverside’s claims. The evidence unambiguously illuminates the hands-on role adopted by Nicaragua—both in orchestrating the HSF invasion and in sustaining the subsequent occupation. Documents reveal the State’s undeniable control over these invaders.
- 74) The evidentiary record, inclusive of the Counter-Memorial and document production, establishes the following:
- a) Former Nicaraguan Resistance Occupation leaders were not in opposition to, but rather displayed allegiance and loyalty to, the Sandinista regime of President Daniel Ortega through written declarations.⁴⁷
 - b) Nicaragua never disclosed that the former members of the Nicaraguan Resistance were in a political alliance with the Sandinista Party. The Alliance jointly ruled Nicaragua (under Sandinista dominance) since 2006.⁴⁸
 - c) While Nicaragua purports to have been dealing with government opponents at HSF, evidence shows consistent high-level meetings with senior government officials at a time when Nicaragua was suppressing its political dissenters through unlawful imprisonment and violence.⁴⁹

⁴⁷Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua September 5, 2018, **(R-0065-SPA-ENG)**.

⁴⁸ Reply Expert Statement of Prof. Justin Wolfe at ¶ 52 and ¶ 114 **(CES-05)**.

⁴⁹ Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 122 - 125 **(CES-05)**.

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- d) Notably absent from Nicaragua's defense is any acknowledgment that many of the HSF occupation leaders were indeed supporters of the Sandinista government, a fact confirmed by Jinotega National Police Commissioner Marvin Castro.⁵⁰
 - e) Nicaragua's repetitive claim that HSF occupiers were government opponents is unsubstantiated. Evidence shows that these individuals were supporters of the Nicaraguan government and received direct support from the Sandinista regime.
 - f) Nicaragua claims that the police were ordered to remain in their barracks between May and sometime in July 2018.⁵¹ No authentic evidence has been provided to substantiate Nicaragua's claim that a presidential order exists restricting police action. Further, the Police Reports supplied by Nicaragua highlight at least eighteen instances in which private landowners received preferential treatment during similar land invasions.
 - g) The evidence also reveals Nicaragua's breach of its Fair and Equitable Treatment obligations towards INAGROSA. For instance, Police Captain Herrera had advanced intelligence of the impending invasion but failed to share this critical information with INAGROSA.
 - h) Evidence points to Nicaragua's abuse of its judicial process in November 2021, when a seizure order was obtained through falsified documentation. Nicaragua seeks to justify this act before this Tribunal, despite its reliance on fabricated evidence.⁵²
 - i) The "offer" was nothing more than an improper *ex post facto* ploy taken by Nicaragua to attempt to address its damages. It was never a viable offer,⁵³ and Riverside submits that it should not be admissible in the arbitration to show anything but Nicaragua's control over the HSF.
 - j) Finally, Nicaragua's abusive judicial process in 2021, which resulted in a *de jure* and *de facto* taking of INAGROSA's property.⁵⁴
- 75) The approach of Nicaragua, in relation to the "offer", the Judicial Order, and Nicaragua's reliance on materially false evidence before its courts and this Tribunal, warrant serious scrutiny, given the egregious deviations from legal norms and the mischaracterizations of communications.

⁵⁰ Reply Expert Statement of Prof. Justin Wolfe at ¶ 116 (CES-05).

⁵¹ Counter-Memorial at ¶ 29.

⁵² Reply Expert Statement of Renaldy J. Gutierrez at ¶ 107 (CES-06).

⁵³ Reply Expert Statement of Renaldy J. Gutierrez at ¶¶ 50-52 and ¶¶ 90-93. (CES-06).

⁵⁴ Reply Expert Statement of Renaldy J. Gutierrez at ¶¶ 79, 83, and 101 (CES-06).

- 76) As elucidated below in this Reply Memorial, the September 2018 offer was tailored with an ulterior motive, which appears aimed at influencing the litigation damages in this ongoing arbitration, as well as providing cover for Nicaragua's *de jure* seizure of HSF, including its modification of the legal title by adding the Republic of Nicaragua to the property title.⁵⁵ This abusive strategy became particularly evident given the arbitration's timeline in relation to the issuance of the September 9, 2021 letter.
- 77) This Reply Memorial speaks to various defenses filed by Nicaragua in its attempt to distract, delay and deny its foundational responsibility for the occupation of HSF.
- 78) In the Reply Memorial, Riverside set out the various ways in which Nicaragua has direct liability for the damage inflicted upon HSF, INAGROSA and Riverside.,
- 79) Both Riverside's Memorial and this Reply Memorial compellingly argue that Nicaragua's actions represent a clear breach of its CAFTA duties. The evidence Riverside presented by indisputably shows that Nicaragua's actions contravene its CAFTA commitments. However, Nicaragua sidesteps the core issues, choosing instead to divert attention.
- 80) The Reply Memorial addresses the following:
- a) Nicaragua's responsibility for the measures.
 - b) A review of the facts associated with the occupation of HSF.
 - c) Riverside's extensive history of ownership and Control of INAGROSA.
 - d) The reasons why there were no material regulatory issues affecting INAGROSA's business operations.
 - e) INAGROSA's Business.
 - f) Nicaragua's specious offer to return HSF and the Judicial Seizure.
 - g) The absence of jurisdictional impediments for this claim.
 - h) The breaches and the relevant international law.
 - i) Damages

⁵⁵Expert Witness Statement of Renaldy J. Gutierrez in Question 2 – especially ¶¶ 74-79 (CES-06).

1. Clear Attribution of Nicaragua's responsibility for the internationally wrongful acts

- 81) There was a clear nexus between the Nicaraguan state and the occupiers at HSF. As set out in this Reply, the evidence is undeniable and consistent:
- a) These occupiers candidly have admitted that they acted under directives from the State when they proceeded with the invasion.⁵⁶
 - b) Furthermore, tangible written evidence corroborates that, not only were the invaders directed by the State to invade, but they were also explicitly instructed by state authorities to sustain their occupation.⁵⁷
 - c) Their unwavering allegiance to, and oversight by, the Nicaraguan state in the period where the irreparable damage to INAGROSA took place further underscores the Nicaraguan State's complicity, and international responsibility for the internationally wrongful acts and facts in this matter.
- 82) Riverside submits the following evidence, which decisively supports the assertion that the occupiers (which included Sandinista supporters and members of the former Nicaraguan Resistance)⁵⁸ operated under the mandate of the Nicaraguan state:
- a) **Admissions from the Invaders Themselves:** The most compelling evidence comes directly from the admissions of the actual invaders.⁵⁹ Their written declarations categorically affirm that their operations at HSF transpired under the directives and sanction of the Nicaraguan government.⁶⁰ Such candid admissions stand as unassailable testimony to

⁵⁶Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 47,49,51,54, and 108 (**CWS-10**).

⁵⁷Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police, regarding the Invasion of Hacienda Santa Fe, July 31, 2018, at NIC01939 (**C-0284-SPA-ENG**).

⁵⁸Characterization of Mr. Benicio de Jesús González Pérez, Jinotega National Police, 2022 (**R-0038-SPA-ENG**); Characterization of Mr. Adrian Wendell Mairena Arauz, Jinotega National Police, 2022 (**R-0039-SPA-ENG**); Characterization Mr. Ciro Manuel Montenegro Cruz, Jinotega National Police, 2022 (**R-0040-SPA-ENG**); Characterization of Mr. Efrén Humberto Orozco, Jinotega National Police, 2022 (**R-0041-SPA-ENG**); Characterization of Mr. Blas de Jesús Villagra Gonzalez, Jinotega National Police, 2022 (**R-0042-SPA-ENG**); Characterization of Mr. Luis Antonio Rizo Reyes, Jinotega National Police (**R-0043-SPA-ENG**); Characterization of Mr. Ney Ariel Ortega Kuan, Jinotega National Police, 2022 (**R-0044-SPA-ENG**); Characterization of Mr. Haniel Samuel Rizo Torrez, Jinotega National Police, 2022 (**R-0045-SPA-ENG**); Characterization of Mr. José Cristóbal Luqués Flores, Jinotega National Police, 2022 (**R-0046-SPA-ENG**); Characterization of Mr. José Dolores Pérez Estrada, Jinotega National Police, 2022 (**R-0047-SPA-ENG**); Characterization of Mr. Sergio Roberto Zelaya Rourk, Jinotega National Police, 2022 (**R-0048-SPA-ENG**); Congresswoman Elida Maria Galeano Cornejo, National Assembly of the Republic of Nicaragua website, August 26, 2022 (**C-0129-SPA**).

⁵⁹Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

⁶⁰Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua September 5, 2018, at pp. 1-2 (**R-0065-SPA**).

the State's dominance over the occupiers and stands in sharp contrast to Respondent's misleading characterizations of the role of the Nicaraguan Resistance.

- b) **Admissions from Nicaragua about the Invaders:** Compelling evidence comes directly from the admissions of Police Commissioner Marvin Castro who admits that at least three of the armed Invasion leaders were supporters of the Sandinista Government.⁶¹
- c) **Actions of the National Police Indicating State Involvement:** The National Police's involvement cannot be ignored.
 - (i) It is evident from the written evidence that the police either actively collaborated with the invaders or consciously abstained from their obligations.⁶² This refusal to intervene not only infringes upon the principles of Fair and Equitable Treatment but also breaches the Full Protection and Security obligations and National Treatment/MFN Treatment obligations.
 - (ii) The Police failed to provide fair and equitable treatment by not making INAGROSA aware of "advance intelligence" of imminent harm. This "intelligence" is admitted by the local police captain in his witness statement. Yet, the National Police never shared that "advance intelligence" to permit INGROSA to take steps to prevent harm to its property.
 - (iii) Riverside further underscores the discernible pattern of police favoritism towards land invasions occurring at the same time elsewhere in Nicaragua, which demonstrates the lack of diligence on the part of the National Police and accentuates the nexus between the former Nicaraguan Resistance and the state apparatus.⁶³

⁶¹Characterization of Mr. Luis Antonio Rizo Reyes, Jinotega National Police, 2022 (**R-0043-SPA-ENG**); Characterization of Mr. Ney Ariel Ortega Kuan, Jinotega National Police (**R-0044-SPA-ENG**); and Characterization of Mr. Haniel Samuel Rizo Torrez, Jinotega National Police, 2022 (**R-0045-SPA-ENG**).

⁶²Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 152-156 (**CWS-10**); Witness Statement of Domingo Ferrufino -Reply – SPA at ¶¶ 90-94 (**CWS-12**).

⁶³Certificate of Handover of Rural Land to Elvis Delgadillo, Raquel Torrez and Benita Garcia by the Leon National Police Delegation, October 12, 2018 (**C-0327-SPA-ENG**); Certificate of Handover of Rural Land to MANGOSA and MELONICSA issued by the Leon National Police Delegation October 24, 2018 (**C-0328-SPA-ENG**); Certificate of Handover of Rural Land to Banco de Fomento a la Produccion issued by the Leon National Police Delegation October 18, 2018 (**C-0329-SPA-ENG**); Certificate of Handover of Rural Land to Angel Rafael Chavez and Alejandro Chavez issued by the Leon National Police Delegation October 16, 2018 (**C-0330-SPA-ENG**); Certificate of Handover of Rural Land to Evenor Blanco issued by the Leon National Police Delegation October 18, 2018 (**C-0331-SPA-ENG**); and Certificate of Handover

- d) **Actions of elected government officials to instruct and support the Invasion and Occupation:** The involvement of elected members of the National Assembly, local elected Mayors, and local municipal councilors cannot be ignored. There is written evidence that elected government officials instructed the occupiers to invade and to remain in control of the premises and continue the occupation. This accentuates the nexus between the former occupiers and the state apparatus.
- e) **Actions of the executive branch of Nicaragua's Government to seize Hacienda Santa Fe since December 2021:** The involvement of the executive branch of the Nicaraguan Government in 2021 and thereafter cannot be ignored. It is evident from the November 2021 court application that Nicaragua covertly brought.⁶⁴ During this period, Nicaragua effectively deprived Riverside and INAGROSA of the foundational aspects of INAGROSA's private property, including its rights to quiet possession, management, control, alienation, and hypothecation of its immovable property.
- f) **Third-party Testimonies from Social Media:** In this digital age, social media stands as a potent testament to the pulse of the public. Several third-party witnesses voluntarily have expressed their insights on various platforms, and their collective voice echoes Riverside's ⁶⁵OBJ. Their testimonies not only bridge the gap between the occupiers and the state but also reinforce the credibility of the presented evidence.
- 83) As noted by Nicaraguan political history expert Prof. Justin Wolfe in his Reply Expert Statement:

Nicaragua's position that the occupiers of Hacienda Santa Fé were opponents of the regime simply does not ring true. Nicaragua relentlessly engaged in shows of force and criminal action against the mildest forms of dissent. An armed uprising by opponents would not have been met with instructions from government leaders to remain in occupation while the government found money to buy the lands from the rightful owners. On balance, it is hard to give weight to Nicaragua's contentions of an absence of connection between the invaders and the government. The absence of police resistance (or resistance from other protective services) also supports this view. Based on the widespread practices of the government

of Rural Land to Mauricio Pallais and Jose Rodriguez issued by the Leon National Police Delegation October 22, 2018 (C-0332-SPA).

⁶⁴Application for Urgent Precautionary Measures for appointment of judicial depositary November 30, 2021 (C-0253-SPA-ENG).

⁶⁵Civic Alliance Facebook Post, July 16, 2018 (C-0035-SPA-ENG); Civic Alliance Facebook Post, Aug. 26, 2018 (C-0036-SPA-ENG).

of Nicaragua in 2018, the occupation of Hacienda Santa Fé appears to have had government support and sanction.⁶⁶

- 84) Given the robust and incontrovertible nature of the presented evidence, Riverside asks this Tribunal to recognize the inextricable link between the occupiers and the Nicaraguan state. It is evident that the activities transpiring at HSF bear the hallmark of state sponsorship, validating Riverside's stance in its entirety.
- 85) Riverside offers compelling evidence showcasing that, at the time of the unfortunate invasion, INAGROSA was not just a local investment but an ongoing commercial enterprise specializing in Hass avocado production. In 2017, INAGROSA had a successful Hass avocado yield. Furthermore, in 2018, right before the intrusion, INAGROSA had another crop poised for harvest, affirming the business's continued success and stability⁶⁷
- 86) Historically, since the late 1990s, INAGROSA was known for its coffee cultivation.⁶⁸ However, the emergence of the Roya fungus posed severe threats to its coffee yields,⁶⁹ compelling the enterprise to pivot its focus.⁷⁰ INAGROSA astutely identified the opportunity within the Hass avocado market, given its immunity to the Roya fungus and the consistent global demand for avocados. With the strategic leverage of its pre-existing coffee cultivation infrastructure and a dedicated workforce, INAGROSA executed a seamless and successful transition to Hass avocado cultivation.
- 87) It is also worth emphasizing that INAGROSA's enterprise was multifaceted. In 2018, alongside its avocado venture, the company prudently nurtured a standing timber forest. This was not just any forest, but one that housed an array of high-demand tree species primarily for veneer purposes. These valuable veneer species within the forest had not only been personally inspected by representatives from Miller Veneers, a prominent US veneer manufacturer, but had also led to tangible actions. Miller Veneers, recognizing the quality of the timber, extracted wood samples. Subsequently, a commercial agreement was set in place, ensuring that, once INAGROSA initiated sustainable harvesting, Miller Veneers would acquire the entire output. This showcases the potential and projected profitability of INAGROSA's endeavors had the invasion not thwarted its operations.

⁶⁶ Reply Expert Statement of Prof. Justin Wolfe at ¶ 125 (CES-05).

⁶⁷ Laquisa Laboratory 2017 avocado crop test analysis results on the avocado crop produced at Hacienda Santa Fe November 17, 2017 (C-0054-SPA).

⁶⁸ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 186 (CWS-10).

⁶⁹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 27, 28, 192, and 193 (CWS-10).

⁷⁰ Witness Statement of Carlos Rondón – Reply – ENG at ¶¶ 99-101 (CWS-09).

- 88) There exists an unequivocal link between Nicaragua's internationally wrongful conduct and the damages INAGROSA incurred. Specifically, during the unwarranted occupation stemming from the second incursion into HSF:
- a) The promising Hass avocado crop was completely decimated.
 - b) Subsequently, the commercial Hass avocado tree plantations, nurtured over years, were uprooted, and replaced with alternative crops, obliterating years of dedication and investment in the avocado enterprise.
 - c) INAGROSA's carefully cultivated standing forest was illicitly logged, specifically targeting valuable species. This wanton act eradicated decades of meticulous investment in forest preservation.
- 89) Notably, INAGROSA faced no substantive regulatory hurdles in conducting its operations.⁷¹
- 90) Riverside holds sustainability as an unwavering core principle. With this vision, INAGROSA sought recognition as a private wildlife reserve. Operating within such a framework would allow INAGROSA to pursue its ventures, provided it adhered to sustainable practices that it was already following. While environmental regulators did acknowledge the merit of HSF for designation as a private wildlife reserve, HSF had yet to achieve this status by the time of the unwarranted invasion in June 2018.
- 91) Within the ambit of the private wildlife reserve designation process, the Ministry of Environment undertook a comprehensive assessment of HSF's land use and related environmental standards. In their internal government assessments in 2018, Nicaragua's own evaluation team ascertained that HSF rigorously complied with Nicaragua's environmental regulatory benchmarks. Consequently, there were no substantial regulatory obstacles hindering INAGROSA's operations at HSF.⁷²
- 92) Absent the devastating ramifications of the occupation, INAGROSA was poised for successful and sustainable business operations.

2. Nicaragua's Direct Involvement

- 93) The comprehensive evidence laid before this Tribunal underscores Nicaragua's direct culpability in the unlawful invasion and persistent occupation of HSF.
- 94) It is noteworthy that given the extent of damage at HSF and the resultant obliteration of material evidence maintained in the INAGROSA offices at HSF

⁷¹ Reply Expert Statement of Renaldy J. Gutierrez at ¶ 184 (CES-06).

⁷² Reply Expert Statement of Renaldy J. Gutierrez at ¶¶ 182-188 (CES-06).

by these illegal occupants, witness testimonies have emerged as a linchpin in this case. These crucial witness testimonies are bolstered by:

- a) written admissions from the occupiers themselves,
 - b) documentary evidence from the police, and
 - c) overt public declarations that inexorably link Nicaragua to the incursion.
- 95) As this case involves an occupation in which there was considerable destruction of documentary evidence due to the ransacking of HSF by the illegal occupiers, the evidence of witnesses for Riverside has become heightened. This evidence is supported by written admissions from the invaders, written confirmations from the Police, and oral public proclamations linking Nicaragua to the invasion.⁷³
- 96) There is no dispute between the disputing parties about attribution in respect of the conduct of State officials or organs. This means that any relevant acts or omissions of such individuals or entities will be attributed to Nicaragua for the purposes of considering liability. This includes:
- a) The police, including Commissioner Marvin Castro and Captain William Herrera.
 - b) Elected members of the legislative branch of government which includes Deputies in the National Assembly, The Mayor of Jinotega, Léonidas Centeno, the Mayor of San Rafael del Norte, Norma Herrera.
 - c) The legislative branch of government which includes elected members of the National Assembly and local elected officials.
 - d) The executive branch includes the Attorney General and other government officials.
 - e) The courts.
- a) Non-disclosure of the relationship between the Nicaraguan Resistance and the Sandinista Government in 2018.**
- 97) The counter-narrative Nicaragua presents asserts the existence of two distinct groups within the country who appear to be in opposition to one another: the Nicaraguan Resistance and the Sandinista National Liberation Front ('SNLF' or Sandinistas) who formed a government.

⁷³Please see the detailed discussion in Part II of this Reply Memorial on this topic.

- 98) It is an indisputable fact that, in the aftermath of the overthrow of the Somoza government in 1979 by a military junta led by the Sandinistas,⁷⁴ both the Nicaraguan Resistance and the Sandinistas engaged in a power struggle. Subsequently, this struggle culminated in the democratic election of a Sandinista government under the leadership of Daniel Ortega in 1984.⁷⁵
- 99) However, it is noteworthy that neither Nicaragua nor its witnesses have acknowledged the significant development since the post-Somoza regime revolutionary struggle: in particular, the Nicaraguan Resistance's political alliance with the Sandinista Party. Instead of being adversaries, members of the Nicaraguan Resistance now operate under the control of the Sandinista National Liberation Front autocratically run by President Daniel Ortega and Vice President Rosario Murillo.⁷⁶

b) The Alliance of the Resistance and the Sandinistas (Alianza Unida Nicaragua Triunfa)

- 100) As delineated in Part II, the “Alianza Unida Nicaragua Triunfa” was established in 2006.⁷⁷ Spearheaded by the Sandinista National Liberation Front, this alliance epitomized a coalition between the Sandinistas and what was left of the former Nicaraguan Resistance. Their combined efforts in 2006 culminated in their electoral victory under the banner of Alianza Unida Nicaragua Triunfa.⁷⁸
- 101) Prof. David Close, in a chapter of “*Reclaiming Latin America*”, offers an analytical discourse on the rapprochement between the Nicaraguan Resistance and the Sandinistas.⁷⁹ This political consolidation transpired during a phase when the Sandinista National Liberation Front (SNLF), often referred to as the “Front” or “Frente”, was not holding government office.⁸⁰ Initially, in 2001, the Sandinistas initiated a relatively constrained political alliance named the “Convergencia”, encompassing political entities distinct from the Resistance. However, this coalition lacked the potency to clinch an electoral win. Recognizing the exigency to amplify its support base, in 2006, the Sandinistas forged an alliance with the

⁷⁴Witness Statement of Diana Gutiérrez-Counter-Memorial-ENG at ¶ 10 and ¶ 12 (RWS-01).

⁷⁵Witness Statement of Diana Gutiérrez-Counter-Memorial-ENG at ¶ 13 (RWS-01).

⁷⁶Please see the detailed discussion in Part II of this Reply Memorial on this topic.

⁷⁷The program manifesto was released in 2006. See the Reconciliation and National Unity Government Program (C-0336-SPA). David Close. Nicaragua: The Return of Daniel Ortega in Geraldine Lievesley & Steve Ludlam (eds) (2009). *Reclaiming Latin America Experiments in Radical Social Democracy*. Zed Books at pages 113-115. (C-0335-ENG).

⁷⁸David Close. Nicaragua: The Return of Daniel Ortega at pp. 113-115. (C-0335-ENG).

⁷⁹David Close. Nicaragua: The Return of Daniel Ortega at pp. 113-115. (C-0335-ENG).

⁸⁰David Close. Nicaragua: The Return of Daniel Ortega at pp. 113-115. (C-0335-ENG).

Resistance and the Catholic Church, leading to their triumphant election under the Alianza Unida Nicaragua Triunfa. Prof. Close writes:

In both 2001 and 2006, the Frente was an integral component of an electoral alliance - the “Convergencia Nacional” in 2001 and the “Alianza Unida Nicaragua Triunfa” in 2006. The nexus within the Convergencia and the Alianza Unida comprised the FSLN and a medley of political personas from both right and center-right orientations. The catalyst for the Frente’s embracement of its erstwhile adversaries was its advocacy for national reconciliation, which was the linchpin in both 2001 and 2006 elections. An extract from a campaign address by Rosario Murillo, spouse of Ortega, in Chinandega during the campaign’s final week captures the zeitgeist:

In Nicaragua, we endeavor to inaugurate a renewed ethos of Love, of Reconciliation, of Peace, for it remains the solitary conduit propelling us forward. Such aspirations resonate with the ethos of the Frente Sandinista de Revolución Nacional. This aligns with the desires of the Nicaraguan populace, and for us, the vox populi is sacrosanct—akin to the Divine Decree.⁸¹

102) Prof. Close continues:

This is not the historic discourse of the sandinistas. Having been burned in the past, especially in 1996 (Close, 1996) by opponents waving the bloody shirt of revolution and frightening voters into the arms of the right, Ortega and the FSLN did not just reach out to their old nemesis, they expropriated their language and concepts (Perez Baltadano, 2009) their government programme (Alianza Unida Nicaragua Triunfa 2006) repeatedly invoked the Lord’s blessing, while talking about respecting the rights of private property; redistributing land without occupations or confiscations; addressing poverty, illiteracy and inequality; And installing a form of direct democracy the FSLN calls citizens’ power.⁸²

103) Prof. Shelley McConnell addressed the politics of the 2001 elections.⁸³

It is pertinent to note the September 2018 correspondence from the occupiers of HSF, chronicles the alliance’s history and unequivocally affirms the infiltrators’ allegiance to the Nicaraguan state. This assertion finds corroboration in the documentary evidence from Nicaragua, which validates the Nicaraguan Resistance’s inclusion

⁸¹David Close. Nicaragua: The Return of Daniel Ortega at pp. 113-115. **(C-0335-ENG)**.

⁸²David Close. Nicaragua: The Return of Daniel Ortega at p. 115 **(C-0335-ENG)**.

⁸³Shelley A. McConnell, The Uncertain Evolution of the Electoral System in D. Close and S. Marti (ed), The Sandinistas and Nicaragua since 1979. at p. 142 **(C-0497-ENG)**.

within the Alianza Unida Nicaragua Triunfa and, by extension, the Sandinista National Liberation Front (SNLF).⁸⁴

c) New evidence of control by the State

- 104) A communique, co-signed by several commanding figures of the armed incursion, was dispatched to the Attorney General of Nicaragua on September 5, 2018. Drafted by the occupiers, this document incontrovertibly delineates their profound ties with the Sandinista administration, overtly professing their fealty to Nicaraguan President Daniel Ortega and Vice President Rosaria Murillo and the Government of Nicaragua.
- 105) Nicaragua persistently has contended that the HSF was breached by members of the El Pavón Cooperative, a group significantly comprised of veterans of the former Nicaraguan Resistance.⁸⁵ Nonetheless, the potential origins of these paramilitary leaders, whether emanating from the Nicaraguan Resistance or the El Pavón Cooperative, are tangential given the weighty documentary evidence enshrined in the September 5, 2018 correspondence.⁸⁶ This pivotal letter (R-0065) is expressly referenced in the Witness Statement of Jinotega Attorney General Gutierrez, in paragraph 44.
- 106) The communique relayed from the El Pavón Cooperative to the Office of the Attorney General of Jinotega categorically substantiates those former members of the Nicaraguan Resistance, operated under the oversight and guidance of the Sandinista Government of Nicaragua during both the breach and occupation at the HSF.⁸⁷
- 107) The communique dated September 5, 2018, stands as irrefutable admission that the occupiers unambiguously conceded their undertakings were executed under the aegis of the Nicaraguan state and pursuant to its mandate.⁸⁸

3. Nicaragua ignored claims about the Government's role in the invasion and occupation.

⁸⁴Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

⁸⁵Counter-Memorial at ¶ 24 (p.27).

⁸⁶Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

⁸⁷Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

⁸⁸Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

- 108) Nicaragua failed to address the issues put directly to it about the role of elected officials, government officials and members of the police. The Civic Alliance for Democracy and Justice posted contemporaneous independent third-party social media messages during the 2018 invasion confirming that the armed invaders occupied HSF under the orders of Jinotega Mayor Leonidas Centeno.⁸⁹
- 109) Police Commissioner Marvin Castro at paragraph 19 of his Witness Statement (RWS-02) contests the credibility of these two social media reports from the Civic Alliance for Democracy and Justice. He alleges that the social media postings were not credible,⁹⁰ but he provides no support for his denunciation of the evidence.
- 110) Claimant Document Request No 41 sought “All documents relied upon by Commissioner Marvin Castro to support his contention that Civic Alliance for Democracy and Justice post were not credible.” Nicaragua produced no responsive documents to this document request.⁹¹
- 111) In June 2021, Thomson Reuters reported that the Inter-American Commission on Human Rights and the Office of the United Nations High Commissioner for Human Rights each have noted that Nicaragua has frequently made false allegations against opponents.
- International organizations, including the Inter-American Commission on Human Rights and the Office of the United Nations High Commissioner for Human Rights, have accused Ortega’s government of fabricating false accusations against opponents.⁹²
- 112) Nicaragua has produced such documents in this arbitration.⁹³ Such statements from supranational agencies should be given great weight by this Tribunal. There was no evidence at all to support the contention that the firsthand witness evidence from the Civic Alliance for Democracy and Justice was non-credible.
- 113) The natural inference to be taken from the lack of production is that there was no basis for the statement challenging the weight of the evidence from the Civic Alliance for Democracy and Justice, Nicaragua produced nothing to

⁸⁹Civic Alliance for Democracy and Justice Facebook Post, July 16, 2018 (**C-0035-SPA**).

⁹⁰ Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 19 (**RWS-02**).

⁹¹Annex A To Procedural Order No. 6 - Tribunal's Decisions on Claimant's Document Requests.at p. 224.

⁹²U.S. blacklists four Nicaraguans. including Ortega's daughter, Thomson Reuters, June 10, 2021 (**C-0306-ENG**).

⁹³For example, see Nicaragua's January 2019 report to the UN Human Rights Committee. UN Document Number A/HRC/WG.6/33/NIC/1 (**R-0019**).

support its categorical denunciation of the contemporaneous third-party evidence.⁹⁴

- 114) Nicaragua was ordered to produce the local police reports regarding the invasion of HSF.⁹⁵ Remarkably, Nicaragua provided no reports from Captain Herrera (who was directly involved in the invasion response) or anyone else from the local station of the National Police.
- 115) Nicaragua was ordered to produce diaries and notes from local Jinotega Mayor Leonidas Centeno⁹⁶ and San Rafael Mayor Norma Herrera.⁹⁷ Nicaragua produced no responsive documents from these elected officials who witnesses to this claim explicitly implicated.
- 116) Nicaragua did not produce any witnesses to contradict the *res gestae* spontaneous declarations by the invasion leaders stating that they had invaded HSF on the direction of Jinotega Mayor Centeno and on behalf of the government of Nicaragua. Riverside identified these statements in its Memorial.⁹⁸⁹⁹
- 117) The only document that purports to refute the contemporaneous social media evidence of the link to Jinotega Mayor Centeno is an *ex post facto* statement from Regional Police Commissioner Marvin Castro stating that Mayor Centeno did not order the Invasion of HSF.¹⁰⁰ There was no evidentiary support for this bare assertion made during this Arbitration.
- 118) Nicaragua failed to address the following assertions from Riverside regarding direct attribution:

⁹⁴CL DR No. 41, Annex A To Procedural Order No. 6 - Tribunal's Decisions on Claimant's Document Requests at pp.224-225 **(C-0549-ENG)**.

⁹⁵CL DR No.35, Annex A To Procedural Order No. 6 - Tribunal's Decisions on Claimant's Document Requests at pp. 197-200 **(C-0549-ENG)**.

⁹⁶See CL DR No.40, Annex A To Procedural Order No. 6 - Tribunal's Decisions on Claimant's Document Requests.at pp. 221-223 **(C-0549-ENG)**.

⁹⁷See CL DR No.44, Annex A To Procedural Order No. 6 - Tribunal's Decisions on Claimant's Document Requests.at pp. 234-237 **(C-0549-ENG)**.

⁹⁸Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42 and 73 **(CWS-02)**; Witness Statement of Jaime Cruz – Memorial – SPA at ¶ 16 **(CWS-06)**; Witness Statement of Carlos J. Rondón– Memorial – ENG at ¶¶ 76 and 80 **(CWS-01)**.

⁹⁹Memorial at ¶¶ 58, 62, 175, and 217.

¹⁰⁰Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 19 **(RWS-02)**.

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- a) Nicaragua does not refute the admission from the armed invaders that they were carrying out the invasion on the orders of Mayor Leonidas Centeno and for the Sandinista government of Nicaragua.¹⁰¹
 - b) Nicaragua does not refute the admission of Enrique Dario who confirmed directly to Luis Gutierrez that the invasion of HSF was a government action with the goal to take away HSF from its private owners.¹⁰²
 - c) Nicaragua provides no witness statement or evidence from Jinotega Mayor Leonidas Centeno, who was directly linked to the invasion at the time of the invasion by the perpetrators:
 - d) Nicaragua provides no witness statement or evidence by San Rafael del Norte Mayor Norma Herrera who met with the invaders, supported the occupation, and demanded property be provided at HSF for the benefit of her family.
 - e) Nicaragua provides no witness statement or evidence from Noel Lopez, the political secretary of the Sandinista National Liberation Front Party, came to HSF.
 - f) Nicaragua does not refute the Civic Alliance for Democracy and Justice posted contemporaneous independent third-party social media messages during the 2018 invasion and occupation to document and confirm that paramilitaries took Hacienda Santa Fé under the orders of Jinotega Mayor Leonidas Centeno.¹⁰³
 - g) Nicaragua does not refute that the staff from INAGROSA directly witnessed the public proclamations made by the leaders of the invaders that the invasion of HSF took place on the direct orders of Jinotega Mayor Leonidas Centeno at the time of the invasion.¹⁰⁴
- 119) Nicaragua fails to refute government documents identifying the involvement and direction of elected Nicaraguan government officials. A government document confirms that a senior government official ordered the invaders to remain in place and confirmed that the government would take actions to continue the occupation on a permanent basis by purchasing the land at

¹⁰¹Memorial at ¶¶ 62, 182, 271, and 293; Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 73, 125 (**CWS-02**); Witness Statement of Jaime Francisco Henriquez Cruz- Memorial-SPA at ¶ 53; Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (**CWS-01**).

¹⁰² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (**CWS-02**).

¹⁰³Civic Alliance Facebook Post, July 16, 2018 (**C-0035-SPA**).

¹⁰⁴Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42,73 (**CWS-02**); Witness Statement of Jaime Cruz – Memorial – SPA at ¶ 16 (**CWS-06**); Witness Statement of Carlos J. Rondón– Memorial – ENG at ¶¶ 76,80 (**CWS-01**).

HSF.¹⁰⁵This document confirms that, no later than July 2018, Nicaraguan government officials were aware that HSF was private property, and that the property was being occupied by non-owners.¹⁰⁶

4. Full Protection and Security was provided to others.

- 120) Despite being requested to act, the police refused to carry out their duties to perform police functions to prevent the invasion or take steps in the summer of 2018 to remove the unlawful invaders.¹⁰⁷
- 121) Local Police Captain William Herrera admit his advance knowledge of the invasion of HSF through “police intelligence sources.”¹⁰⁸ Yet, when ordered to produce the evidence of the intelligence, Nicaragua inexplicably produced no evidence.¹⁰⁹
- 122) The Witness Evidence of Luis Gutierrez confirms that the Police came to HSF, disarmed the INAGROSA security staff, and then did nothing to prevent the invasion or to protect INAGROSA from the invasion and continued occupation of HSF for more than two months.¹¹⁰
- 123) Perplexingly, Police Captain Herrera never shared any of his advanced intelligence on a timely basis with INAGROSA, the target of the wrongful behavior.¹¹¹ The failure to share this information prevented INAGROSA from taking steps to protect its business.

a) Demonstrative Evidence of Preferential Treatment during Simultaneous Invasions of Private Lands

- 124) Police records firmly establish that, during 2018, the Nicaraguan National Police actively intervened to address illegal encroachments on various private properties in Nicaragua. However, notably, the incursion at HSF remained conspicuously unaddressed.

¹⁰⁵Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 **(C-0284-SPA)**.

¹⁰⁶Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 **(C-0284-SPA)**.

¹⁰⁷Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 58, 60, 63-66 **(CWS-10)**.

¹⁰⁸Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG ¶ 21 **(RWS-03)**.

¹⁰⁹Riverside Document Request 35 sought documents evidencing the “Documents evidencing “intelligence” regarding a potential invasion of Hacienda Santa Fé between January 1, 2017, and September 1, 2018.”as they related to paragraph 1 of Captain Herrera’s Witness Statement **(RWS-03)** See Annex A of Procedural Order No. 6.

¹¹⁰Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 67-83 **(CWS-10)**.

¹¹¹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 70, 75, 83 **(CWS-10)**.

- 125) Conclusive evidence sourced from Nicaragua underscores that, concurrent to the intrusion at HSF, the National Police proactively initiated investigations and effectuated the eviction of illegal encroachers from as many as eighteen separate locations across the country. A comprehensive analysis of these instances can be found in the “National Treatment” section under Part VIII of the Reply Memorial.¹¹²
- 126) Nicaragua claims that the police were ordered to remain in their barracks between May and sometime in July 2018 via an executive order from President Ortega to facilitate “peace talks.” Yet, in none of the above documented instances were the National Police restrained or inhibited due to any ostensible presidential mandate to confine the police force to their barracks.
- 127) It is imperative to note that when Nicaragua was formally requested to furnish evidence of this Presidential Order that purportedly mandated this confinement, but Nicaragua failed to produce any concrete written directive.¹¹³ Instead, what was presented was a video footage from a meeting where the President merely verbalized an intention to confine the National Police. This was not an order, and there is no evidence that any order was issued to the National Police Chief, or from the National Police Chief to his Department Commissioners, or any instruction to any Police Captains of such an important order that would affect day-to-day operations. There was also no mention of such a dramatic order in the National Gazette or in the local media. There also is no record of the lifting of such an order. Indeed, as far as the record shows, this same order supposedly would be in effect to the current day. Of course, even if this order did exist, it was ignored completely.
- 128) Such a glaring absence of official and unofficial notification suggests that, contrary to Nicaragua’s assertion, no formal directive aligning with the President’s statement ever officially was disseminated to the police forces or was implemented. The following charts, produced from police reports provided by Nicaragua confirm that the National Police were conducting their activities throughout this period in the summer of 2018.

Chart C1			
Summer 2018 Police Evictions:			
Property Owner	Details	Police Action	Exhibit

¹¹²Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 (**C-0326-SPA**).

¹¹³See CL DR No. 15, Annex A To Procedural Order No. 6 - Tribunal’s Decisions on Claimant’s Document Requests.at pp. 104-108.

Inversiones Nela S.A.	Invasion by 200 people; multiple re-invasions”	Repeated evictions; Notable eviction on July 31,2018	C-0326-SPA
Sucesiones Dscoto Brockman & Desarrollo Xolotklan S.A.	Invasion by 200 people on each property”	Police Eviction	C-0326-SPA
Seventh-day Adventist Mission of Nicaragua	Invasion by four individuals	Police Eviction	C-0326-SPA
DharmaLila Carrasquilla	Invasion by four families	Police Eviction	C-0326-SPA
Julio Cesar Zapata Quiñones	“Property invasion”	Eviction and three arrests	C-0326-SPA

Chart C2 October 2018 Police Evictions			
Property Owner	Details	Police Action	Exhibit
Carlos Callejas Rodríguez, Raquel Torrez, Benita Garcia	Invasion by a group of individuals	Police Eviction - October 12, 2018	
MANGOSA and MELONICSA	Invasion by 30 members of Pablo Rugama Cooperative	Police Eviction - October 24, 2018	C-0328-SPA
Banco del Fomento a la Producción & Evenor de Jesús Blanco Darce	Invasions	Police Eviction - October 18, 2018	C-0329-SPA
Ángel Rafael Chávez and Alejandro Chávez	Invasion by 260 families	Police Eviction - October 16, 2018	C-0330-SPA
Mauricio Pallais and Jose Francisco Rodríguez	Invasion by fifteen families”	Police Eviction - October 22, 2018	C-0332-SPA

Chart C3 Police Potential Evictions			
Property Owner	Details	Police Action	Exhibit
Sociedad Liza Interprise S.A.	Invasion by 200 people	Potential eviction;	C-0326-SPA
Productos Aliados S.A.	Invasion by 300 people	Potential eviction with reinforcements	C-0326-SPA
Iglesia Cristiana Ministerio Leon de Judas	Invasion by neighbors	Potential eviction	C-0326-SPA

Burke Agro Nicaragua S.A.	Invasion by 50 families with weapons	Potential eviction with reinforcements	C-0326-SPA
Gonzalo German Duarte Bojorge	Invasion by 30 people	Potential eviction	C-0326-SPA
Comercial Mantica S.A.	Invasion by 50 families	Potential eviction with reinforcements	C-0326-SPA
Jose Eduar Pastora Lopez	Invasion by 80 people	Potential eviction with reinforcements	C-0326-SPA
Inversiones Espanola S.A.	Invasion by 80 people	Potential eviction with reinforcements	C-0326-SPA

129) The evidence of police activity throughout Nicaragua in the face of the alleged and unproven presidential order is overwhelming. Riverside formally requests that in the absence of production of such a presidential order that was implemented, that this Tribunal take an adverse inference that no such presidential order was effective between June 16, 2018, and the end of July 2018.

b) Lack of other police support from the state

130) Captain Herrera admitted in paragraph 21 of his witness statement that he had “advance intelligence” of the invasion of HSF of harm to occur at HSF.¹¹⁴ As a matter of international law, Nicaragua had a duty to timely share that information to INAGROSA. Yet, no information obtained by the Police was shared with INAGROSA during the period of the invasion. This includes no sharing of the “intelligence” obtained by Police Captain Herrera or the information about the meetings with leading Sandinista Government Deputies with the occupiers, or meetings with Police Commissioner Castro and Jinotega Mayor Leonidas Centeno.

131) Captain Herrera’s suppression of that vital and time-sensitive “advance intelligence” information constituted a violation of long-established fair and equitable treatment obligations. This wrongfulness is directly attributed to Nicaragua as the police are part of the State.

c) INAGROSA could have protected itself.

132) Considering the advanced intelligence, Nicaragua had an obligation to take protective steps to avoid the unlawful and harmful effects of the invasion that Nicaragua’s intelligence community (and its National Police) knew was to occur. This obligation of the international law standard of treatment is separate from that of protection after the event, which is a matter of Full Protection and Security. Nicaragua freely admits this knowledge, but it took

¹¹⁴Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 21 (RWS-03).

no advance efforts of any kind to protect Riverside's investment in INAGROSA.

- 133) Even assuming that the National Police were sequestered for a period, this did not prevent the police from taking steps to investigate the invasion and occupation of HSF. But those steps were not recorded in any reports produced by Nicaragua during document production.
- 134) Nicaragua has provided no evidence that any steps of any kind were taken to assist INAGROSA in June and July 2018.
- 135) At no time did the police return the weapons to INAGROSA's security team. This made any future steps to patrol and secure a returned HSF challenging.
- 136) A more thorough discussion of Nicaragua's failures on account of the actions of the National Police is discussed in the discussion of Full Protection and Security in Part VIII. In addition, examples of more favorable treatment provided to other private landowners in Nicaragua who were suffering invasions in the summer of 2018 are addressed in Part VIII in the National Treatment and MFN Treatment sections.

5. The Invasion

- 137) Considering the filing of the first round of pleadings, the disputing parties have arrived at the following non-contested facts:
 - a) Invasion and occupation were unlawful.¹¹⁵
 - b) Police had advanced intelligence of the invasion.¹¹⁶
 - c) Police removed weapons from INAGROSA staff.¹¹⁷
 - d) National Police were ordered not to take measures to respond to the invasion.¹¹⁸
 - e) Invaders leave briefly.¹¹⁹

¹¹⁵Counter-Memorial admission at ¶¶ 2, 359 and 379.

¹¹⁶Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG ¶ 21 (RWS-03).

¹¹⁷Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 27 (RWS-02).
Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 24 (RWS-03).

¹¹⁸Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 27 (RWS-02).
Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 26 (RWS-03).

¹¹⁹Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 37 (RWS-02).
Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 33 (RWS-03).

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- f) Invaders return shortly.¹²⁰
- g) Invaders are removed by Nicaragua - 2021¹²¹
- 138) Despite the agreement that these events occurred, there is a considerable range of disagreement on their meaning.
- 139) In the Memorial, Riverside provided direct evidence regarding the role of Nicaragua in the invasion and occupation of HSF. Nicaragua contends that the government had no role and that the invasion of Hacienda Santa Fe was “the latest iteration of a decades-long land dispute between INAGROSA and Cooperative El Pavón”.
- 140) Nicaragua “doubles down” on this assertion when it states:
- In any case, far from assisting the unlawful invasion of the Hacienda Santa Fe, the evidentiary record show that the Government opposed it ..., acted diligently under the circumstances to counteract it.¹²²
- 141) Nicaragua claims that the invaders were not a part of the state. To support this counternarrative, they rely on the following:
- a) Statement of Jose Lopez, a resident living outside of HSF, who was not present during the invasion but who claims that the invaders were not connected to the government.
- b) The Statement of Jinotega Attorney General Gutierrez, who was not in that office at the time of the invasion.
- c) The Statement of Jinotega Police Commissioner Castro, who claims that the paramilitary leaders were mainly unfavorable to the government contrary to the other evidence presented.
- 142) Nicaragua denies any involvement from Mayors Centeno and Herrera. Nicaragua also denies any wrongful actions by the police. Unlike Riverside, Nicaragua provides no external evidence to substantiate its position. It provides only self-serving witness statements denying the State’s involvement and a document drafted for this arbitration by Police Commissioner Castro, which he calls a police summary report.
- 143) There is no supporting police file to support this police summary report. The police summary report, prepared after this claim was brought, merely sets out Commissioner Castro’s opinions regarding several paramilitary leaders.

¹²⁰Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG.at ¶ 37 (RWS-03).

¹²¹Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 40 (RWS-02).

¹²²Counter-Memorial ¶ 2.

Nicaragua has produced no external supporting evidence with its counter-memorial or during document production.

- 144) Other than taking steps to prevent a future invasion of HSF years later in 2021 (addressed separately in Part III below), there is no evidence to support Nicaragua's fanciful statements.
- 145) The record demonstrates direct evidence of links between the Government of Nicaragua and the Paramilitary invaders:

6. No support for arguments about lack of permits

- 146) Nicaragua placed great emphasis in its defense on the operation of various regulatory restrictions that would impair INAGROSA's business operations.¹²³ Nicaragua went so far as to call INAGROSA's business operations illegal and subject to sanctions.¹²⁴
- 147) Nicaragua claims that the INAGROSA's business could not operate in a manner that was compliant with local law. However, this is a gross mischaracterization. The damage of these incorrect statements percolates through Nicaragua's defense. Nicaragua's valuation experts rely on Nicaragua's mischaracterizations in their expert report, rendering much of that report's analysis and theory inapplicable.
- 148) Nicaragua has produced witness reports from five different Nicaraguan government regulators on the following:
 - a) Agricultural Land Use.¹²⁵
 - b) Water use.¹²⁶
 - c) Permissions in relation to the purported designation of a Private Wildlife Reserve at HSF.¹²⁷
 - d) Forest Use Regulation.¹²⁸
 - e) Import Permissions for Seeds.¹²⁹

¹²³Counter-Memorial at ¶¶ 104-155.

¹²⁴Counter-Memorial at ¶¶ 452 and 517.

¹²⁵Witness Statement of Norma Gonzalez- Counter-Memorial- ENG (RWS-09).

¹²⁶Witness Statement of Rodolfo J. Lacayo-Counter-Memorial-ENG (RWS-07).

¹²⁷Witness Statement of Norma Gonzalez- Counter-Memorial- ENG (RWS-09).

¹²⁸Witness Statement of Alvaro Méndez- Counter- Memorial- ENG (RWS-08); Witness Statement of Norma Gonzalez- Counter-Memorial- ENG (RWS-09).

¹²⁹Witness Statement of Alcides R. Moncada-Counter-Memorial-ENG (RWS-05).

- f) Export of Hass avocado and timber.¹³⁰
- 149) The permit and authorization arguments advanced by Nicaragua in this arbitration are points of Nicaraguan law. Nicaraguan Legal Expert Renaldy J. Gutierrez has reviewed the permit and authorization arguments advanced by Nicaragua in this arbitration. He confirms that INAGROSA was able to operate lawfully at the time of the invasion and that its operations were not at risk of closure due to missing regulatory permits and authorizations.¹³¹ A thorough review of these regulatory matters fails to disclose any meaningful impacts on the business operations of INAGROSA. In fact, most of the observations Nicaragua files are irrelevant. Any remaining issues are immaterial.¹³²
- 150) Nicaragua sent officials to visit and inspect HSF on many occasions in the years before the 2018 invasion. At no time was INAGROSA ever notified that there were supposed violations to Nicaraguan regulations.¹³³
- 151) Indeed, INAGROSA management understood that they followed all necessary regulatory permissions in the operation of its coffee, avocado and forest operations as a result of these meetings with officials during visits of HSF.¹³⁴
- 152) Nicaragua's own documents confirm that MARENA, the Ministry of the Environment and Natural Resources, concluded in 2018 that INAGROSA was acting in conformity with Nicaraguan law in its operations at HSF.¹³⁵ For example, that INAGROSA was compliant with Nicaraguan environmental, land use and agricultural rules was manifest in MARENA's 2017 Evaluation of INAGROSA's Application for a private wildlife reserve at HSF.¹³⁶ MARENA's own report noted:
- all documents were reviewed according to the current legislation and Decree 20-2017 "Evaluation System Environmental Permits and Authorizations for Sustainable Use of Natural Resources."¹³⁷
- 153) Thus, there is no support for Nicaragua's extensive contentions that INAGROSA was operating in non-conformity with Nicaragua environmental

¹³⁰Witness Statement of Xiomara Mena-Counter-Memorial-ENG (RWS-06).

¹³¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 185 (CES-06).

¹³²Expert Witness Statement of Renaldy J. Gutierrez at ¶ 183 (CES-06).

¹³³ Expert Witness Statement of Renaldy Gutierrez-Reply at ¶ 115. (CES-06).

¹³⁴ Expert Witness Statement of Renaldy Gutierrez-Reply at ¶ 115 (CES-06).

¹³⁵Memorandum DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity February 27, 2018 (C-0285-SPA).

¹³⁶Memorandum DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity February 27, 2018 (C-0285-SPA).

¹³⁷Memorandum DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity February 27, 2018 (C-0285-SPA).

and agricultural rules. Nicaraguan Legal Expert Renaldy J. Gutierrez confirms that there were no extensive regulatory inconsistencies with INAGROSA's operations at HSF.¹³⁸ His expert opinion was consistent with the determination made by Nicaragua's environmental inspectors, reviewing HSF for environmental compliance, who confirmed HSF's compliance as recently as 2017.

- 154) Nicaragua falsely implies that Riverside committed systematic regulatory breaches spanning phytosanitary, land use, environmental, and border control systems, rendering INAGROSA's operations illicit. Nicaragua's submission of five witness statements to this Tribunal that level these baseless regulatory criticisms, is meticulously countered by Nicaraguan legal expert Renaldy J. Gutierrez. Mr. Gutierrez corroborates INAGROSA's adherence to local regulations, further substantiated by official documents showing the absence of any regulatory reprimands or infraction notices issued against INAGROSA. He concludes that there is no basis to the regulatory and permit allegations Nicaragua raises in Section II of its Counter-Memorial and in the five witness statements it filed.¹³⁹ None of the regulatory matters affected the ability of INAGROSA to carry out its current business.¹⁴⁰
- 155) Expert Gutierrez corroborates INAGROSA's adherence to local regulations, further substantiated by an official document showing the absence of any regulatory reprimands or infraction notices against INAGROSA.¹⁴¹
- 156) It appears that the sole purpose of these irrelevant arguments is to buttress damages reduction arguments Nicaragua advances by its valuation experts. Nicaragua's damages reduction theory appears to be driving the substantive defense into irrelevant and immaterial areas, wasting the time and resources of this Tribunal. The damages theory follows the events in the case, it is entirely improper for them to drive the events.

B. The International Law

- 157) Nicaragua has failed to meet the following obligations owed to the Investor and its Investment under the Treaty:
 - a) To compensate Riverside for the expropriation of its property.

¹³⁸Expert Witness Statement of Renaldy J. Gutierrez at ¶ 17 (c) (i) (CES-06).

¹³⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 183-188. (CES-06).

¹⁴⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 113 (CES-06).

¹⁴¹Memorandum DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity February 27, 2018 at NIC00350 (C-0285-SPA).

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- b) To provide the Investment with treatment in accordance with international law, including fair and equitable treatment and full protection and security.
 - c) Because of the operation of the Most Favored Nation Treatment Clause, to not provide more favorable treatment offered to Russian Investors and their investments in Nicaragua than that offered to U.S. Investors and their investments; and
 - d) To provide treatment as favorable to American investors as that provided by Nicaragua to nationals of any third state.
- 158) Nicaragua denies that it acted in non-conformity with any of its international law obligations. For example, Nicaragua contends that there was no expropriation.
- 159) The MFN Treatment obligation plays an important role in this claim. Nicaragua admits the operation and existence of the Russian BIT, but without clear reasons, Nicaragua claims that its obligations for Most Favored Nation Treatment do not apply.¹⁴² Similarly, Nicaragua objects to the provision of National Treatment, again for a non-specified reason.¹⁴³
- 160) Nicaragua claims that it acted in conformity with fair and equitable treatment and full protection and security. Nicaragua claims that its police carried out the full range of its duties as required by international law.
- 161) The evidence produced in this Arbitration demonstrates that:
- a) Persons under the control of Nicaragua's government unlawfully seized HSF starting on June 16, 2018. Such actions create state responsibility upon Nicaragua for the unlawful seizure and destruction of the business at HSF.
 - b) Nicaragua admitted that it currently possesses the expropriated property.¹⁴⁴ Nicaragua has not paid any compensation to Riverside for the taking of HSF.¹⁴⁵
 - c) Nicaragua's police failed to protect INAGROSA, the lawful landowners, and the police actively assisted the wrongdoers.¹⁴⁶

¹⁴²Counter-Memorial at ¶¶ 384-386.

¹⁴³Counter-Memorial at ¶¶ 384-386.

¹⁴⁴Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe, September 9, 2021 (**C-0116-ENG**); Letter from Appleton & Associates to Foley Hoag LLP, September 9, 2021 (**C-0118-ENG**).

¹⁴⁵Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 231 (**CWS-01**).

¹⁴⁶Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 40, 49-54, 72, 98, 101, 129 (**CWS-02**).

- d) Better treatment was available to local Nicaraguans than was provided to Riverside and its Investment in violation of the national treatment protection.
 - e) Nicaragua provided better treatment to Russian investors through the Nicaragua-Russia bilateral investment treaty (“Russian BIT”) than provided to Americans under the CAFTA. As a result, as detailed below, several provisions of the CAFTA are replaced in this claim by more favorable provisions in the Russian BIT.
- 162) Witnesses to the invasion describe how the occupiers intended to facilitate land redistribution by transferring the HSF’s legal title to El Pavón Cooperative. This process was done at gunpoint. There was no legal process applied. No court hearing or application of Nicaraguan domestic law. There is evidence that government officials promised the occupiers that they would obtain title to the property at HSF by continuing the occupant. Later, the Republic of Nicaragua followed an unfair process, without notice to the affected landowners or foreign investor, and that resulted in the deprivation of INAGROSA’s exclusive ownership of HSF.
- 163) The Investor lost its Investment using force applied by those working for the State. The rule of law was replaced with the “rule of the jungle.”
- 164) This claim raises issues of uncompensated expropriation (contrary to CAFTA Article 10.7), breach of National Treatment and MFN Treatment (contrary to CAFTA Articles 10.3 and 10.4) and a breach of customary international law including fair and equitable treatment and full protection and security (contrary to CAFTA Article 10.5).

1. MFN violations

- 165) Nicaragua ratified the Investment Treaty between Nicaragua and the Russian Federation in August 2013.¹⁴⁷
- 166) Nicaragua does not deny that the Russian BIT is in force.¹⁴⁸
- 167) Nor, does Nicaragua dispute that the Russian BIT provides more favorable treatment to investors and investments from the Russian Federation with investments in Nicaragua than to investors and investments of investors from the United States under the CAFTA.¹⁴⁹

¹⁴⁷Ratification of Nicaragua-Russia Bilateral Investment Treaty (Decree No. 7206) published in La Gaceta Diario Oficial on August 16, 2013 (C-0442-SPA).

¹⁴⁸Counter-Memorial at ¶ 325.

¹⁴⁹Counter-Memorial at ¶ 325.

a) No substantive MFN defense filed by Nicaragua

- 168) Nicaragua has filed no substantive defense to MFN treatment in its Counter-Memorial.
- 169) Nicaragua is a sovereign state and is entitled to enter treaties that provide better treatment to the Russian Federation than it provides under the CAFTA. The MFN obligation in the CAFTA automatically extends that better treatment granted by Nicaragua to Russia in the Russian Treaty (entered well after the CAFTA came into force) to investors and investments from the CAFTA Parties. The effect of better treatment under the Russian Treaty is to automatically make the expropriation and fair and equitable treatment obligations autonomous rather than restricted to customary international law, as otherwise would occur under the CAFTA alone. This issue is reviewed in detail against the terms of the CAFTA And the Russian treaty in Part IV of this Memorial below.
- 170) This Tribunal must give effect under the CAFTA to the sovereign decision of Nicaragua to extend broader protections than those under customary international law.
- 171) In particular, the MFN obligation will have an impact on the following:
- a) The meaning of expropriation in CAFTA Article 10.7.
 - b) the meaning of fair and equitable treatment in CAFTA Article 10.5
 - c) the meaning and limitations on MFN and National Treatment in CAFTA Articles 10.3 and 10.4.
 - d) The definition of investment in the CAFTA and the basis for filing required consents and waivers, if any.
- 172) The definition of investment in the CAFTA and the basis for filing required consents and waivers, if any.

2. Expropriation

- 173) CAFTA Article 10.7 requires Nicaragua to provide Inagrosa and its investors with fair market value compensation upon direct or indirect expropriation. The evidence in this arbitration demonstrates that Nicaragua failed to follow due process, the rule of law and fairness, and to provide compensation upon expropriation. There was no adequate protection for the rule of law and fundamental fairness issues in violation of the CAFTA. As detailed in this Memorial, Nicaragua failed to meet its obligations regarding national and most favored treatment.

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- 174) The meaning of expropriation obligations is well known and has been well canvassed by international tribunals, including CAFTA tribunals.
- 175) CAFTA Article 10.7 and Annex 10-C only oblige states to provide compensation for expropriations under customary international law. Detailed tests exist concerning indirect seizures of land. However, those limitations are inapplicable in this claim due to Nicaragua's sovereign decision to provide better treatment on expropriation under the Russian BIT.
- 176) As detailed below, Nicaragua has offered more favorable treatment to Russian investors with investments in Nicaragua than it has offered to Americans under the CAFTA. The MFN obligation in the CAFTA operates to extend the better treatment granted to Russians to investors and investments from CAFTA Party states.
- 177) The occupation was orchestrated by individuals aligned with the Nicaraguan Government and President Daniel Ortega, rather than being driven by forces opposed to the government. Nicaragua's actions to use occupiers under its control to continuously occupy the lands at HSF was an uncompensated expropriation. The effect of the occupation was to substantially deprive INAGROSA (and Riverside) of its investment.

a) Judicial Seizure resulted in a taking.

- 178) Riverside has filed expert evidence on Nicaraguan law explaining that the effect of the Judicial Order was to interfere fundamentally with the attributes of ownership. This interference is both *de jure*, with INAROSA's legal title, and *de facto*, regarding INAGROSA's rights to manage, possess, sell, and hypothecate the property.
- 179) Legal Expert Renaldy J. Gutierrez has confirmed that Nicaragua's implementation of the Judicial Order resulted in the diminution of core private property rights held by Riverside's investment, INAGROSA, in HSF.¹⁵⁰
- 180) The Judicial Order and the Application were made against Riverside.
- 181) The *de jure* effect of removing INAGROSA's exclusive title on the land and substituting it with the joint title of HSF with the Republic of Nicaragua constitutes a *de jure* taking.
- 182) In addition, there was the *de facto* deprivation of rights described by Expert Gutierrez. This substantial deprivation suffered by Riverside had an effect equivalent to expropriation. Nicaraguan Legal Expert Gutierrez confirms that quiet possession, control right to alienation and hypothecation have been

¹⁵⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 101 (CES-06).

coercively removed from INAGROSA for a two-year period.¹⁵¹ These are all core elements of the rights of private property that were taken from INAGROSA and controlled by Nicaragua in its own name. Further Nicaragua, in a highly unusual move, name itself as the judicial depository for the sequestration despite the fact that it is adverse in interest to Riverside in this arbitration. This incremental encroachment is a creeping expropriation of HSF.

- 183) The *de facto* taking of HSF on August 18, 2018, in addition to the substantial deprivation suffered because of the implementation of the Judicial Order, and the apparent unfairness of the trustee's identity must be considered in context. They did not occur alone.
- 184) Nicaragua's Attorney General in the Application notes that the Judicial Order was related to this CAFTA Arbitration. The Attorney General also claims that the remedy was necessary to save the state expense in the international arbitration.
- 185) Expropriation was not the only violation arising from the Judicial Order and its Application. Nicaragua also engaged in an abuse of rights as confirmed by Expert Gutierrez. This was a violation of due process and CAFTA Article 10.5, which is a violation of CAFTA requirements for a lawful expropriation under Article 10.7.
- 186) Because the 2021 Judicial Order is related to the claim arising from the 2018 invasion, the wrongful acts are related and together they constitute a composite act that taken together resulted in the expropriation of HSF going back to the June 2018 invasion.
- 187) The International Law Commission comments on the nature of composite acts saying
- “[w]hile composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation.”¹⁵²
- 188) Besides its legal effects, the Judicial Order has palpable ramifications. It severely curtails Riverside's financial flexibility in relation to HSF, which is presently under Nicaragua's control and subject to 24-hour surveillance. In such circumstances, financial institutions would be disinclined to accept the property as collateral. INAGROSA previously had used HSF as collateral for loans such as the LAAD loan. The Judicial Order made it impossible to post

¹⁵¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 101 (CES-06).

¹⁵² ARSIWA Art 15 and commentary (9) (CL-0017-ENG).

HSF as collateral for any loans. This abusive act was another way to limit Riverside's (and INAGROSA's) financial capacity during the arbitration. Indeed, Nicaragua attempted to rely upon the financially limiting effects of judicially freezing Riverside's main underlying asset as a basis for its October 2023 Security for Costs Motion.¹⁵³

- 189) Thus, there is direct harm done to Riverside through expropriation and the breach of FET. Both Treaty breaches resulted in damages to Riverside reaching back to June 18, 2018.

3. Fair and Equitable Treatment and FPS

- 190) The CAFTA required Nicaragua to provide Inagrosa and its investors with fair and equitable treatment, Full Protection and Security ("FPS"), and compensation upon expropriation. The evidence in this arbitration demonstrates that Nicaragua failed to follow due process, the rule of law and fairness, and to provide compensation upon expropriation. There was no adequate protection for the rule of law and fundamental fairness issues in violation of the CAFTA. As detailed in this Memorial, Nicaragua failed to meet its obligations regarding national and most favored treatment.
- 191) In footnote 523 of the Counter-Memorial, Nicaragua views the meaning of the Fair and Equitable Treatment obligation in CAFTA Article 10.5 to be an autonomous obligation under the CAFTA. Of course, that argument is not relevant once more favourable treatment has been provided by Nicaragua to investors and investments that would result in the invocation of MFN Treatment. Once that better treatment is established, then Nicaragua must provide treatment as favourable to Riverside as it provides under the more favourable Russian BIT.
- 192) In paragraph 396, Nicaragua contends that MFN cannot be applied as Riverside has failed to establish the basis for likeness.¹⁵⁴ However, Nicaragua is simply mistaken. Riverside set out the test for likeness in paragraphs 413-419 of the Memorial.
- 193) It further established the basis for likeness with investors under the Russian BIT in Memorial paragraphs 430-431. Accordingly, Nicaragua is simply mistaken.
- 194) The meaning of the international standard of treatment in CAFTA is well known and has been well canvassed by international tribunals, including CAFTA tribunals.

¹⁵³ Nicaragua's Security for Costs Application, October 4, 2023, at ¶ 47 (C-0573-ENG).

¹⁵⁴ Counter-Memorial at ¶ 396.

- 195) CAFTA Article 10.5 and Annex 10-B only oblige states to provide fair and equitable treatment as it is known under customary international law. However, the limitations in the CAFTA have been modified on account of the better treatment offered by Nicaragua to Russian investors under the Russian BIT.
- 196) As detailed below, Nicaragua has offered more favorable treatment to Russian investors with investments in Nicaragua than it has offered to Americans under the CAFTA.
- a) Nicaragua provides better treatment to Investors from the Russian Federation in Article 3(1) than it provides under the CAFTA concerning FET.
 - b) Nicaragua provides better treatment to Investors from the Russian Federation in Article 2(2) than it provides under the CAFTA concerning FPS. The MFN obligation in the CAFTA operates to extend the better treatment granted to Russians to investors and investments from CAFTA Party states.
- 197) Nicaragua must respect the autonomous standard of fair and equitable treatment to the American Investor and its investments, as Nicaragua is obliged to do so for Russian Investors and their investments in Nicaragua.
- 198) Nicaragua engaged in a breach of FET through National Police Captain Herrera's admission of having advanced intelligence of harm that was to occur at HSF.¹⁵⁵ Captain Herrera confirmed that despite having this information, none of that intelligence was shared with INAGROSA. The failure to give the affected party a warning of impending harm violates long-established international law obligations. This wrongfulness is directly attributed to Nicaragua.
- 199) Nicaragua's actions to use occupiers under its control to occupy the lands at HSF was in violation of its FET obligations.
- 200) In addition, Nicaragua's actions with respect to the failure to provide foundational due process, such as notice of hearing, pleadings, and orders, to the affected owner of HSF and to Riverside,¹⁵⁶ are express violations of FET.
- 201) Finally, Nicaragua's conduct during this arbitration also involves breaches of FET. These include:

¹⁵⁵Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 21 (**RWS-03**).

¹⁵⁶Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 104 – 107 (**CES-06**).

- a) Its deceptive pleadings in this claim
- b) pretense and unfair bargaining with respect to the return of HSF are also violations of FET.

4. National Treatment and MFN

- 202) CAFTA Articles 10.3 and 10.4 impose national treatment and MFN obligations upon Nicaragua concerning American investors and their investments. Those obligations are subject to reservations and a limitation restricting the operation of those obligations only to “acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

5. Jurisdiction

- 203) Nicaragua raised an objection regarding a claim asserted by INAGROSA under CAFTA Article 10.16(1)(b). Based on Nicaragua’s argument, Riverside withdrew that claim.
- 204) Nicaragua had a remaining jurisdictional claim with respect to Riverside’s ability to bring a claim over its ownership or control over INAGROSA. However, Nicaragua has confused the legal test, which makes its jurisdictional objection legally non-cognizable. As set out in Part VI of this Reply Memorial, the test for jurisdiction is whether Riverside owns or control the investment. Nicaragua appears to take the confused position that the test in the treaty is that an Investor both owns and controls.
- 205) As noted below, Riverside both owns and controls INAGROSA as a factual matter. The information in the Mercantile Registry is presumptively valid.¹⁵⁷ Riverside filed the INAGROSA share certificates No. 12,13,14,15,16 and 17 with its Notice of Arbitration.¹⁵⁸ These INAGROSA share certificates clearly state that these share certificates were recorded in the INAGROSA Share Registry Book.¹⁵⁹
- 206) Further, Riverside provided evidence of loans to INAGROSA with its Memorial. Nicaragua entirely ignored this basis for investment in its jurisdictional objection. In the Reply Memorial, Riverside has produced copies of promissory notes evidencing the loans made. These loans have

¹⁵⁷Expert Witness Statement of Renaldy J. Gutierrez at ¶ 197 (CES-06).

¹⁵⁸INAGROSA Share Certificate No. 12, August 31, 2004 (C-0043-SPA); INAGROSA Share Certificate No. 13, August 31, 2004 (C-0044-SPA); INAGROSA Share Certificate No. 14, August 31, 2004 (C-0045-SPA); INAGROSA Share Certificate No. 15, August 31, 2004 (C-0046-SPA).

¹⁵⁹INAGROSA Share Certificate No. 12, August 31, 2004 (C-0043-SPA); INAGROSA Share Certificate No. 13, August 31, 2004 (C-0044-SPA); INAGROSA Share Certificate No. 14, August 31, 2004 (C-0045-SPA); INAGROSA Share Certificate No. 15, August 31, 2004 (C-0046-SPA).

been made over twenty years in addition to acquiring the shares in INAGROSA. The current value of the loans is more than US\$ 14 million. Loans made to INAGROSA by Riverside separately meet the definition of Investment under the CAFTA as well as the characteristics of an investment as required by Article 25 of the ICSID Convention.

- 207) Riverside filed witness evidence to support its claims of control. Control is not necessary in the presence of ownership interests, but Riverside has filed additional evidence with this Reply Memorial that had been regularly filed with the US government in advance of the invasion confirming Riverside's control of INAGROSA as a controlled foreign corporate subsidiary.
- 208) The Tribunal's jurisdiction to hear this matter is indisputable. However, that has not stopped Nicaragua from pursuing erroneous and baseless jurisdictional objections to avoid responsibility for its breaches of CAFTA and unnecessarily add additional time and burden to these proceedings.

6. Treaty Exceptions and MFN

- 209) Nicaragua has asserted two CAFTA-based defenses which it purports to operate as exceptions to its international law obligations under the Treaty. The two defenses are:
- a) The operation of the essential security clause, and
 - b) The operation of War Losses clause.¹⁶⁰
- 210) Nicaragua contests the operative effect of the CAFTA due to the impact of its self-judging invocation of an essential security provision.
- 211) As detailed below, Nicaragua has offered more favorable treatment to Russian investors with investments in Nicaragua than it has offered to Americans under the CAFTA. Nicaragua provides better treatment to Investors from the Russian Federation than it provides under the CAFTA concerning exceptions as the Russian BIT contains no essential security interests exception. As Nicaragua provides treaty protections for expropriation, fair and equitable treatment, legal protection (Full protection and security), MFN and National Treatment in a broader fashion, without an essential security interests exception under the Russian BIT than under the CAFTA, Riverside is automatically entitled to receive this same preferential treatment.

¹⁶⁰Counter-Memorial at ¶¶ 286-319.

- 212) Nicaragua contests the operative effect of the CAFTA due to the impact of its self-judging invocation of the War Losses clause.
- 213) Similarly, Nicaragua provides better treatment to Investors from the Russian Federation than it provides under the CAFTA concerning civil strife as the Russian BIT contains no exception that exempts the operation of Treaty obligations in the case of civil strife.
- 214) The Russian BIT contains section Article 5 on Compensation for Loss. This provision reads:

ARTICLE 5

Compensation for Damages and Losses

Investors of the State of one Contracting Party whose investments and

returns suffer damages or losses owing to war, armed conflict, insurrection, revolution, riot, civil disturbance, a state of national emergency or any other similar event in the territory of the State of the other Contracting Party shall be accorded by the latter Contracting Party in respect of such damages or losses, as regards the restitution, indemnification, compensation or other settlements, a treatment no less favorable than that which the latter Contracting Party accords to investors of its own State or to investors of a third State, whichever investor considers as more favorable.

- 215) The Compensation for Losses and Damages provisions in Article 5 of the Russian BIT does not limit the operation of treaty obligations in the Treaty in the event of the existence of civil strife.
- 216) As Nicaragua provides treaty protections for expropriation, fair and equitable treatment, legal protection (Full protection and security), MFN and National Treatment in a broader fashion, without an essential security interests exception under the Russian BIT than under the CAFTA, Riverside is automatically entitled to receive this same preferential treatment.
- 217) Article 5 refers to the Investor's choices of the benchmark of more favourable treatment operating under local law or under a treaty with a third party (other than the Russian Federation). Riverside has elected in this regard to select the treatment provided under a treaty with a third party. In this regard, more favourable treatment (by way of a double renvoi) occurs through the

Nicaragua- Switzerland Treaty (the Swiss Treaty).¹⁶¹ The Swiss Treaty which contains requires in Article 5(2) of that treaty the following:

The investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or rebellion, which took place in the territory of the other Contracting Party shall benefit, on the part of this latter, from a treatment in accordance with Article 3, paragraph (2) of this Agreement as regards: restitution, indemnification, compensation, or other settlement.¹⁶²

218) Article 3(2) of the Swiss Treaty requires that compensation be accorded as follows:

Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investor of the other Contracting Party. This treatment shall not be less favorable than that granted by each Contracting Party to investments made within its territory by its own investors, or, than that granted by each Contracting Party to the investments located within its territory by investors of the most favoured nation if this latter treatment is more favourable.¹⁶³

219) Thus, under the Swiss Treaty, there is no derogation from the operation of the treaty, or for the payment of damages, in the event of civil strife events such as war or any other armed conflict, revolution, state of emergency or rebellion.

220) Under the Swiss Treaty, there are no substantive derogations permitted to Nicaragua in the case of Civil Strife. This is the standard that must be provided under the Russian BIT which is applicable due to CAFTA Article 10.2's MFN provisions.

221) Alternatively, Riverside relies on Article 5(2) of the Nicaragua -Switzerland Treaty and its more favorable Civil Strife provisions in their entirety (though removing the renvoi requirement).

222) Either way, the operation of MFN under CAFTA Article 10.4 extinguishes Nicaragua's arguments that the civil strife clause excuses its international law obligations.

¹⁶¹Agreement between the Swiss Confederation and the Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments. (Swiss Treaty), signed November 30, 1998, and entered into force on May 2, 2000 **(CL-0188-ENG)**.

¹⁶²Swiss Treaty, Article 5(2) **(CL-0188-ENG)**.

¹⁶³Swiss Treaty, Article 3(2) **(CL-0188-ENG)**.

C. Damages

- 223) Nicaragua must compensate Riverside in a manner that fully reflects the extent of INAGROSA's losses. Nicaragua is required under international law to pay Riverside compensation to wipe out the effects of its unlawful conduct. The losses inflicted upon INAGROSA's agriculture and standing forest operations are clear and indisputable.
- 224) To restore Riverside to the position it would have in all probability occupied but for the unlawful acts, Nicaragua must pay compensation commensurate to the total value of INAGROSA's business regardless of the CAFTA provision that Nicaragua is found to have breached because of its internationally wrongful measures, including the taking of HSF.
- 225) International law is clear that, by default (and without limitation), the correct date to compute damages flowing from an internationally wrongful act coincides with the unlawful act and the loss. Accordingly, Riverside instructed its valuation expert, Vimal Kotecha of Richter, Inc. ("Richter"), to compute damages as of June 16, 2018 (the day of the first invasion of HSF). The damages to the operative business lines (Hass avocados and rare hardwood species in the standing forest) were not crystalized until the second invasion, which commenced one month later July 16, 2018, but the express compensation provisions of CAFTA Article 10.7(2) require the damages be set as soon as possible.
- 226) Given the predictable revenue streams of INAGROSA, the cash flows lost due to Nicaragua's unlawful actions can be estimated with a high degree of certainty. Consequently, Richter finds the Discounted Cash Flow (DCF) method to be the most appropriate for calculating the fair market value of Riverside's investment in INAGROSA.¹⁶⁴
- 227) International law is also clear that where a State's unlawful conduct has totally wiped out or otherwise reduced the value of an investment, the correct measure of damages is the diminution in the fair market value of the investment.
- 228) The cashflows of which INAGROSA was deprived because of the unlawful measures can be estimated with a degree of confidence and certainly well beyond the applicable standard of proof. But for Nicaragua's unlawful conduct, INAGROSA would have continued with its long cycle fruit tree expansion. The revenues of which INAGROSA was deprived can be easily estimated because the business provided a predictable revenue stream based on (i) the annual Hass avocado crop yields and (ii) reliable independent market reporter-backed data on Hass avocado commodity

¹⁶⁴ Richter Reply Expert Damages Report at ¶ 3.9 (CES-04).

prices. Given INAGROSA's advanced stage of preparedness, its cost structure can also be reliably estimated.

- 229) In these circumstances, Richter considers the appropriate calculation of the fair market value of Riverside's controlling investment in INAGROSA using the DCF method.¹⁶⁵ That is, given that INAGROSA's cash flows can be estimated with a degree of confidence (among other relevant factors), Richter considers that the most appropriate way to determine the fair market value of the business is by projecting those cash flows for the duration of the predictable operating life of the Hass avocado orchards and the standing forest and discounting them to a present value.¹⁶⁶
- 230) Nicaragua challenges Richter Inc.'s alleged failure to conduct independent reviews of the feasibility of the representations made by Management about the business.¹⁶⁷
- 231) As addressed in the Reply Expert Damages Report, such criticisms are not well taken.¹⁶⁸ Richter Inc. ensured that Riverside's Management representations were committed to writing within a Management Representation Letter (**C-0055-ENG**) that was filed with the Memorial. This Management Representation Letter sets out the basis for Management representations about the business.
- 232) Richter Inc. engaged in significant external assessment and review of Management representations.¹⁶⁹
- 233) Nicaragua contends that Riverside applied overly pricing and growth forecasts.¹⁷⁰ Again, these criticisms are not well taken.
- a) Richter Inc. relied on independent price reporters for the verified price of Hass avocados.¹⁷¹ That information was produced with the Valuation Report and specified as the basis of the price calculations.
- b) Similarly, Richter Inc. independently reviewed Management representations on Hass avocado yield against the agronomy literature.¹⁷² Indeed, the yield numbers from the scholarly literature were not

¹⁶⁵ Richter Reply Expert Damages Report at ¶ 3.9 (**CES-04**).

¹⁶⁶ Richter Reply Expert Damages Report at ¶ 3.17 (**CES-04**).

¹⁶⁷ Counter-Memorial at ¶ 454; Credibility International Report at ¶¶ 12, 36, 43-49, and 71 (**RER-02**).

¹⁶⁸ Richter Reply Expert Damages Report at ¶¶ 4.7- 4.10, 4.11-4.13 (**CES-04**).

¹⁶⁹ Richter Reply Expert Damages Report at ¶¶ 3.23, 4.3-4.9 (**CES-04**).

¹⁷⁰ Counter-Memorial at ¶¶ 421, 442,450; Credibility International Report at ¶¶ 102,127 and 157 (**RER-02**).

¹⁷¹ Richter Reply Expert Damages Report at ¶¶ 3.23,8.3 (**CES-04**).

¹⁷² Richter Reply Expert Damages Report at ¶ 4.8 (**CES-04**).

significantly different from some of the yield numbers Dr. Duarte provided in his Expert Report.¹⁷³

- 234) Nicaragua challenges Richter's expert opinion to use a DCF valuation approach because INAGROSA did not have an established business in 2018. Nicaragua characterizes the INAGROSA business as speculative.¹⁷⁴ However, this criticism is not well taken. The cultivation of Hass avocados was an operating business. INAGROSA had a successful Hass avocado harvest in 2017 and was weeks away from a successful 2018 harvest when the Invasion occurred.
- 235) After years of investment and capacity building, INAGROSA successfully and repeatedly cultivated Hass avocados in Nicaragua. INAGROSA's expansion into the export market was based upon its successful existing cultivation business. The company had successfully cultivated Hass avocados; it was an established business. Thus, the DCF valuation model remains appropriate to apply in such a circumstance.
- 236) Nicaragua also has relied upon a fiction that it has offered to return HSF to Riverside since September 2021.¹⁷⁵ It claims that Riverside has refused such offers. It uses this fiction to suggest that Riverside must mitigate its damage by receiving the business with a destroyed productive capacity. This issue is considered in detail in this Reply Memorial, where it becomes clear that there was no refusal, and the offer was not a good faith offer, but a mere pretext used *ex post facto* by Nicaragua to attempt to limit its damages. In any event, the offer to return was made to the wrong party as INAGROSA was the legal owner of HSF, not Riverside.
- 237) Damages suffered by Riverside are discussed in detail in Part IX of this Memorial. Based on Richter's Reply Expert Damages Report, the fair market value considers the productive capacity of HSF, the fact that there were successful avocado harvests and the market value of Hass avocados.
- 238) The revised calculation in the Reply Expert Damages Report has accepted specific observations made by Nicaragua's experts with respect to avocado yield and planting density.
- 239) Hass avocados are a commodity that obtains market pricing. These prices are recorded and monitored by independent price monitoring services. These prices are set out in aggregated form in Chart 6 of Richter's Reply Expert Damages Report. These revised calculations have applied the actual

¹⁷³ Duarte Report at ¶ 7.4.1-7.5.5 (RER-01).

¹⁷⁴ Counter-Memorial at ¶¶ 450 and 518; Credibility International Report at ¶¶ 15 and 80 (RER-02).

¹⁷⁵ Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fé, September 9, 2021 (C-0116-ENG).

updated independent price monitoring service data to obtain the most accurate revenue information for the INAGROSA business

Richter Reply– Chart 6 – Avocado Pricing

Avocado Pricing by Year in \$USD		
Year	Purchaser	Price
2018 ⁽¹⁾	Costa Rica	2.03
2019 ⁽²⁾	Canada	1.43
2020 ⁽²⁾	Canada	3.24
2021 ⁽²⁾	Canada	3.77
2022 ⁽²⁾	USA	4.03
September 2023 ⁽²⁾	USA	3.02

(1) Per Tridge (C-0639-ENG)

(2) Per USDA commercial data (C-0641-ENG)

- 240) Chart 7 provides a total with respect to the area of active Hass avocado operations and the standing forest. This model provides value for the entire operation as set out in the business plan and a second value for a subsection of the entire area of HSF.

Richter Reply– Chart 7 – Economic Loss

Economic Loss - Summary in \$USD		
	1000 Hectares	245 Hectares
Economic Loss, before interest	130,498,929	22,419,564
Value of Standing Forest	5,100,000	5,100,000
FMV of unused land	6,507,196	71,857,424
Total before interest	142,106,125	99,376,988
Interest ⁽¹⁾	98,889,014	69,154,601
Economic Loss, including interest	240,995,140	168,531,589

- 241) The first column in this chart assesses a fair market value for the full 1224 hectares taken during the occupation. The fair market value for the full 1224 hectares taken during the occupation are **\$240,995,140**. This consists of USD\$142,106,125 in economic loss, and pre-award interest calculated to mid-July 2024 of \$98,889,014.¹⁷⁶
- 242) In addition, Chart 7 provides a second column that only values the loss of 244.75 hectares which was the area of active Hass avocado operations as an alternative. This 244.75 hectares was the area of business expansion that commenced at the time of the taking. This more limited valuation assesses a fair market value of **\$168,531,589**. This consists of

¹⁷⁶ Richter Reply Expert Damages Report, Chart 7 (CES-04).

USD\$99,376,988 in economic loss, plus pre-award interest calculated to mid-July 2024 of \$69,145,601.¹⁷⁷

- 243) None of these totals include additional items such as a tax gross-up, moral damages or costs as may be assessed by the Tribunal
- 244) The Credibility International Damages Report supported an asset-based model for damages. This alternative valuation model considers an asset-based approach to value instead of the income approach. While Mr. Kotecha believes that an income-based model is a more precise approach to determining damages in this claim, Mr. Kotecha has provided an asset-based model that considers the value of the land at HSF. Chart 5 sets out this Alternative Calculation.

Richter Reply– Chart 5 – Alternative Calculation – Asset-based

Alternative Calculation, Asset Method			
	Hectares	FMV/Ha	
in \$USD			
Land			
Planted	245	85,621	20,977,145
Plantable	763	85,621	65,350,228
Additional Land	76	85,621	6,507,196
Sum			92,834,569
Standing Forest	140		5,100,000
Claimant Total			97,934,569
Semi-Annual Compounded Interest		9%	68,150,848
Total			166,085,418

- 245) The asset-based method of valuation looks at the value of the land at HSF. It is set out, as an alternative calculation, in Chart 5. The total under this alternative valuation comes to **\$166,085,418**. The value consists of the value of the land calculated based on Nicaraguan proxy values at \$97,934,569 and pre-award interest calculated to mid-July 2024 of \$68,150,848.¹⁷⁸
- 246) The effect of the tax gross up is discussed in Part IX and set out on different charts. None of these totals presented on Charts 5 and 7 include additional items such as a tax gross-up, moral damages or costs as may be assessed by the Tribunal. Costs for legal representation and arbitration costs are not included in this total. The Investor will submit such costs at a time noted in the *Procedural Order No. 2* when deemed appropriate by the Tribunal.

¹⁷⁷ Richter Reply Expert Damages Report, Chart 5 (CES-04).

¹⁷⁸ Richter Reply Expert Damages Report, Chart 5 (CES-04).

II. THE FACTS AND CONTEXT OF THE INVASION

- 247) This Part of the Reply Memorial reviews those areas where there is agreement between the disputing parties on key facts, and it addresses those areas where there is factual disagreement.
- a) The Autocratic nature of the Nicaraguan state.
 - b) The relationship of the invaders to the State.
 - c) The Invasion.

The Autocratic Nature of the Nicaraguan State

- 248) Nicaragua has transformed from a liberal market democracy to an autocratic state dominated by Daniel Ortega and his Sandinista National Liberation Front-run government. Independent commentators, and Riverside's expert Prof. Justin Wolfe, provided evidence with Riverside's Memorial about these trends which have destroyed the separation of powers in Nicaragua, eroding the independence of the police and the judiciary and all other elements of the apparatus of the state from the Ortega-led Sandinista National Liberation Front Party rule.¹⁷⁹
- 249) Nicaragua provided no expert evidence to rebut the expert testimony of Professor Wolfe. Nor did Nicaragua rebut the evidence of independent experts from the Inter-American Commission on Human Rights upon which Riverside relied in the Memorial.¹⁸⁰
- 250) Nicaragua did not address the fact that key persons involved in the events in this Arbitration are designated under international sanctions (as Specifically Designated Persons) for intimidation of political opponents and human rights violations. These persons include:
- a) Jinotega Mayor Leonidas Centeno [Leonidas Centeno Rivera (Centeno)], who the invaders claimed gave the directions invade and occupy HSF in the name of the government;¹⁸¹

¹⁷⁹Expert Statement of Prof Justin Wolfe at ¶¶ 70-77 (**CES-02**); See also IACHR, Nicaragua: Concentration of Power and the Undermining of the Rule of Law at pp. 24, 32-33, 39-40, and 43 (**C-0192-ENG**).

¹⁸⁰ Memorial at ¶¶ 143-146, 151, 162-164, 690-693.

¹⁸¹The US Treasury Department in a press release noted that "Centeno is directly linked to instances of repression in Jinotega during the 2018 protests. In particular, attacks with heavy weaponry carried out by paramilitary members killed four individuals, and members of Centeno's mayoral office staff actively

- b) National Police Chief Francisco Javier Diaz Madriz (Francisco Diaz);¹⁸² The New York Times reports that Police Chief Diaz's daughter married the son of President Ortega and Vice President Murillo.¹⁸³ National Police Chief Diaz is under sanction from the Swiss Government, US government, EU Financial Sanctions, and the French Freezing of Assets.¹⁸⁴ and
- c) National Assembly Deputy Edwin Ramon Castro Rivera (Edwin Castro) a leading Sandinista National Liberation Front political leader, singled-out by the Government of Canada and the United States for his ruthless attacks upon political opponents and the suppression of the judiciary and due process in Nicaragua.¹⁸⁵.
- 251) Prof. Justin Wolfe filed an Expert Statement with the Investor's Memorial (**CES-02**). This statement addressed the role of the Nicaraguan state in reaching out to armed persons as "voluntary police" to carry out the political objectives of the Ortega-Murillo administration.
- 252) Prof. Wolfe has filed a Reply Expert Report to support the Reply Memorial (**CES-05**). In this Reply Expert Report, Prof. Wolfe addresses comments on his earlier Expert Report and he addresses the context of political economy in connection to matters raised in the Counter-Memorial and in evidence obtained from Nicaragua during this arbitration.

1. Basic Constitutional Facts

- 253) Nicaragua is a centralized State. The country is administratively divided into 9 regions, 17 provinces or "departamentos", and 143 municipalities.¹⁸⁶
- 254) According to the Constitution of Nicaragua, the President of the Republic is the head of Government, head of State, and supreme chief of the Army and the National Police of Nicaragua.¹⁸⁷

participated in the repression of protestors." See US Treasury Department Press Release. "Treasury Sanctions Public Ministry of Nicaragua and Nine Government Officials Following Sham November Elections", November 15, 2021 at Bates 0000988 (**C-0108-ENG**).

¹⁸²Edmondson, Catie, U.S. Imposes Sanction on 3 Top Nicaraguan Officials after Violent crackdown, New York Times, July 15, 2018 (**C-0425-ENG**).

¹⁸³Edmondson, Catie, U.S. Imposes Sanctions on 3 Top Nicaraguan Officials After Violent Crackdown, New York Times (**C-0425-ENG**).

¹⁸⁴Edmondson, Catie, U.S. Imposes Sanctions on 3 Top Nicaraguan Officials After Violent Crackdown, New York Times, July 5, 2018 (**C-0425-ENG**).

¹⁸⁵Deputy Edwin Castro's direct role in the continuation of the occupation of HSF was discovered in documents supplied by Nicaragua with its Counter-Memorial. (See R-0065) and the discussion in Part III below.

¹⁸⁶Constitution of Nicaragua, Article 175 (**C-0534-SPA**); Law of Political- Administrative Division of Nicaragua, Article 6 (**C-0538-SPA**).

¹⁸⁷Constitution of Nicaragua, Articles 97 and 144 (**C-0534-SPA**).

- 255) The Legislative Power is exercised by the National Assembly through delegation and by the mandate of the people.¹⁸⁸
- 256) The National Assembly is comprised of 90 members of Congress, with their alternates. 20 members are elected at the national level, and 70 in the regional constituencies and autonomous regions levels. The members are elected for terms of five years.¹⁸⁹

2. The Electoral history of the Sandinista Party

- 257) The Sandinista National Liberation Front was a leftist revolutionary movement opposed to the dictatorship of General Anastasio Somoza. The Sandinistas took power in 1979 and were elected in democratic elections in 1984. Daniel Ortega was the leader of the Sandinista Party and he was elected as President.
- 258) In 1990, the Sandinista National Liberation Front was defeated in national elections by the conservative Liberal Constitutional party (PLC). As noted by Prof. Wolfe in paragraph 18 of his Memorial Expert Report:
- Mr. Ortega ruled Nicaragua until his defeated by Violeta Chamorro in democratic elections in 1990. After two consecutive electoral losses (1996 and 2001), Ortega, was elected again as President of Nicaragua in 2006. He was subsequently re-elected in 2011, 2016 and 2020, having held the presidency since his return to power.¹⁹⁰
- 259) A series of Liberal Constitutional Party (PLC) governments ruled in Nicaragua from 1990 until 2006. Arnoldo Alemán governed as President of Nicaragua between 2002-2007 for the Liberal Constitutional Party. He was succeeded in 2003 by Enrique Bolaños, who served with him as his as Vice-President.
- 260) One of the key steps taken by President Bolaños was to prosecute former Nicaraguan President Arnoldo Alemán on the embezzlement of approximately \$100 million in public funds. Former President Alemán was convicted and sentenced to 20 years in jail.
- 261) The prosecution undertaken by President Bolaños of former President Alemán for corruption resulted in a watershed moment in Nicaraguan political history. The effects of the prosecution had transformative political effect in Nicaragua.

¹⁸⁸Articles 132, Constitution of Nicaragua (**C-0534-SPA-ENG**).

¹⁸⁹Articles 132 and 136, Constitution of Nicaragua (**C-0534-SPA-ENG**).

¹⁹⁰ Reply Expert Statement of Prof. Justin Wolfe at ¶ 37 (**CES-05**).

3. The Ortega- Alemán Pact and its effects

- 262) The First Expert Report described the Ortega- Alleman Pact where the two main political parties, the Sandinistas, and the Liberals, formed a power sharing arrangement (conventionally called the Pact) in 2000 which had the effect to exclude other political parties from the nation's political life. Professor David Close considers the practical political arrangements used by the Sandinista Party to build an electoral majority. This included having many opponents of the Sandinista Party becoming political allies. Prof. Close writes, "[B]etween 1979 and 2006, Nicaragua's anti-Sandinistas went from waging counterrevolution to colluding with the FSLN."¹⁹¹
- 263) Despite his criminal indictments, former President Alemán retained extensive political support and power in Nicaragua. In March 2007, former President Alemán was released from jail, shortly after Daniel Ortega returned to office upon the re-election of the Sandinista National Liberation Front.
- 264) The US Congressional Research Office discussed the political context leading to the Sandinista National Liberation Front's resumption of political power. An April 2007 report referred to the effects of the Ortega- Alemán Pact as a defining element of the political economy of Nicaragua as:

In 2003, former President Arnaldo Alemán (1997-2002) was prosecuted by the Administration of President Enrique Bolaños (2002-2007) for embezzling about \$100 million in public funds while in office. The effort was particularly notable because Bolaños and Alemán not only belonged to the same political party, the conservative Liberal Constitutional Party (PLC), but Bolaños also served as Alemán's Vice-President until he stepped down to run for President. Alemán was sentenced to 20 years in prison for fraud and money-laundering. In December 2006 U.S. federal officials seized \$700,000 in certificates of deposit they said were bought for Alemán with Nicaraguan government funds. Nonetheless, Alemán continues to control the Liberal Party. His supporters have tried continually to secure his release and an amnesty. He has served his term under increasingly lax terms and was released under very broad terms in March 2007 after Ortega took office.¹⁹²

The 2006 elections followed more than a year of political tensions among then-President Bolaños, the leftist Sandinista party, and allies of rightist former President Alemán. Alemán and Ortega, once longtime

¹⁹¹David Close, The Politics of Opposition in D. Close and S. Marti (ed), The Sandinistas and Nicaragua since 1979 at 51 (C-0503-ENG).

¹⁹²Nicaragua: The Election of Daniel Ortega and issues in U.S. relations, Congressional Research Office, April 19, 2007 at p. 1 (C-0501-ENG).

political foes, negotiated a power-sharing pact (“El Pacto”) in 1998 that has since defined national politics. Their parties passed laws making it difficult for other parties to participate in elections, and otherwise facilitated an alternating of terms between their two parties. Their ongoing influence made governing increasingly difficult for President Bolaños, who had limited legislative support. In 2004, renegotiation of the pact included a demand for Alemán’s release. In October 2004 the Organization of American States (OAS) sent a special mission to Nicaragua to encourage all parties to preserve and follow democratic order there. In January 2005, the two parties adopted a series of constitutional amendments that transferred presidential powers to the legislature, and further divided up government institutions as political patronage, moves the Central American Court of Justice ruled illegal.¹⁹³

265) In a separate report, the Congressional Research Service wrote:

It appears the Sandinistas have renewed a governing pact with the Liberal Constitutional Party (PLC). On January 16, 2009, the Supreme Court overturned the money laundering conviction of PLC leader and former President Arnoldo Aleman, who Transparency International calls one of the ten most corrupt leaders of all time. Within two hours the National Assembly – which had been paralyzed by the electoral conflict for over two months – reconvened and reelected a Sandinista legislator as president of the Assembly for another two years. This effectively gives the Sandinistas control over all four branches (executive, legislative, judicial, and electoral) of government.¹⁹⁴

A. The Former Nicaraguan Resistance and the Alianza

266) Since 2006, Former Nicaraguan Resistance members and affiliation with the Sandinista Party (and later government in 2018) are not mutually exclusive.

267) The Alianza Unida Nicaragua Triunfa was a political alliance created in 2006.¹⁹⁵ Under the leadership of the Sandinista National Liberation Front

¹⁹³Nicaragua: The Election of Daniel Ortega and issues in U.S. relations, Congressional Research Office, April 19, 2007 at p. 1 **(C-0501-ENG)**.

¹⁹⁴Latin America and the Caribbean: Issues for the 110th Congress, Congressional Research Service Report. January 26, 2009 at p. 31 **(C-0489-ENG)**; See also Inter-American Commission on Human Rights (IACHR), Report., Nicaragua: Concentration of Power and the Undermining of the Rule of Law, Chapter 2: Progressive Breach of the Principle of the Separation of Powers at p. 31 **(C-0192-ENG)**.

¹⁹⁵David Close. Nicaragua: The Return of Daniel Ortega in Geraldine Lievesley & Steve Ludlam (eds) (2009). *Reclaiming Latin America Experiments in Radical Social Democracy*. Zed Books at pp. 114-115. **(C-0335-ENG)**.

(SNLF), the Alliance brought together a coalition of former Nicaraguan Resistance and the Catholic Church.¹⁹⁶ Professor David Close observed:

The Sandinistas in Opposition

So, what did the FSLN do to try to stop being the perpetual runner-up of Nicaraguan politics? First, although the Frente has always called itself a revolutionary party, its everyday practice, the content of its campaigns, and its formal alliances in 2001 and 2006 with groups that included several former anti-Sandinistas revealed an appreciation of the need to at least appear moderate.¹⁹⁷

- 268) Professor Close identifies the two alliances as the “National Convergence (Convergencia Nacional) in 2001 and the United Nicaragua Will Triumph Alliance (Alianza Unida Nicaragua,”¹⁹⁸ which took place in 2006.
- 269) Professor Close discusses the alliance between the Nicaraguan Resistance and the Sandinistas.¹⁹⁹ This occurred during the time that the Sandinista National Liberation Front (SNLF) (also known as the “Front” or “Frente”) were out of government office. Initially, the Sandinistas created a more limited political allied with political interests other than the Resistance in 2001 (the Convergencia) but that alliance was not sufficient to win the election. For the Sandinista Frente to succeed, it had to broaden its base. They allied with the Resistance and the Catholic Church in 2006 to successfully become elected in the Alianza Unidad Nicaragua Triunfa. Prof. Close writes:

As in 2001, the Frente was part of an electoral alliance: the Convergencia Nacional in 2001, the Alianza Unida Nicaragua Triunfa in 2006. What converged in the Convergencia and allied in the Alianza Unida were the FSLN and an array of political figures from the right and center right.²⁰⁰ ...

- 270) Prof. Shelley McConnell addressed the politics of the 2001 elections where the Sandinistas were unsuccessful in obtaining sufficient votes to form a government. She explains that in the 2001 elections, the Nicaraguan Resistance Party (PRN) allied with the governing Liberals,

¹⁹⁶The program manifesto was released in 2006. See the Reconciliation and National Unity Government Program **(C-0336-SPA)**.

¹⁹⁷David Close “The Politics of Opposition” in D. Close and S. Marti (ed), *The Sandinistas and Nicaragua since 1979* p.58 **(C-0503-ENG)**.

¹⁹⁸David Close “The Politics of Opposition” in D. Close and S. Marti (ed), *The Sandinistas and Nicaragua since 1979* at Footnote 32 **(C-0503-ENG)**.

¹⁹⁹David Close, *Nicaragua: The Return of Daniel Ortega in Reclaiming Latin America*: at pp, 109 – 122. **(C-0335-ENG)**.

²⁰⁰David Close. *Nicaragua: The Return of Daniel Ortega* at pp. 114-115 **(C-0335-ENG)**.

who won the elections over the FSLN's Convergencia Nacional.²⁰¹ She notes:

Despite the quorum problem, the preparations in 2001 were sufficiently good for elections to be held on time. Two parties and one alliance registered candidates—the PCN, the FSLN, and an alliance consisting of the PLC and the Nicaraguan Resistance Party (Partido de la Resistencia Nicaragüense, or PRN), the former contras.

- 271) However, by 2001, the FSLN had started its discussion with the former Nicaraguan Resistance Party. Prof. Andres Perez Baltodano wrote about the 2001 national elections in Nicaragua as follows:

The resigned pragmatism of the FSLN showed itself clearly in the quest for alliances in the 2001 elections. To take power, the FSLN was ready to ally with anyone who, for whatever reason, could help them defeat the PLC candidate, Enrique Bolaños. As a result, the FSLN came to head the National Convergence (Convergencia Nacional). In that coalition coexisted—without ever discussing their contrasting visions of how society should work—Sandinistas from the FSLN, dissident Sandinistas from the MRS, evangelical Christians, social Christians (from the Partido Social Cristiano), a sector of the Nicaraguan Resistance (the contras who fought the FSLN in the 1980s), as well as political personalities and sports stars recruited for their names. The pragmatism behind the National Convergence was confirmed by the Sandinista historian Aldo Díaz Lacayo.

The 2001 presidential elections were] an eminently political event in which the important thing is getting into power, literally capturing power, because that at least creates the possibility that some things can be done, and that's enough. Negotiate or accept the economic policies imposed by the international financial institutions without so much as questioning them.²⁰²

- 272) Prof. Close concludes by stating:

What prompted the Frente to accept its former enemies was its campaign of national reconciliation, the centerpiece about 2001 and 2006....

²⁰¹Shelley A. McConnell, The Uncertain Evolution of the Electoral System in D. Close and S. Marti (ed), The Sandinistas and Nicaragua since 1979. At p. 142 **(C-0497-ENG)**.

²⁰²Andres Perez-Baltodano, "Nicaraguan Political Culture and the FSLN: from Utopianism to Pragmatism" in D. Close and S. Marti (ed), The Sandinistas and Nicaragua since 1979 at p. 76 **(C-0496-ENG)** Prof. Perez-Baltodano references Aldo Díaz Lacayo, "These Elections Are Devoid of Ideology," No. 233 **(C-0498-ENG)**.

This is not the historic discourse of the sandinistas. Having been burned in the past, especially in 1996 (Close, 1996) by opponents waving the bloody shirt of revolution and frightening voters into the arms of the right, Ortega and the FSLN did not just reach out to their old nemesis, they expropriated their language and concepts (Perez Baltadano, 2009) their government programme (Alianza Unida Nicaragua Triunfa 2006) repeatedly invoked the Lord's blessing, while talking about respecting the rights of private property; redistributing land without occupations or confiscations; addressing poverty, illiteracy and inequality; And installing a form of direct democracy the FSLN calls citizens' power.²⁰³

1. The Alianza has included the Nicaraguan Resistance into the Sandinista Governing Alliance since 2006.

273) Prof. Justine Wolfe in his Reply Expert Statement notes:

35) Witness statements submitted on behalf of Nicaragua further indicate a purported lack of alignment between individuals previously associated with the Nicaraguan Resistance and the present-day leadership of the Sandinista National Liberation Front.²⁰⁴

36) The Nicaraguan Resistance was a formidable adversary to the Sandinista Regime between 1979 and 1990. Nicaragua's Counter-Memorial and accompanying witness statements extend these historical portrayals of counterrevolutionary activities into the present day. It is historically inappropriate and misleading to suggest that the dynamics between the Sandinista National Liberation Front and the Nicaraguan Resistance remained unaltered from the 1980s until today. Today, the former Nicaraguan Resistance are not opponents of the Sandinista National Liberation Front, nor of the Nicaraguan government.²⁰⁵

274) Since 2006, the Nicaraguan Resistance has been in a political alliance with the Sandinista Party. Rather than being opponents, the Nicaraguan Resistance has been working under the direction of Sandinista President Daniel Ortega and Vice President Rosario Murillo.

²⁰³David Close. Nicaragua: The Return of Daniel Ortega at p. 115 (C-0335-ENG).

²⁰⁴ Witness Statement of Diana Gutiérrez-Counter-Memorial at ¶ 19 (RWS-01); Witness Statement of Police Commissioner M. Castro-Counter-Memorial at ¶¶ 18, 22, 29, 32 and 35 (RWS-02); Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial at ¶¶ 8 and 41 (RWS-03).

²⁰⁵ Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 35-36 (CES-05).

2. The politicization of the police

275) In 2020, Human Rights Watch made the following comments upon the naming of Nicaraguan Police Chief Francisco Diaz to several international sanction's lists:

In 2019, Human Rights Watch recommended sanctions against seven Nicaraguan officials after finding credible evidence linking them to grave human rights abuses, including violence against protesters, acts amounting to torture, and persecution of civil society groups, protestors, and media outlets.²⁰⁶

The new sanctions target four of these individuals: Francisco Díaz, chief of the National Police; Ramon Avellán, deputy police chief; Luis Pérez Olivas, chief of El Chipote prison; and Justo Pastor Urbina, chief of the police's special operations unit. The National Police were primarily responsible for enforcing the repression in 2018, and security forces committed many abuses against demonstrators in El Chipote prison.²⁰⁷

276) An Inter-American Commission on Human Rights Expert Report cited by Prof. Wolfe in his Memorial Expert Report, notes:

68. At the Executive Branch level, the Commission notes with concern how state security entities and institutions have played an important part of the process of concentrating and maintaining power through the manipulation, control, and diversion of functions of the National Police and the Army, and the creation of apparatus for control and surveillance of the citizenry, especially of the political opposition, as is analyzed below.²⁰⁸

277) Shortly thereafter, the Inter-American Commission on Human Rights noted:

....IACHR notes that since 2008, civil society organizations have reported the promotion of selective government political persecution through a disregard for political rights, freedom of demonstration, of association, of expression, and of participation, among others, with

²⁰⁶Vivanco, Jose Miguel, *EU, UK Sanction Top Nicaraguan Official*, Human Right Watch May 9, 2020 (C-0423-ENG).

²⁰⁷Vivanco, Jose Miguel, *EU, UK Sanction Top Nicaraguan Official*, Human Right Watch May 9, 2020 (C-0423-ENG).

²⁰⁸Inter-American Commission on Human Rights (IACHR), Report., *Nicaragua: Concentration of Power and the Undermining of the Rule of Law*, Chapter 2: Progressive Breach of the Principle of the Separation of Powers at p. 31 at ¶ 68 (C-0192-ENG).

different mechanisms against a deteriorated democracy, paving the way for the consolidation of an authoritarian regime.²⁰⁹

- 278) It then continued to focus on the autocratic control of the President over the National Police and the police powers of the state. The experts from the Inter-American Commission noted in paragraphs 71 and 72:

71. In 2014, Law 872 was enacted, “on the organization, functions, career, and special social security regime of the National Police (PN).”²¹⁰ By virtue of that law, the National Police came to be directed by the president of the Republic in his capacity of Commander in Chief, with authority to order the use of National Police forces and resources in accordance with the Constitution and the law, thereby eliminating the Interior Ministry (Ministerio de Gobernación) as an intermediary oversight and control entity between the president and the police institution leadership.

72. This reform gave the president the authority to designate the Director General of the National Police from among the members of the National Leadership Board [*Jefatura Nacional*] and to remove him for “disobeying the orders of the President of the Republic in his capacity as Commander in Chief of the National Police in the exercise of his authorities.”²¹¹ It also established that out of “institutional interest, the time of active service of general officers may be extended by the President of the Republic and Supreme Chief of the National Police, and, for the rest of the police hierarchy, by the Director General of the National Police” and the authority to call up “retired officers of the National Police to carry out specific missions in special cases, to be reincorporated through contract.”²¹²

- 279) In an article cited by Prof. Wolfe in his Memorial Expert Report, Maureen Taft-Gonzales, writing for the US Congressional Research Office in 2016 noted:

Ortega further expanded his legal control over state institutions in June 2014, when the legislature approved a reformed law regulating the

²⁰⁹Inter-American Commission on Human Rights (IACHR), Report., Nicaragua: Concentration of Power and the Undermining of the Rule of Law, Chapter 2: Progressive Breach of the Principle of the Separation of Powers at pp. 31-32 at ¶ 70. **(C-0192-ENG)**.

²¹⁰Law 872, Law of Organization, Functions, Career and Special Social Security Regime of the National Police (Law No. 872)-Entered into force on July 7, 2014 **(C-0007-SPA)**.

²¹¹Law 872, Article 10, Law of Organization, Functions, Career and Special Social Security Regime of the National Police (Law No. 872)-Entered into force on July 7, 2014 **(C-0007-SPA)**.

²¹²Inter-American Commission on Human Rights (IACHR), Report., Nicaragua: Concentration of Power and the Undermining of the Rule of Law, Chapter 2: Progressive Breach of the Principle of the Separation of Powers at page 31 **(C-0192-ENG)**.

national police. Although some observers believe Ortega has had de facto control of the police since 2007, the law shifted responsibility for the police from the interior ministry directly to the president.²¹³ The law also established a vetting process for police recruits through community groups controlled by the ruling FSLN, raising concerns that the police will be used for increased political repression.²¹⁴

- 280) In Paragraph 72 of this Memorial Expert Report, Prof. Wolfe identified that the Inter-American Commission on Human Rights already noted that role of National Police chief Francisco Diaz in eroding independence of the judicial system.

3. The erosion of the rule of law in Nicaragua

- 281) In the Counter-Memorial and witness statements, Nicaragua relies on its January 2019 National Report to the UN Human Rights Council.²¹⁵ Nicaragua provides no additional commentary on the National Report. It relies on this National Report to substantiate its arguments that there were extenuating circumstances in Nicaragua justifying it to suspend the ordinary operation of the CAFTA and international law.
- 282) The United Nations Human Rights Council (“UNHRC”) established a process to investigate the allegations of widespread systemic human rights abuses in Nicaragua. The UNHRC established an expert body, the Group of Human Rights Experts on Nicaragua (the “GHREN”). The GHREN was to evaluate the position put forth by the Republic of Nicaragua in the face of multiple reports of flagrant human rights abuses.²¹⁶
- 283) The GHREN noted:
- The present report, submitted to the Human Rights Council pursuant to its resolution 49/3, contains the findings of the Group of Human Rights Experts on Nicaragua. The report provides an overview of the Group’s findings with regard to the serious human rights violations and abuses perpetrated in Nicaragua since April 2018, including extrajudicial executions, arbitrary detentions, torture and other cruel, inhuman, or

²¹³Nicaragua: Taking Charge of the Police,” Economist Intelligence Unit, June 24, 2014. **(CL-0502-ENG)**.

²¹⁴Congressional Research Service Report, Nicaragua: In Brief, CRS Report No. R44560, Sept. 14, 2016 **(C-0191-ENG)**.

²¹⁵Counter-Memorial at ¶ 26 and ¶ 297 relies upon the National Report issued for the Universal Periodic Report of the United Nations Human Rights Council, January 28, 2019, **(R-0019)**; Witness Statement of Jinotega Police Sub Commissioner William Herrera at ¶ 8 **(RWS-03)**; Witness Statement of Jinotega Police Commissioner Marvin Castro at ¶23 **(RWS-02)**.

²¹⁶Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 on p. 1 **(C-0535-ENG)**.

degrading treatment, arbitrary deprivation of nationality, and violations of the right to remain in one's own country.²¹⁷

The Group finds reasonable grounds to believe that these violations and abuses were perpetrated in a widespread and systematic manner for political reasons, and that, verified in all their elements, they support the existence of crimes against humanity.²¹⁸

- 284) The GHREN did not support the contentions of Nicaragua that there was a coup attempt in April 2018. Instead, the Group of Human Rights Experts concluded that there were peaceful demonstrations in Nicaragua in April 2108 that were violently suppressed by the Police and pro-government armed groups. The GHREN Report stated:

15. Faced with the outbreak of mass peaceful demonstrations in April 2018, the National Police and pro-government armed groups responded with violence to suppress them. Police officers and members of pro-government armed groups, acting jointly and in a coordinated manner, committed extrajudicial executions during the crackdown on the protests that took place between 18 April and 23 September 2018.²¹⁹

- 285) The Group of Human Rights Experts expressly addressed the situation where “police and pro-government armed groups “took extrajudicial activities “in a joint and coordinated manner acting on instructions of State authorities at the national and level and/or by local leaders of the ruling party.”²²⁰

- 286) The GHREN concluded that there was a coordinated approach taken by the government against those the government perceived as different from that supporting the government. The Report states:

111. The GHREN concluded, with reasonable grounds, that since April 2018, a variety of State actors and institutions, following orders issued by the Presidency and Vice Presidency, participated in the commission of crimes and serious human rights violations and abuses as part of a discriminatory policy to systematically persecute and silence any person and disarticulate any civic or political organization that maintains a position

²¹⁷Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 on p. 1 **(C-0535-ENG)**.

²¹⁸Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 at ¶ 111 **(C-0535-ENG)**.

²¹⁹Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 at ¶ 15 **(C-0535-ENG)**.

²²⁰Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023) The Report says that “112. The GHREN found that the police and pro-government armed groups committed extrajudicial executions in the context of the repression of protests, acting in most cases in a joint and coordinated manner. Pro-government groups acted on instructions given by State authorities at the national and local levels and/or by local leaders of the ruling party. at ¶ 112 **(C-0535-ENG)**.”

different from that of the Government, or that is perceived as critical or adversarial to the Government.²²¹

- 287) The GHREN continued to address foundational abuses of due process and fairness by the state through its justice system.

113. The GHREN found that the justice system became a structured and organized mechanism to detain real or perceived opponents, acting in a concerted and systematic manner, and to accuse them, prosecute them, and execute the sentences against them, based on legal processes based on *ad hoc* fabricated evidence, or on legislation interpreted and/or designed by the National Assembly in order to execute instructions from the Presidency of the Republic.²²²

114. The GHREN documented how various government institutions, including the Police, the Public Prosecutor's Office, and the Judiciary, participated in the commission of arbitrary detentions and violations of due process in an articulated manner.²²³

- 288) The Group of Human Rights Experts on Nicaragua (GHREN) noted a fundamental lack of independence of the judicial system in Nicaragua. In their "Detailed Conclusions of the UN Human Rights Committee", the Group of Human Rights Experts noted:

144. The lack of independence of the judicial system –which includes both the jurisdictional bodies and the auxiliary bodies of the Judiciary– constitutes one of the structural factors that have contributed to the human rights violations and abuses identified by the GHREN. The misuse of the justice system to prosecute the exercise of fundamental freedoms and the prevailing impunity for serious human rights violations not only constitute violations of the right to access to justice but have also facilitated the perpetuation and escalation of other violations and abuses.²²⁴

²²¹Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 at ¶ 111 (C-0535-ENG).

²²²Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 at ¶ 113 (C-0535-ENG).

²²³Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 at ¶ 114 (C-0535-ENG).

²²⁴Report of the Group of Human Rights Experts on Nicaragua: Detailed Conclusions of the UN Human Rights Committee, Group of Human Rights Experts on Nicaragua (March 7, 2023) at ¶ 144 (C-0536-ENG).

- 289) This conclusion supported the comments in the GHREN's March 2, 2023 Report that the violations triggered state responsibility for the Republic of Nicaragua as a matter of international law.²²⁵
- 290) A more detailed report was provided to the United Nations Human Rights Council from the Group of Human Rights Experts on Nicaragua. The GHREN noted in the Detailed Report of March 7, 2023 that:
- “on 9 January 2017, 90 representatives elected to the National Assembly of Nicaragua were sworn in. Thus, the Assembly was composed of 71 FSLN members of Congress (70 elected plus the seat constitutionally reserved for the outgoing Vice President of the Republic), 13 from the PLC, 2 from the PLI, 2 from the ALN, 1 from the Conservative Party, 1 from the Alliance for the Republic, and 1 from the indigenous party YATAMA.²²⁶
- 291) Riverside filed an expert report from Tulane University Professor Justin Wolfe on the government's use and control of paramilitary forces (Expert Statement (CES-02)). The purpose of Professor Wolfe's expert report was to present similar fact evidence and to provide a context to the political situation in Nicaragua. Prof. Wolfe is an expert on the use of force by the Government of Nicaragua against public protestors and the recent general history of public policy in Nicaragua. Nicaragua did not challenge Prof. Wolfe's expertise.
- 292) Prof. Wolfe's Expert Report outlined the extensive role of the government in creating violence during opposition demonstrations, which could then be used to justify police-sanctioned violence and criminal arrests of protesters. The Expert Report documented the close role of the National Police, the government, the voluntary police, and the Sandinista party.²²⁷
- 293) Nicaragua did not file an expert report to counter Prof. Wolfe's expert report. The only evidence was an opinion from Police Commissioner Castro in paragraph 41 of his Witness Statement (RWS-02) saying that he disagreed with Prof. Wolfe's characterizations regarding the relationship among the paramilitaries, Voluntary Police and the government as carefully documented in Prof. Wolfe's Expert Report. Commissioner Castro provided no evidence to support his categorical denials of the detailed independent evidence from the Inter-American Commission on Human Rights, independent media and

²²⁵The Report says that “115. The violations, abuses, and crimes investigated by the GHREN and described in this report trigger both the responsibility of the State of Nicaragua, as well as individual criminal responsibility, under international criminal law. Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 at ¶ 115 (C-0525-ENG).

²²⁶Report of the Group of Human Rights Experts on Nicaragua: Detailed Conclusions of the UN Human Rights Committee, Group of Human Rights Experts on Nicaragua (March 7, 2023) at ¶ 138 (C-0536-ENG).

²²⁷Expert Statement of Prof. Justin Wolfe- Memorial- ENG at ¶¶ 26-42, 102 (CES-02).

other sources referenced by Prof. Wolfe. Police Commissioner Castro just dismissed Prof. Wolfe's evidence as wrong.

- 294) Nicaragua characterizes Prof. Wolfe's Expert Report as hearsay evidence because Professor Wolf was not a first-person witness to what took place at HSF.²²⁸
- 295) Nicaragua ignores the role of Prof. Wolfe. Prof. Wolfe is not a party witness but an expert. Experts generally do not have first-hand knowledge of the events but have expertise about specific issues which is shared with the Tribunal. Prof. Wolfe's expertise is on the political economy of Nicaragua.²²⁹
- 296) Nicaragua makes a series of technocratic objections on the events in Nicaragua as set forth by Professor Wolf, including saying that references in his expert report to young persons being involved in the voluntary police to support the Ortega government meant that the invaders of Hacienda Santa Fé could not be government supporters because those leaders were too old.²³⁰
- 297) Such concerns are misguided. Given that the leadership identified themselves as part of the Ortega Sandinista movement and that they were ordered to invade on the orders of Mayor Centeno, a well-known Sandinista Party operative, Nicaragua's criticism is unconvincing.

B. The affiliation of the Invaders with the State

- 298) The heart of Nicaragua's defense is that the invaders of HSF could not be affiliated with the state because many of them were affiliated with the Nicaraguan Resistance. Nicaragua carefully voices this counter-narrative in its Counter-Memorial to suggest that the Nicaraguan Resistance had an "anti-government" agenda. Nicaragua states:

Their invasion was encouraged by Inagrosa's abandonment of Hacienda Santa Fé and made dangerous by the ongoing widespread violent unrest and of civil strife throughout Nicaragua that existed between April 2018 and July 2018, as well as the underlying anti-Government history of the invaders.²³¹ (*emphasis added*)

[...]

At first, the backlash was led mainly by students in peaceful fashion but this backlash soon turned violent when Resistencia Nicaragüense

²²⁸Counter-Memorial at ¶ 56.

²²⁹Expert Statement of Prof. Justin Wolfe- Memorial- ENG at ¶ 15 (CES-02).

²³⁰Counter-Memorial at ¶ 61.

²³¹Counter-Memorial at ¶ 2 p. 15.

and other political opponents of the Government exploited this backlash to pursue their anti-Government agendas.²³² (*emphasis added*)

[...]

At the same time, the political orientation of the illegal occupants—led by armed former Contra fighters—made it important to avoid any unnecessary use of force at Hacienda Santa Fé, especially while the Government was obliged to contend with civil strife and violent unrest on a widescale.²³³ (*emphasis added*)

- 299) Nicaragua’s witnesses also presented statements that infer that there is no affiliation between the members of the former Nicaraguan Resistance and the leadership of the Sandinista National Liberation Front.

a) Government control of the Invaders during occupation

- 300) In this case, Riverside has presented evidence of oral statements made by the armed invaders at the time of invasion confirming that they were sent in the name of the government to seize HSF.²³⁴ The proclamations made by the leaders of the invaders during the June 16, 2018, first invasion was witnessed by HSF’s Security Chief Raymundo Palacios.²³⁵
- 301) However, with Nicaragua’s Counter-Memorial filing, there is timely corroborating evidence from Nicaraguan Resistance invaders themselves.
- 302) The invaders of HSF admitted their connection and direction by the Sandinista government of Nicaragua in a letter to the Attorney General of Nicaragua in September 2018.²³⁶
- 303) Jinotega Attorney General Gutierrez presents a document from September 5, 2018, that was presented by the Cooperative El Pavón to Hernán Estrada, the Attorney General of Nicaragua,²³⁷ The letter says:

All of the affiliated members were members of the Former Nicaraguan Resistance, and we are currently members of the *Alianza Unidad*

²³²Counter-Memorial at ¶ 26 (p.28).

²³³Counter-Memorial at ¶ 3 (h) (p.17).

²³⁴Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42 and 73 (**CWS-02**); Witness Statement of Jaime Cruz – Memorial – SPA at ¶ 16 (**CWS-06**); Witness Statement of Carlos J. Rondón– Memorial – ENG at ¶¶ 76 and 80 (**CWS-01**).

²³⁵ Witness Statement of Luis Gutierrez – Reply – SPA at ¶¶ 48-49 (**CWS-10**).

²³⁶Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

²³⁷Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

Nicaragua Triunfa [“Nicaragua Overcomes United Alliance”], which is presided over and led by the Sandinista National Liberation Front (SNLF) and thus we can say that we are directly under the leadership of our comrade the President of the Republic, Commander Daniel Ortega Saavedra and our comrade and Vice-President Rosario Murillo.²³⁸

- 304) Notably, this letter was signed by two of the armed invasion leaders: Comandante Gorgojo (Benicio de Jesus Gonzalez), as the President of the El Pavón Cooperative and Comandante Cinco Estrellas (Efren Humberto Orozco) of the Surveillance Committee of the El Pavón Cooperative.²³⁹
- 305) This letter makes clear that while the invaders, Efren Humberto Orozco, and Benicio de Jesus Gonzalez, who signed this letter as members of the Former Nicaraguan Resistance. They were currently members of another movement, the Alianza Unidad Nicaragua Triunfa. The invaders state:

We are currently members of the *Alianza Unidad Nicaragua Triunfa* [“Nicaragua Overcomes United Alliance”], which is presided over and led by the Sandinista National Liberation Front (SNLF)²⁴⁰

- 306) The invaders then continue to confirm their direction and control of the state. They confirm to the Attorney General that they are under the leadership of President Daniel Ortega and Vice-President Rosario Murillo:

Thus, we can say that we are directly under the leadership of our comrade the President of the Republic, Commander Daniel Ortega Saavedra and our comrade and Vice-President Rosario Murillo.²⁴¹

- 307) This letter sent by the invaders to the senior legal officer of Nicaragua confirms that these invaders members of the Nicaraguan Resistance were under the direct command of the Nicaraguan government lead by President Daniel Ortega and Vice-President Rosario Murillo.²⁴²

²³⁸Sept 5, 2018, Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua at p. 2 (**R-0065-SPA-ENG**).

²³⁹Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

²⁴⁰Sept 5, 2018, Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua at p. 2 (**R-0065-SPA-ENG**).

²⁴¹Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua at p. 2 (**R-0065-SPA-ENG**).

²⁴²Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

- 308) In addition, Commissioner Marvin Castro confirms that there were at least three armed Sandinista Party members in the leadership of the invaders:
- a) Comandante Toño Loco (Luis Antonio Rizo Reyes)²⁴³
 - b) El Chino (Ney Ariel Ortega Kuan)²⁴⁴
 - c) Haniel Samuel Rizo Torrez²⁴⁵
- 309) These three Sandinista National Liberation Front members did not sign this letter to the Attorney General. Comandante Toño Loco already publicly had proclaimed his allegiance to the Nicaraguan government in his public proclamation witnessed by Domingo Ferrufino, and promptly reported to Luis Gutiérrez.²⁴⁶
- 310) These admissions of the role of the invaders are consistent with the evidence adduced by Riverside.
- 311) In the July 16, 2018 invasion, Domingo Ferrufino witnessed about 60 additional armed invaders enter and occupy HSF led by two paramilitary leaders. Comandante Gorgojo (Benicio de Jesús González Pérez) and “Avispa” (Ciro Montenegro).²⁴⁷
- 312) Raymundo Palacios arrived at HSF on June 16, 2018, after the invasion. He met with several paramilitary leaders, including “Comandante Cinco Estrellas,” (Efren Zeledón Orozco), “Avispa” (Ciro Montenegro), and “Comandante Chaparra,” former member of Congress Elida María Galeano Cornejo. They informed Mr. Palacios “that they [the paramilitaries] wanted the INAGROSA staff to surrender peacefully” because the government had sent them to take possession of HSF.²⁴⁸
- 313) Mr. Palacios witnessed the National Police arrive at Hacienda Santa Fe and spoke with Police Inspector Calixto Vargas, who ordered him, and the rest of the workers present, to hand over their guns without a court order or basis of other lawful authority.²⁴⁹
- 314) There is direct evidence of a meeting between Luis Gutierrez and a government official, Enrique Fabio Dario from the agricultural department,

²⁴³Characterization of Mr. Luis Antonio Rizo Reyes, Jinotega National Police, 2022 (R-0043-SPA-ENG).

²⁴⁴Characterization of Mr. Ney Ariel Ortega Kuan, Jinotega National Police, 2022 (R-0044-SPA-ENG).

²⁴⁵Characterization of Mr. Haniel Samuel Rizo Torrez, Jinotega National Police, 2022 (R-0045-SPA-ENG).

²⁴⁶Witness Statement of Luis Gutierrez - Memorial – ENG at ¶ 89 (CWS-02).

²⁴⁷Witness Statement of Luis Gutierrez-Memorial-SPA at ¶ 64 (CWS-02).

²⁴⁸Witness Statement of Luis Gutierrez-Memorial-SPA at ¶ 45 (CWS-02).

²⁴⁹Witness Statement of Luis Gutierrez-Memorial-SPA at ¶ 50 (CWS-02).

confirming that this was a government taking.²⁵⁰ Nicaragua has ignored this evidence completely other than claiming it is hearsay (but as Luis Gutierrez had a direct conversation with Mr. Dario – this cannot be hearsay evidence).²⁵¹

- 315) It matters not if the armed insurgents are paramilitaries, or simply agents of the state. The armed invaders confirmed that they are “directly under the leadership of our comrade the President of the Republic, Commander Daniel Ortega Saavedra and our comrade and Vice-President Rosario Murillo”.²⁵² The invaders were acting on behalf of the government in their September 5, 2018 letter.²⁵³
- 316) This admission in the September 5, 2018, letter is completely consistent with the proclamations made by armed invaders on June 16, 2018, during the first invasion.²⁵⁴
- 317) This is also consistent with the statements made by the Civic Alliance for Democracy and Justice who confirmed that the invaders were sent by Mayor Leonidas Centeno.²⁵⁵
- 318) In addition to the September 2018 admission letter from the invaders to the Nicaraguan Attorney General,²⁵⁶ there are additional documents which confirm that the invaders were directed and controlled by Nicaragua.
- 319) The July 2018 Report from Police Commissioner Marvin Castro to the National Police Chief Francisco Diaz contradicts Nicaragua’s fictitious explanation.²⁵⁷ Police Commissioner Castro’s own internal documents expose the connections between the government and the invaders at HSF, and the government’s instructions to the invaders to continue the occupation in the summer of 2018.²⁵⁸

²⁵⁰Witness Statement of Luis Gutierrez-Memorial-SPA at ¶¶ 82-86 (**CWS-02**).

²⁵¹Counter-Memorial at ¶¶ 74 and 280.

²⁵²Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

²⁵³Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

²⁵⁴Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (**CWS-02**).

²⁵⁵Civic Alliance Facebook Post, July 16, 2018 (**C-0035-SPA-ENG**); Civic Alliance Facebook Post, Aug. 26, 2018 (**C-0036-ENG**) see also Riverside Memorial at ¶¶ 276-278.

²⁵⁶Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065-SPA-ENG**).

²⁵⁷Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding the Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**),

²⁵⁸Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding the Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

- 320) Nicaragua provided a counter-narrative that is unsupported by external documentation and contradicted by those scant government documents produced by Nicaragua in document production. Nicaragua could provide no support, other than *ex post facto* documents prepared by Police Commissioner Castro, to support such legally significant contentions.

C. New Evidence of Government Involvement

- 321) In the July 31, 2018 Report from Jinotega Police Commissioner Marvin Castro to National Police Chief Francisco Diaz, Commissioner Castro admits that:
- a) The police had made no inquiry as to the legal ownership of HSF more than six weeks after the invasion of HSF.
 - b) There had been direct communications at very senior levels between the government and the occupiers of HSF.
 - c) The senior government leaders provided instructions to the invaders that they were to remain in occupation of HSF while the government finds “a way to buy it”: Commissioner Castro reported:

In a conversation that has been had with members of the cooperative, they have indicated that they have communicated with comrade Edwin Castro and that he has mentioned to them to stay in that property since the government is looking for a way to buy it.²⁵⁹

- 322) The Police Commissioner was aware when he wrote the report that HSF was privately-owned property that required government intervention to buy it.²⁶⁰
- 323) The content of Police Commissioner Castro’s is even more shocking admission once the importance of the identity of “Comrade Edwin Castro” becomes clear.
- 324) The term “Comrade” in the communication means that Edwin Castro was a supporter of the Sandinista Party.²⁶¹ Otherwise, a term such as “Citizen” would be used, such as the reference to Citizen Carlos Rondón.²⁶²

²⁵⁹Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (C-0284-SPA-ENG).

²⁶⁰Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (C-0284-SPA-ENG).

²⁶¹ Reply Expert Statement of Prof. Justin Wolfe at ¶ 63 (CES-05).

²⁶²Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (C-0284-SPA-ENG). Reply Expert Statement of Prof. Justin Wolfe at ¶ 63 (CES-05).

- 325) Edwin Castro is a prominent member of the Nicaraguan Legislative Assembly. He has served since 2007 as the head of the Sandinista (FSLN) caucus in the National Assembly, making him the most prominent Sandinista leader in the Legislative Assembly.²⁶³ He also serves as a member of the Sandinista National Council.²⁶⁴
- 326) As a matter of international law, Nicaragua has state responsibility for the actions of all members of its government. This includes the legislative branch of government, Deputy Castro's biography on the official government website reports:

.... He is a member of the Sandinista National Liberation Front (FSLN) and is a member of the Sandinista National Council. In the 1997-2002 legislature, he carried out his legislative work in the Communication, Transport, Energy and Construction Commissions, the Special Anti-Corruption Commission, the Justice Commission, and the Modernization Commission. Since the previous legislative period, he has served as Head of the Sandinista Bench and continues to be so in 2007, a position that he alternates with his work in the Infrastructure and Public Services Commissions, as well as in the Justice and Legal Affairs Commission. He is an hourly professor at the Universidad Centroamericana (UCA) in the Faculty of Legal Sciences, teaching the discipline of Constitutional Law.²⁶⁵

- 327) Deputy Edwin Castro's picture from his government webpage:



- 328) Deputy Castro is a prominent Sandinista government leader In the Nicaraguan National Assembly. His actions on behalf of the government

²⁶³ Reference Justin Wolfe Reply Statement **(CES-05)**. Congressman Edwin Ramon Castro Rivera profile, Nicaraguan National Legislative Assembly, undated **(C-0305-SPA-ENG)**.

²⁶⁴Congressman Edwin Ramon Castro Rivera profile, Nicaraguan National Legislative Assembly, undated **(C-0305-SPA-ENG)**.

²⁶⁵Congressman Edwin Ramon Castro Rivera profile, Nicaraguan National Legislative Assembly, undated **(C-0305-SPA-ENG)**.

have garnered attention from the media,²⁶⁶ the US State Department, and the Canadian Ministry of Foreign Affairs. Edwin Castro is a specifically designated person on the sanctions lists in both countries for his actions to “harass and jail political opponents” and for violations against the rule of law and human rights on behalf of the Ortega regime in Nicaragua.²⁶⁷

329) The US State Department noted the following on Deputy Castro:

Edwin Ramon Castro Rivera, member of the Nicaraguan National Assembly since 1997 and head of the FSLN caucus since 2007, for ensuring Ortega-Murillo loyalists won all magistrate positions in the CSE and ensuring the passage of extremely broad legislation that the Ortega-Murillo regime used to exclude opposition candidates and parties and harass and jail political opponents.²⁶⁸

330) Nicaragua only produced this one internal communication in document production regarding the high-level communications between the invaders and the government. But even with this one document, the most senior Deputy of the Ortega- Sandinista government in the national assembly met with the invaders at HSF and gave them instructions to remain in occupation. Deputy Castro gave the invaders an indication of a government buy-out reward for remaining in occupation of the property that they had invaded.

331) Nicaragua suppressed the information about the role of Deputy Castro from its Counter-Memorial, and no indication about his involvement was disclosed previously in this arbitration. Nicaragua characterizes the situation at HSF as “the undisputedly illegal invasion and occupation of Hacienda Santa Fé.”²⁶⁹ Yet Commissioner Castro report confesses that government officials aided and abetted in the occupation of HSF .

332) In a July 26, 2017 newspaper report, the Alianza Unida Nicaragua Triunfa slate was announced by Deputy Edwin Castro on behalf of the Sandinista

²⁶⁶Reference Justin Wolfe Reply Statement **(CES-005)**. U.S. blacklists four Nicaraguans including Ortega’s daughter, Thomson Reuters, June 10, 2021 **(C-0306-ENG)**.

²⁶⁷US Sanctions on Edwin Castro are set out at OFAC Press Release re Edwin Castro added to the Specially Designated Nationals List dated **(C-0307-ENG)**. The sanction is also in the *US Federal Register* at US Federal Register, Notice of OFAC Sanctions Actions re Edwin Castro added to the OFAC Specially Designated Nationals and Blocked Persons List dated June 22, 2021 **(C-0308-ENG)**. He was also sanctioned in Canada. He is also sanctioned in Canada (see Global Affairs Canada Press Release, Background, Additional Nicaraguan sanctions re: Edwin Castro dated July 14, 2021 **(C-0309-ENG)**). The notice in the Canada Gazette (see Canada Gazette, Amending the Special Economic Measures (Nicaragua) Regulations: SOR/2021-175 -Edwin Castro added to schedule to the Special Economic Measures (Nicaragua) Regulations dated July 14, 2021 **(C-0310-ENG)**).

²⁶⁸U.S. Action Against Corruption and Attacks on Democracy in Nicaragua Press Release re Edwin Castro added to the Corrupt and Undemocratic Actors list, U.S. Embassy in Chile Press Statement, March 9, 2021 **(C-0311-ENG)**.

²⁶⁹Counter-Memorial at ¶ 5.

government to the CSE, the Nicaraguan election commission.²⁷⁰ Deputy Edwin Castro stated to the press that the Alliance shows:

The reconciliation and unity national that is being pushed for in Nicaragua and with the changes and transformations which it has been achieving that the people so desire from Nicaragua.²⁷¹

- 333) In an August 19, 2022 newspaper report, the Nicaraguan media reported on the slate of new government candidates for municipal elections.²⁷² The Alianza Unida Nicaragua Triunfa slate was again announced on behalf of the Sandinista government by Deputy Edwin Castro to the CSE.²⁷³
- 334) Deputy Castro was described as the legal representative of the Sandinista Party. He stated:

“Today in compliance with number 3 of the Electoral Calendar, we come to request the registration of the Sandinista National Liberation Front Alliance (FSLN) United Nicaragua Triumphs, an alliance constituted by the FSLN, the Nationalist Liberal Party (PLN), the Christian Unity Party (PUC), the Alternative Party for Change (AC), Nicaraguan Resistance Party (PRN), Multiethnic Indigenous Party of Constitutionalist Liberals of Convergence and the Independent Constitutionalist Liberal Movement (MLCI).”²⁷⁴

²⁷⁰Alianza Unida Nicaragua Triunfa registers with the Supreme Electoral Council, August 19, 2022 (C-0333-SPA-ENG)

²⁷¹La Prensa, *Sandinista National Liberation Front registers Alianza Unida Nicaragua Triunfa with the Supreme Electoral Council*, July 26, 2017 (C-0500-SPA).

²⁷²Alianza Unida Nicaragua Triunfa registers with the Supreme Electoral Council, August 19, 2022 (C-0333-SPA-ENG)

²⁷³Alianza Unida Nicaragua Triunfa registers with the Supreme Electoral Council, August 19, 2022 (C-0333-SPA-ENG)

²⁷⁴Alianza Unida Nicaragua Triunfa registers with the Supreme Electoral Council, August 19, 2022, at p. 3 (C-0333-SPA-ENG).

- 335) The article contains a picture of Deputy Edwin Castro registering the candidate slate with the Electoral Commission.



- 336) The news article noted that the Nicaraguan Resistance Party (PRN) was part of the alliance.²⁷⁵ It noted that Comandante Chaparra (Elida María Galeano) was a Sandinista government candidate in the election.²⁷⁶ Comandante Chaparra was one of the invaders at HSF.²⁷⁷ While Police Commissioner Marvin Castro in his witness statement disputes that Comandante Chaparra was a member of the government at the time of the invasion, Commissioner Castro does not dispute that she was present in the occupation of HSF.²⁷⁸
- 337) The article noted that the Nicaraguan Resistance Party (PRN) was part of the alliance that was directed by the FSLN (Sandinista National Liberation Front).²⁷⁹

²⁷⁵Alianza Unida Nicaragua Triunfa registers with the Supreme Electoral Council, August 19, 2022, at p. 3 (C-0333-SPA-ENG)

²⁷⁶Alianza Unida Nicaragua Triunfa registers with the Supreme Electoral Council, August 19, 2022, at p. 8 (C-0333-SPA-ENG); see also Witness Statement of Luis Gutierrez - Memorial – ENG at ¶¶ 33,45.

²⁷⁷Witness Statement of Luis Gutierrez - Memorial – ENG at ¶ 44 (CWS-02); Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 31 (RWS-02).

²⁷⁸Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 31 (RWS-02).

²⁷⁹Alianza Unida Nicaragua Triunfa registers with the Supreme Electoral Council, August 19, 2022, at p. 3 (C-0333-SPA-ENG).

- 338) The most recent announcements tie together the actors at HSF in the summer of 2018 to the invasion and occupation. They are:
- a) Toño Loco (Luis Antonio Rizo Reyes)– A Comandante leading the invasion who is supporter of the National Government and who claims he is acting for the government;²⁸⁰
 - b) Comandante Gorgojo (Benicio de Jesus Gonzalez) and Comandante Cinco Estrellas (Efren Humberto Orozco) Nicaraguan Resistance Invaders who have confirmed to the Attorney General that they were acting under the direct control of Nicaraguan President Daniel Ortega.²⁸¹
 - c) Jinotega Mayor Leonidas Centeno, the reported director of the invasion, and who met with the invaders at HSF in August 2018.
 - d) San Rafael del Norte Mayor Norma Herrera;²⁸²
 - e) Deputy Edwin Castro, caucus leader of the National Sandinista National Liberation Front in the National Assembly, and legal representative for the Sandinista party;²⁸³
 - f) Noel Lopez. Political Secretary for the National Sandinista National Liberation Front, and a member of the San Rafael del Norte government who was also present during the occupation of HSF.²⁸⁴
- 339) In his comprehensive analysis, Prof. Justin Wolfe thoroughly examined the circumstances surrounding the invasion and occupation of HSF. In his Reply Expert Statement (**CES-05**), he noted parallels between the land invasion at HSF and other such incidents orchestrated by the government, as detailed in his First Expert Report (**CES-02**).

117) The presence of government supporters in the leadership of the occupation is entirely consistent with the discussion of government supported land invasions in the First Expert Statement.

²⁸⁰Witness Statement of Luis Gutierrez - Memorial – ENG at ¶ 89 (**CWS-02**).

²⁸¹Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018 (**R-0065-SPA-ENG**).

²⁸²Witness Statement of Luis Gutierrez - Memorial – ENG at ¶¶ 98, 101-103 (**CWS-02**).

²⁸³Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**); Congressman Edwin Ramon Castro Rivera profile, Nicaraguan National Legislative Assembly, undated (**C-305-SPA-ENG**).

²⁸⁴Witness Statement of Luis Gutierrez - Memorial – ENG at ¶ 101 (**CWS-02**).

340) Professor Wolfe provided additional commentary on those factors which supported his conclusion that the invasion of HSF was a government-supported land invasion. Prof. Wolfe noted:

118) The evidence demonstrates a close connection between, and contact between, a range of Sandinista officials and those involved in the occupation, including:

a) The “proclamation” that Riverside’s witnesses claim the armed invaders made during their June invasion, where they claimed that they were taking Hacienda Santa Fe in the name of the Nicaraguan state and on the orders of Jinotega Mayor Leonidas Centeno.

b) The role of Sandinista National Assembly Deputy Edwin Castro to continue to remain in occupation of Hacienda Santa Fe in July 2018. His direct involvement with the invaders in July 2018 was confirmed in the July 31, 2018, report of Jinotega Police Commissioner Castro. (see C-0284-SPA). National Assembly Deputy Castro gave the invaders an indication of a government buy-out reward for remaining in occupation of the property they had invaded.

c) National Assembly Deputy for Jinotega, Comandante Chaparra, (the name used by Maria Elida Galeano) actively participated in the initial occupation of Hacienda Santa Fé and took steps meeting with the occupiers to legalize the occupation.

119) Assessing the evidence leads to the reasonable conclusion that the occupation was not carried out by opponents of the State but by those controlled by or affiliated with the government of Nicaragua.²⁸⁵

341) Thus, according to Prof. Wolfe, in his expert opinion the invasion of HSF had all the hallmarks of a state act directed and controlled by the Republic of Nicaragua.

342) The continuous and ongoing presence of senior government leaders working with the admitted armed invaders under the control and direction of the President of Nicaragua weakens the credibility of Nicaragua’s contentions of an absence of connection between the invaders and the government.

²⁸⁵ Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 118 – 119 (CES-05).

343) Professor Wolfe considered all the available information in the context of the political situation underway in the summer of 2018 in Nicaragua. He concluded that:

120) The cumulative weight of the consistency of the extrinsic evidence and the testimonial evidence (along with the social media evidence) consistently supports the links between the Government and the invaders.

121) Negotiation was simply not the pattern for those opposed to the government of Nicaragua. In the summer of 2018, those considered non-supporters of the Nicaraguan regime were uniformly met with arrest, detention without charge, and confiscation of their goods. Many were subjected to physical violence. That is the pattern to expect from those opposed to the Sandinista regime.

122) The evidence produced demonstrates an ongoing presence of Nicaraguan government officials meeting with the armed occupiers of Hacienda Santa Fé. These occupiers admitted to the most senior legal officer of Nicaragua that they were loyally under the control and direction of the President and Vice President of Nicaragua as members of the Sandinista political alliance. These actions, considered in context, conclude that there was a direct relationship between the occupiers at Hacienda Santa Fé and the Nicaraguan Government.

123) It is unreasonable to believe that senior Nicaraguan government members would regularly interact with opponents of the Nicaraguan Regime who have invaded private lands in Jinotega. Senior members of the Nicaraguan Regime would include regional attorneys general, local mayors and senior police commissioners and sub-commissioners. To be appointed to such a position, these office holders would be active supporters of the Sandinista National Liberal Front (or the Alianza Unida) to serve in such senior positions.²⁸⁶

344) At paragraphs 124 to 125 of his Reply Expert Statement, Prof. Wolfe concludes that Nicaragua explanation is not credible. He states:

124) Factual statements made by the Republic of Nicaragua regarding its motivations and actions in connection with the events arising since April 2018 need to be carefully examined for consistency and trustworthiness. As can be seen from the responses to the serious human rights concerns raised by the UN Human Rights Council and the Organization of American States experts, Nicaragua has provided justifications of events that lack balance, candor, and credibility. In these circumstances, this Tribunal may

²⁸⁶ Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 118 – 119 (CES-05).

require the application of extra scrutiny in its consideration of unsupported statements arising from the Republic of Nicaragua.

125) Nicaragua's position that the occupiers of Hacienda Santa Fé were opponents of the regime simply does not ring true. Nicaragua relentlessly engaged in shows of force and criminal action against the mildest forms of dissent. An armed uprising by opponents would not have been met with instructions from government leaders to remain in occupation while the government found money to buy the lands from the rightful owners. On balance, it is hard to give weight to Nicaragua's contentions of an absence of connection between the invaders and the government. The absence of police resistance (or resistance from other protective services) also supports this view. Based on the widespread practices of the government of Nicaragua in 2018, the occupation of Hacienda Santa Fé appears to have had government support and sanction.²⁸⁷

345) When carefully assessed, the counter-narrative is nothing but fiction. The Nicaraguan Resistance was controlled by the Nicaraguan state.²⁸⁸

346) Nicaragua sought to rely upon the political situation to invoke a non-effective essential security interest, but it has said little about the autocratic nature of the state in its Counter-Memorial. But this understanding is necessary for this Tribunal to evaluate the context of the invasion and the motivations of those who have given evidence on the part of the Republic of Nicaragua before this tribunal.

347) The actions at HSF in the invasion and the occupation of HSF were directly attributable to the government. They could have been ended at any time by the government based on the written admission of the actual invaders.

a) State Responsibility under ASRIWA Art 11

348) As discussed in Part VIII below, the acts on Congressman Edwin Castro constituted an act of acknowledgement and recognition of the actions of the occupiers. The measures of Congressmen Castro, as a member of a branch of the government, create state responsibility for Nicaragua for the effects of the occupation.

b) State Responsibility for the actions of the Police

349) In addition, there is direct state attribution on account of the actions of the National Police, either in directly aiding and abetting the invasion (in breach of Fair and Equitable Treatment obligations) or in the failure of diligence to

²⁸⁷ Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 124-125 (CES-05).

²⁸⁸ Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 120-123 (CES-05).

carry out their duties in violation of Full Protection and Security). The police activity also is relevant to the violation of national treatment obligations as there is significant and repeated evidence of more favourable police treatment in dealing with invasions of private lands at the same time in the summer of 2018. All these treaty violations are addressed in Part VIII of the Reply Memorial in detail.

- 350) In addition to the direct evidence, there is additional evidence of the connection between the invaders and the government from third-party witnesses who addressed the matter on social media.

D. The 2018 invasion

1. The First Invasion – June 2018

a) June 16, 2018

351) The first invasion of HSF began on June 16, 2018.

- a) On June 16, 2018, there were only three security guards on duty at HSF.²⁸⁹ Efrain (“Payin”) Chavarria and Francisco (“Chepon”) Chavarria were the security guards on duty in the upper part of Hacienda Santa Fé.²⁹⁰ Efrain and Francisco Chavarria called Domingo Ferrufino, the security guard on duty on the lower part of HSF, reporting that invaders had invaded the upper part of Hacienda Santa Fé.²⁹¹ They also reported to Mr. Ferrufino that the invaders had told them that they were sent by the Nicaraguan Government (described by the invaders as the Government of National Unity and Reconciliation) to take Hacienda Santa Fé.²⁹²
- b) Domingo Ferrufino reported the ongoing developments to Raymundo Palacios, HSF’s Security Chief, was on leave that day.²⁹³ Domingo Ferrufino also reported informed Luis Gutierrez, HSF’s Administrator.²⁹⁴
- c) Chief Security Palacios returned to HSF and met with the invaders leadership who told him that the invaders demanded them to surrender peacefully because the Government of Nicaragua had sent them to take

²⁸⁹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 45 (CWS-10).

²⁹⁰ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 47 (CWS-10); Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 51 (CWS-12).

²⁹¹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 47 (CWS-10); Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 51 (CWS-12).

²⁹² Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 47 (CWS-10); Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 52 (CWS-12).

²⁹³ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 46 (CWS-10); Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 53 (CWS-12).

²⁹⁴ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 54 (CWS-10).

possession of Hacienda Santa Fé.²⁹⁵ The invaders added they were not stealing anything, and that they were just taking possession of what the Nicaraguan government had given them.²⁹⁶

- d) Luis Gutierrez called Carlos Rondon informing him that invaders had invaded and occupied that upper part of Hacienda Santa Fé.²⁹⁷ Carlos Rondon told Luis Gutierrez to monitor the situation and immediately inform the National Police.²⁹⁸
- e) Upon receiving these reports from the security staff, Luis Gutierrez called the National Police station of San Rafael del Norte while the invasion was taking place and spoke with Police Captain William Herrera.²⁹⁹ Luis Gutierrez told Police Captain Herrera that armed invaders had broken into HSF and requested immediate assistance of the police.³⁰⁰
- f) Police Captain William Herrera told Luis Gutierrez he knew that invaders were going to invade the upper part of Hacienda Santa Fé and that he was monitoring the situation.³⁰¹
- g) Police Captain William Herrera Police did not mention any order from President Ortega mandating the police to remain in their barracks.³⁰² Police Captain William Herrera did not make any mention of these invaders being opponents of the Government.³⁰³

b) June 17, 2018

- a) On June 17, 2018, Luis Gutierrez received a call from Security Chief Raymundo Palacios reporting that Police Inspector Calixto Vargas accompanied by three police officers arrived at HSF.³⁰⁴
- b) Police Inspector Vargas without producing any legal mandate, directed the Security Team workers to surrender their firearms.³⁰⁵ Police Inspector Vargas did not explain the reason for the police presence to the security staff.³⁰⁶

²⁹⁵ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 48 (CWS-10).

²⁹⁶ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 48 (CWS-10).

²⁹⁷ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 57 (CWS-10).

²⁹⁸ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 57 (CWS-10).

²⁹⁹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 58 (CWS-10).

³⁰⁰ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 58 (CWS-10).

³⁰¹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 58 (CWS-10).

³⁰² Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 59 (CWS-10).

³⁰³ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 59 (CWS-10).

³⁰⁴ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 67 (CWS-10).

³⁰⁵ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 67 (CWS-10).

³⁰⁶ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 67 (CWS-10).

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- c) Upon receiving this report, Luis Gutierrez called Police Inspector Calixto Vargas.³⁰⁷ Mr. Gutierrez asked Police Inspector Calixto Vargas to produce a formal document certifying the legality of the confiscation, but Police Inspector Vargas declined to do so.³⁰⁸
- d) In their telephone call, Police Inspector Vargas informed Luis Gutierrez that invaders were going to invade the lower part of Hacienda Santa Fé.³⁰⁹ Police Inspector Vargas added that these invaders would burn down the Casa Hacienda Santa Fé (main building) located in the lower part of Hacienda Santa Fé.³¹⁰ Police Inspector Vargas did not disclose the source of this information or provide any further details.³¹¹ Most significantly, Police Inspector Vargas did not disclose the existence of any preventive actions being taken by the National Police to prevent the complete taking of Hacienda Santa Fé and protect the lives of the workers.³¹²
- e) In that telephone conversation, Police Inspector Vargas did not disclose any order by President Ortega mandating that the National Police to remain in their barracks at that time or that the invaders at HSF were opponents of the Government.³¹³
- f) Again, Luis Gutierrez called Police Captain Herrera who confirmed that the order to confiscate the weapons had been given by Police Commissioner Castro.³¹⁴
- g) In their telephone call, Police Captain Herrera confirmed his knowledge of impending actions that that invaders were going to invade the lower part of Hacienda Santa Fé and intended to burn down the Casa Hacienda Santa Fé (main building) located in the lower part of Hacienda Santa Fé, as mentioned earlier by Police Inspector Vargas.³¹⁵ Police Captain Herrera advised Mr. Gutierrez that the workers should evacuate HSF for their safety.³¹⁶
- h) After this call with Police Captain Herrera, Luis Gutierrez instructed Hacienda Santa Fé's security team to surrender their guns to the police once Police Captain William Herrera produced valid legal authority of

³⁰⁷ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 68 (CWS-10).

³⁰⁸ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 69 (CWS-10).

³⁰⁹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 70 (CWS-10).

³¹⁰ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 70 (CWS-10).

³¹¹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 70 (CWS-10).

³¹² Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 71 (CWS-10).

³¹³ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 73 (CWS-10)

³¹⁴ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 74 (CWS-10)

³¹⁵ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 75 (CWS-10)

³¹⁶ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 75 (CWS-10).

confiscation order for the firearms.³¹⁷ Police Captain Herrera said that he was going to take the guns by force.³¹⁸

- i) Luis Gutierrez called Carlos Rondón to inform him of the ongoing developments.³¹⁹ Carlos Rondón called Police Captain William Herrera to inquire why the National Police was not taking immediate steps for removing the invaders and were taking the firearms of the security staff instead without a confiscation order.³²⁰ Police Captain Herrera told Mr. Rondon that he had orders from Police Commissioner Castro not to remove the invaders and that he also had given the order to confiscate the security guard's firearms.³²¹
 - j) Mr. Rondon then called Police Commissioner Castro but Police Commissioner Castro did not answer the call, and there was no way for him to leave a message.³²²
- 352) This version of the invasion is loosely reflected in paragraph 24 of Mr. Lopez's Witness Statement:

Then, in June 2018, Messrs. Gorgojo, Cinco Estrellas and José Dolores Pérez Estrada, together with a group of approximately 50 men, went down from the upper part of the property to the lower part, where the Hacienda Santa Fe Residence (Casa Hacienda) is located to occupy that area of the property.³²³

- 353) During the period between June 16, 2018, and July 16, 2018, former National Resistance and Alianza Unida National Assembly Deputy Comandante Chaparra (Elida Maria Galeano Cornejo) and the occupiers held multiple meetings.³²⁴ During these meetings, each of the occupiers were required to pay 100 to 200 Cordobas, presumably for expenses linked to securing the legal title for lands at HSF that were seized from INAGROSA.³²⁵
- 354) Luis Gutierrez continuously updated Carlos Rondón on the ongoing developments via telephone calls and emails during the first invasion. These include a report to Carlos Rondón that Yimi Blandon, Wilmer Miguel Rosales and Comandante Chaparra (Elida Maria Galeano Cornejo), Sandinista members of the Nicaraguan Legislative Assembly were supporting the

³¹⁷ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 77 (CWS-10).

³¹⁸ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 77 (CWS-10).

³¹⁹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 78 (CWS-10).

³²⁰ Witness Statement of Carlos J. Rondón –Memorial –ENG at ¶ 78 (CWS-01).

³²¹ Witness Statement of Carlos J. Rondón –Memorial –ENG at ¶ 78 (CWS-01).

³²² Witness Statement of Carlos J. Rondón –Memorial –ENG at ¶ 78 (CWS-01).

³²³ Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 24 (RWS-04).

³²⁴ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 98 (CWS-10).

³²⁵ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 99 (CWS-10).

invaders (referred to by Mr. Gutierrez in his report as “thieves”).³²⁶ Mr. Gutierrez reported that the deputies are being assisted by the police.³²⁷

c) June 19, 2018

- 355) Mr. Gutierrez reported to Carlos Rondón that approximately 100 additional people were going to invade the lower part of HSF led by Comandante Gorgojo.³²⁸

d) June 28, 2018

- 356) Luis Gutierrez reported to Carlos Rondón that Sandinista Councilor Vidal de Jesus Huertas Gomez, was recruiting invaders for the taking of HSF.³²⁹

e) July 3 - 4, 2018

- 357) Mr. Gutierrez reported to Carlos Rondón that on July 3, 2018, Avispa, Toño Loco and Comandante Cinco Estrellas met with Jinotega Municipality councilor Rosibel Miranda.³³⁰ The invaders contacted her for help with the paperwork and legalization of the lands [getting property title] at Hacienda Santa Fe.³³¹
- 358) Mr. Gutierrez reported to Carlos Rondón that on July 4, 2018, members of the National Police from the National Police detachments in both San Rafael del Norte and in the nearby town of La Concordia met with the invaders and Comandante Cinco Estrellas (Efren Zeledón Orozco).³³² The purpose of this meeting was to allocate title to plots of the HSF lands amongst the invaders and their supporters.³³³ Mr. Zeledón was joined by a municipal government official, at this meeting, Ramon Garcia, who was also an invader.³³⁴

³²⁶Email from Luis Gutierrez to Carlos Rodon re government officials supporting invaders, June 17, 2018 **(C-0296-SPA-ENG)**.

³²⁷Email from Luis Gutierrez to Carlos Rodon re government officials supporting invaders, June 17, 2018 **(C-0296-SPA-ENG)**.

³²⁸Email from Luis Gutierrez to Carlos Rondón re: reports of invasion of 100 people led by Comandante Gorgojo June 19, 2018 **(C-0297-SPA-ENG)**.

³²⁹Email from Luis Gutierrez to Carlos Rondón re Vidal de Jesus Huertas Gomez, Sandinista councilor, June 28, 2018 **(C-0340-SPA-ENG)**; La Gaceta No. 221, List of Elected Citizens- Municipal Elections 2017- Jinotega Department at p. 10351 **(C-0130-SPA)**.

³³⁰Email from Luis Gutierrez to Carlos Rondón re invaders meeting with police on July 4, 2018, August. 6, 2018 **(C-0341-SPA-ENG)**; La Gaceta No. 221, List of Elected Citizens- Municipal Elections 2017- Jinotega Department at p. 10351 **(C-0130-SPA)**.

³³¹Email from Luis Gutierrez to Carlos Rondón re invaders meeting with police on July 4, 2018, August. 6, 2018 **(C-0341-SPA-ENG)**.

³³²Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 94-95 **(CWS-10)**.

³³³Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 96 **(CWS-10)**.

³³⁴Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 97 **(CWS-10)**.

2. The Second Invasion – July 16, 2018

a) July 16, 2018

- 359) On the second invasion, on July 16, 2018, Domingo Ferrufino was also on duty on the lower part of HSF and saw the invaders enter HSF and take possession of the lower part of Hacienda Santa Fé.³³⁵
- 360) Approximately 60 additional armed invaders led by Comandante Gorgojo (Benicio de Jesus Gonzalez Perez) and Avispa (Ciro Montenegro) occupied the lower part of Hacienda Santa Fe and took possession of the buildings.³³⁶
- 361) The invaders tried to disarm Domingo Ferrufino. When he refused to obey the invaders demands, approximately 25 invaders started to beat him with the shotgun and then sat me down over some metal farming tools and started to kick him.³³⁷ They hit him on the ribs and on the neck with a tube.³³⁸ El Pistolero (Cristobal Luque) hit him in the back with a rocket mortar.³³⁹
- 362) The invaders took Mr. Ferrufino's cell phone and the cell phones of the rest of the workers so that that they could not report what was going on at HSF.³⁴⁰ After several hours, Comandante Gorgojo (Benicio de Jesus Gonzalez Perez) gave the order to return the worker's cell phones.³⁴¹
- 363) After Domingo Ferrufino was savagely assaulted, he was taken by the invaders to see Comandante Gorgojo (Benicio de Jesus Gonzalez Perez).³⁴² Comandante Gorgojo (Benicio de Jesus Gonzalez Perez) offered him 10 manzanas if he surrendered and got out their way. Domingo Ferrufino refused the invaders' offer and did not surrender to them.³⁴³
- 364) Domingo Ferrufino called Security Chief Palacios, who was away at the time, to inform him that the invaders and had invaded the lower area of Hacienda Santa Fé and that they brutally had attacked him.³⁴⁴ Raymundo Palacios called Luis Gutierrez to relay all the information he received from Domingo Ferrufino.³⁴⁵

³³⁵Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 59 (CWS-12).

³³⁶Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 59 (CWS-12).

³³⁷Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 61 (CWS-12).

³³⁸Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 61 (CWS-12).

³³⁹Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 61 (CWS-12).

³⁴⁰Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 66 (CWS-12).

³⁴¹Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 66 (CWS-12).

³⁴²Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 62 (CWS-12).

³⁴³Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 63 (CWS-12).

³⁴⁴Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 67 (CWS-12).

³⁴⁵Witness Statement of Luis Gutierrez –Memorial – SPA at ¶ 72 (CWS-02).

- 365) The Jinotega Chapter of the Civic Alliance for Democracy and Justice confirmed the armed paramilitaries' occupation of Hacienda Santa Fé on its social media page on July 16, 2018.³⁴⁶

Figure 2 - Civic Alliance Facebook Post – July 16, 2018

Figure 2 English Translation:

To the land takers that the government has in Hacienda Santa Fé located in the Municipality of San Rafael del Norte, which was taken on June 17th from where the paramilitary forces in Jinotega operated, they were told that they had to go to the square on July 19th and anyone that does not attend will have the land assigned to them from the government taken away. As always, Leogenocides Centeno³⁴⁷ distributing what is not his, the Vice of taking private property [Vicio piñatero], that never left the [sandiratas]³⁴⁸ that called themselves sandinistas after 87.

- 366) These social media posts were discussed in paragraphs 276 – 278 of the Memorial. The Respondent has called the social media information unreliable for the sole reason that the report was posted on social media and from government opponents. In document production, Nicaragua was asked to provide support for its contention that the Civic Alliance for Justice and Democracy postings were unreliable.³⁴⁹ Nicaragua produced no responsive documents to support this rejection of timely and persuasive evidence that is consistent with the evidence in the witness statements Riverside filed.
- 367) Domingo Ferrufino identified the leaders of the invaders of the second invasion as Comandante Gorgojo (Benicio de Jesus Gonzalez) and Avispa (Ciro Montenegro).³⁵⁰
- 368) Raymundo Palacios arrived at Hacienda Santa Fé after receiving a call from Domingo Ferrufino informing him that invaders had invaded the lower part of HSF.³⁵¹ When Mr. Palacios arrived he heard the invaders say that they were there with the support of the Government of Nicaragua.³⁵² Security Chief Palacios called him and told him that he had heard the invaders say that they were there with the support of the Government of Nicaragua.³⁵³ Security

³⁴⁶Civic Alliance for Democracy and Justice Facebook Post, July –6, 2018 - includes translation into English **(C-0035-SPA)**.

³⁴⁷Leogenocides Centeno is a term used in Nicaragua to refer to Leonidas Centeno, Mayor of Jinotega.

³⁴⁸Sandiratas is a pejorative term to refer to the Sandinistas.

³⁴⁹CLDR No. 44, Annex A to Procedural Order No. 6, May 29, 2023 **(C-0549-ENG)**.

³⁵⁰Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 59 **(CWS-12)**.

³⁵¹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 106 **(CWS-10)**.

³⁵²Public Instrument No. 132, Affidavit of Raymundo Palacios, August 19, 2018 **(C-0214-ENG)**.

³⁵³Public Instrument No. 132, Affidavit of Raymundo Palacios, August 19, 2018 **(C-0214-ENG)**.

Chief Palacios reported to Luis Gutierrez that when he arrived at Hacienda Santa Fé, he discovered that the invaders had stormed the premises and had removed the shotguns and rifles.³⁵⁴ He also informed that the invaders physically attacked Domingo Ferrufino.³⁵⁵

- 369) That day, Luis Gutierrez went to the Hacienda Santa Fé.³⁵⁶ Mr. Gutierrez met with Domingo Ferrufino who told him that he was disarmed and brutally attacked by the invaders.³⁵⁷ Domingo Ferrufino told Mr. Gutierrez that one of the invaders called him a liar because he told the police that there were no more guns at Hacienda Santa Fé.³⁵⁸
- 370) Mr. Gutierrez heard Efren Zeledón Orozco “Comandante Cinco Estrellas” say that they were sent to occupy Hacienda Santa Fé under the order of Mayor Leónidas Centeno and that he had promised the invaders that each of them could keep part of the Hacienda Santa Fé lands.³⁵⁹
- 371) Later that day, Luis Gutierrez encountered a Nicaraguan government official, Enrique Fabio Darío who told him that the Government of Nicaragua was taking the Hacienda Santa Fé to put pressure on the business sector with a particular emphasis on targeting foreign-owned enterprises.³⁶⁰ Specifically, he mentioned that the Government was expropriating Hacienda Santa Fe’s lands for redistribution.³⁶¹
- 372) Luis Gutierrez continued to keep Carlos Rondon abreast of the developments unfolding at Hacienda Santa Fe. On July 16, 2018, Mr. Gutierrez made two calls to Carlos Rondon:
- a) On the first call, Luis Gutierrez reported to Carlos Rondón to inform him that that approximately 60 additional heavily armed invaders led by paramilitaries had entered and occupied the lower area of Hacienda Santa Fé. He told Mr. Rondón that the invaders’ leadership claimed that they were ordered to occupy Hacienda Santa Fé at the order of Jinotega Mayor Leonidas Centeno and that Mayor Leonidas Centeno had promised the invaders that each of them could keep part of the Hacienda Santa Fé lands.³⁶²
 - b) On the second call, Luis Gutierrez reported to Carlos Rondón that he had encountered Enrique Fabio Dario, a MAGFOR employee, who had told him that Mr. Dario told me that the Government going to take a more severe approach

³⁵⁴ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 106 (CWS-10).

³⁵⁵ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 106(CWS-10).

³⁵⁶Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 107 (CWS-10).

³⁵⁷ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 107 (CWS-10).

³⁵⁸ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 107 (CWS-10).

³⁵⁹Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 108 (CWS-10).

³⁶⁰Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 109 (CWS-10).

³⁶¹Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 109 (CWS-10).

³⁶² Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 110 (CWS-10).

towards business entities that did not show support for the Government's policies, specifically targeting foreign-owned enterprises. Specifically, Mr. Dario mentioned that the Government was taking Hacienda Santa Fé's lands for redistribution.³⁶³

3. Intensification of the Second Invasion – July 24, 2018

a) July 24, 2018

- 373) On the July 24, 2018, a heavily armed forty-person paramilitary contingent led by the infamous paramilitary leader Luis Antonio Rizo known as “Toño Loco” invaded Hacienda Santa Fé.³⁶⁴ Luis Gutierrez witnessed the invasion.³⁶⁵ Mr. Gutierrez heard the paramilitaries Sergio Roberto Zelaya Rouk, Efren Zeledón Orozco “Comandante Cinco Estrellas”, Vinicio Garcia “Comandante Gorgojo”, and Ciro Manuel Montenegro “Avispa” say that they were being sent to Hacienda Santa Fé by the Nicaraguan government.³⁶⁶
- 374) The day before, on July 23, Members of the National Police and the leadership of the land invaders entered Hacienda Santa Fe and went up to El Pavón area.³⁶⁷
- 375) On July 24, more people entered El Pavón area of Hacienda Santa Fe.³⁶⁸ Police Captain William Herrera and other police officers accompanied by invaders carrying guns and AK 47s entered Hacienda Santa Fe.³⁶⁹
- 376) Police Captain Herrera and Police Commissioner Castro do not mention any of these meetings in their witness statements, and Nicaragua has not filed any police reports, memoranda, or communications of any kind dating from this period.

b) August 4 - 7, 2018

- 377) On August 4, 2018, Comandante Cinco Estrellas (Efren Zeledón Orozco) and San Rafael del Norte Mayor Norma Herrera, were escorted into HSF by members of the National Police. Police Captain William Herrera of the

³⁶³ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 111 (CWS-10).

³⁶⁴Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 87 (CWS-02).

³⁶⁵Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 88 (CWS-02).

³⁶⁶Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 88 (CWS-02).

³⁶⁷Email exchange between Luis Gutierrez and Carlos Rondón re: police escorted the invaders into Hacienda Santa Fe July 23, 2018 (C-0298-SPA-ENG); Email Luis Gutierrez to Carlos Rondón re: police escorted the invaders into Hacienda Santa Fe July 23, 2018 (C-0343-SPA-ENG).

³⁶⁸Email from Luis Gutierrez to Carlos Rondón re report people entered El Pavón July 24, 2018 (C-0299-SPA-ENG).

³⁶⁹Email from Luis Gutierrez to Carlos Rondón re: Police Captain Herrera visit to Hacienda Santa Fe July 24, 2018 (C-0342-SPA-ENG).

National Police also was present.³⁷⁰ Neither Mayor Herrera nor Police Captain William Herrera mentioned to the invaders that they were illegally occupying private property or that they should leave HSF.³⁷¹

- 378) On August 6, 2018, Mayor Norma Herrera was escorted into HSF by members of the San Rafael del Norte National Police.³⁷² Mayor Herrera addressed the approximately 400 invaders that had gathered to hear her speak. Mayor Herrera proposed that the Municipality would provide new water, electricity, and housing infrastructure projects at HSF for the benefit of the invaders. Mayor Herrera did not mention to the invaders that they were illegally occupying private property or that they should leave HSF.
- 379) That day, on August 6, 2018, Mayor Herrera met with Comandante Gorgojo (Benicio de Jesus Gonzalez) and Toño Loco (Luis Antonio Rizo). They discussed making new roads and fixing the existing ones at HSF.³⁷³
- 380) Luis Gutierrez kept sending contemporaneous reports to Carlos Rondon:

a) **August 6, 2018:**

- 381) Luis Gutierrez reported to Carlos Rondon that Mayor Herrera visited Hacienda Santa Fe escorted by the National Police and met with the invaders.³⁷⁴
- 382) Luis Gutierrez reported to Carlos Rondon that Mayor Herrera met with Comandante Gorgojo and Toño Loco to discuss the repair of the roads at HSF and the construction of new roads.³⁷⁵
- 383) Luis Gutierrez reported to Carlos Rondon that Jinotega Mayor Leonidas Centeno had promised the invaders rights to the lands of Hacienda Santa Fé.³⁷⁶

³⁷⁰Witness Statement Jaime Henrriquez Cruz -Memorial- ENG at ¶ 43 **(CWS-06)**; Witness Statement of Luis Gutierrez - Memorial – ENG at ¶ 98 **(CWS-02)**.

³⁷¹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 116 **(CWS-10)**.

³⁷²Email from Luis Gutierrez to Carlos Rondón re Mayor Herrera entered Hacienda Santa Fe escorted by police and met with invaders August 7, 2018 **(C-0302-SPA-ENG)**.

³⁷³Email from Luis Gutierrez to Carlos Rondón re meeting between Mayor Herrera and Toño Loco August 7, 2018 **(C-0637-SPA-ENG)**

³⁷⁴ Email from Luis Gutierrez to Carlos Rondón re Mayor Herrera entered Hacienda Santa Fe escorted by police and met with invaders August 7, 2018 **(C-0302-SPA)**.

³⁷⁵ Email from Luis Gutierrez to Carlos Rondón re meeting between Mayor Herrera and Toño Loco August 7, 2018 **(C-0637-SPA-ENG)**

³⁷⁶ Email from Luis Gutierrez to Carlos Rondón re Mayor Centeno promised to give Hacienda Santa Fé lands, August 7, 2018 **(C-0344-SPA-ENG)**.

- 384) Meanwhile, Police Captain William Herrera denies that either he or the National Police ever escorted Mayor Norma Herrera into HSF.³⁷⁷ His statement is contradicted by contemporaneous documents.

4. A slight retrenchment - August 10-16, 2018

- 385) On August 11, 2018, Nicaragua reports that there was a meeting convened by Mayor Centeno and Police Commissioner Castro with the invaders at HSF.³⁷⁸ INAGROSA was not informed of this development.³⁷⁹
- 386) On August 11, 2018, HSF was abandoned under the orders Toño Loco (Luis Antonio Rizo), who in turned received the order to evacuate HSF from Mayor Leónidas Centeno and Police Commissioner Marvin Castro.³⁸⁰
- 387) On August 12, 2018, Luis Gutierrez and Attorney Alberto Rivera delivered a letter from Carlos Rondón to Police Captain William Herrera complaining about the lack of action on the part of the police.³⁸¹ His letter outlined the failure of the police to take timely action which would have protected the property and the physical safety of the workers at Hacienda Santa Fé. INAGROSA never received a response to this letter.³⁸²
- 388) That same day, on August 12, 2018, Chief Security Palacios and Domingo Ferrufino went to Hacienda Santa Fé.³⁸³ Chief Security Palacios received a call from Police Captain William Herrera informing him that the invaders had left Hacienda Santa Fé.³⁸⁴ Chief Security Palacios and Domingo Ferrufino went to Hacienda Santa Fé to verify the evacuation of the invaders.³⁸⁵ Chief Security Palacios and Domingo Ferrufino saw that most of the invaders had left but that there were still some invaders in the upper part of Hacienda Santa Fé.³⁸⁶ There were no members of the National Police guarding the property when they arrived.³⁸⁷
- 389) On August 14, 2018, Luis Gutierrez accompanied by Alberto Rivera, Attorney and Notary Public went to HSF to inspect the damage.³⁸⁸ Police Captain

³⁷⁷Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 31 (**RWS-03**).

³⁷⁸Counter-Memorial at ¶ 81(a); -Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 37 (**RWS-02**).

³⁷⁹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 124 (**CWS-10**).

³⁸⁰Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 120 (**CWS-10**).

³⁸¹Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 127 (**CWS-10**).

³⁸²Witness Statement of Carlos Rondón - Memorial – ENG at ¶¶ 87-88 (**CWS-01**); Witness Statement of Luis Gutierrez - Memorial – ENG at ¶105 (**CWS-02**).

³⁸³ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 80 (**CWS-12**).

³⁸⁴ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 79 (**CWS-12**).

³⁸⁵ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 79 (**CWS-12**).

³⁸⁶ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 80 (**CWS-12**).

³⁸⁷ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 81 (**CWS-12**).

³⁸⁸ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 140 (**CWS-10**).

William Herrera was present with five armed police officers, Domingo Ferrufino, Raymundo Palacios, and Jaime Vivas were also present to assess some of the damage to the Casa Hacienda at HSF.³⁸⁹

- 390) At that time and in the presence of Police Captain and Alberto Rivera, Luis Gutierrez informed them of the damage done by the invaders to the avocado plantation, the rare hardwoods in the forests as well as the stolen objects.³⁹⁰ Mr. Monzón made an affidavit of the inventory of the damages and the stolen objects.³⁹¹ Both Police Captain William Herrera and Luis Gutierrez were present and signed the document.³⁹²

5. Occupation Continues- August 17 – 18, 2018

- 391) On August 17, 2018, invaders entered El Pavón and stated that more land invaders would enter that day.³⁹³
- 392) On August 17, 2018, Domingo Ferrufino and Raymundo Palacios witnessed the return of the invaders to Hacienda Santa Fé.³⁹⁴ The taking thus was complete on August 18, 2018.³⁹⁵
- 393) On August 18, 2018, the additional invaders entered and occupied HSF under the orders of the government.³⁹⁶ The invaders were led by Comandante Cinco Estrellas (Efren Zeledón Orozco), Avispa (Ciro Montenegro).³⁹⁷
- 394) That same day, on August 18, 2018, Domingo Ferrufino and Raymundo Palacios were forcibly expelled from HSF. As we were being forced out, Comandante Cinco Estrellas (Efren Zeledón Orozco) told Raymundo Palacios and Domingo Ferrufino that they were going to kill them to ensure that there were no witnesses to the events.³⁹⁸
- 395) A day after the invaders' taking of Hacienda Santa Fé on behalf of Government of Nicaragua was complete, on August 19, 2018, Domingo

³⁸⁹Witness Statement of Luis Gutierrez - Memorial – ENG at ¶ 111 (CWS-02).

³⁹⁰Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 144 (CWS-10).

³⁹¹Witness Statement of Luis Gutierrez - Memorial – ENG at ¶ 111 (CWS-02); Inventory of damages at Hacienda Santa Fé, August 14, 2018 (C-0058-SPA).

³⁹²Email from Luis Gutierrez to Carlos Rondón re invaders return to Hacienda Santa Fe August 17, 2018 (C-0349-SPA-ENG).

³⁹³Email from Luis Gutierrez to Carlos Rondón re invaders return to Hacienda Santa Fe August 17, 2018 (C-0349-SPA-ENG).

³⁹⁴Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 117 (CWS-02).

³⁹⁵Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 117 (CWS-02).

³⁹⁶Email from Luis Gutierrez to Carlos Rondón re invaders return to Hacienda Santa Fe on the orders of Mayor Centeno August 21, 2018 (C-0350-SPA-ENG).

³⁹⁷Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 87 (CWS-12).

³⁹⁸Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 88 (CWS-12).

Ferrufino and Raymundo Palacios went before a Public Notary to declare the events had witnessed during the invasions of Hacienda Santa Fé by the paramilitaries.³⁹⁹

- 396) On August 19, 2018, INAGROSA worker Omar Gomez told Luis Gutierrez that councilor Arlen Chavarria had told him that Mayor Centeno sent the invaders to Hacienda Santa Fe.⁴⁰⁰
- 397) Nicaragua did not provide a certificate of delivery of property to INAGROSA. Such certificates were used by the authorities in other land invasions and would be the expected approach taken by the authorities to confirm that the invasions were over and that it was safe to re-possess the premises.
- 398) Police Commissioner Castro now complains that the August 17th reinvasion of HSF was the fault of INAGROSA as it did not re-establish a secure perimeter at HSF, but Nicaragua did not advise INAGROSA that the property was fully vacated in August 2018, and Nicaragua has not produced any handover certificate.⁴⁰¹
- 399) Under such circumstances, INAGROSA would not be able to reclaim its property until it received clear and unambiguous instructions from the local authorities. None were provided.
- 400) On August 26, the Jinotega Chapter of the Civic Alliance for Democracy and Justice confirmed that Mayor Leónidas Centeno ordered HSF taken and that the lands were distributed amongst the paramilitaries.⁴⁰² On August 26, the Jinotega Chapter of the Civic Alliance for Democracy and Justice, confirmed that Mayor Leónidas Centeno had ordered HSF taken and that the lands were to be distributed amongst the paramilitaries⁴⁰³

6. Continued Occupation - August 2018 – August 2021

- 401) Nicaragua did not communicate with INAGROSA about the situation at HSF.
- 402) Nicaragua nevertheless details several steps that it claims it took after August 2018 to remove the unlawful occupiers of HSF. These steps are summarized in paragraph 81 of its Counter-Memorial. Riverside cannot comment on the veracity or characterization of sub-paragraphs 81 (b) to 81(i)

³⁹⁹Public Instrument No. 131, Affidavit of Domingo German, August 19, 2018 (C-0211-SPA); Public Instrument No. 132, Affidavit of Raymundo Palacios, August 19, 2018 (C-0214-ENG).

⁴⁰⁰Email from Luis Gutierrez to Carlos Rondón re invaders return to Hacienda Santa Fe on the orders of Mayor Centeno August 21, 2018 (C-0350-SPA-ENG).

⁴⁰¹Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 134-136 (CWS-10).

⁴⁰²Civic Alliance Facebook Post, August 26, 2018 (C-0036-ENG).

⁴⁰³Civic Alliance Facebook Post, August 26, 2018 (C-0036-ENG).

as Nicaragua did not involve Riverside or its investment, INAGROSA, during this period and thus these supposed efforts are meaningless.⁴⁰⁴

- 403) On August 28, 2020, Riverside filed a Notice of Intent to Submit and Investment Dispute with Nicaragua identifying the issues in dispute and seeking consultations on the matter with Nicaragua.⁴⁰⁵ Even with this notification, Nicaragua did not provide any detailed update on its actions involving HSF to INAGROSA or to Riverside.

E. What Nicaragua Claims it did during the Invasion

404) 1. Admissions and Justifications

- 405) Nicaragua concedes the unlawful nature of the invasion and occupation of HSF.⁴⁰⁶ It now maintains that it neither assisted the occupiers nor failed to execute reasonable countermeasures. Paragraphs 331-338 of the Counter-Memorial elaborate on Nicaragua's response to the invasion.
- 406) Nicaragua situates the occupation within the backdrop of civil unrest. It notes that the National Police acted under a Presidential Police Shelter Order to remain in their barracks.⁴⁰⁷
- 407) Nicaragua also emphasizes the limited police resources in San Rafael del Norte, noting Captain Herrera was one of only eight available officers.⁴⁰⁸
- 408) Nicaragua argues that the occupiers were primarily Nicaraguan Resistance members, posing a significant threat to the government.⁴⁰⁹
- 409) Nicaragua argues that because of these factors, the National Police could not provide police protection to INAGROSA during the invasion and occupation of HSF in June and July of 2018.⁴¹⁰

1. Communication and Inaction

⁴⁰⁴Riverside challenges the veracity and characterization of sub-paragraph (a) and sub-paragraphs (j) to (m) of Counter-Memorial paragraph 81. And the underlying witness evidence, which Nicaragua contends supports such contentions.

⁴⁰⁵Riverside Coffee, LLC Notice of Intent to Submit a Claim to Arbitration under the CAFTA **(C-006-ENG)**.

⁴⁰⁶Counter-Memorial at ¶¶ 2, 359, and 373; Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fé, September 9, 2021 **(C-0116-ENG)**.

⁴⁰⁷Counter-Memorial at ¶ 331; Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 24 **(RWS-02)**; Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 10 **(RWS-03)**.

⁴⁰⁸Counter-Memorial at ¶ 337(a); Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 25 **(RWS-03)**; Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 25 **(RWS-02)**.

⁴⁰⁹Counter-Memorial at ¶ 354.

⁴¹⁰Counter-Memorial at ¶¶ 2, 25, and 369.

- 410) On June 16, 2018, Captain Herrera received a call from Carlos Rondón regarding the invasion at HSF.⁴¹¹ Although the call's content is disputed, its occurrence is not.
- 411) Captain Herrera admits to possessing "advance intelligence" about the invasion but failed to alert INAGROSA or share this information proactively.⁴¹²
- 412) Inspector Calixto Vargas was dispatched to HSF on June 17, 2018, but took no measures to secure the property or dispel the occupiers. Inspector Herrera ordered the INAGROSA security team to turn over their security weapons to him.⁴¹³ Nicaragua has not explained why no notes or records of any kind were produced.
- 413) Captain Herrera indicates that the National Police informed INAGROSA that they should evacuate HSF.⁴¹⁴ Nicaragua claims that this warning was to protect the occupants of HSF.⁴¹⁵ Yet, Nicaragua produces no evidence that the National Police ever contacted the fire department.

2. Post-Invasion Measures

- 414) The National Police were at HSF on July 4, 2018.⁴¹⁶ This visit is not discussed in the Witness Statements of Captain Herrera or Commissioner Castro. Luis Gutierrez notes that National Police Officers from the San Rafael del Norte post and the La Concordia post attended.⁴¹⁷
- 415) Despite an inquiry from INAGROSA's COO, Carlos Rondón, Captain Herrera remained unresponsive.⁴¹⁸
- 416) The National Police were aware that INAGROSA has local representatives present.⁴¹⁹ INAGROSA had no communication from the National Police after June 17 until August 12, 2019.

⁴¹¹Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 19 (**RWS-03**); Witness Statement of Carlos Rondón - Memorial – ENG at ¶ 78 (**CWS-01**).

⁴¹²Counter-Memorial at ¶337(a); Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 21 (**RWS-03**)

⁴¹³Witness Statement of Luis Gutierrez - Memorial- SPA at ¶ 50 (**CWS-02**).

⁴¹⁴Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 23 (**RWS-03**).

⁴¹⁵Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 23 (**RWS-03**).

⁴¹⁶Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 94 (**CWS-10**).

⁴¹⁷ Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 94-95 (**CWS-10**).

⁴¹⁸Witness Statement of Carlos Rondon - Memorial – ENG at ¶ 88 (**CWS-09**).

⁴¹⁹This is referenced in the July 31, 2018 Report from Commissioner Marvin Castro to National Police Chief Francisco Diaz at NIC01938 (**C-0284-SPA**).

- 417) Unbeknownst to INAGROSA, a meeting between National Assembly Deputy Edwin Castro and the occupiers occurred in July 2018.⁴²⁰ Deputy Castro, the Sandinista Leader in the National Assembly, advised them to maintain the occupation, claiming the government would eventually purchase the property.⁴²¹
- 418) After nearly two months of inaction, Regional Police Commissioner Marvin Castro claims that Jinotega Mayor Leonidas Centeno and him met with the occupiers.⁴²²

3. Evaluation of the Shelter Order

- 419) Nicaragua justifies its inaction by citing a presidential Shelter Order (“Shelter Order”) directing the National Police to remain in their barracks.⁴²³ Nicaragua has produced no evidence supporting the existence of such an order.
- 420) Such an order to the National Police would be an extraordinary matter. Nicaragua’s government was fully functional, and during this period, there was no impairment of its executive branch of government from publishing orders. For example, the national gazette continued to function and proclaim matters.⁴²⁴
- 421) Despite a production order from the Tribunal for the presidential Police Shelter Order, Nicaragua could not produce a copy.⁴²⁵ The best that Nicaragua produced was a television address in which the president simply said that the police would not engage in bloodshed against students.⁴²⁶
- 422) Captain Herrera, in his Witness Statement, claims that in addition to the supposed President’s Shelter Order, he was additionally ordered to shelter his officers in their barracks by Jinotega Commissioner Marvin Castro.⁴²⁷ Yet again, despite a Tribunal production order to produce communications between Commissioner Castro and Captain Herrera relevant to the invasion of HSF, Nicaragua did not produce a copy of any such order.

⁴²⁰Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 at NIC01939 **(C-0284-SPA)**.

⁴²¹Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 at NIC01939 **(C-0284-SPA)**.

⁴²²Counter-Memorial at ¶ 337(c).

⁴²³Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 37 **(RWS-03)**.

⁴²⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶ 212 **(CES-06)**.

⁴²⁵CLDR No. 15 See Annex A to Procedural Order No. 6, May 29, 2023 **(C-0549-ENG)**.

⁴²⁶Video of Opening of the National Dialogue- President Daniel Ortega speech **(C-0339-SPA)**.

⁴²⁷Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 26 **(RWS-03)**; Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 25 **(RWS-02)**.

- 423) In any event, Captain Herrera admits that he did not follow this supposed order on June 17, 2018, when he sent Inspector Calixto Herrera to HSF.⁴²⁸
- 424) Riverside does not accept that a valid operative Police Shelter Order, even if it existed, would justify the total absence of police protection as a matter of International Law. This matter is considered in the Full Protection and Security legal considerations later in this Reply Memorial, but as the party claiming the benefit of the excuse, Nicaragua has the burden to establish the existence of an order that its National Police no longer operate. It simply cannot do so, considering the absence of any evidence for such a critical

4. Evaluation of Police Resources

- 425) Despite claiming limited staff availability, Nicaragua omits to mention additional police stations in the Jinotega Department.
- 426) Nicaragua's argument on lack of capacity thus lacks credibility and is unsupported by evidence.
- 427) Nicaragua does not disclose that there were additional police stations in Jinotega Department.
- 428) On July 4, 2018, Luis Gutierrez emailed Carlos Rondón informing him that the National Police from the town of Concordia joined the national police from San Rafael at HSF.⁴²⁹
- 429) The largest city in Jinotega Department is the nearby city of Jinotega. Jinotega is the provincial capital.⁴³⁰

[MAP C-0664]

- 430) The National Police have a full complement of staff in Jinotega.
- 431) The National Police website in Nicaragua is no longer accessible to the public.⁴³¹ Requests to policia.gob.ni are returned with a message of "you

⁴²⁸Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG at ¶ 35 (**RWS-02**).

⁴²⁹Email from Luis Gutierrez to Carlos Rondón re: invaders meeting with police on July 4, 2018, August 6, 2018 (**C-0341-SPA-ENG**).

⁴³⁰ Jinotega Department, Nicaragua, Nicaragua. com (**C-0663-ENG**).

⁴³¹Screenshot search result for Nicaraguan National Police website (searched on September 25, 2023) (**C-0543-SPA**).

have been blocked".⁴³² However, Google reports that there also are National Police stations in the following municipalities in Jinotega Department.⁴³³

432) In June 2023, Police Commissioner Castro held an opening of a new police station. In that video, Commissioner Castro identified the names of the local police chiefs. Chief Commissioner Castro, in the video, named the following stations:

- a) Jinotega
- b) San Rafael de Norte,
- c) La Concordia,
- d) El Cuá,
- e) San José de Bocay,
- f) Santa María de Pantasma,
- g) San Sebastián de Yali.⁴³⁴

433) It would be reasonable to assume that these national police stations had staff and resources.

5. Alternative Measures

434) Nicaragua had various nuanced approaches at its disposal to address the invasion but failed to employ any. They included:

- a) Using specialized police teams short of bringing in the military.
- b) The use of the local district attorney or attempts at mediation.
- c) The military if necessary.

435) A senior government leader met with the invaders and encouraged them to say that the government had promised to find the funds to buy the property.⁴³⁵ Telling the wrongdoers to stay put and continue their

⁴³²Screenshot search result for Nicaraguan National Police website (searched on September 25, 2023) **(C-0543-ENG)**.

⁴³³Police Stations in Jinotega Department, Google Maps **(C-0665-ENG)**.

⁴³⁴Video of opening new police unit in La Rica Community in San Sebastian de Yali Municipality, Vision Policial Nicaragua February 24, 2023 **(C-0670-SPA)**.

⁴³⁵Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31. 2018 **(C-0284-SPA)**.

unlawfulness was not one of the appropriate routes available to Nicaragua in this circumstance.

- 436) The government's failure to act is in clear violation of its Full Protection and Security obligation under international law as explained *infra*.

6. The Occupiers were allies of the Government.

- 437) Nicaragua contends that the occupiers mainly were members of the Nicaraguan Resistance, and as such, they were dangerous opponents to the government.
- 438) This fallacy has been addressed in detail in Part I above. The occupiers of HSF were led by Sandinista Party supporters and former members of the Nicaraguan Resistance who were loyal to the government and formally expressed their fealty, control, and direction to the government.
- 439) Contrary to Nicaragua's claims, the occupiers were not adversaries of the government; they were supporters of the government,⁴³⁶ a fact mischaracterized by the state.

7. Conclusion

There is no support for Nicaragua's justification for the absence of police protection to INAGROSA in the summer of 2018.

- a) No verifiable Presidential Police Shelter Order justified the inaction of the National Police during the summer of 2018.
- b) Nicaragua had additional police resources it could have deployed.
- c) The government's claim about the nature of the occupiers is misleading and contradicts evidence suggesting their allegiance to the state.
- d) This concludes the assessment of Nicaragua's claims and actions, or lack thereof, during the invasion and occupation of HSF.

F. The irrelevance of the 1990 and 2003 events

- 440) Nicaragua relies on a witness statement from Jose López, a former member of the resistance, who claims to have first-hand knowledge of the local demobilization process, including the settlement of former resistance fighters in the Hacienda Santa Fé area from 1990 to 2003-2004. Mr López states that

⁴³⁶Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 57-69 (CES-05).

he was president of the Cooperativa El Pavón from its formation in 1995 until 2003.

- a) Jose Lopez discusses political discussions over 1990 land claims over HSF as a potential resettlement area for former Nicaraguan Resistance fighters. That proposal was never implemented.⁴³⁷
 - b) Mr. López discusses the eviction of squatters on the property in 2003-2004, which he claims was taken at the request of the Rondón family.
 - c) He then describes being approached in June 2017 by a former Nicaraguan Resistance member, Adrián Wendel Mairena Arauz, a.k.a. “Wama”, inviting him to take part in taking over the ‘el Pavón’ sector of Hacienda Santa Fé. While he states that he did not take part, he gives some general background on what he claims was an invasion of HSF in 2017 onwards.
- 441) However, the Reply Memorial and the Witness Statement of Domingo Ferrufino, a member of the Security Team at HSF contradicts essential elements of Mr. López testimony. Mr. Ferrufino was present at HSF in 2003 at the time of the eviction of squatters. Mr. Ferrufino describes that most of the squatters at HSF left voluntarily and were paid compensation for their property.⁴³⁸ He says that a few squatters remained, and those were evicted with the assistance of the National Police and the Physical Protection Force. Mr. Ferrufino notes that the evictions were not violent.⁴³⁹
- 442) In addition, the fact that the former Nicaraguan Resistance has formed an alliance with the Sandinistas. This deeply affects the credibility of Mr. Lopez’s evidence, as he is giving only a partial account of the facts.
- 443) Mr. Lopez asserts that HSF has been in constant turmoil because of the Nicaraguan revolution and a political proposal that never was carried out in the 1990s to give part of the lands at HSF to demobilized Nicaraguan Resistance fighters of the El Pavón Cooperative.⁴⁴⁰
- 444) Discussions that may have taken place over thirty years ago about HSF are simply irrelevant to the issue before this Tribunal. Nicaragua agrees that INAGROSA has lawful and valid title to HSF.⁴⁴¹
- 445) As is pointed out in this Reply Memorial, and in the Reply Expert Report of Prof. Justin Wolfe, the role of the Nicaraguan Resistance more than thirty

⁴³⁷Witness Statement of José V. López-Counter-Memorial-ENG at ¶¶ 5-13 (RWS-04).

⁴³⁸ Witness Statement of Domingo Ferrufino–Reply at ¶ 34 (CWS-12).

⁴³⁹ Witness Statement of Domingo Ferrufino– Reply at ¶¶ 37-38 (CWS-12).

⁴⁴⁰Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 5 (RWS-04).

⁴⁴¹Counter-Memorial at ¶¶ 13, 24 and 33.

years ago is very different from the former Nicaraguan Resistance that forms an integral part of the Sandinista National Liberation Front Front's Alianza Unida Nicaraguan Triunfa government that was in power in 2018 (and continues today).⁴⁴²

- 446) While there may have been were historical political discussions about the resettlement of former Nicaraguan Resistance in the early 1990s, they clearly were over by 1993. INAGROSA was not a party to those discussions or to that dispute. Carlos Rondón was not involved.⁴⁴³ INAGROSA did not make an investment in HSF until 1997 – years after the earlier dispute had stopped.⁴⁴⁴

1. There was no continuous invasion over the last 40 years.

- 447) Nicaragua claims that there were continuous invasions of HSF.⁴⁴⁵ However, there is no evidence so support such contentions.
- 448) Riverside denies the existence of continuous invasions of HSF during the period that INAGROSA owned HSF. As noted by Riverside in the Witness Statement of Carlos Rondón (**CWS-01**), one incursion took place.⁴⁴⁶
- 449) The contemporaneous July 31, 2018, police communication from Jinotega Police Commissioner Castro to National Police Chief Diaz on the invasion of HSF says nothing about continuous invasions of the area around HSF.⁴⁴⁷ That Report mentioned a dispute 28 years earlier over the land in 1990.⁴⁴⁸ The report also identified that HSF had been under the control of INAGROSA staff, headed by Luis Gutierrez at the time of the June 2018 invasion.⁴⁴⁹ Had such continuous invasions of HSF been present, one would expect the only report issued from the Jinotega Police Commissioner to the National Police Chief to mention such an essential fact.

⁴⁴²Reply Expert Statement of Prof. Justin Wolfe at ¶ 36 (**CES-05**).

⁴⁴³Witness Statement of Carlos J. Rondón- Reply -ENG at ¶ 28 (**CWS-09**).

⁴⁴⁴Forced Sale Agreement of Hacienda Santa Fe (Public Instrument No. 13 dated April 29, 1998) (**C-0173-SPA**).

⁴⁴⁵Report to National Police Chief Francisco Diaz regarding the Invasion of Hacienda Santa Fe at NIC01938 (**C-0284-SPA-ENG**).

⁴⁴⁶Witness Statement of Carlos Rondon - Memorial – ENG at ¶ 75 (**CWS-01**).

⁴⁴⁷Report to National Police Chief Francisco Diaz regarding the Invasion of Hacienda Santa Fe (**C-0284-SPA-ENG**).

⁴⁴⁸Report to National Police Chief Francisco Diaz regarding the Invasion of Hacienda Santa Fe at NIC01938 (**C-0284-SPA-ENG**).

⁴⁴⁹Report to National Police Chief Francisco Diaz regarding the Invasion of Hacienda Santa Fe at NIC01938 (**C-0284-SPA-ENG**).

- 450) The El Pavón Cooperative apparently consists of former Nicaraguan Resistance members living in Nicaragua and was incorporated on June 20, 1997.⁴⁵⁰
- 451) Apparently, the members of the Nicaraguan Resistance affiliated with the El Pavón Cooperative desired to have the lands at HSF for their own in the mid-1990s.⁴⁵¹ However, the El Pavón Cooperative never was granted the lands at HSF.⁴⁵² The government offered lands in other locations to resettle Mr. Lopez's followers, but HSF was not granted to El Pavón.⁴⁵³
- 452) Mr. Lopez claims that the El Pavón area was "delivered" on November 22, 1990⁴⁵⁴ and that the failure to obtain legal title to the lands in that 1990s resulted in an occupation of the northern part of HSF.⁴⁵⁵
- 453) Carlos Rondón was not involved in the 1990 dispute.⁴⁵⁶
- 454) INAGROSA obtained the lands at HSF after a judicial sale which took place in 1996.⁴⁵⁷ As this was a judicial sale of land, there was no legally cognizable dispute over the land ownership.
- 455) It appears that the El Pavón Cooperative still sought title to the land. The lands at HSF were large (approximately 1220 hectares).

2. The 2003 squatter incident

- 456) In 2003 squatters attempted to obtain title to a section of HSF. At the time, the squatters were aware that they did not have title to land. They purportedly relied on political assurances made more than a dozen years earlier by a former Nicaraguan administration.
- 457) The squatters were provided with alternate lands by the Nicaraguan government over the years. It appears that the squatters declined to keep those lands, and instead sold them off, retaining the cash proceeds. In his Reply Witness Statement, Mr. Rondón refers to those squatters who sought

⁴⁵⁰Certificate of incorporation of the El Pavón Cooperative issued by the National Registry of Cooperatives of the Ministry of Labor (**C-0334-SPA**).

⁴⁵¹Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 10 (**RWS-04**).

⁴⁵²Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 11 (**RWS-04**).

⁴⁵³Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 6 (**RWS-04**).

⁴⁵⁴Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 9 (**RWS-04**).

⁴⁵⁵Witness Statement of José Valentín López Blandón. Lopez at ¶ 9 (**RWS-04**)
Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 11 (**RWS-04**).

⁴⁵⁶Witness Statement of Carlos Rondón- Reply -ENG at ¶ 28 (**CWS-09**).

⁴⁵⁷Forced Sale Agreement of Hacienda Santa Fe (Public Instrument No. 13 dated April 29, 1998 (**C-0173-SPA**)).

to obtain private land for the purpose of later selling lands supplied by the government for cash as “land traffickers”.⁴⁵⁸

- 458) INAGROSA’s legal title to HSF was established by a judicial sale. As a result, the 2003 squatters were removed by Nicaragua following due process before its courts.
- 459) INAGROSA contacted the police and, with the assistance of the local police, the squatters were removed.⁴⁵⁹ The local police carried out court orders to remove the squatters in 2003.⁴⁶⁰ In this task, the Physical Protection Corps, an auxiliary force to the National Police, provided additional support.⁴⁶¹ The shelters that were left by the unlawful residents were demolished and the perimeters of HSF were marked.⁴⁶² According to INAGROSA, the 2003-2004 government action to remove the El Pavón squatters ended that dispute.⁴⁶³
- 460) José Valentín López Blandón says that there was an established settlement in the El Pavón area. He claims that the unlawful squatters were evicted at the request of the Rondón family. Mr. Lopez gave an interview to El Nuevo Diario at the time in 2003.⁴⁶⁴ Mr. Rondón was not interviewed for the story, nor was anyone from INAGROSA.
- 461) Nicaragua filed a document claiming to be a Minute from the Commission for Agrarian Reform and Agricultural Affairs dated November 26, 2003. The document claims that Carlos Rondón Molina was personally involved in the 2003 eviction of the members of El Pavón Cooperative occupying part of Hacienda Santa Fé.⁴⁶⁵
- 462) The Minutes of the Commission for Agrarian Reform and Agricultural Affairs says:

From August of this year to date, Mr. CARLOS RONDON MOLINA, who claims to be a US citizen, accompanied by his legal representative JUAN CARLOS BONILLA LOPEZ, and by 300 riot police and San Rafael Police del Norte, in the month of August 2003 they destroyed homes, the crops, the fences, and everything they had built on said farm since 1990, the year in which it was given to them by the Regional Agrarian Commission. Also, the members of the

⁴⁵⁸Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 23 (CWS-12).

⁴⁵⁹Witness Statement of José V. López-Counter-Memorial-ENG at ¶¶ 14-15 (RWS-04).

⁴⁶⁰Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 14 (RWS-04).

⁴⁶¹Francisco Mendoza, Scorched Land in El Pavón, El Nuevo Diario, November 22, 2003, at p.1 (R-0036-SPA-ENG).

⁴⁶²Witness Statement of José V. López-Counter-Memorial-ENG at ¶¶ 14-15 (RWS-04).

⁴⁶³Witness Statement of José V. López-Counter-Memorial-ENG at ¶¶ 21-22 (RWS-04).

⁴⁶⁴El Nuevo Diario, Scorched Land in El Pavón dated November 22, 2003 (R-0036-SPA).

⁴⁶⁵Minute, Commission for Agrarian Reform and Agricultural Affairs November 26, 2003 (R-0062-SPA-ENG).

Cooperative were humiliated so much by the members of the National Police and by Carlos Rondón Molina himself and his legal representative.

- 463) The minutes do not indicate that INAGROSA or Carlos Rondón were present at the meeting or that they were even informed of it. Mr. Rondón confirms that he does not agree with the accuracy of the contents of the description in the document.⁴⁶⁶
- 464) Riverside contends that the legal documents from 2003/2004 speak for themselves. There was an instance of squatters at HSF and the public authorities of Nicaragua carried out their duties commensurate with the rule of law, in stark contrast to how they addressed the invasion at issue in this arbitration.
- 465) Witness Domingo Ferrufino challenges the evidence from Mr. López. Mr. Ferrufino is a former Nicaraguan military member who was a part of the Security Team at HSF at the time of the occupation in 2018. Mr. Ferrufino was working at HSF in 2003 at the time of the eviction of the squatters.
- 466) Mr. Ferrufino reports that the squatters at HSF in 2003 were not invaders. Originally, the former owner of the lands at HSF allowed former Nicaraguan Resistance veterans to grow subsistence crops on some land in the norther part of HSF that was not being used at that time for coffee.⁴⁶⁷ However, some unscrupulous veterans were trafficking in fraudulent land rights in exchange for cash payments from the unsuspecting victims who believed that they had rights to the lands, when they had none.⁴⁶⁸
- 467) Mr. Ferrufino reports that the squatters at HSF in 2003 were given compensation for their homes and property in exchange for voluntarily leaving HSF. Most squatters left voluntarily. A few remained.⁴⁶⁹ Mr Ferrufino reports that those squatters at HSF that remained on the lands were legally evicted.⁴⁷⁰
- 468) Mr Ferrufino reports that the eviction at HSF in 2003 was peaceful.⁴⁷¹ He rejects Mr. López' version of the events, noting that the press story produced by Mr. López was unbalanced, noting expressly the points buried in the story from INAGROSA's legal counsel.⁴⁷²

⁴⁶⁶Witness Statement of Carlos Rondón J. Rondón – Reply – ENG at ¶ 48 (CWS-09).

⁴⁶⁷ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 27 (CWS-12).

⁴⁶⁸ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 28 (CWS-12).

⁴⁶⁹ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 36 (CWS-12).

⁴⁷⁰ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 36 (CWS-12).

⁴⁷¹ Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 37 (CWS-12).

⁴⁷² Witness Statement of Domingo Ferrufino – Reply – SPA at ¶ 41 (CWS-12).

- 469) From the judicial removal of squatters in 2004 until June 2018, for fourteen years there were no additional squatter incidents at HSF.
- 470) Squatters settled in the northern part of Hacienda Santa Fé in 2004. However, Nicaragua took legal action against the invaders and obtained a court order for their removal.
- 471) The squatters were removed from the grounds of Hacienda Santa Fé and relocated to a different community, El Sauce, Leon Department in Nicaragua, many kilometers away.
- 472) The 1990-2003 squatters event thus is irrelevant to the issue of the 2018 invasion and taking of HSF. Nicaragua attempts to imply that this was a prelude to the 2018 invasion and taking of HSF to create a distraction.
- 473) The paramilitaries that invaded Hacienda Santa Fé in 2018 always stated that they were sent by the Government of Reconciliation and National Unity (the term used for the current Government of the Republic of Nicaragua headed by President Daniel Ortega).⁴⁷³ Comandante Cinco Estrellas told Luis Gutierrez directly that the paramilitaries were invading on the instructions of local Mayor Centeno, a strong Sandinista party loyalist.
- 474) Mr. López stated that in June 2017 a former Resistance member, Adrian Wendel Mairena “Wama”, accompanied by 170 people invaded the northern area (El Pavón) within Hacienda Santa Fé with the objective of recovering the lands.⁴⁷⁴
- 475) Mr. López was not present in the alleged 2017 invasion and did not provide the source of his knowledge. Nicaragua produced no document externally to substantiate Mr. Lopez’s statement.
- 476) INAGROSA Management denies that there was an invasion in 2017 and that the invaders had a settlement within Hacienda Santa Fé.
- 477) Nicaragua did not file any evidence to support Mr. Lopez’s statement.⁴⁷⁵ The only police report Nicaragua filed by Nicaragua about the invasion of HSF, also does not make any mention of such an important fact.⁴⁷⁶

⁴⁷³Witness statement of Luis Gutierrez- Memorial- ENG at ¶ 42 (CWS-02).

⁴⁷⁴Witness Statement of José V. López-Counter-Memorial-SPA at ¶ 22 (RWS-04).

⁴⁷⁵Witness Statement of José V. López-Counter-Memorial-SPA at ¶ 22 (RWS-04).

⁴⁷⁶Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31. 2018 (C-0284-SPA-ENG).

- 478) In addition, full-time security guards were patrolling Hacienda Santa Fé. If there were an invasion 2017, and the invaders had a settlement within Hacienda Santa Fé, the security guards would have alerted Management.
- 479) Nicaragua relies on this purported 2017 invasion to argue that INAGROSA contributed to the situation and seeks to reduce the damages as a result. It is wrong.
- 480) Mr. López claims that in June 2018 approximately 50 people invaded the upper part of Hacienda Santa Fé, and then another 200 or 300 people invaded between June and July 2018.⁴⁷⁷ He denies that the invaders were paramilitaries and states that they mainly were farmers and former Resistance members.⁴⁷⁷
- 481) Mr. López was not present during the 2018 invasions and thus he lacks personal knowledge. He did not provide the source for his statement that the invaders were farmers and former Resistance members.⁴⁷⁸
- 482) The Jose López states at paragraph 27 in relation to Riverside's contention that the invaders were paramilitaries connected to the state:
- I can confirm that this is not true, these invaders are mostly farmers, and they are part of a community incited by the former members of the Resistencia Nicaragüense. I know the communities in the area and am not aware that either the Police or the government have ever given them instructions to invade Hacienda Santa Fé.⁴⁷⁹
- 483) Mr. López does not comment on the role of the members of the invaders at any point, even though the El Pavon Cooperative acknowledges itself to be supporters of the Ortega regime. He also does not focus on Comandante Toño Loco, who was acknowledged as the primary leaders of the invasion of Hacienda Santa Fé.⁴⁸⁰ He also does not comment on Comandante Cinco Estrellas, who made the statement about being directed by Mayor Centeno.
- 484) Mr. López also does not comment on the social media reports on the role of local Mayor Centeno and that the invasion was done at Mayor Centeno's instruction.
- 485) Further, Mr. López does not address the role of other government officials in the ongoing occupation or the role of the police.

⁴⁷⁷Witness Statement of José V. López-Counter-Memorial-SPA at ¶ 27 (RWS-04).

⁴⁷⁸Witness Statement of José V. López-Counter-Memorial-SPA at ¶ 27 (RWS-04).

⁴⁷⁹Witness Statement of José V. López-Counter-Memorial-SPA at ¶ 27 (RWS-04).

⁴⁸⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 87 (CWS-10).

G. There was no 2017 Secret Invasion.

- 486) According to Jose López, the El Pavón Cooperative covertly re-occupied HSF in 2017.⁴⁸¹ Mr. López suggests that over 150 people somehow occupied HSF without the knowledge of INAGROSA Management.
- 487) INAGROSA management categorically denies that there was an invasion of HSF in 2017.⁴⁸²
- a) INAGROSA Management reports that its security team did regular patrols and would have known if there were people living within the boundaries of HSF.⁴⁸³
 - b) INAGROSA's Luis Gutierrez personally did rounds around the entire estate weekly, and he reports that there were no squatters residing in HSF in 2017.⁴⁸⁴
 - c) Carlos Rondón regularly walked through the grounds on HSF on his visits in 2017 and 2018 and he reports no squatters residing in HSF.⁴⁸⁵
- 488) Major incursions require logistics and leave significant traces of human settlement. While Nicaragua contends that there was a major human settlement taking place in HSF, Nicaragua provides no extrinsic proof of any squatter incursion in 2017 or of any continued habitation. For such a large habitation, there would be newspaper reports, health records, police incident reports, or even satellite pictures to support such contentions of occupation, but none have been supplied. All of this is in stark contrast to the admitted 2018 invasion at issue.
- 489) Riverside has provided evidence from Luis Gutierrez, who personally patrolled HSF biweekly as part of his job, and Carlos Rondón, who walked the grounds on each of his visits to Nicaragua in 2017 and 2018, that there were no squatters on HSF.

⁴⁸¹Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 21 (**RWS-04**).

⁴⁸²Witness Statement of Carlos J. Rondón – Reply – ENG at ¶¶ 50-57 ; Witness Statement of Luis Gutierrez – Reply – SPA at ¶¶ 32-39 (**CWS-10**).

⁴⁸³Witness Statement of Carlos J. Rondón – Reply – SPA at ¶¶ 51-53 (**CWS-09**); Witness Statement of Luis Gutierrez – Reply – at ¶ 32 (**CWS-10**).

⁴⁸⁴Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 51 (**CWS-09**); Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 32 (a) (**CWS-10**).

Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding the Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

⁴⁸⁵Reply Witness Statement of Carlos. J. Rondón. Reply Witness Statement of Luis Gutierrez. Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding the Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

- 490) The only source of this contention appears to be Jose López. However, Mr. López is careful to confirm his non-involvement. He says that he was not a party to the 2017 invasion as he knew the lands at HSF were private property.⁴⁸⁶ He claims that an invasion leader known as “Wama” invited him to participate in the invasion, but that he declined to participate.⁴⁸⁷
- 491) Mr. López provides no support of any kind for his statement. Nicaragua provides no police reports or confirmatory satellite images to support the statement of occupation in 2017.
- 492) Jinotega Attorney General Diana Gutiérrez mentions an invasion in 2017, but she also provides no support for this statement. As she was not in office in 2017, it could not have been contemporaneous knowledge. Jinotega Attorney General Diana Gutiérrez relied heavily on the uncorroborated evidence of Mr. López for her information in her Witness Statement.
- 493) The July 31, 2018 Report from Jinotega Police Commissioner Castro to National Police Chief Diaz on the invasion of HSF says nothing about a 2017 invasions of HSF by the El Pavón Cooperative.⁴⁸⁸ His only reference is a statement that he later was informed that there was an occupation at a time long after the invasion. Again, there is no proof.
- 494) Other than a statement made in this Arbitration by Jose López Blandon, there is absolutely no evidence of any 2017 invasion taking place at HSF.⁴⁸⁹
- 495) In July 31, 2018, a formal report from Jinotega Police Commissioner Marvin Castro to its National Police Chief Diaz about the invasion of HSF mentions the 1990 land dispute but fails to mention any 2017 squatter incursions.⁴⁹⁰ In the government document, the police does not mention the 2003/2004 eviction.⁴⁹¹ The police treat the June 2018 invasion at issue here as the only relevant unlawful invasion activity.⁴⁹² This report was drafted six weeks after the first invasion in 2018, and after numerous contacts with the invaders.⁴⁹³ It is reasonable to assume that the Jinotega Police would be well-aware of a

⁴⁸⁶Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 21 (**RWS-04**).

⁴⁸⁷Witness Statement of José Valentín López Blandón. Lopez at ¶ 21 (**RWS-04**).

⁴⁸⁸Report to National Police Chief Francisco Diaz regarding the Invasion of Hacienda Santa Fe (**C-0284-SPA-ENG**).

⁴⁸⁹Witness Statement of José V. López-Counter-Memorial-ENG at ¶¶ 20-22 (**RWS-04**); see also Witness Statement of Diana Gutierrez- Counter-Memorial- ENG at ¶ 61 (**RWS-01**).

⁴⁹⁰Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

⁴⁹¹Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

⁴⁹²Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

⁴⁹³Report to National Police Chief Francisco Diaz regarding the Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

2017 invasion had such event ever taken place by the time that the July 31, 2018 report was issued to the National Police Chief.

- 496) At no point during Mayor Herrera's visit did she, or any of the National Police members, instruct nor demand the invaders to end their unlawful occupation of Hacienda Santa Fé.⁴⁹⁴
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⁴⁹⁴Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 51 (**CWS-06**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 103 (**CWS-02**).

III. THE NON-GOOD FAITH OFFER AND THE JUDICIAL SEIZURE

- 497) Nicaragua has relied upon an irrelevant offer and a fabricated refusal of the return of HSF in September 2021. As described in detail below in this Part, this Offer was a pretext that Nicaragua attempted to use, *ex post facto*, as a stratagem to fabricate a limitation of damages to its valuation team, thereby undermining its sincerity to reduce its damages. As will become evident shortly, the Offer⁴⁹⁵ was not taken in good faith, and in any event, it was legally irrelevant.
- 498) Nicaragua filed an application for urgent precautionary measures seeking to be designated the judicial depository of HSF before its local courts on November 30, 2021 [the "Application"].⁴⁹⁶ The Application sought an order to grant Nicaragua continued control of HSF.⁴⁹⁷
- 499) Nicaragua does not explain how it selected the parties to the court action. The named parties to the Application were the Republic of Nicaragua and Riverside, a foreign investor who did not legally own HSF but controlled INAGROSA.⁴⁹⁸
- 500) INAGROSA, the legal owner of HSF, was not named as a party to the action.⁴⁹⁹ As a matter of Nicaraguan law, the legal landowner is required to be a named party to this Application. Naming another legal entity is not the same as naming the proper party, INAGROSA.⁵⁰⁰ It is clear from the Application that the Attorney General knew or should have known the lands at HSF were legally owned by INAGROSA.⁵⁰¹
- 501) No notice of the application was provided to the landowner, INAGROSA. The Attorney General's failure to provide effective notice of the Application to INAGROSA or even Riverside, which it named, had a detrimental effect on the administration of justice and the rule of law in Nicaragua. This failure was the definition of a breach of due process.⁵⁰²
- 502) Nicaraguan Legal Expert Renaldy Gutierrez opines that the absence of notice to INAGROSA, the legal owner of the title to the property, was grossly

⁴⁹⁵ The "Offer" refers to the email sent by Foley Hoag LLP to Appleton & Associates regarding the return of Hacienda Santa Fé dated September 9, 2021 **(C-0116-ENG)**.

⁴⁹⁶ Application made by the Republic of Nicaragua, November 30, 2021 **(C-0253-SPA-ENG)**. Hereinafter the "Application".

⁴⁹⁷ Application, Section entitled Petition at p. 10 **(C-0253-SPA-ENG)**.

⁴⁹⁸ Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 36,44 **(CES-06)**.

⁴⁹⁹ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 44 **(CES-06)**.

⁵⁰⁰ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 45 **(CES-06)**.

⁵⁰¹ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 43 **(CES-06)**.

⁵⁰² Expert Witness Statement of Renaldy J. Gutierrez at ¶ 48 **(CES-06)**.

unfair to INAGROSA's property rights. The absence of notice violated the most basic notions of due process and the rule of law in Nicaragua.⁵⁰³

- 503) The Application was brought to the Court as an *ex parte* matter. However, the Petitioner (the State of Nicaragua) failed to give legal reasons for the matter to proceed *ex parte*.⁵⁰⁴ As a matter of Nicaraguan law, as a party to the dispute, Riverside, was entitled to notice. As part of the entitled to notice, Riverside was entitled to review the Application Record, and if necessary, to be able to challenge it before the Court below as well as in appeal.⁵⁰⁵ This is especially true given that these proceedings already were pending.
- 504) The Application itself notes that Riverside commenced an arbitration claim against Nicaragua and sought substantial damages. Nicaragua's attorney general filed a copy of the CAFTA Notice of Arbitration and requested an order with the intent that returning the property supposedly would end the Arbitration. The Attorney-General's application sought *inter alia* "to seek mechanisms for the immediate end of the arbitration".⁵⁰⁶
- 505) Nicaragua's Application was based on the assertion that Nicaragua reported to the Court in the Application that Riverside's legal counsel on September 9, 2021 expressly refused to accept the return of Hacienda Santa Fé and that Riverside "expressed their refusal to travel to Nicaragua and their fear of taking possession of the property in the face of alleged threats."⁵⁰⁷
- 506) The issue of the refusal of the supposed Offer, and the impact of the legal proceedings in Nicaragua, are essential issues in this dispute. Nicaragua's damages case highly depends on the impact of Riverside's "refusal" of the Offer. This Part of the Reply Memorial considers
- a) the Offer,
 - b) the Application,
 - c) the hearing, and
 - d) the Judicial Order⁵⁰⁸ (including how the order was affected against the lands at HSF).

⁵⁰³ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 49 (CES-06).

⁵⁰⁴ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 52 (CES-06).

⁵⁰⁵ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 52 (CES-06).

⁵⁰⁶ Application, Fact III, at p. 4 (C-0253-SPA) / pp.4-5 (C-0253-ENG).

⁵⁰⁷ Application, Fact IV, at pp. 4-5 (C-0253-SPA-ENG) / p.5 (C-0253-ENG).

⁵⁰⁸ Order of the Second Oral Court of the Civil District Court of Jinotega Northern District, December 15, 2021 (C-0251-SPA-ENG).

- 507) To assist the Tribunal with matters of Nicaraguan law, Riverside engaged Renaldy J. Gutierrez to provide an expert statement. As there are several people before the Tribunal with the surname Gutierrez, we refer to Renaldy J. Gutierrez as Expert Gutierrez. Expert Gutierrez is a practicing Nicaraguan lawyer, educated at the Universidad Centroamericana in Nicaragua, the Harvard Law School, and the University of Miami Law School.⁵⁰⁹ He is also a member of the Bar of the state of Florida.⁵¹⁰ He practices law in Miami, Florida.⁵¹¹ Expert Gutierrez practiced law in Nicaragua for several years and was a former professor of Commercial Law, Contract, and Professional Ethics at the Universidad Centroamericana in Managua before moving to the United States.⁵¹²

The Offer

- 508) There was a communication on September 9 from Paul Reichler, Counsel for Nicaragua, to Barry Appleton, Counsel for Riverside. That letter [referred to as the Reichler Letter] **(C-0116-ENG)** admits that Nicaragua controlled and possessed HSF. The Reichler Letter, in relevant part, states:

If your clients are in a position to demonstrate their ownership of the property, Nicaragua would be willing to meet with them and establish the conditions for ensuring that the property is properly and securely placed in their hands as promptly as possible.⁵¹³

- 509) That letter was not unconditional. It referenced conditions as a precondition for the release of the land.⁵¹⁴ One condition was specified in the letter (that Riverside prove lawful ownership) the other conditions were unspecified.⁵¹⁵
- 510) Within hours of receipt, Mr. Appleton wrote to Mr. Reichler (C-0118-ENG) That letter [referred to as the Appleton Letter] addressed the Reichler letter by noting that proof of lawful ownership was in the record filed with the Notice of Arbitration. The Appleton Letter inquires:

“... What other documentation could you possibly require? Accordingly, could you please explain why there would be a need to further

⁵⁰⁹ Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 10, 13 **(CES-06)**.

⁵¹⁰ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 14 **(CES-06)**.

⁵¹¹ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 1 **(CES-06)**.

⁵¹² Expert Witness Statement of Renaldy J. Gutierrez at ¶ 1 **(CES-06)**.

⁵¹³ Letter from Foley Hoag LLP to Appleton & Associates regarding the offer to return Hacienda Santa Fé, September 9, 2021, at p. 1 **(C-0116-ENG)**.

⁵¹⁴ Letter from Foley Hoag LLP to Appleton & Associates regarding the offer to return Hacienda Santa Fé, September 9, 2021, at p. 1 **(C-0116-ENG)**.

⁵¹⁵ Letter from Foley Hoag LLP to Appleton & Associates regarding the offer to return Hacienda Santa Fé, September 9, 2021, at p. 1 **(C-0116-ENG)**.

demonstrate the property ownership under these circumstances and elaborate on your client's conditions for the return of HSF?"⁵¹⁶

511) Concerning the unspecified conditions, the Appleton letter concluded as follows:"

Concerning the second condition, could you please elaborate on your client's conditions for returning Hacienda Santa Fe and the basis for the imposition of these conditions?⁵¹⁷

512) There is no plausible scenario under which Nicaragua could have been uninformed of INAGROSA's unambiguous legal title to HSF.

- a) Information about the ownership of title to HSF would have been available to Nicaragua as the title was registered in government registries.⁵¹⁸
- b) Documents confirming INAGROSA's title were filed by Riverside with the Notice of Intent on August 28, 2020, and again with the Notice of Arbitration in March 2021.⁵¹⁹
- c) INAGROSA procured its title to HSF via a judicial sale sanctioned by Nicaraguan Courts in 1997.⁵²⁰ Consequently, the legitimacy of its title is beyond any reasonable dispute.
- d) Moreover, on July 31, 2018, Jinotega Police Commissioner Marvin Castro notified Nicaragua's National Chief of Police, Francisco Diaz, that National Assembly Deputy Edwin Castro admitted that the government was aware that HSF was privately owned.⁵²¹ Congressman Castro committed the government to obtain funds to acquire the property at HSF from its lawful owners for the occupiers.⁵²²

513) Nicaragua nevertheless stated that "remarkable and continuing refusal to accept back its undisputed".⁵²³ But the words speak for themselves. As does

⁵¹⁶ Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 **(C-0018-ENG)**.

⁵¹⁷ Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 **(C-0018-ENG)**.

⁵¹⁸ Literal Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry, December 17, 2019 **(C-0080-SPA)**.

⁵¹⁹ Forced Sale Agreement of Hacienda Santa Fe (Public Instrument No. 13 dated April 29, 1998) **(C-0173-SPA)**.

⁵²⁰ Forced Sale Agreement of Hacienda Santa Fe (Public Instrument No. 13 dated April 29, 1998) **(C-0173-SPA)**.

⁵²¹ Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 **(C-0284-SPA-ENG)**.

⁵²² Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding the Invasion of Hacienda Santa Fe, July 31, 2018 **(C-0284-SPA-ENG)**.

⁵²³ Counter -Memorial at ¶ 373.

the fact that Nicaragua did not respond to the question about the conditions for another 18 months (until April 2023).⁵²⁴

1. Nicaragua's Counsel leaves the case

- 514) Six months went by without a clarification from counsel for Nicaragua. During that time there were communications between counsel, but there was no clarification on conditions necessary for the return of the land. But clearly, there were tensions lurking behind the scenes between Nicaragua's highly respected US-based counsel, Paul Reichler, and the President of Nicaragua.
- 515) On March 27, 2022, Foley Hoag partner Paul Reichler published a stinging rebuke against President Daniel Ortega, making front-page news in Nicaragua⁵²⁵. His firm withdrew from its representation of Nicaragua. Mr. Reichler questioned the State's repression of peaceful demonstrations in 2018 that resulted in "hundreds of tragic deaths." In his letter of resignation, he wrote that "[i]t is inconceivable to me that the Daniel Ortega whom I proudly served would have destroyed the democracy that he was instrumental in building, and establish a new dictatorship with sham elections, not unlike the one he was instrumental in defeating."⁵²⁶
- 516) The Attorney General of Nicaragua remained on this arbitration throughout. A notification of external counsel for Nicaragua, now represented by Baker Hostetler, was sent out in May 2021 before the procedural hearing held the next month.

2. No Response from Nicaragua to the Enquiry.

- 517) Nicaragua did not respond to the inquiries in the Appleton Letter until April 2023 (some eighteen months later).
- 518) As discussed below, two months after this exchange, and without any further response, Nicaragua's Attorney General commenced its Application on November 30, 2021.⁵²⁷ Nicaragua had a hearing without notice to Riverside. A Judicial Order granting Nicaragua exclusive possession to HSF was issued without notice to Riverside or INAGROSA.
- 519) Riverside was unaware of the Judicial Order when it filed its Memorial and only discovered this surreptitious judicial maneuver by chance, and then

⁵²⁴ Email from Analia Gonzalez to Barry Appleton re: Nicaragua's conditions for return of Hacienda Santa Fe, April 3, 2023 **(C-0352-ENG)**.

⁵²⁵ Paul Reichler Resignation Letter dated March 2, 2022 **(C-0671-ENG)**.

⁵²⁶ International lawyer Paul Reichler resigns from the Government of Daniel Ortega - El Confidencial March 27, 2022 **(C-0672-ENG)**.

⁵²⁷ Application for Urgent Precautionary Measures, November 30, 2021 **(C-0253-SPA-ENG)**.

immediately apprised the Tribunal of its discovery in November 2022. The Application and the Judicial Order are discussed below.

3. Renewed Discussions in 2023

- 520) In 2023, Counsel reinitiated dialogue concerning the status of HSF.
- 521) On January 16, 2023, Barry Appleton for Riverside and Analia Gonzalez and Marco Molina from Baker Hostetler for Nicaragua had a discussion. The discussions revolved around two pivotal issues tabled by Riverside:
- a) The proposal raised in Riverside's November 13 motion (regarding the discovery in 2022 of the Judicial Order taken out nearly one year earlier) was for a mutual *status quo* consent order. Nicaragua did not address that issue in any of the responding material, and was an outstanding matter; and
 - b) A discussion about the return of HSF as part of a formal consultation and settlement.⁵²⁸
- 522) Thinking that the parties were discussing settlement, Riverside's Counsel underscored that Nicaragua had yet to respond to its September 9, 2001, letter and emphasized the necessity of receiving comprehensive answers. Nicaragua's Counsel concurred to bring these issues before the Nicaraguan authorities.
- 523) A few weeks later, on February 6, Ms. Gonzalez wrote back, stating:
- Just letting you know that I transmitted your request regarding steps for taking back the Hacienda Santa Fe to the Nicaraguan government. The government informed that the corresponding Commission that deals with this matter is meeting this week. I hope to be able to revert to you on this matter as soon as I receive instructions.⁵²⁹
- 524) Even in February 2023, some eighteen months after the September 9, 2021 offer, Nicaragua could not respond to the conditions it required for the handover of HSF to INAGROSA. This clearly demonstrates that the Reichler Letter was not a complete offer in any meaningful way.
- 525) Again, another unexpected gap in the communications arose, with Nicaragua saying not a word about the terms it required for the handover of HSF.

⁵²⁸This earlier conversation was referenced in a later written communication. See Email Gonzalez to Appleton "Hacienda Santa Fe" February 6, 2023 (C-0428-ENG).

⁵²⁹Email Gonzalez to Appleton "Hacienda Santa Fe" February 6, 2023 (C-0428-ENG).

- 526) Close to two months later, on April 3, 2023, another communication from Nicaragua arrived. This communication, explicitly titled “Handover of Hacienda Santa Fe,” was received from Nicaraguan Counsel.⁵³⁰ The April 3, 2023 communication was declaratory. It opened by saying, “The Government of Nicaragua is pleased that Riverside has accepted its offer of September 9, 2021, to reassume control of Hacienda Santa Fé”.⁵³¹
- 527) Such a conclusion was made unilaterally and again without any factual predicate; Riverside never had participated in exhaustive talks with the Nicaraguan government about such acceptance or conditions.
- 528) Riverside sought explicit indications from Nicaragua on the contours of a comprehensive approach to resolving extant matters. For Riverside, such a resolution would include remuneration for the damage suffered in addition to the now-derelict HSF.
- 529) The “Handover Communication” of April 3, 2023, from Nicaragua went on to outline preconditions that Nicaragua insisted upon for the reversion of HSF to Riverside, notably:
- a) Execution of a formal “Agreement for the Handover of Hacienda Santa Fé.”⁵³²
 - b) An inventory and inspection of HSF to be conducted by the Nicaraguan government.⁵³³
 - c) Lifting of a precautionary measure by the Second District Court Department of Jinotega within 60 days of signing the Agreement.⁵³⁴
 - d) Formal handover to take place within 30 days of the court’s approval, with the issuance of a “Handover Certificate” and confirmation that HSF is free from encumbrances.⁵³⁵
- 530) This “Handover Communication” confirmed that Nicaragua maintained its control over HSF and set these preconditions as *sine qua non* for its reversion to Riverside/INAGROSA.⁵³⁶ As discussed below, the terms of the *Judicial Seizure Order* did not expressly allow Nicaragua to return HSF to

⁵³⁰Email Gonzalez to Appleton “Handover of Hacienda Santa Fe” April 3, 2023 (C-0429-ENG).

⁵³¹Email Gonzalez to Appleton “Handover of Hacienda Santa Fe” April 3, 2023 (C-0429-ENG).

⁵³²Email Gonzalez to Appleton “Handover of Hacienda Santa Fe” April 3, 2023 (C-0429-ENG).

⁵³³Email Gonzalez to Appleton “Handover of Hacienda Santa Fe” April 3, 2023 (C-0429-ENG).

⁵³⁴ Email Gonzalez to Appleton “Handover of Hacienda Santa Fe” April 3, 2023 (C-0429-ENG).

⁵³⁵Email Gonzalez to Appleton “Handover of Hacienda Santa Fe” April 3, 2023 (C-0429-ENG).

⁵³⁶Email Gonzalez to Appleton “Handover of Hacienda Santa Fe” April 3, 2023 (C-0429-ENG).

INAGROSA without going back to court, although INAGROSA was the lawful owner of the property.

- 531) Nicaragua's prerequisites for inspection and inventory, as outlined in item 2 of the "Handover Communication," contradicted its assertion that HSF was readily accessible to Riverside.⁵³⁷
- 532) Finally, the provisions of the Handover Certificate (*Acta De Entrega*) are essential. The Handover Certificate is the mechanism Nicaraguan authorities use upon the turnover of any property after the return of a property to its owner. It is key that such a Handover Certificate be provided.
- 533) The issuance of a Handover Certificate (*Acta De Entrega*) is an established legal mechanism in Nicaragua upon restitution of any seized property. The police reports (provided in document production) indicate that such certificates had been provided to other private landowners in 2018.⁵³⁸
- 534) The April 2023 "Handover Communication" was not a negotiated agreement with Riverside. Instead, it represented yet another maneuver by Nicaragua to exert judicial influence over its courts to unilaterally impose its terms on Riverside, the Claimant in this arbitration.

4. Riverside's Response to Nicaragua

- 535) On August 3, 2023, Riverside formally addressed the matter by issuing a comprehensive response to the April "Handover Communication", previously transmitted by Nicaragua.⁵³⁹
- 536) By the time Riverside generated its August 3, 2023, response, it had become incontrovertibly clear to the company that Nicaragua had no genuine

⁵³⁷Email Gonzalez to Appleton "Handover of Hacienda Santa Fe" April 3, 2023 (C-0429-ENG).

⁵³⁸Riverside has received the following certificates of Handover from Nicaragua because of the document production process. The following are examples of handover certificates used by the Nicaraguan authorities to address unlawful invasions of private lands in the summer and fall of 2018. Certificate of Handover of Rural Land to Elvis Delgadillo, Raquel Torrez and Benita Garcia by the Leon National Police Delegation, October 12, 2018 (C-0327-SPA); Certificate of Handover of Rural Land to MANGOSA and MELONICSA issued by the Leon National Police Delegation, October 24, 2018 (C-0328-SPA), Certificate of Handover of Rural Land to Banco de Fomento a la Produccion issued by the Leon National Police Delegation, October 18, 2018 (C-0329-SPA); Certificate of Handover of Rural Land to Angel Rafael Chavez and Alejandro Chavez issued by the Leon National Police Delegation, October 16, 2018 (C-0330-SPA); Certificate of Handover of Rural Land to Evenor Blanco issued by the Leon National Police Delegation, October 18, 2018 (C-0331-SPA); and Certificate of Handover of Rural Land to Mauricio Pallais and Jose Rodriguez issued by the Leon National Police Delegation October 22, 2018 (C-0332-SPA).

⁵³⁹Email exchange between Barry Appleton and Analia Gonzales regarding the response to the handover of Hacienda Santa Fe on August 7, 2023, containing an earlier communication from August 3, 2023. (C-0430-ENG).

intention of achieving a comprehensive settlement of the outstanding disputes between the parties.

- 537) In its correspondence dated August 3, 2023, Riverside meticulously delineated that at no juncture did the dialogues between the disputing parties ascend to the level of constituting a legally binding offer or agreement, thereby precluding any suppositions to the contrary.
- 538) Riverside's August 3 communication analyzed the existing jurisprudential landscape, citing authoritative sources in international law, international arbitration, civil law, and common law. The analysis unambiguously reiterates that *ex post facto* communications, particularly those drafted by legal counsel for the purpose of resolving matters under arbitration, are neither admissible nor considered favorably by international courts and tribunals. This position aligns seamlessly with the prevailing jurisprudence and scholarly literature. Riverside noted in the letter:

On this point, it is long settled as a general principle of law in civil, common, and international law that a Tribunal cannot rely on settlement negotiations or communications as they are privileged and inadmissible.

The Permanent Court of International Justice made this clear in the Chorzow Factory case (which is already before this Tribunal as (CL-0054-ENG), saying on page 51 that:

“the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement”.⁵⁴⁰

There is no shortage of authority. Paragraph 23 of Procedural Order No. 6 in *Lion Mexico Consol. LP v. United Mexican States* provides:

“A requested Party may also invoke privilege regarding Documents prepared in connection with settlement negotiations, including (i) internal Documents prepared specifically for negotiations, (ii) oral or written statements submitted to the other side during negotiations, and (iii) drafts or final versions of any settlement agreements”.⁵⁴¹

The US-Iran Claims Tribunal also came to the same conclusion in *Mobil Oil Iran v. Iran*,):

[it is] “well-settled” that tribunal “need not take into account” prior settlement proposals and negotiations in award on damages, on basis that rejected proposals “have lost all validity and have become meaningless” and that “such proposals and concessions have no purpose other than to allow an agreement to be attained and may well be very far from what each party considered to be its rights”.⁵⁴²

⁵⁴⁰ *Chorzow Factory* at p. 51 (CL-0054-ENG).

⁵⁴¹ *Lion Mexico Consolidated LP v. United Mexican States*, Procedural Order No. 6 at ¶ 23 (CL-0279-ENG).

⁵⁴² *Mobil Oil Iran v. Iran*, Partial Award in IUSCT Case No. 311-74/76/81/150-3 of 14 July 1987, 16 Iran-US CTR 3, 55 (1987) (CL-0280-ENG).

This is also the rule in commercial arbitration cases. In ICC Case No. 6653.543 The Tribunal stated:

The arbitral Tribunal also considers that it is customary, not only in French law – where the custom is equally a rule of professional conduct for *avocats* – but also in the field of international commerce, that exchanges of proposals between parties with a view to reaching an agreement aimed at resolving a dispute submitted to a tribunal – arbitral or not – are and must remain confidential. If the parties have tried in good faith to reconcile their positions, one of them cannot, in the event the negotiations fail, use for its benefit the proposals of the other to deduce an alleged admission of fault”.

Leading authors in international arbitration have stated the same. For example, Berger, in *The Settlement Privilege: A General Principle of ADR Law*, 24 *Arb. Int'l* 265, 274 (2008) states:

“Statements, views, admissions, proposals, suggestions, indications of readiness to accept a certain proposal for settlement, whether written or oral, submitted by a party during settlement negotiations, mediation/conciliation or any other ADR proceedings, or statements made or views expressed by a third neutral involved in such proceedings, and any document, witness statement and expert report submitted in or prepared solely for these negotiations or stemming from settlement negotiations, mediation/conciliation or any other ADR process between the parties are inadmissible as evidence in subsequent arbitration or court proceedings between the same parties, provided that the privilege objection is raised in the arbitration.⁵⁴⁵

- 539) Riverside also noted that it was disturbed by Nicaragua’s approach to use settlement discussions as a pretext to allow Nicaragua to provide a non-existent settlement to its valuation expert in a failed attempt to limit part of its liability for its internationally wrongful actions by seeking contribution for the failure of Riverside to accept the “offer” on September 9, 2021.⁵⁴⁶
- 540) Riverside noted that the “offer” was not a genuine settlement offer. Riverside’s Counsel noted:

Nicaragua had no intention of settling with Riverside and only made the Offer, knowing it would not be accepted, so its expert could use its

⁵⁴³ICC Case No. 6653, (set out in J.-J. Arnaldez, Y. Derains & D. Hascher (eds.), *Collection of ICC Arbitral Awards 1991-1995* 513, 516 (1997) **(CL-0281-FR-ENG)**.

⁵⁴⁴Klaus-Peter Berger, in *The Settlement Privilege: A General Principle of ADR Law*, 24 *Arb. Int'l* 265, 274 (2008) **(CL-0282-ENG)**.

⁵⁴⁵Klaus-Peter Berger, *The Settlement Privilege: A General Principle of ADR Law*,⁵⁴⁵ 24 *Arb. Int'l* 265, 274 (2008) **(CL-0282-ENG)**.

⁵⁴⁶ Email exchange between Barry Appleton and Analia Gonzalez regarding the response to the handover of Hacienda Santa Fe August 7, 2023, containing an earlier communication from August 3, 2023 at Bates 0007414 **(C-0430- ENG)**.

prospect to limit damages. Such an approach would be cynical and inappropriate. It confirms why such offers are inadmissible.⁵⁴⁷

5. August 7, 2023 Response from Nicaragua

- 541) Nicaragua subsequently wrote back on August 7, 2023.⁵⁴⁸ Nicaragua tried to recharacterize its position as solely constituting an expression of administrative steps without any conditions of any kind.

6. Conclusions Regarding the Correspondence

- 542) The correspondence from September 9, 2021, admits that Nicaragua had obtained control of HSF, more than two years after the start of the occupation⁵⁴⁹ (which was acknowledged and recognized by Nicaragua's through Congressman Edwin Castro in July 2018)⁵⁵⁰.
- 543) Nicaragua's letter set out a vague reference to potential conditions for the return of HSF. At that juncture, it is undisputed that Nicaragua had taken full governmental control over INAGROSA's property. In seeking clarity on the conditions for the return, Riverside wrote back within hours to Nicaragua's letter seeking clarification on the meaning of the offer, but Riverside was left without substantive feedback from Nicaragua for a span nearing eighteen months, until April 2023.⁵⁵¹
- 544) There never was a refusal in September 2018 to Nicaragua's offer. Contrary to Riverside's genuine inquiry, Nicaragua mischaracterized the request for further details as refusing its offer. Nicaragua never issued any communication terming the request for information as being refusal to Riverside. It appears that Nicaragua had what it wanted from the September 9 communications. Rather than respond in good faith, Nicaragua went to its courts with a fictitious version of a response, not contained in the written communications, that was false. This action was not an *ex parte* action. Riverside was noted as the opponent, however, Nicaragua never notified Riverside of the proceeding.

⁵⁴⁷ Email exchange between Barry Appleton and Analia Gonzalez regarding the response to the handover of Hacienda Santa Fe August 7, 2023, containing an earlier communication from August 3, 2023 at Bates 0007414 (C-0430- ENG).

⁵⁴⁸ Email exchange between Barry Appleton and Analia Gonzalez regarding the response to the handover of Hacienda Santa Fe August 7, 2023, containing an earlier communication from August 3, 2023 at Bates 0007414 (C-0430- ENG).

⁵⁴⁹ Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe September 9, 2021 (C-0116-ENG).

⁵⁵⁰ Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (C-0284-SPA-ENG).

⁵⁵¹ Email Gonzalez to Appleton "Handover of Hacienda Santa Fe" April 3, 2023 (C-0429-ENG).

- 545) Nicaragua's perjured evidence on the refusal went unchallenged before the court as Nicaragua gave no notice of the judicial application to Riverside. Indeed, Nicaragua gave no notice of the hearing, nor even served the Judicial Order on the affected parties. Without effective rights of audience for the affected parties (Riverside and INAGROSA), the local court accepted the fabricated statements from the Nicaraguan Attorney General in its subsequent Judicial Order. All these actions constituted abuses of rights and an abuse of process under Nicaraguan law.⁵⁵² As discussed below in this Reply Memorial, these acts were inconsistent with the Fair and Equitable treatment standard of good faith under international law. They also evidence an abuse of process in this arbitration by Nicaragua.
- 546) As elucidated in this Reply Memorial, the September 2018 offer was tailored with an ulterior motive, aimed at influencing the damages in this ongoing arbitration, as well as providing cover for Nicaragua's *de jure* seizure of HSF, including modifying the legal title of the property to add Nicaragua as owner.⁵⁵³ This strategy became particularly evident given the arbitration's timeline in relation to the issuance of the September 9, 2021 letter.
- 547) In summary, the approach, and actions of Nicaragua, in relation to the "offer", the Judicial Order, and Nicaragua's reliance on materially false evidence, warrant serious scrutiny, given the egregious deviations from legal norms and the mischaracterizations of communications. This approach has the tail wagging the dog. It is all backwards.

7. The Offer was an *ex post facto* ploy to limit damages

- 548) The "offer" was nothing more than an improper *ex post facto* ploy Nicaragua took to attempt to address its damages. It was never a viable offer, and it should not be admissible in the arbitration to show anything but to evidence Nicaragua's control over the HSF.
- 549) Nicaragua's Offer was never a *bona fide* offer. It is manifestly clear that Nicaragua's entire set of communications was not meaningful and was only a "setup" for tactical litigation purposes.
- 550) **Ownership of HSF** - Given Nicaragua's awareness that INAGROSA was the exclusive lawful owner of the property, the stipulation that ownership be proven served no valid purpose and instead functioned as a pretext. There was no question of the title. At the time of the Reichler Letter, Nicaragua had

⁵⁵²This matter is detailed in the Expert Statement on Nicaraguan legal questions of Renaldy J. Gutierrez. After reviewing the record, Mr. Gutierrez concludes that there was an abuse of rights and legal process under the law of Nicaragua due to the absence of notice, notice of hearing, and failure to serve the Judicial Order. Expert Witness Statement of Renaldy J. Gutierrez in Question 2 – the conclusions are in ¶¶ 104-107 (CES-06).

⁵⁵³Expert Witness Statement of Renaldy J. Gutierrez in Question 2 – especially ¶¶ 74-79 (CES-06).

received proof that INAGROSA owned HSF.⁵⁵⁴ This was never a *bona fide* issue.

- 551) **Failure to Contact the Legal Owner, INAGROSA** - Nicaragua possessed the means and opportunity to relinquish property control directly to INAGROSA. The Expert Gutierrez confirms that any legal proceeding involving the lands at HSF had to involve its owner, INAGROSA.⁵⁵⁵ This would be required of an offer Riverside was not the legal owner of HSF, INAGROSA was.
- 552) Further, the absence of any offer made to the legal owner, INAGROSA, was not a mere technicality. Riverside had no *de jure* authority with respect to HSF. That was always a power exclusively in the hands of INAGROSA.
- 553) Nicaragua's contention that there was an "offer" of return is fictitious and completely pretextual. It was nothing more than a poorly executed legal maneuver Nicaragua concocted after the occupation of HSF. Nicaragua's reliance on this bogus "offer" made to the wrong party is nothing more than a breach of good faith and an abuse of process on the part of Nicaragua.
- 554) As further confirmed in the Reply Witness Statement of Luis Gutierrez, Nicaragua did not attempt to reach out to INAGROSA, despite the Nicaraguan authorities knew that Luis Gutierrez was the Administrator of HSF.⁵⁵⁶ This omission suggests an intentional failure to engage with the lawful owner for the return of the property.
- 555) **Nicaragua needed court approval as a precondition to act:** Nicaragua was not in a position alone to return HSF. As confirmed by Expert Gutierrez, under the terms of the Judicial Order, Nicaragua could not effect a return of HSF without court approval.⁵⁵⁷ As noted by Prof. Justin Wolfe in his Reply Expert Statement, the UN GHREN noted the independence of the judicial system was significantly in doubt since April 2018.⁵⁵⁸ Other independent international human rights experts have identified Nicaragua as being an autocratic state.⁵⁵⁹ It is likely that if the government requested a return of

⁵⁵⁴Riverside Notice of Arbitration at ¶ 79.

⁵⁵⁵Expert Statement of Renaldy J. Gutierrez at ¶ 45 and ¶¶ 90-91(**CES-06**)

⁵⁵⁶Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 157-158 (**CWS-10**); Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 at Bates NIC01938 (**C-0284-SPA-ENG**).

⁵⁵⁷Expert Statement of Renaldy J. Gutierrez at ¶ 62. Expert Gutierrez states, "Judicial authorization is necessary for the property's disposition or encumbrance" He does note that the unusual form of the making the government the judicial depository might have allowed a transfer even though it would be otherwise inconsistent with the rules.

⁵⁵⁸Reply Expert Statement of Prof. Justin Wolfe at ¶ 15 (**CES-05**).

⁵⁵⁹Reply Expert Statement of Prof. Justin Wolfe at ¶ 112 noting the position of the Inter-American Commission on Human Rights (**CES-05**). This point was addressed in ¶ 72 of the First Expert Statement of Justin Wolfe (**CES-02**).

HSF, the courts were likely to do as they were told without scrutiny. Certainly, that appears to be the situation with the 2021 Application which was approved without scrutiny and in the face of many egregious due process failures including utter lack of notice.⁵⁶⁰

- 556) **Ulterior Motives** - Nicaragua's Offer to "return" HSF to Riverside appeared calculated to fabricate an artificial cut-off to mitigate its own potential liabilities for damages rather than facilitating genuine restitution. This Offer serves as mere window dressing to obfuscate the underlying intent to diminish legal repercussions.
- 557) **Authenticity of Offer for Return of HSF** -The correspondence from Nicaragua failed to constitute a genuine, *bona fide* offer to return the property known as HSF. A review of the correspondence shows that the "offer" lacked good faith. Nicaragua proffered the document solely as a stratagem to fabricate a limitation of damages to its valuation team, thereby undermining its sincerity.
- 558) With respect to the Offer, one must note the fact that even Nicaragua is unclear if there ever was an offer or not. Nicaragua disclaimed the existence of an "offer" in August 2023, despite that in April 2023, it surprisingly announced that Riverside had accepted its Offer.
- 559) **Misdirection in Legal Proceedings** – INAGROSA held clear title to HSF, whereas Riverside had no claim to the title. The inexplicable inclusion of Riverside as a party in the Judicial Order application before the court, the reliance on fictitious evidence of refusals from Riverside to come to Nicaragua, and the omission of naming or notifying INAGROSA from any of the proceedings over its own lands, highlights a distinct lack of legitimate reasoning behind these legal maneuvers.
- 560) **Absence of Standard Procedures** - Had there been a sincere intent to return HSF to INAGROSA, a straightforward, legally recognized protocol exists for such a transfer. Such a process was used for other properties invaded in 2018. This was noted in the police reports provided by Nicaragua. Nicaragua neglected to adhere to these protocols, further bringing into question the sincerity of its Offer.
- 561) What was abundantly clear was that Nicaragua simply was not turning over HSF. It could have quickly been done in September 2021 through a Handover Certificate (*Acta de Entrega*), which would have been provided to INAGROSA, the lawful owner. Nicaragua did that in the other invasions of private land where it returned property. But Nicaragua did not.

⁵⁶⁰Expert Statement of Renaldy J. Gutierrez at ¶¶ 102-107 (CES-06).

- 562) INAGROSA always maintained local representatives and lawyers in Nicaragua, but Nicaragua never contacted INAGROSA to arrange for a transfer of the property, or a Handover Certificate, since the first invasion occurred in June 2018.
- 563) **Material and Operational Losses** - Further complicating matters, Riverside attests that substantial damage was inflicted upon HSF's assets, including the decimation of its Hass avocado plantations, the destruction of its agricultural infrastructure and equipment, and the loss of ongoing harvests and valuable timber resources, from the years 2018 to 2021.
- 564) **Infeasibility of Complete Restitution** - Given these material changes and losses, the property as it stands in 2021, or even in 2023, bears little resemblance to its original state in June 2021, rendering full restitution ('restitutio in integrum') a futile endeavor. It is important to note, in the context of expropriation law, that once the core economic operations of HSF were dismantled, restitution to INAGROSA became an impractical, if not impossible, objective.
- 565) **Obligations Under International Law** - It is noteworthy that under international law, neither INAGROSA, which was not in possession of HSF, nor Riverside, which was not the property's owner, bore any obligation to accept a compromised restitution of the property. There was no international law obligation on the Part of INAGROSA to receive it and no obligation upon Riverside (who was not the owner of HSF).

a) The Fictional Refusal

- 566) A third area arises from the alleged "refusal" of Nicaragua's September 9, 2021 offer, which formed the basis of the November 2021 application and the December 15, 2021 Judicial Order.
- 567) The correspondence from September 9 2021, admits that Nicaragua now established complete control of HSF, more than two years after the start of the occupation.⁵⁶¹ Nicaragua's letter set out a vague reference to potential conditions for the return of HSF.⁵⁶² At that juncture, it is undisputed that Nicaragua had taken full governmental control over INAGROSA's property. In seeking clarity on the conditions for the return, Riverside wrote back within hours to Nicaragua's letter seeking clarification on the meaning of the offer

⁵⁶¹ Letter from Foley Hoag LLP to Appleton & Associates regarding the offer to return Hacienda Santa Fé, September 9, 2021, at p. 1 (C-0116-ENG).

⁵⁶² Letter from Foley Hoag LLP to Appleton & Associates regarding the offer to return Hacienda Santa Fé, September 9, 2021, at p. 1 (C-0116-ENG).

but Riverside was left without substantive feedback from Nicaragua for a span nearing eighteen months, until April 2023.⁵⁶³

568) There never was a refusal in September 2021 to Nicaragua's offer. Contrary to Riverside's genuine inquiry, Nicaragua mischaracterized the request for further details as refusing its offer. Nicaragua never issued any communication terming the request for information as being refusal to Riverside. It appears that Nicaragua had what it wanted from the September 9 communications. Rather than respond in good faith, Nicaragua went to its courts with a fictitious version of a response, not contained in the written communications.⁵⁶⁴ This action did not have permission to proceed as an *ex parte* action. Riverside was noted as the plaintiff, however, Nicaragua never notified Riverside of the proceeding. Nicaragua's perjured evidence on the refusal went unchallenged before the court as Nicaragua gave no notice of the judicial application to Riverside. Indeed, Nicaragua gave no notice of the hearing, nor even served the Judicial Order on the affected parties. Without effective rights of audience for the affected parties (Riverside and INAGROSA), the local court accepted the false statements from the Nicaraguan Attorney General in its subsequent Judicial Order. All these actions constituted abuses of rights and an abuse of process under Nicaraguan law.⁵⁶⁵ As discussed below in this Reply Memorial, these acts were consistent with the Fair and Equitable treatment standard of good faith under international law. They also evidence an abuse of process in this arbitration by Nicaragua.

569) Any legitimate proposal for the return of the property should have been directed to its rightful owner, INAGROSA. Nicaragua, however, has abstained from any form of communication with INAGROSA regarding HSF since August 18, 2018.⁵⁶⁶ While Riverside holds a controlling stake in INAGROSA, decisions pertaining to the land legally fall under INAGROSA's jurisdiction.⁵⁶⁷ There is no basis for Nicaragua to argue that that Riverside was obligated to "settle" the parties' dispute as Part of its duty of mitigation by taking back the land unconditionally, especially have the value of the land was destroyed.

⁵⁶³ Email from Analia Gonzalez to Barry Appleton regarding handover of Hacienda Santa Fe April 3, 2023 **(C-0429-ENG)**.

⁵⁶⁴ Application, Fact IV at pp.4-5 **(C-0253-SPA-ENG)**.

⁵⁶⁵This matter is detailed in the Expert Statement on Nicaraguan legal questions of Renaldy J. Gutierrez. After reviewing the record Mr. Gutierrez concludes that there was an abuse of rights and legal process under the law of Nicaragua due to the absence of notice, notice of hearing, and failure to serve the Judicial Order. Expert Witness Statement of Renaldy J. Gutierrez in Question 2 – the conclusions are in ¶¶ 104-107 **(CES-06)**.

⁵⁶⁶ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 163 **(CWS-10)**.

⁵⁶⁷ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 103 **(CES-06)**.

570) Nicaragua's self-serving statement that Riverside's counsel "accepted" this Offer by silence is absurd and Riverside always has acted consistently with the fact that no deal exists.⁵⁶⁸

571) Regarding the correspondence, both sides took time to respond. Nicaragua took eighteen months to respond to Riverside's questions sent to Nicaragua the same day as its illusory "offer" communication.⁵⁶⁹

b) The exclusion of settlement communications

572) As noted in the review of the August 7th communications, Nicaragua has taken the position that there never was an offer. Certainly, Riverside has come to the view that there never was a *bona fide* offer. As noted by Riverside in its August 3, 2023 letter, international law does not permit reliance upon settlement documents as evidence.⁵⁷⁰ The only exception is for the admission of documents that establish internationally wrongful measures (such as unlawful retention of property).⁵⁷¹

573) When considering such a type of matter, the United States courts have concluded that an offer of return must be unconditional. A Florida District Court said:

W]here property has been converted an attempt to plead and prove a qualified return in mitigation of the damages is not permissible, since one who wrongfully converts personalty should not be allowed to state a condition with which the owner of the property is bound to comply in order to have the property returned to him."⁵⁷²

574) That was exactly the situation here. The demand to turn over wrongfully withheld property based upon conditions (*i.e* a release) is a conversion. If property is held wrongfully, it should be turned over unconditionally. If it is being held based upon a condition such as a release, the wrongdoer is still exercising dominion over it.

575) Fundamentally, there must be a voluntary and gratuitous transfer without conditions. While this is an international tribunal, the American reason

⁵⁶⁸ Email from Analia Gonzalez to Barry Appleton regarding handover of Hacienda Santa Fe April 3, 2023 **(C-0429-ENG)**.

⁵⁶⁹ Email from Analia Gonzalez to Barry Appleton regarding handover of Hacienda Santa Fe April 3, 2023 **(C-0429-ENG)**.

⁵⁷⁰ Email exchange between Barry Appleton and Analia Gonzales regarding the response to the handover of Hacienda Santa Fe August 7, 2023, containing an earlier communication from August 3, 2023. **(C-0430-ENG)**.

⁵⁷¹ *Murrell v. Trio Towing Service, Inc.*, 294 So. 2d 331, 333 (Fla. 3d DCA 1974) **(CL-0285-ENG)**.

⁵⁷² *Murrell v. Trio Towing Service, Inc.*, 294 So. 2d 331, 333 (Fla. 3d DCA 1974) **(CL-0285-ENG)**.

makes good practical sense. It is not a return if it is not a *bona fide* gift. Here there was no “gift” but there were conditions placed upon it.

- 576) As discussed below, Nicaragua’s took formal title to HSF over INAGROSA by a Judicial Order where INAGROSA was not even a party to the Application.⁵⁷³ This is even more astonishing, as INAGROSA’s interest in HSF was noted in the court papers, and the Application noted improperly that Riverside, a Kansas-based corporation, was in the offices of INAGROSA in Nicaragua⁵⁷⁴ (which was a complete fabrication). The effect of the Judicial Order was to deprive INAGROSA of its exclusive rights of property ownership, possession, and control over the property.⁵⁷⁵ It is not legally accurate to characterize the Judicial Order as not constituting a deprivation of property rights during its effective period (which runs until December 2023).⁵⁷⁶
- 577) Furthermore, use of these letters is improper. Any discussions of settlement should remain confidential, not revealed to the decision makers, especially when the communication was made during an ongoing proceeding. The reason for that is simple: settlement offers can be made for many reasons after an action has commenced that are independent of the merits of the dispute.
- 578) Here it is clear that Nicaragua made the Offer in a self-serving attempt to bolster its damages defense. A Tribunal should not accept or consider any evidence that a party has offered to settle a dispute because it inherently is not trustworthy evidence. It is fabricated evidence after-the-fact.

A. General duties under International Law.

- 579) Nicaragua contends that it was obligated under customary international law to protect the interests of HSF. However, it must be emphasized that there is no internationally recognized legal obligation compelling a State to safeguard foreign-owned property *per se*. While there are obligations to protect property owned by aliens, they are manifested differently.
- 580) Despite Nicaragua’s assertions, no such obligation is articulated in pertinent international treaties. Furthermore, a comprehensive review of jurisprudence and academic literature offers no corroborative evidence to substantiate the existence of such an obligation under customary international law. The duty to protect foreign investors’ assets is typically predicated upon explicit requests by those investors, which was conspicuously absent in the present

⁵⁷³Application for Urgent Precautionary Measures, November 30, 2021 at 0005467 (C-0253-SPA-ENG).

⁵⁷⁴Application for Urgent Precautionary Measures, November 30, 2021 at 0005467 (C-0253-SPA-ENG).

⁵⁷⁵Expert Statement of Renaldy J. Gutierrez at ¶ 83 (CES-06).

⁵⁷⁶Expert Statement of Renaldy J. Gutierrez at ¶¶ 96-107 (CES-06).

case. To protect those assets does not include assisting invaders from taking the property in the first instance.

- 581) There was an obligation under international law that Nicaragua omits. That was Nicaragua's obligation under international law to prevent harm from taking place once it knew that risk was imminent. The International Court of Justice considered this in the *Corfu Channel* case.⁵⁷⁷ Here, damage to British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. The commentary to the International Law Commission Articles on State Responsibility comments as follows on this obligation:

In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.⁵⁷⁸

- 582) Nicaragua's Police Captain Herrera admits in his witness statement that he had "advanced intelligence" of an invasion of HSF before the invasion of the lower part of HSF took place.⁵⁷⁹ Luis Gutierrez confirms in his Reply Witness Statement that Captain Herrera did not share any of his "intelligence" with INAGROSA in advance.⁵⁸⁰ Like in the *Corfu Channel* case, Nicaragua failed to warn of the risk. This creates direct responsibility for Nicaragua irrespective of whether Nicaragua ordered the invasion or not.

1. Nicaragua misstates the international law.

- 583) Nicaragua advised the Tribunal in a communication of November 23, 2022, that the judicial seizure was "entirely consistent with Nicaragua's obligations under international law to protect a foreign investor's property from damage by third parties".⁵⁸¹ The only support for this contention was a reference to the CAFTA fair and equitable treatment obligation in Article 10.5.
- 584) CAFTA Article 10.5 does not contain any such obligation.
- 585) There is no international law obligation upon a state to preserve property with respect to private disputes between locals and foreigners. Nicaragua has

⁵⁷⁷Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 4 at pp. 17–18 and 22–23. **(CL-0283-ENG)**.

⁵⁷⁸International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA") with commentaries. **(CL-0017-ENG)**. 12 to Article 31 at 93 refers to *Corfu Channel*, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949, p. 244, at p. 250. **(CL-0284-ENG)**.

⁵⁷⁹Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 21 **(RWS-03)**.

⁵⁸⁰Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 62 **(CWS-10)**.

⁵⁸¹Letter from Nicaragua to Tribunal regarding Judicial Seizure – November 23, 2022.at page 3 **(C-0257-ENG)**.

asserted such a position without any support. Such an obligation is not contained in the relevant treaties, Nicaragua provides no support for this outlandish notion, and we have found no support for any such obligation as a matter of customary international law. Again, this is not in fact what happened at all, as seen above.

- 586) The obligations to protect foreign investors' property arise from such investors' requests (or from their home government) and cannot be used without the express request of the foreign investor while at the same time depriving the owner of the property, as occurred in this case.

B. NICARAGUA'S SECRET JUDICIAL SEIZURE

- 587) On November 30, 2021, an Assistant Jinotega Attorney General filed an application in the Nicaraguan courts for a preventative application to seize and occupy Hacienda Santa Fé.⁵⁸² The Application was not served upon the Investor, Riverside Coffee, LLC, or the Investment, INAGROSA in 2021.

- 588) According to the terms of the Judicial Order, the Attorney General predicated its Application to the courts on filing the Investor's CAFTA Notice of Investment Dispute and Notice of Arbitration against Nicaragua under the CAFTA.⁵⁸³

- 589) The Attorney General admitted in the Application that Nicaragua took steps to occupy and control the lands owned by Riverside's local investment, Inagrosa, on August 17, 2021.⁵⁸⁴ The Court reported the Attorney General stipulating that:

1.4.- That on the ninth of September of the year two thousand and twenty-one via email communication, received by Barry Appleton, the plaintiffs were informed that the property had been recovered and that they would proceed to the effective delivery of the property to its owners, however, the response of the company Riverside Coffee L.L.C. – Investor through its representatives Appleton & Associates International Lawyers, expressed their refusal to travel to Nicaragua and their fear of taking possession of the property.”⁵⁸⁵

- 590) Due to this alleged refusal to accept delivery of the Hacienda Santa Fé, the Attorney General reported that it created a government task force comprised

⁵⁸² Application (C-0253-SPA-ENG).

⁵⁸³ Judicial Order at Section entitled Factual Background at ¶¶ 1.1-1.2 (C-0251-SPA).

⁵⁸⁴ Judicial Order at Section entitled Factual Background at ¶ 1.3 (C-0251-SPA).

⁵⁸⁵ Judicial Order at Section entitled Factual Background at ¶¶ 1.4 - 1.5 (C-0251-SPA).

of three government agencies to maintain the property.⁵⁸⁶ According to the terms of the *Judicial Order*, Nicaragua took these measures:

1.5.- [...] to seek a legal mechanism that allows to safeguard the property. The State of Nicaragua with the sole purpose of avoiding any affectations to the property belonging to the Riverside Coffee party L.L.C. – Investor and that the possible damages that may occur due to the refusal of the party to come to Nicaragua to take possession of the property, and that these damages or losses are subsequently attributed to the State of Nicaragua is why the appointment of a judicial depositary of the property known as Hacienda Santa Fé is requested. [...] ⁵⁸⁷

2.- [...] Precautionary measure will have a duration of two years counted from the date of its execution, in accordance with the second paragraph of article 387 CPCN.⁵⁸⁸

591) The Judicial Order was issued on December 15, 2021 and is final and non-appealable.⁵⁸⁹ Contrary to the express requirements of the Order, Nicaragua failed to serve the Judicial Order against the Investor, Riverside Coffee, LLC, in 2021.⁵⁹⁰

592) The Nicaraguan Court issued the requested Order in the form requested by the Attorney General on December 15, 2021.⁵⁹¹ The Judicial Order was effective for two years, stating:

4.- When the precautionary measure is executed, a copy of the request letter is given to the person affected by the measure, so that the person can exercise the right of opposition, if the person so wishes, within the third day counted from the notification, and the affected party may propose the evidence that it intends to use to substantiate his opposition.⁵⁹²

593) Despite the requirement in the Order, a copy of the request letter was never provided to any person affected by the measure. As a result, Riverside was not able to be aware of this matter and to effectively rely upon its legal rights.

⁵⁸⁶Judicial Order at Section entitled Factual Background at ¶ 1.5 (C-0251-SPA).

⁵⁸⁷Judicial Order at Section entitled Factual Background at ¶ 1.5 (C-0251-SPA).

⁵⁸⁸Judicial Order at Section entitled Decision at ¶ 2 (C-0251-SPA).

⁵⁸⁹Judicial Order at Section entitled Decision at ¶ 5 (C-0251-SPA).

⁵⁹⁰Judicial Order at Section entitled Decision at ¶ 4 (C-0251-SPA).

⁵⁹¹Judicial Order at p. 5 (C-0251-SPA).

⁵⁹²Judicial Order at Section entitled Decision at ¶ 4 (C-0251-SPA).

- 594) In the *Judicial Order*, Nicaragua's Attorney General told the courts that the communications said the following:
- 1.4.- That on the ninth of September of the year two thousand and twenty-one via email received by Barry Appleton, the plaintiffs were told that the property had been recovered and that they would proceed to effectively deliver the property to its owners, however, the response of Riverside Coffee L.L.C. – Investor through its representatives, Appleton & Associates International Lawyers, expressed their refusal to travel to Nicaragua and their fear of taking possession of the property due to alleged threats.⁵⁹³
- 595) In a very troubling turn of events, the express representations the Attorney General of Nicaragua made to its courts were untethered from the truth. A simple review of the documents demonstrates a very different understanding between Counsel for the disputing parties.
- 596) As discussed above, the only response from Riverside to Nicaragua's Counsel on September 9, 2021, is the Appleton Letter.⁵⁹⁴ Nowhere does the Appleton Letter express a refusal by Riverside to travel to Nicaragua. Neither does the Appleton Letter state a "fear of taking possession of the Hacienda Santa Fé property due to alleged threats." Instead, a review of the Appleton Letter demonstrates that Riverside's Counsel confirmed the sufficiency of evidence already supplied in the Notice of Arbitration's supporting documents to substantiate Inagrosa's ownership of the lands at HSF.⁵⁹⁵
- 597) Rather than resiling from accepting the lands as claimed by the Attorney General before local courts, the Investor sought discussions over the return of the lands and asked for clarifications of the further conditions demanded by Nicaragua for the release of the property, which had not been disclosed in the earlier communication.
- 598) Nicaragua's Attorney General presents unsupported (and fictitious) facts that did not appear in the September 9, 2021 letter. Paragraph 1.5 of the *Judicial Order*, states:
- By virtue of the aforementioned and due to the refusal of Riverside Coffee, L.L.C. – Investor to take possession of the property, it was necessary to find a legal mechanism that allows to safeguard the property. The State of Nicaragua with the sole purpose of avoiding

⁵⁹³Judicial Order at Section entitled Factual Background at ¶ 1.4 (C-0251-SPA). Also, see Nicaragua's Judicial Application at Fact 4 (C-0253 SPA-ENG).

⁵⁹⁴ Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 (C-0118-ENG).

⁵⁹⁵ Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 (C-0118-ENG).

any issues with the property belonging to Riverside Coffee L.L.C. – Investor and any possible damages that may occur due to the refusal of the plaintiffs to come to Nicaragua to take possession to the property, and that these damages or losses could subsequently be attributed to the State of Nicaragua are the reasons why the appointment of a judicial depository for the property known as Hacienda Santa Fé is requested, (*emphasis added*).⁵⁹⁶

- 599) The Attorney General unabashedly relied on this utter fiction about the content of the September 9, 2021 correspondence to the detriment of Riverside. The Appleton Letter evidences that Riverside did not refuse the return of HSF, nor was there any statement saying Riverside was unwilling to accept the return of its property due to death threats made against its management. Riverside never refused to take possession of HSF in 2021 despite Nicaragua's repeated statements to the contrary. The documents speak for themselves.
- 600) Nothing in that September 9, 2021 correspondence supported the Attorney General's statement. The Attorney General's statement was simply an act of fiction.
- 601) As seen in the emails between the parties, Nicaragua's Counsel was thorough and consistent in recording positions taken between the disputing parties. Counsel for Nicaragua recorded an agreement between the disputing parties on time extensions.⁵⁹⁷ Similarly, Counsel for Nicaragua recorded an agreement between the disputing parties to continue to work to find an agreed candidate to chair the Tribunal.⁵⁹⁸ or Counsel for Nicaragua confirmed the parties' agreement "I write to confirm Nicaragua's agreement with your proposal...."⁵⁹⁹
- 602) Yet, within the extensive collection of emails, there is no discussion nor any confirmation from Nicaragua that Riverside refused to take possession of HSF.
- 603) Nicaragua failed to respond to the Appleton Letter about the conditions that Nicaragua would seek to return HSF. Riverside sought to understand better the unspecified conditions imposed by Nicaragua to return HSF.⁶⁰⁰

⁵⁹⁶Judicial Order at Section entitled Factual Background at ¶ 1.5 (C-0251-SPA).

⁵⁹⁷See February 2, 2021, email from Pasipanodya to Appleton at 6:52 am at Bates 0005901; See email exchanges between Counsel from October 4, 2021- March 1, 2022 (C-0275-ENG).

⁵⁹⁸See February 1, 2021, email from Pasipanodya to Appleton at 2:57 pm at Bates 0005904; See email exchanges between Counsel from October 4, 2021- March 1, 2022 (C-0275-ENG).

⁵⁹⁹See November 3, 2021, email from Pasipanodya to Appleton at 1:53 pm at Bates 0005909; See email exchanges between Counsel from October 4, 2021- March 1, 2022 (C-0275-ENG).

⁶⁰⁰Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 (C-0118-ENG); Investor's Motion, November 13, 2022, at ¶¶ 50,55 (C-0256-ENG).

Nicaragua never provided any response to Riverside's September 9, 2022 letter until 2023 (years after the Application).

- 604) The emails from November 3, 2021, evidence the ongoing discussions between Nicaragua and Riverside focused on an expert for an inspection of HSF (Exhibit **C-0275-ENG**).
- a) The 2:00 pm email of November 3, 2021 discussed seeking a copy of the private forestry report and the potential property inspection; (Exhibit **C-0275-ENG** – see an email from Appleton to Pasipanodya – November 3, 2021 – 2:00 pm at Bates 0005908).
 - b) The 2:14 pm email also discussed a joint inspection; (Exhibit C-275-ENG – see an email from Pasipanodya to Appleton– November 3, 2021- 2:14 pm at Bates 0005908).
 - c) The 2:25 pm email from Appleton to Pasipanodya addressed that Nicaragua was in possession of the property and thus it “was in a much better position to make recommendations that could be considered by Riverside Coffee” on the identity of inspectors; (Exhibit **C-0275-ENG** – see email from Appleton to Pasipanodya– November 3, 2021, at 2:25 pm at Bates 0005907).
 - d) The 3:06 pm email from Appleton to Pasipanodya provided additional clarifications that Riverside sought to identify “some possible organizations or persons to start a meaningful and hopefully fruitful conversation that might result in the identification of persons or organizations upon whom the parties might agree to conduct an inspection”; (Exhibit **C-0275-ENG** – see email from Appleton to Pasipanodya– November 3, 2021 at 3:06 pm at Bates 0005906).
- 605) As seen from nearly one year's collection of emails, the issues between the disputing parties concerned a property inspection at HSF and a request to produce the Private Forest Reserve Report filed with the Nicaraguan government.
- 606) While Counsel for Riverside referred to Nicaragua's occupation of HSF in the emails concerning the property inspection report, at no time did Nicaragua disclose the judicial seizure order (which was in place since December 15, 2021).⁶⁰¹ Nicaragua continued with its systemic practice of deception to keep Riverside unaware of Nicaragua's unilateral measure.

⁶⁰¹See February 1, 2021 email from Appleton to Pasipanodya at 10:18 am at Bates 0005905; February 1, 2021 email from Pasipanodya to Appleton at 2:57 pm at Bates 0005904; February 1, 2021 email from Appleton to Pasipanodya at 3:13 pm at Bates 0005903; February 1, 2021 email from Pasipanodya to

- 607) None of the emails contained any reference to any refusal by Riverside to accept the return of HSF.
- 608) Nicaragua's Counsel never wrote any communication to Riverside confirming any refusal on the part of Riverside to return HSF. Riverside never wrote any communication to Nicaragua refusing to accept the return of HSF. The communications on September 9, 2021, were precisely about how to obtain the return of the lands.⁶⁰² Indeed if there had been a communication important enough to ground an entire judicial seizure application, one would have expected Nicaragua to have confirmed the refusal in writing.
- 609) Nicaragua produces no extrinsic confirmation of any refusal from Riverside to accept the return of HSF, as no such refusal ever took place. The extrinsic evidence is consistent in confirming Riverside's position. Riverside's Counsel never rejected Nicaragua's Offer to return HSF, and Nicaragua's claim otherwise – without offering any proof– is absurd.

C. DISCOVERY OF THE JUDICIAL SEIZURE ORDER

- 610) Nicaragua failed to serve the Judicial Order as ordered by the court in the Order. This raises the issue of Nicaragua relying upon its own wrong in violating the *nullus commodum* principle.⁶⁰³
- 611) Despite the requirement in the Order, a copy of the Judicial Order was never given to any person affected by the measure.⁶⁰⁴ As a result, Riverside could not be aware of this matter and rely effectively upon its legal rights.
- 612) The Investor was not aware of the existence of any order before the filing of its Memorial on October 21, 2022.⁶⁰⁵ Given Nicaragua's response, the Investor has reviewed this evidence in detail.

1. Nicaragua failed to serve the order on Riverside as ordered

Appleton at 3:28 pm at Bates 0005903; November 3, 2021 email from Appleton to Pasipanodya at 2:00pm at Bates 0005908; November 3, 2021 email from Pasipanodya to Appleton at 2:14pm at Bates 0005908; November 3, 2021 email from Pasipanodya to Appleton at 2:14pm at Bates 0005908; November 3, 2022 email from Appleton to Pasipanodya at 2:25 pm at Bates 0005907; November 3, 2021 email from Pasipanodya to Appleton at 3:00pm at Bates 0005907; and November 3, 2021 email from Appleton to Pasipanodya at 3:06 pm at Bates 0005906; See email exchanges between Counsel from October 4, 2021- March 1, 2022 **(C-0275-ENG)**.

⁶⁰²Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 **(C-0118-ENG)**.

⁶⁰³Bin Cheng, *General Principles* at p. 149. **(CL-0170-ENG)**.

⁶⁰⁴Judicial Order at Section entitled Decision at ¶ 4 **(C-0251-SPA-ENG)**.

⁶⁰⁵Investor's letter to the Tribunal regarding Discovery of *ex parte* Seizure Order, November 13, 2022, at ¶ 37 **(C-0256-ENG)**.

- 613) Nicaragua was ordered in December 2021 to serve the *Judicial Order* upon Riverside and its Counsel.⁶⁰⁶ Yet, no service occurred over the last eleven months after the Seizure Order was issued. As a result, Riverside did not become aware of this action until after the filing of its Memorial pleading.
- 614) While the Attorney General before its local courts- and now Counsel for Nicaragua- made extensive representations about what was said between Counsel, at no time did Nicaragua ever provide any supporting documents for any of its contentions.
- 615) Professor Bin Cheng confirms that the “no one may profit from their own wrongdoing” rule is a general principle of international law.⁶⁰⁷ Prof. Cheng refers to the Permanent Court of International Justice’s decision in the *Chorzow Factory* case, which stated:

It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party had, by some illegal act, prevented the later from fulfilling the obligation in question....⁶⁰⁸

- 616) A similar conclusion was made on this principle by the US-Iran Claims Tribunal in *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*.⁶⁰⁹
- 617) In the *Roberts* case, the US-Venezuela Mixed Claims commission rejected Venezuela’s prescriptive limitation defense on a thirty-year-old non-payment claim as follows:

The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose.⁶¹⁰

- 618) In the words of Prof. Bin Cheng, “[n]o one should be allowed to reap advantages from his own wrong.”⁶¹¹

⁶⁰⁶Judicial Order at Section entitled Decision at ¶ 4 (C-0251-SPA)/(C-0251-ENG).

⁶⁰⁷Bin Cheng, *General Principles* at p. 149. In this circumstance, he references the *Montijo Case* (1875) 2 Int. Arb. 1421 at 137 (CL-0251-ENG) at p. 149 of his treatise (CL-0170-ENG).

⁶⁰⁸Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26) at ¶ 86 (CL-0173-ENG).

⁶⁰⁹Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, 6 IRAN-U.S. C.T.R., at p. 6 (CL-0171-ENG).

⁶¹⁰*Frances Irene Roberts case*, Vol. IX, R.I.A.A 1903 – 1905 at p. 207 (CL-0172-ENG).

⁶¹¹Bin Cheng, *General Principles* at p. 150 (CL-0170-ENG).

619) In *Procedural Order No. 4*, the Riverside Tribunal concluded that Nicaragua's failure to serve the *Judicial Order* upon Riverside and its Counsel was a breach of fair and equitable treatment. In paragraph 37, the Tribunal noted:

it appears undisputed that the Court Order was not formally served on the Claimant, which is not in accordance with due process.

- 620) The legal process that was taken by Nicaragua regarding HSF rings hollow.
- a) There was no advance notice of the hearing provided to INAGROSA or Riverside.⁶¹² There was also no service of the order, which meant that there could be no effective review of the order before the courts and the affected parties had no rights of opposition,⁶¹³ allowing the false evidence in the record and other misadministration of the rule of law.
 - b) The documents provided by Nicaragua's Attorney General to the court contained false statements as a foundation for the Court's issuance of the *Judicial Order*.
 - c) INAGROSA, a local Nicaraguan company, was the owner of HSF yet it was not given notice of the hearing of the proceeding.⁶¹⁴
 - d) The apparent reason that Riverside was named as a party was the fact that Riverside had sought a determination under the CAFTA that is currently before this ICSID Tribunal.⁶¹⁵

621) In the *ADC* claim, the Tribunal made the following conclusion about the expectations that a foreign investor should have with respect to the fair administration of process in the state:

("[A]n actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing, and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the

⁶¹²Expert Statement of Renaldy J. Gutierrez at ¶¶ 90-93 (CES-06).

⁶¹³Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 94-95 (CES-06).

⁶¹⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 90-93 (CES-06).

⁶¹⁵Judicial Order at Section entitled Factual Background at ¶¶ 1.1-1.2 (C-0251-SPA).

actions are taken under due process of law’ rings hollow.”) (emphasis added).⁶¹⁶

622) Expert Renaldy J. Gutierrez notes :

104. Various aspects of this case raise significant concerns regarding the alignment of the Application and Judicial Order with the tenets of the rule of law, fundamental fairness, and the principles of good faith. These concerns encompass the omission in document service, misidentification of key parties in the Application, and a consistent lack of transparency. This involved severe misconduct by Nicaragua’s Attorney General, actions that were not in alignment with Nicaraguan law. When viewed as a whole, it is apparent both the Judicial Order and its Application significantly deviate from the proper application of Nicaraguan law.⁶¹⁷

623) Expert Gutierrez considers Article 14 of the Nicaraguan Civil Procedure Code on Good Faith and Procedural Integrity and then concludes:

Article 14 makes clear that “the parties, their representatives and all participants in the process” owe a duty of loyalty and good faith. The repeated failures of notice, service and the absence of fair hearing described above are violative of good faith and foundationally eroded procedural integrity to the litigants in this judicial process. On balance these gross irregularities constitute an abuse of rights of the legal process under Nicaraguan law.⁶¹⁸

624) These foundational basic expectations were not met by Nicaragua with respect to the Application, the hearing, and the Judicial Order. Overall, Nicaragua’s measures with respect to the Application, absence of notice of hearings, and the Judicial Order not only constituted an abuse of rights under the law of Nicaragua, but clearly under the FET standard under international law.

D. Effect of the Offer and the Judicial Seizure

625) Nicaragua bears direct state responsibility for actions that have resulted in the deprivation of HSF’s interests in INAGROSA. Such direct responsibility stems from the organs of the state who have taken measures to dispossess Riverside or its investment of property rights.

626) As noted above, as a matter of international law, under the doctrine of expropriation, Nicaragua assumed ownership of HSF at the time of the

⁶¹⁶ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, October 2, 2006, at ¶ 435 (CL-0106-ENG).

⁶¹⁷Expert Witness Statement of Renaldy J. Gutierrez at ¶ 104 (CES-06).

⁶¹⁸Expert Witness Statement of Renaldy J. Gutierrez at ¶ 107 (CES-06).

substantial deprivation. That is why the treaty requires payment of FMV or *restitutio in integrum* (which cannot occur in this claim as HSF cannot be returned integrally). Consequently, Nicaragua is the legal owner of HSF. Notably, the concept of mitigation *post facto* is not applicable in expropriation matters. The date for assessing damage is immutably stipulated in the treaty governing the investment.

a) Deprivation Effect of Order

- 627) The Judicial Order, which Nicaragua carried out in 2021, resulted in significant deprivation of core property rights.⁶¹⁹ This deprivation which would generally constitute an expropriation.
- 628) Nicaragua's covert legal proceedings in Nicaragua were manifestly abusive.⁶²⁰ Though ostensibly initiated to protect property rights, the judicial process culminated in an effective deprivation—transferring effective rights of title, such as possession or rights of alienation and hypothecation away from INAGROSA to the Trustee. INAGROSA had no notice of this process (either before or after), and neither did Riverside. This consequence stems from a skewed application of local law, as implemented by the presiding judge.
- 629) Pursuant to the Judicial Order dated December 15, 2021, the Court designated the State of Nicaragua as the judicial depository of HSF. This Order consequently divested INAGROSA of its possessory rights over the said property, conferring them upon Nicaragua.⁶²¹
- 630) As Expert Gutierrez discusses, the Judicial Order was implemented in a manner that resulted in *de jure* and *de facto* substantive deprivations of INAGROSA's property rights.⁶²²
- 631) Judge Julio Cesar Blandon Villagra's correspondence to the Jinotega Property Registry, directing a preventive annotation on the property title of Hacienda Santa Fé, substantiates that the Court's action was a precautionary measure.⁶²³

For your due compliance and other legal effects, I hereby transcribe the dictated order within the process the action of innominate precautionary measure [...].

⁶¹⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 83-84. **(CES-06)**.

⁶²⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 107 **(CES-06)**.

⁶²¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 78 **(CES-06)**.

⁶²² Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 73-84 **(CES-06)**.

⁶²³ Literal Property Certificate of Hacienda Santa Fé property title (Farm No. 6145) issued at 1:03 PM and attachments— Originally filed by the Respondent as part of Exhibit B-SPA November 15, 2022 **(C-0236-SPA)**

- 632) The Attorney General's petition construed the urgent precautionary measure request as a confluence of two separate legal notions, specifically, "intervention or judicial administration of productive, commercial, and industrial assets" under Article 343.3 of the Nicaraguan Civil Procedure Code and "deposit" under Article 3449 of the Nicaraguan Civil Code.⁶²⁴
- 633) INAGROSA was entitled to the right of notice to the Application and a right of appeal (opposition) when the order was made in December 2021,⁶²⁵ but neither time was INAGROSA given notice. This profoundly violated due process and the rule of law, including the law of Nicaragua⁶²⁶ and international norms of fairness.

b) Intervention or Judicial Administration of Productive, Commercial, and Industrial Assets

- 634) Article 343.3 of the Nicaraguan Civil Procedure Code authorizes the intervention or judicial administration of productive, commercial, and industrial assets as a precautionary measure. Although "intervention" and "judicial administration" appear to be used interchangeably, they embody distinct legal principles with disparate effects.⁶²⁷
- 635) Article 364 of the Nicaraguan Civil Procedure Code, the measure of intervention [...] allows the intervenor to scrutinize all operations executed by the administrator and proffer objections thereto.⁶²⁸ Article 364 of the Nicaraguan Civil Procedure Code states:
- With the measure of intervention of a company or productive assets, without altering the existing administration, the intervenor will take cognizance of each and every one of the operations carried out by the administrator and may oppose them.
- 636) In the case of an intervention, the owner's management and control rights over the property are affected.⁶²⁹ The Nicaraguan Civil Procedure Code is silent on whether Nicaragua requires judicial authorization to use, dispose, or hypothecate the property. Because of the silence, it is possible for Nicaragua to sell the property without the court's permission.⁶³⁰

⁶²⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶ 58 (CES-06).

⁶²⁵Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 88-89 (CES-06).

⁶²⁶Expert Witness Statement of Renaldy J. Gutierrez at ¶ 89 and ¶ 107 (CES-06).

⁶²⁷Expert Witness Statement of Renaldy J. Gutierrez at ¶ 58 (CES-06).

⁶²⁸Expert Witness Statement of Renaldy J. Gutierrez at ¶ 69 (CES-06).

⁶²⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 70 (CES-06).

⁶³⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 70 (CES-06).

c) Judicial Administration

637) Article 367 of the Nicaraguan Civil Code states:

When the judicial administration of a company or productive assets is agreed or named, it will be substituted for the pre-existing administrator and the rights, obligations, powers, and responsibilities of the judicial administrator, will be those that corresponded with ordinary character to the previous one. However, the administrator or the judicial administrator will need judicial authorization to dispose of or encumber a movable or immovable property, shares in the company or of this in others, to hire or fire personnel or any other act that its nature or importance, the judicial authority had expressly indicated.⁶³¹

638) The property owner's rights to management and control are compromised.⁶³² These are essential rights of private property. Judicial authorization is necessary for the property's disposition or encumbrance. As noted above, the disposition or encumbrance could occur under the intervention rights, and no court authorization would be expressly required.⁶³³

d) Judicial Deposit of Property

639) Deposit under Article 3229 of the Nicaraguan Civil Code means transferring possessory rights from the owner to the depositary, who is legally proscribed from utilizing the property.⁶³⁴

640) Article 3450 of the Nicaraguan Civil Code deals with the category of judicial deposits. If a public official makes the deposit, then the deposit is termed a sequestration.⁶³⁵ The judge who made the Judicial Order was a public official who created a judicial deposit, technically effected a sequestration.⁶³⁶

641) The legal effect of the sequestration of property is to transfer the possession of the property from the owner to the person in charge of the sequestration.⁶³⁷ Thus, under Article 3453 of the Nicaraguan Civil Code, the trustee obtained the core possessory and control rights over HSF.⁶³⁸ Under Article 3449 of the Civil Code, the Trustee is prohibited from using the property. Expert Gutierrez notes his concerns about the propriety of

⁶³¹ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 61 (CES-06).

⁶³² Expert Witness Statement of Renaldy J. Gutierrez at ¶ 60 (CES-06).

⁶³³ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 62 (CES-06).

⁶³⁴ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 64 and Footnote 37 (CES-06).

⁶³⁵ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 65 (CES-06).

⁶³⁶ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 65 (CES-06).

⁶³⁷ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 66 (CES-06).

⁶³⁸ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 66 and Footnote 40 (CES-06).

Nicaragua being names as the depository in this situation. He states in paragraph 67 of his Expert Witness Statement:

67) In this case the Court Order appointed the Nicaraguan State “judicial depository” of Hacienda Santa Fé, without further explanation or limitations on the depository’s power and authority, except for its term. The precautionary measure was ordered to last for two years from the date of its execution. Pursuant to Article 348 of the Nicaraguan Code of Civil Procedure, the judge should have appointed as depository the owner of the property and not the defendant in this action.⁶³⁹ However, in this case the Court appointed an unlikely candidate, the Defendant, as judicial depository. Questions of fairness immediately arise in appointing Riverside’s opponent in the arbitration claim as the independent judicial depository.⁶⁴⁰

e) Judicial Seizure resulted in a taking from INAGROSA.

- 642) The legal concepts cited manifest divergent impacts on property rights. While a deposit chiefly affects possessory rights, both intervention and judicial administration impact managerial and control rights.⁶⁴¹ The rights to disposition and hypothecation ostensibly remain with the property owner but they cannot be effectively used.⁶⁴² This is like a quarantine or blockage of the INAGROSA’s property rights.
- 643) The legal and practical deprivation effect of the Judicial Order resulted in a substantial deprivation of Riverside’s property rights.⁶⁴³ This substantial deprivation suffered by Riverside had an effect equivalent to expropriation.
- 644) The *de facto* taking of HSF on August 18, 2018, in addition to the substantial deprivation suffered due to the Judicial Order, constitutes a part of a composite act that taken together resulted in the expropriation of HSF.
- 645) The International Law Commission comments on the nature of composite acts say “[w]hile composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation.”⁶⁴⁴
- 646) Nicaraguan Legal Expert Gutierrez confirms that quiet possession, control right to alienation, and hypothecation have been coercively removed from

⁶³⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 67 and Footnote 42 (CES-06).

⁶⁴⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 67 (CES-06).

⁶⁴¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 60 (CES-06).

⁶⁴²Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 99-101 (CES-06).

⁶⁴³Expert Witness Statement of Renaldy J. Gutierrez at ¶ 101 (CES-06).

⁶⁴⁴ARSIWA Art 15 and commentary (9) (CL-0017-ENG).

INAGROSA for a two-year period.⁶⁴⁵ These are all core elements of the rights of private property that were taken from INAGROSA and controlled by Nicaragua, in its own name. This incremental encroachment is a creeping expropriation of HSF.

- 647) Besides its legal effects, the Judicial Order has palpable ramifications. It severely curtails Riverside's financial flexibility in relation to HSF, which is presently under Nicaragua's control and subject to 24-hour surveillance. Financial institutions would be disinclined to accept the property as collateral in such circumstances. INAGROSA previously had put HSF up as collateral for loans such as the LAAD loan. The Judicial Order made it impossible to post HSF as collateral for any loans. This abusive act was yet another means to limit Riverside (and INAGROSA's) financial capacity during the arbitration. Indeed, then Nicaragua attempted to rely upon the financially limiting effects of judicially freezing Riverside's main underlying asset and then audaciously claiming that this asset was now "illiquid" as a basis for its October 2023 Security for Costs Motion.⁶⁴⁶

2. Conclusions

- 648) The Judicial Order transferred the essential elements of title from the rightful owner, INAGROSA, to Nicaragua. INAGROSA lost exclusive title and had to share formal title with Nicaragua by fiat.⁶⁴⁷
- 649) As outlined above, the *de facto* effect of the Judicial Order was to prevent INAGROSA's quiet possession and control of HSF. As well, the Judicial Order deprived INAGROSA of its right to alienation and hypothecation for a two-year period.⁶⁴⁸ INAGROSA previously had made use of its rights of hypothecation such as with its loan with the Latin American Agricultural Development Bank (LAAD). Thus, preventing collateralization of HSF by INAGROSA had a direct and harmful effect upon INAGROSA (and its corporate parent Riverside). Both the restrictions on sale, and the restrictions on hypothecation, had direct effects on Riverside and INAGROSA. This was a substantial deprivation of property by any standard.
- 650) The impact of the Judicial Order occurred in 2021, years after the initial damage occurred. However, the Judicial Order did not occur in isolation. This act is an element of a composite breach based on separate, but related acts. The series of actions performed in a specific sequence or within a

⁶⁴⁵Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 99-101 (CES-06).

⁶⁴⁶ Nicaragua's Security for Costs Application, October 4, 2023, at ¶ 47 (C-0573-ENG).

⁶⁴⁷Expert Witness Statement of Renaldy J. Gutierrez at ¶ 97 (CES-06).

⁶⁴⁸ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 99 (CES-06).

specific timeframe, constituting a single act. CAFTA Article 10.7(2)(b) provides that damages run from the beginning of the invasion in the summer of 2018.

- 651) Further, Expert Gutierrez details the abuse of rights in the legal process of⁶⁴⁹[REDACTED]. This resulted in a *de jure* modification in the legal title of HSF, and *de facto* limitations, which prevented INAGROSA from entering⁶⁵⁰
- 652) CAFTA protects Riverside's expression of those Treaty rights. Nicaragua cannot take retaliatory action against Riverside for asserting its rights under the Treaty. Nicaragua's own Application linked this relief to Riverside's initiation of this CAFTA arbitration claim.⁶⁵¹ As a result of the combination of the 2021 actions with the June 2018 occupation of HSF, the 2021 actions are part of a series in a composite act with its damages reaching back to the start of the series of acts, which would be the June 16, 2018 invasion and occupation of HSF.
- 653) Further, the deprivation that harmed Riverside was based on an abuse of rights under Nicaraguan law⁶⁵² and international law. As a result, the damages arising from the 2021 abuse of rights start with the invasion in June 2018.
- 654) Collectively, these actions by the Nicaraguan government fulfill the criteria that would substantiate a claim of expropriation under the "sole effects doctrine."
- 655) The substantial deprivation affecting Riverside transpired during the occupation in July 2018. Documentary evidence establishes a clear nexus between the Nicaraguan state and the substantial deprivation damages arising from the occupation controlled by persons for whom Nicaragua has state responsibility under international law.
- 656) We also note that Luis Gutierrez in his Reply witness statement has confirmed that he had not been offered entry to HSF, nor allowed entry to HSF since the Judicial Order took place.⁶⁵³
- 657) **Legal Basis of Expropriation** - As a matter of international law, Nicaragua assumed ownership of HSF at the time of the substantial deprivation in the summer of 2018 under the doctrine of expropriation. That is why the treaty requires payment of FMV or *restitutio in integrum* (which cannot occur in this

⁶⁴⁹Expert Witness Statement of Renaldy J. Gutierrez in Question 2 (CES-06).

⁶⁵⁰Expert Witness Statement of Renaldy J. Gutierrez in Question 2 – especially ¶¶ 74-79 regarding de jure taking of title and ¶¶ 104-107 on the abuse of rights (CES-06).

⁶⁵¹Application for Urgent Precautionary Measures, November 30, 2021 (C-0253-SPA-ENG).

⁶⁵²Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 104-107 (CES-06).

⁶⁵³Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 163-165 (CWS-10).

claim as HSF cannot be returned integrally). Consequently, Nicaragua is the legal owner of HSF once an expropriation occurs. Notably, the concept of mitigation *post facto* is not applicable in expropriation matters. The date for assessing damage is immutably stipulated in the Treaty.

- 658) Nicaragua's actions, both in orchestrating the occupation and subsequent legal maneuvers, defy the principles of international law and Fair and Equitable treatment, thus warranting an appropriate legal remedy.
- 659) Nicaragua has attempted to foist restitution upon Riverside as a remedy. That was essentially the purpose of the "offer." The goal was to force Riverside to replace an operating facility at HSF with a mere shell that has suffered the annihilation of its core economic drivers and had all its financial resources pulled away from it.
- 660) Should the Tribunal opt not to categorize the deprivation as an expropriation, only then does the issue of Nicaragua's "purported offer" come into play. Fundamentally, Riverside's investment was not obligated to reacquire HSF in its severely diminished state. *Restitutio in integrum* was impossible.
- a) Following its deforestation, the forest's regeneration would require a minimum of 40 years for new trees to replace those that were deforested.
 - b) Soil remediation would take one-to-two years, and only then could new plantings in the avocado plantation be commenced. That would necessitate at least 6 years of investment and waiting to obtain a replacement crop, resulting in an unreasonable delay of over 9 years from the purported Offer in 2021 to the operative time for avocado operations to resume.
 - c) According to Nicaragua's expert analysis, the financial outlay to reconstruct the avocado operation would range between \$8 to \$10 million and take a minimum of four years from the planting date.⁶⁵⁴
 - d) The HSF offer to Riverside was essentially a shell due to the destruction of its core economic drivers.
- 661) Remarkably, Nicaragua proffered no accompanying financial compensation for the restitution of the property. Under these circumstances, a true return of an economically viable property is a sheer impossibility.
- 662) **Abusive Legal Maneuvers** - As elaborated below, Nicaragua's Offer was disingenuous, and the subsequent covert legal proceedings in Nicaragua were manifestly abusive.

⁶⁵⁴Expert Report of Dr. Odilo Duarte at ¶ 9.1.8 (RER-02).

- a) First, it is clear from Nicaragua's explanatory letter to the Tribunal of November 23, 2022, the September 9 Reichler Letter was issued solely to justify its November 2021 court Application.⁶⁵⁵ However, it appears that Nicaragua did not anticipate Riverside's response later that very same day, which was not a refusal of the "offer" but an inquiry with a request for clarity. Riverside responded with questions as Riverside naively understood that the letter was a legitimate settlement offer.

Nicaragua has proceeded on the incorrect basis that the inquiry was a refusal. Nicaragua says that the reason for the court application in November was the express refusal of Riverside to accept the return of HSF. But nowhere in the September 9, 2021, correspondence, was there an express refusal of the return of HSF, nor any communication that INAGROSA would refuse to make itself available to accept the return of HSF as part of a legitimate settlement in which Nicaragua also would remunerate Riverside for the substantial damages caused. Yet, those two "factual" points were falsely put into its Application (which was not subjected to scrutiny from INAGROSA or Riverside in the Application), and the untruths then were repeated to the Tribunal in its November 2022 explanatory letter.⁶⁵⁶

- b) Second, the actual operation of the Judicial Order did not create a protective bailment over the property. A review of the operation of Nicaraguan law and the skewed implementation of the Judicial Order demonstrates that Nicaragua formally took possession of control and the core elements of effective title away from Riverside's investment in December 2021.⁶⁵⁷ This Judicial Order was issued for a two-year period (which is still operational today).

663) Though ostensibly initiated to protect property rights, the judicial process culminated in an effective deprivation—transferring title away from INAGROSA to the Trustee. INAGROSA had no notice of this process (either before or after), and neither did Riverside. This consequence stems from a skewed application of local law, as implemented by the presiding judge.

664) **Absence of Mitigation Salvage Value** - Given the extent of the deprivation and harm inflicted on Riverside at HSF, Nicaragua could not reasonably assert a mitigation salvage value for HSF. The reason is simple. The Treaty establishes compensation of the fair market value (FMV) at the time of the taking. Acts or facts that arise after that time are not considered. In essence,

⁶⁵⁵Letter from Nicaragua to Tribunal regarding Judicial Seizure – November 23, 2022.at page 3. **(C-0257-ENG)**.

⁶⁵⁶Letter from Nicaragua to Tribunal regarding Judicial Seizure – November 23, 2022.at page 3 **(C-0257-ENG)**.

⁶⁵⁷Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 96-101 **(CES-06)**.

the host state has purchased the expropriated business. There can be no mitigation because the item was sold. Mitigation is available for other Treaty obligations, but in these circumstances, mitigation through resumption of control of the lands from Nicaragua is challenging given the fact that the lands were rendered non-operational, deforested of valuable hardwoods and the Hass avocado plantations, and the soil and other growing conditions were severely compromised.

IV. OWNERSHIP AND CONTROL OF INAGROSA

665) Part III addresses the ownership and control of INAGROSA by Riverside

Riverside's longstanding interests in INAGROSA

666) Riverside made its first investment in INAGROSA in 1997 and it made its last formal financial commitment to INAGROSA in March 2018 for US\$16 million plus interest moratorium of another \$1.5 million.⁶⁵⁸

667) Riverside is an American limited liability company incorporated in Kansas. Riverside owned shares and debt in INAGROSA at the time of the expropriation in 2018.⁶⁵⁹

668) To obtain treaty protection by the CAFTA, an investor must be an investor of another party or have a covered investment under the treaty. The CAFTA defines an investor of a party as follows:

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.⁶⁶⁰

669) Riverside has owned shares in INAGROSA since September 2003. Riverside's pleading asserts ownership of shares in INAGROSA.⁶⁶¹ As an owner of shares in INAGROSA, Riverside is entitled to bring a claim under the CAFTA.

670) Riverside has been the controlling shareholder of INAGROSA for many years before the June 2018 invasion.⁶⁶² Riverside controlled INAGROSA at the

⁶⁵⁸ Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion March 7, 2018 (**C-0287-ENG**); Witness Statement of Melvin Winger - Memorial - ENG at ¶ 8 (**CWS-04**); Witness Statement of Mona Winger -Memorial -ENG at ¶ 10-11 (**CWS-05**); Witness Statement of Melva Jo Winger de Rondon- Memorial - ENG at ¶ 26 (**CWS-03**).

⁶⁵⁹Articles of Incorporation- Riverside Coffee, LLC, June 18, 1999 (**C-0040-ENG**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022, at ¶ 3 (**C-0055-ENG**).

⁶⁶⁰CAFTA, Article 10.28: Definitions.

⁶⁶¹Memorial at ¶¶ 41,83-85,87, 89,91, 102, and 468.

⁶⁶²Witness Statement of Melva Jo Winger de Rondon – Memorial – ENG at ¶ 39 (**CWS-03**).

time of the Invasion. As the controlling shareholder in 2018,⁶⁶³ Riverside can bring a claim arising from its control of INAGROSA.⁶⁶⁴

1. Investments prior to share issuance

- 671) Riverside was incorporated in 1999. As early as 1997 (two years before incorporation), Melvin and Mona Winger, US investors who eventually became members of Riverside, made investments in INAGROSA.⁶⁶⁵
- 672) The indicium of financial control goes back well before the 2018 invasion of HSF. By the end of 1999, Riverside members made more than \$350,000 in investment loans in INAGROSA (recorded in a handwritten ledger from Riverside's books).⁶⁶⁶
- 673) The loans are summarized as follows:

Year	Summary of all Investors in INAGROSA ⁶⁶⁷
1999	\$233,850.25
2000	\$526,000.00
2001	\$227,000.00
2002	\$182,500.00
2003	\$286,000.00

- 674) The pre-incorporation investments were held as loans to INAGROSA. In 2003, when INAGROSA shares were issued to Riverside, the cost of the shares was deducted from the loans already advanced to INAGROSA by Riverside.

⁶⁶³Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 37 (**CWS-03**). Witness Statement of Melvin Winger – Memorial – ENG at ¶ 30 (**CWS-04**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 212, 220 (**CWS-01**).

⁶⁶⁴Witness Statement of Melvin Winger – Memorial – ENG at ¶ 32 (**CWS-04**); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 46 (**CWS-03**).

⁶⁶⁵ Witness Statement of Melvin Winger - Memorial - ENG at ¶ 8 (**CWS-04**); Witness Statement of Mona Winger -Memorial -ENG at ¶ 10-11 (**CWS-05**); Witness Statement of Melva Jo Winger de Rondon-Memorial - ENG at ¶ 26 (**CWS-03**).

⁶⁶⁶Riverside Coffee, LLC ledger of capital contributions and loans (**C-0294-ENG**).

⁶⁶⁷ Summary of Total Investment by All Investors in INAGROSA, undated (**C-0295-ENG**).

2. Riverside's share ownership started in 2003

675) Riverside and Melvin Winger first acquired shares in INAGROSA on September 24, 2003,⁶⁶⁸ but INAGROSA did not formally issue them until August 31, 2004. INAGROSA increased its social capital and issued new shares.⁶⁶⁹ This share issuance INAGROSA approved in shareholder meeting minute no. 14, dated September 24, 2003.⁶⁷⁰

CHART A- INAGROSA new shares

Date	Owner	Share Cert	Shares	% of Control	Exhibit
Aug. 31, 2004	Riverside	12	25	50%	C-0043-SPA
		13	20		C-0044-SPA
		14	4		C-0045-SPA
		15	0.5		C-0046-SPA
		16	0.5		C-0047-SPA
	Carlos Rondón	19	25	26%	C-0050-SPA
		20	1		C-0051-SPA
	Ana Lorena Rondón	21	20	20%	C-0314-SPA
	Melvin Winger	17	3	4%	C-0048-SPA
		18	1		C-0049-SPA
TOTAL			100	100%	

676) The issuance of the new shares was recorded in the INAGROSA share register.⁶⁷¹ The INAGROSA share register is presumptively valid as it was filed with the Mercantile Registry in Nicaragua.⁶⁷²

⁶⁶⁸INAGROSA Share Registry Book-Riverside shareholder entry page, undated (C-0312-SPA).
INAGROSA Share Registry Book- Melvin Winger shareholder entry page, undated (C-0659-ENG).

⁶⁶⁹INAGROSA Share Registry Book-Riverside shareholder entry page, undated (C-0312-SPA).

⁶⁷⁰INAGROSA Shareholder Meeting No. 14, September 24, 2003 (C-0313-SPA).

⁶⁷¹INGROSA Share Registry Book, 1996-2020 (C-0315-SPA).

⁶⁷²Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 196-197 (CES-06).

- 677) On January 30, 2013, the INAGROSA shareholder composition changed. Melvin Winger increased his share ownership to 25.5%.⁶⁷³
- 678) Similarly, the 2013 INAGROSA shareholder composition was recorded on the INAGROSA share register.⁶⁷⁴ The 2013 INAGROSA shareholder composition was approved in shareholder meeting minute no. 48 dated January 30, 2013.⁶⁷⁵

CHART B- 2013 INAGROSA shareholder composition

Date	Owner	Share Cert	Shares	% of Control	Exhibit
January 30, 2013	Riverside	12	25.5	25.5%	C-0043-SPA
		15			C-0046-SPA
	Melvin Winger	13	25.5	25.5%	C-0316-SPA
		16			C-0318-SPA
		20			C-0319-SPA
	Carlos Rondón	19	25	25%	C-0050-SPA
	Ward Nairn	14	24	24%	C-00317-SPA
		21			C-00314-SPA
TOTAL			100	100%	

- 679) The INAGROSA shareholder composition remained the same until August 28, 2020, when Riverside acquired 95 %⁶⁷⁶ and Carlos Rondón⁶⁷⁷ acquired 5% of INAGROSA.

3. A Brief Review of Evidence filed in the Memorial on Control

- 680) Riverside already produced evidence of its control in its Memorial. Riverside has provided direct evidence of control by the most senior officers of INAGROSA (the controlled entity), the most senior officers of Riverside (the

⁶⁷³INAGROSA Share Certificate No. 13- Riverside endorsement to Melvin Winger (**C-0316-SPA**). INAGROSA Share Certificate No. 16- Riverside endorsement to Melvin Winger (**C-0318-SPA**); and INAGROSA Share Certificate No. 20- Carlos Rondón endorsement to Melvin Winger (**C-0319-SPA**).

⁶⁷⁴INGROSA Share Registry Book, 1996-2020 (**C-0315-SPA**).

⁶⁷⁵Notarial certificate of InagroSA Shareholder Meeting Minute No. 48, January 30, 2013 (**C-0126-SPA**).

⁶⁷⁶INAGROSA Share Certificate No. 23, August 28, 2020 (**C-0053-SPA**).

⁶⁷⁷INAGROSA Share Certificate No. 22, August 28, 2020 (**C-0052-SPA**).

controller), and the Riverside Member with the most significant equity interest. This included:

- a) The witness evidence of Melvin D. Winger, the Operating Manager of Riverside, and the former President of INAGROSA.
 - b) The witness evidence of Carlos Rondón, the Chief Operating Officer of INAGROSA.
 - c) The witness evidence of Mona L. Winger, a Member of Riverside.
 - d) The witness evidence of Melva Jo Winger de Rondón, the legal representative of Riverside to INAGROSA at the time of the internationally wrongful events (and the current Operating Manager of Riverside); and
 - e) Riverside's pleading that it is a creditor of debt in INAGROSA.⁶⁷⁸
- 681) This extensive evidence has been expanded in this Reply Memorial to include:
- a) US tax filings filed annually from 2014 to 2018 independently confirming that INAGROSA was a controlled foreign subsidiary of Riverside, and Riverside's majority voting control of INAGROSA.⁶⁷⁹
 - b) Documentation evidence Riverside's extensive financial control, such as promissory notes,⁶⁸⁰ draft loan agreements,⁶⁸¹ and confirmations of extensive financial commitments to fund the avocado expansion.⁶⁸²

4. Riverside's Financial Control over INAGROSA

- 682) Riverside exerted financial control over INAGROSA. This financial control occurred as:

⁶⁷⁸Memorial at ¶¶ 95, 469, 929.

⁶⁷⁹2015 Riverside US Federal IRS Tax Return- Form 1065 (**C-0320-ENG**); 2016 Riverside US Federal IRS Tax Return- Form 1065 (**C-0321-ENG**); 2017 Riverside US Federal IRS Tax Return- Form 1065 (**C-0322-ENG**); and 2018 Riverside US Federal IRS Tax Return- Form 1065 (**C-0323-ENG**).

⁶⁸⁰INAGROSA Promissory Note to Riverside December 15, 2014 (**C-0288-ENG**); and Extension INAGROSA Promissory Note to Riverside, December 1, 2019 (**C-0289-ENG**).

⁶⁸¹Draft Loan agreement between Melvin Winger and INAGROSA, 2003 (**C-0324-ENG**); and INAGROSA Meeting Minute No. 23 regarding authorization to Carlos Rondón to accept a loan from Melvin Winger on behalf of INAGROSA, May 23, 2005 (**C-0325-SPA**).

⁶⁸²Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (**C-0286-ENG**); and Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (**C-0287-ENG**).

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- a) Riverside was the largest creditor of INAGROSA (with over \$9.5 million in existing loans)⁶⁸³; and
 - b) Riverside had committed to making a further \$16 million investment in INAGROSA for the Hass avocado expansion in March 2018.⁶⁸⁴
- 683) The loans made before 2014 were listed and consolidated in a listing that formed part of the 2014 transfer of loans from the Melvin D. Winger Revocable Trust and the Mona L. Winger Revocable Trust to Riverside.⁶⁸⁵ These loans are summarized in the following two documents:
- a) The transfer from the Melvin D. Winger Revocable Trust to Riverside Coffee, LLC on December 15, 2014 ⁶⁸⁶ and
 - b) The transfer from the Mona L Winger Revocable Trust to Riverside on December 15, 2014.⁶⁸⁷
- 684) Early Riverside investments in INAGROSA were recorded in three additional key documents:
- a) Summary of Total Investment by all Investors in INAGROSA.⁶⁸⁸
 - b) Riverside's Investment in INAGROSA 2001-2018.⁶⁸⁹
 - c) Riverside Coffee, LLC ledger of capital contributions and loans.⁶⁹⁰
 - d) In 2014, the Melvin D. Winger Revocable Trust and the Mona L, Winger Revocable Trust transferred their investments in INAGROSA to Riverside.
- 685) The loans made by Riverside made numerous loans to INAGROSA over the years are detailed as follows:

⁶⁸³Richter Expert Reply Damages Report at ¶¶ 4.48-4.49 **(CES-04)**.

⁶⁸⁴Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 **(C-0287-ENG)**.

⁶⁸⁵Melvin D. Winger Revocable Trust transfer to Riverside Coffee, LLC December 15, 2014 **(C-0293-ENG)**; Mona L. Winger Revocable Trust transfer to Riverside Coffee, LLC, December 15, 2014 **(C-0291-ENG)**.

⁶⁸⁶Melvin D. Winger Revocable Trust transfer to Riverside Coffee, LLC December 15, 2014 **(C-0293-ENG)**

⁶⁸⁷Mona L. Winger Revocable Trust transfer to Riverside Coffee, LLC, December 15, 2014 **(C-0291-ENG)**.

⁶⁸⁸Summary of Total Investment by All Investors in INAGROSA, undated **(C-0295-ENG)**.

⁶⁸⁹Riverside Investment in INAGROSA 2001-2018, December 31, 2018 **(C-0424-ENG)**.

⁶⁹⁰Melvin D. Winger Revocable Trust transfer to Riverside Coffee, LLC December 15, 2014 **(C-0293-ENG)**; Mona L. Winger Revocable Trust transfer to Riverside Coffee, LLC, December 15, 2014 **(C-0291-ENG)**.

CHART D – Loans from Riverside

Loan Date	Original Creditor	Principal USD	Interest rate %
12/30/1998	Mona L. Winger	312,500.00	8.25
12/30/1998	Melvin D. Winger	62,500	8.25
5/10/2001	Mona L. Winger	4,500.00	8.0
6/1/2001	Mona L. Winger	12,000.00	8.0
6/22/2001	Mona L. Winger	3,500.00	8.0
6/22/2001	Mona L. Winger	13,500.00	8.0
7/20/2001	Mona L. Winger	20,000.00	8.0
8/2/2001	Mona L. Winger	12,000.00	8.0
9/7/2001	Mona L. Winger	12,000.00	8.0
9/20/2001	Mona L. Winger	25,000.00	8.0
9/28/2001	Mona L. Winger	12,200.00	8.0
9/28/2001	Melvin D. Winger	72,300	8.00
10/19/2001	Mona L. Winger	10,000.00	8.0
11/19/2001	Mona L. Winger	12,000.00	8.0
12/4/2001	Mona L. Winger	18,000.00	8.0
1/15/2002	Mona L. Winger	12,000.00	8.0
1/31/2002	Mona L. Winger	200.00	8.0
2/7/2002	Mona L. Winger	3,100.00	8.0
2/7/2002	Mona L. Winger	9000.00	8.0
3/7/2002	Mona L. Winger	8,000.00	8.0
3/28/2002	Mona L. Winger	1,200.00	8.0
4/12/2002	Mona L. Winger	13,000.00	8.0

5/10/2002	Mona L. Winger	14,000.00	8.0
6/21/2002	Mona L. Winger	12,000.00	8.0
7/17/2002	Mona L. Winger	14,000.00	8.0
8/14/2002	Mona L. Winger	14,000.00	8.0
9/9/2002	Mona L. Winger	7,000.00	8.0
9/18/2002	Mona L. Winger	30,000.00	8.0
10/17/2002	Mona L. Winger	15,000.00	8.0
10/18/2002	Mona L. Winger	15,000.00	8.0
12/12/2002	Mona L. Winger	15,000.00	8.0
2/19/2003	Mona L. Winger	20,000.00	8.0
5/15/2003	Mona L. Winger	15,000.00	8.0
7/30/2003	Mona L. Winger	20,000.00	8.0
8/18/2003	Mona L. Winger	10,000.00	8.0
8/29/2003	Mona L. Winger	20,000.00	8.0
9/4/2003	Mona L. Winger	31,000.00	8.0
9/12/2003	Mona L. Winger	14,900.00	8.0
9/12/2003	Mona L. Winger	100.00	8.0
9/24/2003	Mona L. Winger	20,000.00	8.0
10/1/2003	Mona L. Winger	10,000.00	8.0
10/29/2003	Mona L. Winger	50,000.00	8.0
11/17/2003	Mona L. Winger	25,000.00	8.0
11/21/2003	Mona L. Winger	35,000.00	8.0
12/16/2003	Mona L. Winger	15,000.00	8.0
1/24/2004	Mona L. Winger	500.00	8.0

4/29/2004	Mona L. Winger	15,000.00	8.0
5/13/2004	Mona L. Winger	10,000.00	8.0
5/28/2004	Mona L. Winger	10,000.00	8.0
7/26/2004	Mona L. Winger	14,000.00	8.0
8/20/2004	Mona L. Winger	500.00	8.0
8/27/2004	Mona L. Winger	35,000.00	8.0
9/27/2004	Mona L. Winger	16,000.00	8.0
10/1/2004	Mona L. Winger	10,000.00	8.0
10/8/2004	Mona L. Winger	18,000.00	8.0
10/15/2004	Mona L. Winger	40,000.00	8.0
10/28/2004	Mona L. Winger	50,000.00	8.0
11/6/2004	Mona L. Winger	15,000.00	8.0
11/26/2004	Mona L. Winger	25,000.00	8.0
12/10/2004	Mona L. Winger	30,000.00	8.0
12/15/2004	Mona L. Winger	25,000.00	8.0
12/22/2004	Mona L. Winger	28,000.00	8.0
1/25/2005	Mona L. Winger	15,000.00	8.0
2/3/2005	Mona L. Winger	85,000.00	8.0
3/11/2005	Mona L. Winger	600.00	8.0
6/17/2005	Mona L. Winger	17,000.00	8.0
7/22/2005	Mona L. Winger	17,000.00	8.0
8/10/2006	Mona L. Winger	3,000.00	8.0
11/9/2006	Mona L. Winger	10,000.00	8.0
12/12/2006	Mona L. Winger	3,000.00	8.0

6/15/2007	Mona L. Winger	15,000.00	8.0
6/1/2014	Mona L. Winger Revocable Trust	2,350.00	8.0
10/9/2014	Mona L. Winger Revocable Trust	634,000.00	8.0
Total Principal Amount		2,214,450.00	

686) Because of accrued interest, the value of the unpaid loans over the last twenty plus years is US\$ 9.5 million.⁶⁹¹

687) Nicaraguan Legal Expert Gutierrez reviewed the promissory notes Riverside held at the time of the Invasion. He confirms that the promissory notes establish legally valid obligations under Nicaraguan law.⁶⁹²

5. Expansion of the Business

688) Riverside was fully aware of INAGROSA's expansion plans.⁶⁹³ Riverside was prepared to make additional capital available to INAGROSA if necessary.⁶⁹⁴

689) If Inagrosa did not secure outside funding to implement the expansion,⁶⁹⁵ Riverside was prepared to invest up to US\$17.5 million into Inagrosa's expansion of the Hass avocado production at Hacienda Santa Fé and move Inagrosa into Hass avocado sales into export markets such as the United States.⁶⁹⁶ Like all of Riverside's investments since 1999, this investment was made on an interest-only basis.⁶⁹⁷ Riverside charged U.S. bank prime to INAGROSA on its loans.⁶⁹⁸

⁶⁹¹ Richter Expert Reply Damages Report – Reply- ENG at Chart 4 (CES-04).

⁶⁹²Expert Witness Statement of Renaldy J. Gutierrez Question 4, at ¶ 195 (CES-06).

⁶⁹³Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 31 (CWS-03); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 20 (CWS-04); Witness Statement of Mona Winger – Memorial – ENG at ¶¶ 23,27(CWS-05).

⁶⁹⁴Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 35 (CWS-03); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 23 (CWS-04); Witness Statement of Mona Winger – Memorial – ENG at ¶ 27 (CWS-05).

⁶⁹⁵Witness Statement of Melva Jo Winger – Memorial – ENG at ¶ 34 (CWS-03).

⁶⁹⁶Witness Statement of Melva Jo Winger – Memorial – ENG at ¶ 34 (CWS-03).

⁶⁹⁷Witness Statement of Mona Winger – Memorial – ENG at ¶ 24 (CWS-05); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 34 (CWS-03).

⁶⁹⁸Witness Statement of Mona Winger – Memorial – ENG at ¶ 24 (CWS-05); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 34 (CWS-03).

- 690) By the summer of 2018, Riverside had invested over U.S.\$9.5 million in the Nicaraguan investment ⁶⁹⁹ The value of these loans has been summarized in the Richter Expert Reply Damages Report in Chart 4 as follows:

Richter Reply Chart 4 – Investment Balance Calculations ⁷⁰⁰

in \$USD, unless otherwise stated

		Compounded Interest	
		as at June 16, 2018	as at July 15, 2024
Equity	<i>Note 1</i>	625,000	625,000
Debt:		2,665,600	2,665,600
Principal		3,290,600	3,290,600
Less: payments		(470,894)	(470,894)
Interest (Debt + Equity)		6,773,459	12,762,077
Total		9,593,165	15,581,783

Notes

(1) Total equity investments broken down below :

Larry Winger	31,250
Ward Nairn	31,250
Daniel Senestrano	125,000
Arch Nairn	62,500
Melvin Winger	62,500
Mona Winger	312,500
	625,000

- 691) Riverside and was prepared to provide significant additional capital for the INAGROSA Hass avocado expansion already underway in 2018. This was through the commitment of \$16 million in capital and the commitment of interest relief of another \$1.5 million for a total of \$17.5 million to assist INAGROSA operate its business and complete its Hass avocado expansion.⁷⁰¹
- 692) Riverside owns and controls the Investment in Nicaragua. It also is an investor with investments in debt of INAGROSA. All these investments meet the definition in the CAFTA and the characteristics of an investment under Article 25 of the ICSID Convention. Accordingly, Riverside has the standing to bring this claim.
- 693) Riverside had a promissory note listing the investments made by Riverside in INAGROSA. The INAGROSA Promissory Note to Riverside was executed

⁶⁹⁹Richter Expert Reply Damages Report at Chart 4 (CES-04).

⁷⁰⁰Richter Expert Reply Damages Report at Chart 4 (CES-04).

⁷⁰¹ Witness Statement of Melva Jo Winger de Rondon-Reply- - ENG at ¶¶ 82-83 (CWS-08). Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (C-0286-ENG). Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (C-0286-ENG).

on December 15, 2014.⁷⁰² The Promissory Note's term was extended in December 2019.⁷⁰³

- 694) The Expert Gutierrez reviewed the legal sufficiency of the Promissory note. He confirms that the promissory note was evidence of a debt owed by INAGROSA to Riverside under the law of Nicaragua.⁷⁰⁴ In coming to his conclusion, he relied on a legal opinion that confirmed that the promissory note was a valid instrument under the law of the State of Kansas.⁷⁰⁵
- 695) On June 10, 2016, Riverside issued a Members' Resolution to provide financial support to INAGROSA in its conversion from coffee to Hass Avocados.⁷⁰⁶
- 696) A second resolution occurred on March 7, 2018. It referred to the earlier June 2016 resolution and confirmed up to \$16 million to INAGROSA for its Hass Avocado expansion.⁷⁰⁷ Further, Riverside held over \$9.5 million in existing loans in INAGROSA during the 2018 invasion.⁷⁰⁸ Riverside holds one promissory note with INAGROSA issued on December 15, 2014.⁷⁰⁹ This promissory note was extended on December 1, 2019.⁷¹⁰

6. Management control

- 697) In addition to the financial control through loans, Riverside exerted actual management control due to its majority control over the shares in INAGROSA. The indicia of management control went back well before the 2018 invasion of HSF.
- 698) Because of U.S. tax considerations after March 2010, Melvin Winger always avoided control of a foreign corporation such as INAGROSA.⁷¹¹ Melvin Winger's Revocable Trust voted his Inagrosa shares with Riverside.⁷¹² They and Riverside consistently voted a combined total of 51% of INAGROSA

⁷⁰²INAGROSA Promissory Note to Riverside December 15, 2014 **(C-0288-ENG)**.

⁷⁰³Extension INAGROSA Promissory Note to Riverside, December 1, 2019 **(C-0289-ENG)**.

⁷⁰⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶ 195 **(CES-06)**.

⁷⁰⁵Expert Witness Statement of Renaldy J. Gutierrez at ¶ 194 **(CES-06)**.

⁷⁰⁶Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 **(C-0286-ENG)**; Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 **(C-0286-ENG)**

⁷⁰⁷Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 **(C-0287-ENG)**.

⁷⁰⁸Richter Expert Reply Damages Report at Chart 4 **(CES-04)**.

⁷⁰⁹INAGROSA Promissory Note to Riverside December 15, 2014 **(C-0288-ENG)**.

⁷¹⁰Extension INAGROSA Promissory Note to Riverside **(C-0289-ENG)**.

⁷¹¹Witness Statement of Melvin Winger – Memorial – ENG at ¶ 26 **(CWS-04)**.

⁷¹²Witness Statement of Melvin Winger – Memorial – ENG at ¶¶ 25,30 **(CWS-04)** Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶¶ 39-40. **(CWS-03)**.

shares, sufficient to allow Riverside to control INAGROSA.⁷¹³ Ward Nairn consistently voted his 24% of INAGROSA shares along with Riverside. As a result, Riverside always presented a control bloc of 75% of Inagrosa shares.⁷¹⁴

- 699) As of January 30, 2013, Melva Jo Winger de Rondón was Riverside's representative before the INAGROSA Board of Directors.⁷¹⁵ Riverside vetted all significant decisions made by the INAGROSA Board of Directors and had the final word.⁷¹⁶
- 700) Melva Jo Winger de Rondón, confirms that Riverside consistently voted in combination with the shares held by Ward Nairn and the interests of Melvin Winger and then the Melvin Winger Revocable Trust.⁷¹⁷
- 701) Riverside always maintained voting control over INAGROSA.⁷¹⁸ This Riverside voting bloc was not recorded in a written document but was followed in every vote. This agreement ensured that Riverside controlled board decisions at Inagrosa from 2013 onwards.⁷¹⁹
- 702) On behalf of Riverside, Melva Jo Winger de Rondón ensured that Riverside consistently voted its shares with the unwavering support of Melvin Winger.⁷²⁰ That alone added to 51% of the shares of INAGROSA. In addition, Ward Nairn's unwavering support consolidated Riverside's vote count, allowing Riverside to control 75% of every vote.⁷²¹
- 703) Riverside continues to control INAGROSA to this day.⁷²²

⁷¹³Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 30 (**CWS-04**).

⁷¹⁴Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (**CWS-03**).

⁷¹⁵Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 22 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶15 (**CWS-04**); Inagrosa Shareholder Meeting Minute No.48 dated January 30, 2013 (**C-0126-SPA**).

⁷¹⁶Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 30 (**CWS-03**).

⁷¹⁷Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶¶ 40, 43 (**CWS-03**).

⁷¹⁸Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶¶ 40, 46 ((**CWS-03**).

⁷¹⁹Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (**CWS-03**).

⁷²⁰Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶¶ 26,29 (**CWS-03**); Witness Statement of Mona Winger – Memorial – ENG at ¶10-11 (**CWS-05**); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 8 (**CWS-04**).

⁷²¹Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 43 (**CWS-03**).

⁷²²Witness Statement of Melvin Winger – Memorial – ENG at ¶ 32 ((**CWS-04**); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 46 (**CWS-03**).

V. PERMITS AND APPROVALS

704) Nicaragua asserts a regulatory defence that there were significant regulatory requirements associated with these businesses that INAGROSA had not met. Nicaragua alleges regulatory insufficiencies over the following:

- Phytosanitary permits (food safety)
- Environmental Permits (land use)
- Water Concessions
- Forest Permits
- Export Permits

705) In the Counter-Memorial, Nicaragua has taken an *argumentum in terrorem* approach. Nicaragua warns that the permitting processes that INAGROSA needed to complete were “uncertain and cannot be assumed.”⁷²³ It further contends that:

Each violation carries a substantial monetary penalty and the fact that the violations persisted over a five-year period suggests that Inagrosa could be susceptible to the more severe sanctions under Nicaraguan law, including the suspension or forced closure of the business.⁷²⁴

706) Again, Nicaragua continues in Counter-Memorial paragraphs 106 - 107:

106. These permits and authorizations are not optional or aspirational. Rather, they must be obtained prior to engaging in the regulated business activities. Indeed, failure to obtain any such permit or authorization will lead to significant penalties, including large fines, the cancellation of other permits, or even the forced closure of the business.

107. Inagrosa’s complete failure to obtain these permits and authorizations with respect to the Hass avocado business is fatal to Riverside’s claims. These omissions mean that the alleged business was not viable, since it was never approved by the relevant agencies.⁷²⁵

707) Indeed, Nicaragua even usurps the role of this Tribunal in the Counter-Memorial. In paragraph 517, Nicaragua proclaims that its regulatory impossibility argument is “proven” and it relies on this “proof” as a basis to reduce the damages to be awarded to Riverside.

⁷²³Counter-Memorial at ¶ 24 at p. 8.

⁷²⁴Counter-Memorial at ¶ 24 at p. 8. See also Counter-Memorial ¶ 104 at p. 66.

⁷²⁵Counter-Memorial at ¶ 106 at p. 67.

708) Nicaragua states in Counter-Memorial paragraph 517 that:

As Nicaragua has proven, the activities that Inagrosa was undertaking at Hacienda Santa Fé vis-à-vis the Hass avocado and forestry businesses were illegal because Inagrosa never obtained requisite permits and authorizations. This fact means that Inagrosa is subject to severe sanctions, including sizable economic penalties and the forced closure of the business.

709) Nicaragua presents five different witnesses from various Nicaraguan government regulators, each contending that INAGROSA had been non-compliant with necessary Nicaraguan regulations in the operation of its businesses at HSF.⁷²⁶

710) Despite numerous and regular visits and an inspection by the government on INAGROSA's operations at HSF, Nicaragua never issues any permit infractions or warnings to INAGROSA before the Invasion.⁷²⁷

711) Nicaragua falsely implies that Riverside committed systematic regulatory breaches spanning phytosanitary, land use, environmental, and border control systems, rendering INAGROSA's operations illicit.⁷²⁸

712) Expert Gutierrez meticulously counters the needless submission of five witness statements to this Tribunal by Nicaragua, which level these baseless regulatory criticisms. Mr. Gutierrez corroborates INAGROSA's adherence to local regulations, further substantiated by an official document showing the absence of any regulatory reprimands or infraction notices against INAGROSA.⁷²⁹

713) The sole purpose of these irrelevant arguments is to buttress damages reduction arguments Nicaragua's valuation experts advance. They suggest that the Tribunal not follow the damages methodology Riverside's damages expert applies due to foundational illegality or regulatory headwinds risk to

⁷²⁶Witness Statement of Alcides R. Moncada-Counter-Memorial – ENG at ¶¶ 31-44 (**RWS-05**); Witness Statement of Xiomara Mena – Counter-Memorial –ENG at ¶¶ 38-39 (**RWS-06**); Witness Statement of Rodolfo J. Lacayo-Counter-Memoria – -ENG at ¶¶ 31-35 (**RWS-07**); Witness Statement of Alvaro Méndez-Counter-Memorial-ENG at ¶¶ 32, 37, 39-40 and 44-45 (**RWS-08**); Witness Statement of Norma González-Counter-Memorial-ENG at ¶¶ 50, 53, 78 (**RWS-09**).

⁷²⁷Witness Statement of Carlos Rondon – Reply – ENG at ¶ 172 (**CWS-09**); Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 171 (**CWS-10**); Technical report, technical valuation of the farm "Inversiones Agropecuarias S.A." proposed as a Private Wildlife Reserve in the Municipality of San Rafael del Norte, Department of Jinotega December 13, 2016 (**R-0034-SPA-ENG**); Expert Statement of Renaldy Gutierrez at ¶ 115 (**CES-06**).

⁷²⁸Counter-Memorial at ¶ 105, 517.

⁷²⁹Memorandum– DAL – UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity February 27, 2018 at NIC00350 (**C-0285-SPA**).

INAGROSA.⁷³⁰ This approach again has the tail wagging the dog. It is all backwards. Nicaragua's damages reduction theory appears to be driving the substantive defense into irrelevant and immaterial areas, wasting the Tribunal's time and resources. The damages theory follows the events in the case; it is entirely improper for them to drive the events.

- 714) A careful review of the regulatory defense in the Counter-Memorial discloses another story. None of the regulatory matters affected the ability of INAGROSA to carry out its current business.⁷³¹ The review also demonstrates that the observations Nicaragua filed are either irrelevant or immaterial to the issues before the Tribunal.
- 715) While it is correct that INAGROSA would need in the future to obtain certain standard-issue regulatory permits, they all were matter of fact and ordinary course matters, such as obtaining inspections certificates once INAGROSA started exporting its Hass avocados.⁷³² Nicaragua dramatically mischaracterizes the process of obtaining such standard commodity inspection certificates as being “uncertain” and with determinations that “cannot be assumed.”⁷³³
- 716) Try as hard as it may, Nicaragua was unable to demonstrate regulatory inconsistencies that would impair the orderly and ongoing business operations at INAGROSA.

Factual Overview of INAGROSA Operations

- 717) To provide context to the regulatory permit discussion, it is useful to highlight some critical factual elements regarding INAGROSA's agricultural and forestry operations at HSF.

1. The foundational facts

- 718) HSF had an area of 12,248,251.99 square meters plantation (an area of approximately 1224.8-hectares).⁷³⁴ INAGROSA had been operating HSF as a sustainable agribusiness since its purchase of the property in 1997.⁷³⁵

⁷³⁰Credibility International Report at ¶¶ 16-17, 49 (i), 105, 107 (**RER-02**).

⁷³¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 113 (**CES-06**).

⁷³²Expert Witness Statement of Renaldy J. Gutierrez at ¶ 116 (**CES-06**).

⁷³³Counter-Memorial at ¶ 24 at p. 8.

⁷³⁴Literal Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry, December 17, 2019 (**C-0080-SPA**); Related Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry dated June 30, 2022 at Bates 0001037 (**C-0060-SPA**).

⁷³⁵Forced Sale Agreement of Hacienda Santa Fe (Public Instrument No. 13 dated April 29, 1998) (**C-0173-SPA**).

INAGROSA successfully registered and complied with necessary Nicaraguan regulatory requirements in its coffee business.⁷³⁶

- 719) HSF had impacts from the Roya fungus in 2013 and 2014.⁷³⁷ The Roya fungus was a widespread outbreak that affected many countries in Central America at that time.⁷³⁸ It was not a specific outbreak to HSF. INAGROSA did not report the Roya fungus to the agricultural ministry as its presence was notorious and prevalent across the region.⁷³⁹ INAGROSA no longer grows coffee.⁷⁴⁰ Any reporting requirements of the Roya fungus affectation at HSF is time-barred due to the operation of the statute of limitations.⁷⁴¹
- 720) INAGROSA operated two basic commodity businesses at HSF.
- a) The first was a long-cycle fruit tree business that cultivated and grew Hass avocados.
 - b) The second was a standing forest including rare hardwood species.
- 721) INAGROSA knew how to comply with Nicaraguan regulations. Both Carlos Rondón and Luis Gutierrez confirm that INAGROSA always operated with the intention of complying with Nicaraguan laws and regulations.⁷⁴²
- 722) In 2018, INAGROSA had planted 44.75 hectares of avocados.⁷⁴³ At the time of the taking of its lands, INAGROSA had plans underway to expand. It would plant 700 ha at HSF with Hass avocados with a view to eventually expanding to 1000 ha under cultivation.⁷⁴⁴
- 723) The expansion of the operations at HSF was underway in 2018 on 200 ha of land.⁷⁴⁵ That land had been staked and ready for final pre-planting

⁷³⁶Witness Statement of Carlos Rondón - Reply – ENG at ¶ 94 (**CWS-09**).

⁷³⁷ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 192-195 (**CWS-10**).

⁷³⁸Roya advances to Jinotega, La Prensa, December 1, 2012 (**C-0304-SPA**).

⁷³⁹Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 193 (**CWS-10**).

⁷⁴⁰Witness Statement of Carlos Rondón - Reply – ENG at ¶ 104 (**CWS-09**).

⁷⁴¹Expert Statement of Renaldy J. Gutierrez at ¶ 176 (**CES-06**).

⁷⁴²Witness Statement of Carlos Rondón - Reply – ENG at ¶ 189, 191, 203, 206-209, 263, 303 (**CWS-09**);

Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 170, 183, 203-205, 263, (**CWS-10**).

⁷⁴³Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 130 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶9 (**C-0055-ENG**)

⁷⁴⁴Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 207 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶28 (**C-0055-ENG**).

⁷⁴⁵Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 208 (**CWS-01**). Management Representation letter from Riverside Coffee, LLC to Richter Inc. executed September 12, 2022 at ¶ 31 (**C-0055-ENG**).

preparation.⁷⁴⁶ The existing producing Hass avocado plantation (44.75 ha) and the first expansion area of 200 ha were located on lands that had been historically dedicated to agriculture, including crops like coffee.⁷⁴⁷ These were existing agricultural lands. These lands were not located in the private forest at HSF.⁷⁴⁸

- 724) INAGROSA had three plant nurseries at HSF.⁷⁴⁹ The nurseries had been developed initially as part of INGROSA's coffee cultivation infrastructure, but they were available to and utilized by INAGROSA for its Hass avocado and standing forestry business.⁷⁵⁰ No plants from the nurseries at HSF were available for commercial sale to anyone in Nicaragua.⁷⁵¹ The nurseries were used exclusively for INAGROSA to develop plants and grafts for in-house use.⁷⁵²
- 725) INAGROSA made an application to have HSF designated as a Private Wildlife Reserve in 2015.⁷⁵³ MARENA evaluated the application and approved it.⁷⁵⁴ Nicaraguan Legal Expert Gutierrez confirms that the necessary pre-condition requirements for a legally effective designation of a Private Wildlife Reserve at Hacienda Santa Fe were not met.⁷⁵⁵ As a result, no Private Wildlife Reserve was validly created at Hacienda Santa Fe.⁷⁵⁶
- 726) INAGROSA had a successful 2017 Hass Avocado harvest.⁷⁵⁷ The 2017 Hass avocado harvest was not exported.⁷⁵⁸ That harvest was used to produce avocado oil and seeds and grafts from the 2017 harvest were available for use, and were used in the nurseries, for the 2018 plantings that were to take place at HSF.⁷⁵⁹

⁷⁴⁶CWS-02- Witness Statement of Luis Gutierrez-Memorial- ENG at ¶155. Witness Statement of Carlos Rondón - Reply – ENG at ¶ 99 (**CWS-09**); Witness Statement of Luis Gutierrez - Reply – ENG at ¶ 186 (**CWS-10**).

⁷⁴⁷Witness Statement of Carlos Rondón - Reply – ENG at ¶ 23(e) (**CWS-09**); Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 186-188 (**CWS-10**).

⁷⁴⁸Witness Statement of Carlos Rondón - Reply – ENG at ¶ 23(e) (**CWS-09**); Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 187 (**CWS-10**).

⁷⁴⁹ Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 230-231 (**CWS-10**).

⁷⁵⁰ Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 230-231, 238 (**CWS-10**).

⁷⁵¹ Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 179-84 (**CWS-10**).

⁷⁵² Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 180 (**CWS-10**).

⁷⁵³Witness Statement of Carlos J. Rondon - Reply – ENG at ¶ 120 (**CWS-09**).

⁷⁵⁴Ministerial Resolution No. 021.2018. by the Ministry of the Environment and Natural resources February 27, 2018 (**RL-0112-SPA-ENG**)

⁷⁵⁵Expert Witness Statement of Renaldy J. Gutierrez at ¶ 32 (**CES-06**).

⁷⁵⁶Expert Witness Statement of Renaldy J. Gutierrez at ¶ 32 (**CES-06**).

⁷⁵⁷Witness Statement of Carlos Rondon - Reply – ENG at ¶ 283 (**CWS-09**); Witness Statement of Luis Gutierrez - Reply – SPA at ¶ (**CWS-10**).

⁷⁵⁸ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 283 (**CWS-10**).

⁷⁵⁹ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 283 (**CWS-10**).

2. The Private Forest

- 727) HSF had a forest of over 35,000 hardwood trees being maintained for a sustainable harvest.⁷⁶⁰
- 728) Hacienda Santa Fé had a private forest reserve consisting of black walnut (*Juglans Nigra*) granadillo, and other species including granadillo⁷⁶¹ and mature coyote wood trees.⁷⁶²
- 729) INAGROSA Management started in 2012 to take steps towards regarding sustainable management of the forest to provide an additional revenue source for INAGROSA.⁷⁶³ By 2018, approximately 20,300 black walnut trees were growing at Hacienda Santa Fé.⁷⁶⁴
- 730) INAGROSA planned to sell sustainably harvested wood from the private forest as an additional revenue source.⁷⁶⁵

a) Application as a Private Wildlife Reserve

- 731) INAGROSA applied for a private reserve designation in 2015.⁷⁶⁶ The application was filed by Juan Francisco Rivera, former Administrator of HSF.⁷⁶⁷
- 732) Carlos Rondón describes the context and reasons for the filing of the Private Wildlife Reserve application in his Reply Witness Statement.⁷⁶⁸ Mr. Rondón explains that the purpose of the Wildlife Reserve application was to underscore the sustainability principles of the underlying business operation at HSF.⁷⁶⁹

⁷⁶⁰Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 21 (CWS-02).

⁷⁶¹Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 57 (CWS-01); Witness Statement of Tom Miller at ¶¶ 6-8 (CWS-07) Witness Statement of Luis Gutierrez-Memorial- SPA at ¶ 21(CWS-02); The number of black walnut trees was confirmed in Tree Census at Hacienda Santa Fé prepared by Luis Gutierrez, January 20, 2018 (C-0084-SPA); The number of granadillo was confirmed in the Witness Statement of Luis Gutierrez-Memorial-SPA at ¶ 24 (CWS-02).

⁷⁶²Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 57, 62 (CWS-01); Witness Statement of Tom Miller at ¶ 6 (CWS-07) Witness Statement of Luis Gutierrez-Memorial- SPA at ¶ 21(CWS-02); Witness Statement of Luis Gutierrez-Memorial- SPA at ¶ 295 (CWS-10).

⁷⁶³Witness Statement of Tom Miller– Memorial – ENG at ¶¶12-13 (CWS-07).

⁷⁶⁴Tree Census at Hacienda Santa Fé prepared by Luis Gutierrez, January 20, 2018 (C-0084-SPA).

⁷⁶⁵Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 58 (CWS-01) and the Witness Statement of Tom Miller Witness at ¶¶ 7, 12 (CWS-07).

⁷⁶⁶MARENA Form application for designation of Private Wildlife Reserve filed by INAGROSA, undated (C-0083-SPA)

⁷⁶⁷MARENA Form application for designation of Private Wildlife Reserve filed by INAGROSA, undated (C-0083-SPA)

⁷⁶⁸Witness Statement of Carlos J. Rondón – Reply – ENG at ¶¶ 121-122 (CWS-09).

⁷⁶⁹Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 121 (CWS-09).

- 733) INAGROSA put in the application based on discussions with the nearby El Jaguar reserve.⁷⁷⁰ INAGROSA Management understood that Private Wildlife Reserve allowed for sustainable agriculture and sustainable forestry practices.⁷⁷¹ INAGROSA was deeply committed to sustainability in its business practices and protection of biodiversity was also important to INAGROSA and its management.⁷⁷²
- 734) When INAGROSA wrote its comments in the application, they did not prevent sustainable farming or sustainable forest management.⁷⁷³

b) MARENA Review for the Private Wildlife Approval wildlife

- 735) MARENA conducted a rigorous three-step process during its consideration of the approval of a private wildlife reserve at HSF. The steps were:
- a) INAGROSA's filing of an application.⁷⁷⁴
 - b) Technical evaluation and inspection of the property.⁷⁷⁵
 - c) Review of the applicant's documentation to see if it was acting in conformity with all necessary environmental regulations.⁷⁷⁶
- 736) Nicaragua's witness, Norma Gonzalez, confirms (RWS-09) that these three steps were a legal requirement.⁷⁷⁷
- 737) In this Arbitration, Nicaragua contends that INAGROSA was non-complaint with domestic laws regarding permits, authorizations, and prohibitions.⁷⁷⁸ However, the actual documents Nicaragua's environment department prepared in the period leading up to the invasion tells an entirely different story.

⁷⁷⁰Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 120 (**CWS-09**).

⁷⁷¹Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 121 (**CWS-09**).

⁷⁷²Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 121 (**CWS-09**).

⁷⁷³Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 122 (**CWS-09**).

⁷⁷⁴Inagrosa Ministry of Environment and Natural Resources (MARENA) Form application for designation of Private Wildlife Reserve, undated (**C-0083-SPA**).

⁷⁷⁵Technical report, technical valuation of the farm "Inversiones Agropecuarias S.A." proposed as a Private Wildlife Reserve in the Municipality of San Rafael del Norte, Department of Jinotega, December 13, 2016 (**R-0034-SPA-ENG**).

⁷⁷⁶Memorandum– DAL – UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity, February 27, 2018 (**C-0285-SPA**).

⁷⁷⁷Gonzalez at ¶ 59 (**RWS-09**).

⁷⁷⁸Witness Statement of Alcides R. Moncada-Counter-Memorial – ENG at ¶¶ 31-44 (**RWS-05**); Witness Statement of Xiomara Mena – Counter-Memorial –ENG at ¶¶ 38-39 (**RWS-06**); Witness Statement of Rodolfo J. Lacayo-Counter-Memoria – ENG at ¶¶ 31-35 (**RWS-07**); Witness Statement of Alvaro Méndez-Counter-Memorial-ENG at ¶¶ 32, 37, 39-40 and 44-45 (**RWS-08**); Witness Statement of Norma González-Counter-Memorial – ENG at ¶¶ 50, 53, 78 (**RWS-09**); and Counter-Memorial at ¶ 517.

- 738) Nicaragua's own internal government documents demonstrate that INAGROSA's Private Wildlife Reserve application was reviewed for compliance with all necessary environmental regulations and permits. The critical document, issued in 2017, states:

All documents were reviewed according to the current legislation and Decree 20-2017 "Evaluation System Environmental Permits and Authorizations for Sustainable Use of Natural Resources".⁷⁷⁹

- 739) Despite numerous visits and an inspection of HSF by Nicaraguan government officials, INAGROSA Management never was given any indication of potential regulatory inconsistencies of its avocado, coffee, or forestry operations at HSF.⁷⁸⁰
- 740) Further, an indication of potential regulatory inconsistency does not constitute a finding on inconsistency. Nicaraguan law required the initiation of an administrative process for the imposition of sanctions in case of infractions.⁷⁸¹ This is a matter of Nicaraguan law.⁷⁸²
- 741) Notably, Nicaragua has not filed any evidence that any administrative process for the imposition of sanctions ever was initiated for any of the alleged infractions cited in the witness statements of any of Nicaragua's government officials.⁷⁸³

c) The Private Wildlife Reserve was not in force.

- 742) Nicaraguan Legal Expert Gutierrez confirms that the designation of HSF as a Private Wildlife Reserve was not legal force through issuance of the MARENA Ministerial Resolution 021.2018 alone.⁷⁸⁴ While MARENA officials approved the application of HSF for a Private Wildlife Reserve, other legal

⁷⁷⁹Memorandum– DAL – UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity, February 27, 2018 (**C-0285-SPA**).

⁷⁸⁰Witness Statement of Carlos J. Rondon – Reply – ENG at ¶ 95 (**CWS-09**); Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 171 (**CWS-10**); Technical report, technical valuation of the farm "Inversiones Agropecuarias S.A." proposed as a Private Wildlife Reserve in the Municipality of San Rafael del Norte, Department of Jinotega December 13, 2016 (**R-0036-SPA-ENG**).

⁷⁸¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 20-22 (**CES-06**).

⁷⁸²Article 22- 25 of the Seed Production and Trade Law, Law No. 280, December 10, 1997 (**RL-0019-SPA-ENG**); Articles 123-130 of the General National Water Law, Law No. 620, May 15, 2007 (**RL-0022-SPA-ENG**); Procedure for Authorization of Change of Land Use at pp. 12-14 (**RL-0112-SPA**); Articles 58-63 of the Basic Law on Animal Health and Plant Health, Law No. 291, April 16, 1998 (**RL-0020-SPA**).

⁷⁸³Witness Statement of Alcides René Moncada Casco at ¶¶ 30-44 (**RWS-05**); Witness Statement of Rodolfo J. Lacayo-Counter-Memorial-ENG at ¶¶ 31-35 (**RWS-07**); Witness Statement of Alvaro Méndez-Counter-Memorial-ENG at ¶¶ 30-42 (**RWS-08**); Witness Statement of Norma González-Counter-Memorial-ENG at ¶¶ 38-53 (**RWS-09**)

⁷⁸⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 29-33 (**CES-06**).

requirements needed to be complied with for the MARENA Ministerial Resolution 021.2018 to enter into force.

- 743) MARENA Ministerial Resolution 021.2018 is not in legal force as the Ministerial Resolution never was given legal force under the law of Nicaragua.
- 744) The legal effectiveness of the MARENA Ministerial Resolution approving HSF as a Private Wildlife Reserve was conditional on the completion of two requirements:
- a) The execution of the Administrative Agreement, Management Plan or Annual Operative Plan.
 - b) The publication of the Ministerial Resolution approving Hacienda Santa Fe as a private Wildlife Reserve through official written social media channels, national circulation means of communication, or in the official gazette “La Gaceta Diario Oficial”.⁷⁸⁵
- 745) For a Private Wildlife Reserve to become legally effective, it was necessary to execute an Administrative Agreement, a Management Plan, and an Annual Operative Plan. Article 4 of the MARENA Ministerial Resolution provides:
- The recognition of Hacienda Santa Fé as a Private Wildlife Reserve shall be subject to the terms and conditions set forth in the Private Wildlife Reserve Administration Agreement, as well as in the Management Plan and Annual Operational Plans approved by the Ministry of Environment and Natural Resources (MARENA), for monitoring and follow-up.⁷⁸⁶
- 746) In accordance with Article 5 of the MARENA Ministerial Resolution, an Administration Agreement must be executed by INAGROSA's legal representative.⁷⁸⁷
- 747) Nicaragua filed a certificate issued by MARENA dated February 9, 2023, confirms the absence of any executed Administrative, Agreement, Management Plan, or Annual Operative Plan. The MARENA Certificate No. 4 states:

⁷⁸⁵ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 19 (**CES-06**).

⁷⁸⁶ Article 4 of the Ministerial Resolution No. 021.2018. by the Ministry of the Environment and Natural Resources February 27, 2018 (**R-0012-SPA-ENG**).

⁷⁸⁷ Article 5 of the Ministerial Resolution No. 021.2018. by the Ministry of the Environment and Natural Resources February 27, 2018 (**R-0012-SPA-ENG**).

Section 4 of such Ministerial Resolution provides that the recognition of the Private Wildlife Reserve shall be subject to the terms and conditions set forth in the Private Wildlife Reserve Administration Agreement, as well as the General Management Plan and the Annual Operational Plans approved by MARENA for monitoring and follow-up and section 5 of said Ministerial Resolution provides that the Administration Agreement for Hacienda Santa Fé Private Wildlife Reserve shall be signed and executed by its legal representative. **As of the date of this certificate, the owner of the Reserve did not make any arrangements before MARENA to sign the administration agreement and filed no application for approval of the Reserve's Management Plan under Section 26 of Decree No. 01-2007;** said instruments are expected to lay down management guidelines and activities to be carried out.⁷⁸⁸ (*emphasis added*)

- 748) As evidenced above, the MARENA Certificate No. 4 confirms the absence of any required administrative agreement, management plan, or annual operative plan.⁷⁸⁹ This was a necessary pre-condition before a Private Wildlife Reserve could become legally effective.⁷⁹⁰
- 749) The MARENA Ministerial Resolution also requires publication of the Ministerial Resolution as a necessary pre-condition before a Private Wildlife Reserve could become legally effective.⁷⁹¹
- 750) According to Article 6 of the MARENA Ministerial Resolution, the “publication through official written social media channels, national circulation means of communication, or in the official gazette “La Gaceta Diario Oficial” is required.⁷⁹²
- 751) The Tribunal ordered Nicaragua to produce the publication of the MARENA Ministerial Resolution through official written social media channels, national circulation means of communication, or in the official gazette “La Gaceta Diario Oficial” in Document Request 76.⁷⁹³
- 752) The Nicaraguan Legal Expert Gutierrez concludes that neither of these necessary pre-condition requirements for a legally effective designation of a Private Wildlife Reserve at Hacienda Santa Fé was met.⁷⁹⁴ MARENA

⁷⁸⁸ Certificate issued by MARENA No. 4, February 9, 2023 (R-0073-SPA-ENG).

⁷⁸⁹ Expert Witness Statement of Renaldy J. Gutierrez J. at ¶ 23 (CES-06); Certificate issued by MARENA No. 4, February 9, 2023 (R-0073-SPA-ENG).

⁷⁹⁰ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 23 (CES-06).

⁷⁹¹ Expert Witness Statement of Renaldy J. Gutierrez J. at ¶ 24 (CES-06).

⁷⁹² Expert Witness Statement of Renaldy J. Gutierrez J. at ¶ 25 (CES-06).

⁷⁹³ Claimant's Document Request No. 76, set out Annex A to Procedural Order No. 6 (C-0549-ENG). Expert Witness Statement of Renaldy J. Gutierrez at ¶ 27 (CES-06).

⁷⁹⁴ Expert Witness Statement of Renaldy J. Gutierrez J. at ¶ 32 (CES-06).

Ministerial Resolution 021. 2018 was not completed and thus had no legal effect. As a result, no Private Wildlife Reserve was validly created at Hacienda Santa Fé.⁷⁹⁵

3. Government assurances and Legitimate Expectations

753) Nicaragua has provided internal government documents confirming the reasonableness of INAGROSA's expectations by confirming the legality of INAGROSA's agricultural and forestry operations at HSF.⁷⁹⁶

754) Further, INAGROSA reasonably believed that it was compliant with regulations regarding:

- a) Phytosanitary permits (food safety)
- b) Environmental permits (land use)
- c) Water Concessions

755) As discussed in detail below, INAGROSA had legitimate expectations surrounding its compliance with these permits because of discussions with officials from MARENA, Nicaragua's Environment Department.⁷⁹⁷

756) Nicaragua would have been aware of these alleged infractions relating to permits, authorizations, and prohibitions since at least 2015 and it took no action against these alleged infractions to its domestic laws. Nicaraguan government environmental and agricultural officials have visited HSF in at least the following occasions:

- a) On September 2015, Dania Hernandez, environmental consultant, had meetings with INAGROSA staff and prepared an ecological study of HSF as part of the process for the consideration of HSF as a private wildlife reserve.⁷⁹⁸
- b) On December 13, 2016, a technical team from MARENA's National Protected Area System Directorate conducted a field inspection of Hacienda Santa Fe. As a result of this inspection, the environmental

⁷⁹⁵ Expert Witness Statement of Renaldy J. Gutierrez J. at ¶ 32 (CES-06).

⁷⁹⁶Memorandum– DAL – UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity, February 27, 2018 (C-0285-SPA)

⁷⁹⁷Ecological Study prepared by Dania Hernandez, August 20, 2015 at Bates 0000715 (C-0081-SPA); Technical report, technical valuation of the farm "Inversiones Agropecuarias S.A." proposed as a Private Wildlife Reserve in the Municipality of San Rafael del Norte, Department of Jinotega, December 13, 2016 at p. 3 (R-0034-SPA-ENG); Witness Statement of Luis Gutierrez – Reply – ENG at ¶¶ 171-173 (CWS-10).

⁷⁹⁸Ecological Study prepared by Dania Hernandez, August 20, 2015 (C-0081-SPA).

officials provided a favorable for the declaration of HSF as a Private Wildlife Reserve.⁷⁹⁹

- c) Engineers from Nicaragua's Department of Agricultural and Forestry (MAGFOR) regularly visited Hacienda Santa Fe to conduct follow-up inspections on the agricultural harvest cycle. The reports of these inspections were retained by the officials for the use of the Agriculture and Forestry Department. (MAGFOR).⁸⁰⁰

A. Phytosanitary Regulation

1. INAGROSA was not a seed importer.

- 757) Nicaragua makes a confused allegation of regulatory impropriety in paragraphs 108 – 115 of the Counter-Memorial. Nicaragua notes that INAGROSA did not provide bills of lading or other import documentation with respect to the import of seeds.⁸⁰¹ From this, Nicaragua concludes that INAGROSA failed to comply with Nicaraguan phytosanitary import and registration requirements.⁸⁰²
- 758) It is completely correct that INAGROSA did not register as a seed importer. Nicaragua applies its reasoning to faulty factual analysis. The specific Hass avocado seeds were sold to INAGROSA in Nicaragua by Rodrigo Jimenez.⁸⁰³
- 759) INAGROSA did not import avocado seeds at any time for its Hass Avocado operations at HSF.⁸⁰⁴ All the obligations Nicaragua raises by Nicaragua on importation are obligations placed upon an importer, and not obligations imposed upon a non-importing domestic purchaser.⁸⁰⁵ To the extent that any requirement existed to register with the Government and obtain import inspections, registrations, or permits, that burden fell on the vendor and not on INAGROSA. As a result, none of the seed import regulatory permission applies to INAGROSA.⁸⁰⁶
- 760) Nicaragua's contentions regarding INAGROSA's obligation to apply as a seed importer under Law No. 280 simply are irrelevant.

⁷⁹⁹Technical report, technical valuation of the farm "Inversiones Agropecuarias S.A." proposed as a Private Wildlife Reserve in the Municipality of San Rafael del Norte, Department of Jinotega, December 13, 2016 at p. 3 (**R-0034-SPA-ENG**).

⁸⁰⁰Witness Statement of Luis Gutierrez – Memorial – ENG at ¶ 83 (**CWS-02**).

⁸⁰¹Counter-Memorial at ¶ 108.

⁸⁰²Counter-Memorial at ¶ 108.

⁸⁰³Witness Statement of Luis Gutierrez – Memorial – ENG at ¶ 177 (**CWS-02**).

⁸⁰⁴Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 177 (**CWS-10**).

⁸⁰⁵Expert Witness Statement of Renaldy J. Gutierrez at ¶ 122 (**CES-06**).

⁸⁰⁶Expert Witness Statement of Renaldy J. Gutierrez at ¶ 123 (**CES-06**).

- 761) Nicaragua relies upon the witness statement of Alcides Moncada to support these inapplicable contentions. Alcides René Moncada Casco works in Jinotega for IPISA, the Institute of Agricultural Protection and Health.⁸⁰⁷ His witness statement addresses phytosanitary permits for importing, cultivating, and commercializing Hass avocados.⁸⁰⁸ Mr. Moncada contends that INAGROSA failed to take several regulatory steps, namely:
- a) Registration as a seed importer with IPISA's Department of Seeds.⁸⁰⁹
 - b) Registration of imported seeds with the IPISA's Variety Register.⁸¹⁰
 - c) Obtaining import permits before seed importation.⁸¹¹
 - d) Compliance with inspection, sample, certification, and mandatory vegetable quarantine.⁸¹²
 - e) Registration with IPISA's Vegetable and Seed Health Directorate for the commercialization and distribution of nursery plants.⁸¹³
 - f) Registration with IPISA as a producer, exporter, and packer of agricultural products.⁸¹⁴
 - g) Certification of the phytosanitary conditions of the products for export.⁸¹⁵
 - h) Failure to notify IPISA of the existence of plagues and diseases.⁸¹⁶
- 762) INAGROSA was not subject to the terms of the Seed Production and Trade Law or its Regulations. As a result, the following seed pre-importation requirements are inapplicable to INAGROSA's business at the time of the invasion:
- a) Register as a seed importer.⁸¹⁷

⁸⁰⁷Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 1 (**RWS-05**).

⁸⁰⁸Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 4 (**RWS-05**).

⁸⁰⁹Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 15 (**RWS-05**).

⁸¹⁰Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 16 (**RWS-05**).

⁸¹¹Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 17 (**RWS-05**).

⁸¹²Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 18 (**RWS-05**).

⁸¹³Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 19 (**RWS-05**).

⁸¹⁴Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 25 (**RWS-05**).

⁸¹⁵Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 27 (**RWS-05**).

⁸¹⁶Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 28 (**RWS-05**).

⁸¹⁷Article 16 of Seed Production and Trade Law, Law No. 280, December 10, 1997 (**RL -0019-SPA-ENG**); Article 54 of the Decree No. 26/98, Regulation of the Seed Production and Trade Law, April 3, 1998 (**RL-0011-SPA-ENG**); Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 15 (**RWS-05**).

- b) Register as seed storer.⁸¹⁸
 - c) Register the imported seed with the Registry of Varieties⁸¹⁹.
 - d) File certificate issued by the Plant Health Department regarding compliance with phytosanitary regulations established by the Plant Quarantine Directorate.⁸²⁰
 - e) Comply with quality regulations issues by the Seed Directorate.⁸²¹
 - f) Obtain a Seed Import Permit.⁸²²
- 763) To the extent that INAGROSA may have imported foreign seeds or foreign rootstock in the future, INAGROSA would have complied with all necessary local requirements.⁸²³ However, INAGROSA did not require imported seeds to carry out its avocado operations at the time of the invasion.

2. INAGROSA was not a Nursery Plant Producer or Distributor

- 764) Similarly, Nicaragua has made another factual presumption error with respect to INAGROSA's nursery operations. INAGROSA was not a nursery plant producer or distributor. INAGROSA was growing avocados only for its own use and not for distribution to others.⁸²⁴
- 765) Once again, Nicaragua makes has taken an *argumentum in terrorem* approach claiming in Counter-Memorial paragraph 120 that the regulatory failure was material. But the commercial nursery regulations related to registration and inspection addressed in paragraphs 116 – 118 are irrelevant to this dispute.

⁸¹⁸Article 16 of Seed Production and Trade Law, Law No. 280, December 10, 1997 (**RL -0019-SPA-ENG**); Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 16 (**RWS-05**).

⁸¹⁹Article 55 (1) of the Decree No. 26/98, Regulation of the Seed Production and Trade Law, April 3, 1998 (**RL-0011-SPA-ENG**); Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 17 (**RWS-05**).

⁸²⁰Article 55 (2) of the Decree No. 26/98, Regulation of the Seed Production and Trade Law, April 3, 1998 (**RL-0011-SPA-ENG**); Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 18 (**RWS-05**).

⁸²¹Article 55 (3) of the Decree No. 26/98, Regulation of the Seed Production and Trade Law, April 3, 1998 (**RL-0011-SPA-ENG**). Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 19 (**RWS-05**).

⁸²²Article 56 of the Decree No. 26/98, Regulation of the Seed Production and Trade Law, April 3, 1998 (**RL-0011-SPA-ENG**).

⁸²³ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 178 (**CWS-10**).

⁸²⁴ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 182 (**CWS-10**).

- 766) INAGROSA envisioned a long-term plan to be able to supply local farms in Jinotega with Hass avocado plants and have those farms produce Hass avocados for processing and export sale by INAGROSA.⁸²⁵ That was a long-range vision that would be considered after INAGROSA had optimized all available Hass avocado capacity at HSF.⁸²⁶ To the extent that INAGROSA would have distributed nursery plants in the future, INAGROSA would have complied with all necessary local requirements.⁸²⁷ However, INAGROSA never carried out commercial nursery operations.
- 767) INAGROSA was not required to register as a nursery plant producer and distributor as INAGROSA was not selling or distributing Hass avocado seedlings from its nurseries to others.⁸²⁸ INAGROSA did not commercialize nursery plants, which would have entailed selling the plants to third parties. Instead, INAGROSA cultivated for its internal use. Consequently, the regulatory requirements related to commercial nurseries did not apply to the following obligations:⁸²⁹
- a) Registration with IPSA as a producer, exporter, and packer of agricultural products.⁸³⁰
 - b) Registration with IPSA's Vegetable and Seed Health Directorate for the commercialization and distribution of nursery plants.⁸³¹
- 768) Accordingly, INAGROSA was not a nursery plant producer and distributor for commercial purposes at the time of the Invasion under the Seed Production and Trade Law or the Regulation.⁸³²
- 769) Since INAGROSA was not producing or distributing nursery plants at the time of the Invasion, there was no need for INAGROSA to obtain import permissions as alleged by Nicaragua in its Counter-Memorial.⁸³³ INAGROSA was not required to comply with the following:⁸³⁴
- a) Register with the Seed General Directorate as a nursery plant producer.⁸³⁵

⁸²⁵ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 181 (CWS-10).

⁸²⁶ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 181 (CWS-10).

Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 181-182 (CWS-10).

⁸²⁸Expert Witness Statement of Renaldy J. Gutierrez at ¶ 126 (CES-06).

⁸²⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 127 (CES-06).

⁸³⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 127 (CES-06).

⁸³¹Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 19 (RWS-05).

⁸³² Expert Witness Statement of Renaldy J. Gutierrez at ¶ 122 (CES-06).

⁸³³Counter-Memorial at ¶¶ 108-115.

⁸³⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶ 122 (CES-06).

⁸³⁵Article 27 of Decree No. 26-98) (RL-0011-SPA).

- b) Register with the Seed General Directorate as a nursery plant distributor.⁸³⁶
- 770) INAGROSA contemplated selling avocado seedlings as an additional revenue line in connection with the later stages of its expansion plan.⁸³⁷ At the time of the Invasion, INAGROSA was not distributing Hass avocado seeds.⁸³⁸
- 771) INAGROSA would have registered with the Seed General Directorate nursery plant producer and distributor before selling avocado seedlings.⁸³⁹

3. Compliance for future necessary Phytosanitary Certificates

- 772) Nicaragua contends the INAGROSA was not compliant with phytosanitary product inspection rules for future exports. Yet again, Nicaragua has taken an *argumentum in terrorem* approach to regulatory obligations that were not yet applicable.
- 773) INAGROSA was not exporting Hass avocados. Consequently, the regulatory requirements related to commercial nurseries did not apply for the following:⁸⁴⁰
- a) Registration with IPSA as a producer, exporter, and packer of agricultural products.⁸⁴¹
 - b) Certification of the phytosanitary conditions of the products for export.
 - c) Application for a Phytosanitary Export Certificate.
 - d) Reporting the existence of plagues or diseases associated with avocados planned for export.
- 774) Nicaragua notes that INAGROSA was aware of agricultural product inspection for its earlier successful coffee operations.⁸⁴² INAGROSA notes this as well.⁸⁴³ However, the registration of new products with the appropriate authority was not a long or complicated process.⁸⁴⁴ Like it had done with its successful coffee operations, INAGROSA would have complied

⁸³⁶Article 27 of Decree No. 26-98 (RL-0011-SPA).

⁸³⁷ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 181 (CWS-10).

⁸³⁸ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 179 (CWS-10).

⁸³⁹ Witness Statement of Luis Gutierrez – Reply – SPA at ¶¶ 181-182 (CWS-10).

⁸⁴⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 129 (CES-06).

⁸⁴¹Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 39 (RWS-05).

⁸⁴²Counter-Memorial at ¶ 128; Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶ 25 (RWS-05).

⁸⁴³Witness Statement of Carlos J. Rondon – Reply – ENG at ¶ 93-96 (CWS-09).

⁸⁴⁴Witness Statement of Alcides R. Moncada-Counter-Memorial-SPA at ¶¶ 21-29 (RWS-05).

with all necessary procedures to allow for phytosanitary inspection and export registration before avocado or forest products exports took place.

4. Nicaragua's other irrelevant Phytosanitary issues

- 775) In paragraph 43 of Mr. Moncada's Witness Statement (**RWS-05**), Mr. Moncada addresses an irrelevant matter regarding whether INAGROSA had been non-compliant in reporting Roya fungus on its coffee plants in 2013 and 2014. This issue is not a matter in dispute in this claim and affects a reporting matter that occurred almost a decade ago.
- 776) As early as 2012, the Association of Coffee Producers of Jinotega publicly denounced the presence of the Roya fungus in the coffee fields of Jinotega in the media.⁸⁴⁵ Eduardo Rizo, President of the Association of Coffee Producers of Jinotega, criticized the Nicaraguan Government inaction to confront the Roya fungus crisis.⁸⁴⁶
- 777) On this matter, Nicaragua's valuation expert has pointed to newspaper accounts that indicates that the widespread effect of the Roya virus effects upon the coffee industry in Nicaragua and vast swatches of Central America would have been notorious and well-known to Mr. Moncada's department at that time.⁸⁴⁷
- 778) Nicaragua's allegations of non-conformity ten years after the occurrence are capricious. Nicaragua took no regulatory steps with respect to this non-conformity. Any reporting requirement of the Roya fungus affectation at Hacienda Santa Fe is time-barred due to the operation of the statute of limitations.⁸⁴⁸ The impact of non-conformity was a non-material monetary fine in the order of US\$1400.⁸⁴⁹

B. Environmental Permits

- 779) Nicaragua's arguments about environmental permits suffers from the same sort of foundational errors as Nicaragua's flawed phytosanitary permit arguments. Nicaragua's environmental permit arguments occur in Counter-Memorial paragraphs 108 – 115. Nicaragua incorrectly contends that INAGROSA failed to obtain required environmental permits with respect to its land use at HSF.

⁸⁴⁵Roya advances to Jinotega, La Prensa, December 1, 2012 (**C-0304-SPA**).

⁸⁴⁶Roya advances to Jinotega, La Prensa, December 1, 2012 (**C-00304-SPA**).

⁸⁴⁷"Central America battles to save coffee from fungus", Blanca Morel, phys.org, dated 18 January 2013 [**CRED-1**].

⁸⁴⁸ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 176 (**CES-06**).

⁸⁴⁹Article 55 & 59 of Basic Law on Animal Health and Plant Health, Law No. 291, April 16, 1998 (**RL-0020-SPA**).

- 780) Once again, Nicaragua has taken an *argumentum in terrorem* approach in the Counter-Memorial, Nicaragua warns that INAGROSA was unable to carry out its business operations due to flaws in following Nicaragua's environmental regulations.
- 781) As set Nicaragua's primary environmental regulatory defence can be found in Counter-Memorial paragraphs 137 - 149. Here, Nicaragua contends that:
- a) INAGROSA engaged in "soil modification" without appropriate permits when it planted Hass avocados in 2014 and 2018.⁸⁵⁰
 - b) INAGROSA impermissibly planted its avocado plantations in protected areas.⁸⁵¹
 - c) The laws governing Private Wildlife Reserves made INAGROSA's avocado and forestry operations impossible.⁸⁵²
- 782) There simply is no support for Nicaragua's contentions that there was any outstanding environmental permission that would prevent the successful operation of INAGROSA's business operations at HSF.

1. INAGROSA did not require a Soil Modification Permit

- 783) INAGROSA did not obtain environmental permits from Nicaragua's environmental regulator, MARENA, when it planted its Hass avocado plantation in 2014 or at any time subsequent. Nicaragua contends that INAGROSA engaged in two impermissible "soil modifications" when it planted its Hass avocado plantations.⁸⁵³
- 784) The facts do not support Nicaragua's inaccurate contentions.
- 785) First, Nicaragua has its facts wrong. There never was a soil modification at HSF for either of the Hass avocado planting areas.
- 786) In 2018, Inagrosa had planted 44.75 hectares of avocados.⁸⁵⁴ The expansion of the operations at Hacienda Santa Fé was underway in 2018 on 200 ha of

⁸⁵⁰Counter-Memorial at ¶ 138.

⁸⁵¹Counter-Memorial at ¶¶ 141 – 145.

⁸⁵²Counter-Memorial at ¶ 150.

⁸⁵³Counter-Memorial at ¶ 138.

⁸⁵⁴Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 130 (CWS-01); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶9 (C-0055-ENG).

land.⁸⁵⁵ That land had been staked and ready for final pre-planting preparation.⁸⁵⁶

787) The Ministry of Agriculture and Livestock defines the “change of land use” as:

the activity through which man intervenes in the land resource, moving from the current use of the land to a different use, for example, forest to agriculture or livestock. A change in land use also occurs when the site is uncultivated (*tacotal*) and is converted to agricultural or livestock use”.⁸⁵⁷

788) As noted above, a change in land use also occurs when an uncultivated land, commonly referred to as “*tacotal*,” is converted to agricultural or livestock use.⁸⁵⁸

789) In 2014, INAGROSA changed the agribusiness crop from coffee to Hass avocado. The land use was still the same- agricultural.⁸⁵⁹ Further, the area where the Hass avocado was planted was previously cultivated.⁸⁶⁰ Consequently, there was no change in land use in 2014.⁸⁶¹

790) At the time of the Invasion, the existing producing Hass avocado plantation (44.75 ha) and the first expansion area of 200 ha were located on lands that had been used by INAGROSA in the past for agricultural cultivation, including coffee.⁸⁶² These were existing agricultural lands.⁸⁶³ These lands were not located in the private forest at HSF.⁸⁶⁴

791) The lands where the plantings took place were on agricultural lands used for coffee, and they were used for Hass avocados. There was no modification of soil, Thus, there was no requirement for a change of land use permit from MARENA for “soil modification” in 2014.⁸⁶⁵

⁸⁵⁵Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 208 (CWS-01); Management Representation letter from Riverside Coffee, LLC to Richter Inc. executed September 12, 2022 at ¶ 31 (C-0055-ENG); Witness Statement of Luis Gutierrez-Memorial- ENG at ¶155 (CWS-02).

⁸⁵⁶Witness Statement of Luis Gutierrez-Memorial- SPA at ¶155 (CWS-02); Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 186 (CWS-10).

⁸⁵⁷Ministry of Agriculture and Livestock- Procedure for Authorization of Change of Land Use, July 2014 (RL-0112-SPA).

⁸⁵⁸ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 133 (CES-06).

⁸⁵⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 134 (CES-06).

⁸⁶⁰Witness Statement of Carlos Rondon – Reply – ENG at ¶ 23€ (CWS-09); Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 185-188 (CWS-10).

⁸⁶¹Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 137-39 (CES-06).

⁸⁶²Witness Statement of Carlos Rondon - Reply – ENG at ¶ 23(e) (CWS-09); Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 185-188 (CWS-10).

⁸⁶³ Witness Statement of Carlos Rondon - Reply – ENG at ¶ 23(e) (CWS-09); Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 185-188 (CWS-10).

⁸⁶⁴ Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 187(CWS-10).

⁸⁶⁵Expert Witness Statement of Renaldy J. Gutierrez at ¶ 134 (CES-06-ENG).

- 792) For greater certainty, Annex 3 of the *Procedure for Authorization of Change of Land Use* is an exhaustive of the types of cases that would require a change of land use permit.⁸⁶⁶ According to Annex 3 of the of the *Procedure for Authorization of Change of Land Use*, the cases that require are the following:
- a) Change from agricultural activities to livestock or vice versa.
 - b) Agribusiness or industrial activities.
 - c) Establishment of forest plantations.
 - d) Change of forest plantations to agricultural or livestock activities.
 - e) Construction of residential, tourist, equipment, and commercial complexes
 - f) Construction of manufacturing establishments (foundries, chemical industries)
 - g) Treatment plants for liquid and solid industrial waste generated by the livestock farms and agro-industries, when they are processed, in addition to the own waste, third party waste or only third-party waste.
 - h) Extraction of metallic and non-metallic minerals.
 - i) Construction of water reservoirs for electricity generation⁸⁶⁷
- 793) Nicaragua incorrectly assumes that the lands INAGROSA planned to use for the cultivation of Hass avocados in 2018 were upon lands not previously uncultivated.⁸⁶⁸ This is simply incorrect.
- 794) INAGROSA continued with its agribusiness land use for the original 44.75 ha Hass avocado plantation and with its 200 ha planned expansion that was underway at the time of the invasion.⁸⁶⁹ Neither of these operations fit within the prescribed situation under Annex 3.⁸⁷⁰
- 795) None of the situations in Annex 3 apply to INAGROSA. Accordingly, INAGROSA did not require a change of land use permit.⁸⁷¹

⁸⁶⁶Procedure for the Authorization of Change of Land Use, July 2014 at p. 22 (**RL-0112-SPA**).

⁸⁶⁷Ministry of Agriculture and Livestock-Procedure for Authorization of Change of Land Use, July 2014 (**RL-0112-SPA**).

⁸⁶⁸ Witness Statement of Norma González-Counter-Memorial-ENG at ¶ 32 (**RWS-09**).

⁸⁶⁹INAGROSA Planting Schedule 2014-2018 (**C-0441-SPA**).

⁸⁷⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 134 and 142 (**CES-06**).

⁸⁷¹Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 134 and 142 (**CES-06**).

a) No Environmental Authorization needed for 200 ha expansion.

- 796) No Environmental Authorization was necessary for INAGROSA's planned avocado expansion in 2018. INAGROSA was in the process of expanding on an additional 200 hectares of the Hass avocados in 2018. At the time of the Invasion, INAGROSA had commenced the work on the 200 hectares area but the actual clearing for planting had not yet commenced.⁸⁷² The 200 hectares expansion area was in an area that was previously cultivated with agricultural crops, including coffee.⁸⁷³ There was no change in the soil use.⁸⁷⁴
- 797) The witness statement of Norma Gonzalez, head of the Legal Advice Division of MARENA, erroneously states that the 200 hectares had been cleared.⁸⁷⁵ However, paragraphs 32-34 of Norma Gonzalez's witness statement are based on an incorrect factual assumption. As a result, no Environmental Authorization was necessary at the time of the Invasion.⁸⁷⁶

b) No Environmental Authorization is needed for further expansion.

- 798) INAGROSA contemplated the expansion of the Hass avocado plantation beyond 245 hectares. INAGROSA had more than 750 ha of its 1224 ha of lands cultivated in coffee.⁸⁷⁷ It saw no reason to not use all its existing coffee lands for Hass avocados as those lands could be utilized.⁸⁷⁸ Change of agricultural crop from coffee to Hass avocados on the existing coffee lands maintained the current use of the soil.⁸⁷⁹
- 799) The conversion of these lands previously cultivated with agricultural crops, including coffee, to Hass avocado did not change the land use- it remained agricultural.⁸⁸⁰ Thus, planting additional Hass avocados on the existing coffee lands did not require any Environmental Authorization.
- 800) The business plan considered 700 hectares of avocados, but INAGROSA management considered expanding HSF's Hass avocado cultivation capacity to 1000 ha.⁸⁸¹

⁸⁷²Witness Statement of Luis Gutierrez – Memorial – ENG at ¶ 167 (CWS-02).

⁸⁷³Witness Statement of Carlos Rondon – Reply – ENG at ¶ 23€ (CWS-09); Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 185-188(CWS-10).

⁸⁷⁴Witness Statement of Carlos Rondon - Reply – ENG at ¶ 23€ (CWS-09); Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 185-188 (CWS-10).

⁸⁷⁵Witness Statement of Norma Gonzalez-Counter-Memorial-ENG at ¶ 32 (RWS-09).

⁸⁷⁶Expert Witness Statement of Renaldy J. Gutierrez at ¶ 142 (CES-06).

⁸⁷⁷Witness Statement of Carlos J. Rondon – Reply – ENG at ¶ 99 (CWS-09).

⁸⁷⁸ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 187(CWS-10).

⁸⁷⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 146 (CES-06).

⁸⁸⁰ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 146 (CES-06).

⁸⁸¹Witness Statement of Carlos J. Rondón – Memorial – ENG ¶ 196 (CWS-01).

- 801) To the extent that INAGROSA would have required Environmental Authorizations for expansion beyond its existing coffee lands, INAGROSA would have sought MARENA permissions.⁸⁸²

2. INAGROSA did not plant in protected areas.

- 802) Nicaragua contends in Counter-Memorial paragraphs 140-144 that INAGROSA planted Hass avocados in protected areas, contrary to Nicaraguan regulations.
- 803) Nicaragua relies on the witness evidence of Norma del Socorro González Argüello, the head of the Legal Advice Division of MARENA.⁸⁸³ Her witness statement addresses the lack of environmental permits.⁸⁸⁴ Director Gonzalez observed that, in her opinion, the expansion of INAGROSA's operational capacity would have been non-viable for the following reasons:
- a) INAGROSA changed land use in its avocado operations and there was a prohibition on changing land use from forest or forest-type areas.⁸⁸⁵
 - b) There was a ban on logging or cutting trees 200 meters from riverbanks and lake shores,⁸⁸⁶
 - c) The prohibition of exploiting a conservation area, such as a wooded area located in a private wildlife reserve with cutting or logging activities,⁸⁸⁷ and
 - d) The prohibition of cutting, extraction, or destruction of trees of those protected and endangered species registered in national lists and international conventions and protected areas.⁸⁸⁸

a) Prohibition in change of land use from forest or forest-type areas

- 804) INAGROSA did not use forest lands for avocado cultivation purposes, and it did not plan to do so.⁸⁸⁹ The fact is that INAGROSA did not clear forest lands for the cultivation of the 44.75 ha Hass avocado plantation and would not have cleared any forest lands for the planned expansions.⁸⁹⁰

⁸⁸²Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 189 (CWS-10).

⁸⁸³Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 1 (RWS-09).

⁸⁸⁴Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 4 (RWS-09).

⁸⁸⁵Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 36 (RWS-09).

⁸⁸⁶Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 18 (RWS-09).

⁸⁸⁷RWS-09-Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 36 (RWS-09).

⁸⁸⁸RWS-09-Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 36 (RWS-09).

⁸⁸⁹Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 185-188, 300-302 (CWS-10).

⁸⁹⁰ Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 185-188 (CWS-10).

805) INAGROSA did not clear any forestry land for its Hass avocado plantings or for its expansion plantings.⁸⁹¹ With no conversion, this objection is inapplicable.

b) Prohibition on clearing trees 200 meters from riverbanks or lakeshore

806) Nicaragua is also incorrect when it suggests that the 44.75 hectares of Hass avocados at HSF were within 200 meters of El Diamante River.⁸⁹² At para. 144 of the Counter-Memorial, Nicaragua claims that the 40 ha avocado plantation “appears” to be located within a prohibited area since it was located within 200 meters of the El Diamante River.⁸⁹³

807) The 44.75 ha avocado plantation, inclusive of the subsequent 200 ha expansion, were strategically located beyond the regulatory boundary of 200 meters from any water body.⁸⁹⁴

808) To support its position, Nicaragua filed a map of HSF prepared by the National Environmental Information System dated February 13, 2023.⁸⁹⁵ This map allegedly shows that the 40 hectares of the Hass avocado plantation was located within 200 meters of El Diamante River.⁸⁹⁶ This map does not provide the names coordinates of the rivers or the exact distance in relation to the 40 hectares of the Hass avocado plantation.

809) The map Nicaragua provides does not provide any meaningful data to prove the alleged non-compliance.

810) Luis Gutierrez, the Chief Agronomist at INAGROSA, has been able to locate the growing areas based on a satellite map prepared for soil analysis in 2015. It is clear from this satellite map that neither of the Hass avocado agricultural areas were located within 200 meters of the El Diamante River.

811) According to Nicaragua law, the sanction for clearing land within 200 meters of a riverbank is to repair the environmental harm in addition to the temporary or definitive closure depending on the gravity of the harm caused.⁸⁹⁷ However, MARENA never made any allegation of a violation even though it carefully reviewed the environmental conditions at HSF in preparation of the Private Wildlife Reserve.

⁸⁹¹ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 300-302 (**CWS-10**).

⁸⁹² Counter-Memorial at ¶ 144.

⁸⁹³ Counter-Memorial at ¶ 144.

⁸⁹⁴ Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 196-200 (**CWS-10**).

⁸⁹⁵ Map of Hacienda Santa Fé prepared by the National Environmental Information System dated February 13, 2023 (**R-0033**).

⁸⁹⁶ Map of Hacienda Santa Fé prepared by the National Environmental Information System dated February 13, 2023 (**R-0033**).

⁸⁹⁷ Articles 96 & 129-30 of the General Water Law No. 620 enacted on May 15, 2007 (**RL-0022-SPA**)

812) Nicaragua's contentions of an environmental planning violation are not only contested by INAGROSA management, but also by the internal reports of MARENA itself.⁸⁹⁸

c) Prohibition to exploit a conservation zone, such as a forested area in a private wildlife reserve, with cutting or logging activities.

813) Norma del Socorro González, from MARENA's Legal Department, states in her witness statement that in a Private Wildlife Reserve, the forest area is a conservation zone where forest timber cannot be cut or used.⁸⁹⁹

814) As previously explained, the MARENA Ministerial Resolution was not in legal force and consequently HSF was not a conservation zone.⁹⁰⁰

815) In any event, INAGROSA was not logging its private standing forest at the time of the Invasion. INAGROSA was tending a standing forest. Accordingly, INAGROSA did not infringe on this prohibition.⁹⁰¹

d) The prohibition of cutting, extraction, or destruction of trees of those protected and endangered species registered in national lists and international conventions and protected areas

816) At the time of the Invasion, INAGROSA was not cutting, extracting, or destroying any trees from the private forest.⁹⁰²

C. Water Regulation

817) Nicaragua makes yet another assertion in Counter-Memorial paragraphs 151 – 155 that INAGROSA would be required to obtain a water concession from the Nicaraguan National Water Authority ("ANA").

818) Nicaragua does not contend that INAGROSA would not obtain a water concession, simply that it might require one. To support this contention, Nicaragua relies upon the Witness Statement of Rodolfo José Lacayo Ubau, the Interim Executive Director of ANA.⁹⁰³

819) Interim Director Lacayo explains that INAGROSA required a water concession or authorization to use the hydrological resources.⁹⁰⁴ He states

⁸⁹⁸Memorandum DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity, February 27, 2018 (C-0285-SPA).

⁸⁹⁹Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 77 (RWS-09).

⁹⁰⁰ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 152 (CES-06).

⁹⁰¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 152 (CES-06).

⁹⁰² Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 300-303 (CWS-10).

⁹⁰³Witness Statement of Rodolfo J. Lacayo-Counter-Memorial-SPA at ¶ 1 (RWS-07).

⁹⁰⁴Witness Statement of Rodolfo J. Lacayo-Counter-Memorial-SPA at ¶ 31 (RWS-07).

that there were no records of water concession permits for INAGROSA or HSF.⁹⁰⁵

- 820) The Hass avocado orchards were sustained by the existing hydrology resources at HSF which had been supporting coffee cultivation at HSF since at least 1997.⁹⁰⁶
- 821) INAGROSA's use of the existing hydrology resources at the HSF predates the entry into force of the General National Water Law, Law No. 620 on February 2008.⁹⁰⁷
- 822) INAGROSA was not required to bring its use of the hydrology resources at the HSF into conformity with the General National Water Law.⁹⁰⁸ The General National Water Law only required that natural or juridical persons with "water structure investments" to legalize their situation.⁹⁰⁹ Article 137 of the General National Water Law states:

Natural or legal persons who have **water structure investments prior to the entry into force of this Law**, must proceed within a period of no more than six months from the entry into force of this Law to legalize their situation and adjust to the conditions and terms established by it.⁹¹⁰ (*emphasis added*)

- 823) Even though INAGROSA was not required to bring its use of the hydrology resources into conformity with the General National Water Law, INAGROSA is favored by the law for the granting to it of permits or concessions:
- a) As a landowner whose land is contiguous to a body of water and who has been using the existing hydrological resources of Hacienda Santa Fé, as provided for in Article 47 of the said Law.
- b) The water would be used for agricultural purposes (pursuant to Article 73 General National Water Law).⁹¹¹

⁹⁰⁵Witness Statement of Rodolfo J. Lacayo-Counter-Memorial-SPA at ¶ 35 (**RWS-07**).

⁹⁰⁶Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 131 (**CWS-01**).

⁹⁰⁷The General National Water Law, Law No. 620 was published in the Official Gazette on September 4, 2007. Article 155 of the General National Water Law, Law No. 620 provides that the law will enter into force 6 months after its publication in the Official Gazette. Article 155 of the of the General National Water Law, Law No. 620 provides: "This Law shall enter into force six months after its In publication in the Official Gazette."

⁹⁰⁸Expert Witness Statement of Renaldy J. Gutierrez at ¶ 156 (**CES-06**).

⁹⁰⁹Article 137 of the General National Water Law, Law No. 620, May 15, 2007, May 15, 2007 (**RL-0022-SPA-ENG**).

⁹¹⁰Article 137 of the General National Water Law, Law No. 620, May 15, 2007, May 15, 2007 (**RL-0022-SPA-ENG**).

⁹¹¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 157 (**CES-06**).

- 824) INAGROSA would have obtained a water concession permit for the building of the water reservoir at HSF in the execution of the expansion plan.⁹¹²

D. Regulation of Forests

- 825) Nicaragua continues with its regulatory impropriety allegations with respect to INAGROSA's forestry operations in paragraphs 187 to 191 of the Counter-Memorial. Once again, Nicaragua contends that the standing forest at HSF had no commercial value for various irrelevant reasons.
- 826) Nicaragua ignores the facts to argue that significant regulatory obstacles were blocking the operation of INAGROSA's standing forest. According to Nicaragua, these obstacles were:
- a) Forest harvest operations were inconsistent with the designation of the Private Wildlife Reserve.⁹¹³
 - b) INAGROSA did not have necessary commercial forest registration from government departments.⁹¹⁴
 - c) INAGROSA was not registered with CETREX for the export of timber from Nicaragua.⁹¹⁵
 - d) Riverside did not receive the necessary CITES export permits to export grenadillo and coyote timber.⁹¹⁶
 - e) INAGROSA failed to register its forest nursery for commercial operations.⁹¹⁷
- 827) The purported forestry "regulatory errors" are like the "regulatory errors" Nicaragua improperly asserted regarding the Hass avocado operations. Both the avocado and the forest regulatory errors are irrelevant and immaterial to the issues in dispute in this claim. They are a poor attempt at a diversion and are nothing more than an artifice and caprice on the part of Nicaragua.
- 828) Once again, Nicaragua is correct in the statement that INAGROSA did not register for commercial forest operations in general and for the export of

⁹¹² Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 191 (CWS-10).

⁹¹³ Counter-Memorial at ¶ 187.

⁹¹⁴ Counter-Memorial at ¶ 188.

⁹¹⁵ Counter-Memorial at ¶ 187.

⁹¹⁶ Counter-Memorial at ¶ 189.

⁹¹⁷ Counter-Memorial at ¶ 190.

forest products. However, once again, Nicaragua applies faulty reasoning to the facts.

- 829) INAGROSA was caring for a standing forest.⁹¹⁸ INAGROSA was tending to that forest in a sustainable manner.⁹¹⁹ Up to the time of the Invasion, INAGROSA had not harvested trees from its forest.⁹²⁰ In fact, it was continuing with the sustainable planting of additional saplings in its forest in preparation for eventual sustainable harvests.⁹²¹
- 830) INAGROSA grew black walnut saplings for its own use in its own plant nurseries. INAGROSA tended to the sustainable development of its private forest and, when the time came, INAGROSA would have sustainably harvested valuable timber species from the private forest for sale to its customer, Miller Veneers in the United States.
- 831) At the time of the Invasion, INAGROSA was not logging or cutting trees. INAGROSA was tending a standing forest.
- 832) Nicaragua relies upon the witness statements of Norma Gonzalez, Álvaro Méndez, and Xiomara Mena to support these inapplicable contentions.
- a) Norma Gonzalez, head of the Legal Advice Division of MARENA, explains that INAGROSA failed to obtain specific permissions for a Forest Use Permit,⁹²² CITES export permits for the export of protected wood species,⁹²³ and did not address the need to obtain environmental assessments for forests of over 500 ha.⁹²⁴
 - b) Álvaro Méndez Valdivia is the Delegate of the National Forestry Institute (“INAFOR”) for the Department of Jinotega.⁹²⁵ His witness statement addresses the circumstances when registration with INAFOR was necessary, and the requirements of a Forest Use Permit.
 - c) Xiomara Mena is the Director of CETREX, Nicaragua’s Export Processing Center⁹²⁶ Nicaragua relies upon her witness statement to confirm that

⁹¹⁸Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 300 (CWS-10)

⁹¹⁹Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 300 (CWS-10)

⁹²⁰Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 300 (CWS-10)

⁹²¹Witness Statement of Carlos Rondón - Reply – ENG at ¶ 116 (CWS-09); Witness Statement of Luis Gutierrez – Reply – ENG at ¶ 301 (CWS-10).

⁹²²Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 49 (RWS-09).

⁹²³Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 51-52 (RWS-09).

⁹²⁴Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 41 (RWS-09).

⁹²⁵Witness Statement of Alvaro Méndez-Counter-Memorial-SPA at ¶ 1 (RWS-08).

⁹²⁶Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 1 (RWS-06).

INAGROSA did not register for export permits for the future sale of forest products such as timber.⁹²⁷

1. There was no Inconsistency with the Private Wildlife Reserve Designation

833) There was no inconsistency between INAGROSA's forest operations and the obligations of a Private Wildlife Reserve.

a) HSF was not a Private Wildlife Reserve

834) INAGROSA could not act inconsistently with the Private Wildlife Reserve designation (as discussed *supra*) since the MARENA Ministerial Resolution 021.2018 was not in legal force.⁹²⁸

b) HSF was not a Protected Area

835) Nicaragua contends that HSF was a Private Wildlife Reserve and as such it was also a protected area and thus could it not engage in exploitation and extraction of forest woods.⁹²⁹

836) As noted above, the MARENA Ministerial Resolution 021.2018 was not in legal force.⁹³⁰

c) INAGROSA did not require an Environmental Assessment

837) INAGROSA did not require an environmental impact assessment for the forest. As noted above, INAGROSA was not engaged in commercial forestry activities. As a result, there was no "forest use in a forest plantation."⁹³¹

838) Additionally, INAGROSA was not engaged in the harvesting of trees.⁹³² As a result, it was not exploiting the forest area at HSF at the time of the Invasion.⁹³³ Since INAGROSA was not exploiting the forest area at HSF, INAGROSA was not required to obtain an Environmental Impact Assessment or an Environmental Permit from MARENA.

⁹²⁷Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 17, 39 (RWS-06).

⁹²⁸ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 161 (CES-06).

⁹²⁹ Witness Statement of Norma González-Counter-Memorial-SPA at ¶ 77 (RWS-09).

⁹³⁰ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 161 (CES-06).

⁹³¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 162 (CES-06).

⁹³²Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 117 (CWS-09).

⁹³³Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 300 (CWS-10).

d) No need for clear forests for Agriculture

- 839) INAGROSA did not need to clear forest land at HSF to grow avocados.⁹³⁴ Nicaragua incorrectly contends that INAGROSA would clear 200 ha of forest lands and convert the forest to agricultural uses for the initial expansion. As noted above, the 2018 expansion was a re-use of its existing and already cleared agricultural lands used for coffee cultivation.
- 840) To be clear, INAGROSA would have followed all local laws concerning the harvest of trees in its forest.⁹³⁵ Once it expanded the standing forest to sustainable harvesting, INAGROSA would have applied for a forest use permit and obtained one.⁹³⁶
- 841) INAGROSA had numerous meetings with the forestry ministry and worked with their officials.⁹³⁷ There was no indication there would be an obstacle to its sustainable forest harvest.
- 842) The regulatory issues raised did not present a barrier to the sustainable harvest of trees from the forest reserve by INAGROSA.⁹³⁸ Nicaragua does not demonstrate that this would prevent business operations. They merely assert that this would make harvest impossible.

2. No Requirement for Commercial Forest Registration and Permits

- 843) Nicaragua contends that Riverside did not have necessary commercial forest registration from government departments.⁹³⁹ Nicaragua relies on Álvaro Méndez, INAFOR's local Jinotega representative. Mr. Méndez testifies that INAGROSA was required to register with INAFOR and obtain a Forest Use Permit.⁹⁴⁰ But INAGROSA did not require Forest Use Permit by the time of the Invasion in June 2018.⁹⁴¹

a) No requirement for a Forest Use Permit

- 844) Once again, Nicaragua misconstrues the factual underpinnings to reach a capricious conclusion of regulatory inconsistency. INAGROSA had no requirement to register with INAFOR for a Forest Use Permit before the Invasion.

⁹³⁴Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 302 (CWS-10).

⁹³⁵Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 303 (CWS-10).

⁹³⁶Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 300 (CWS-10).

⁹³⁷Witness Statement of Carlos Rondón - Reply – ENG at ¶ 113 (CWS-09).

⁹³⁸Expert Witness Statement of Renaldy J. Gutierrez at ¶ 17 (c) (illus) (CES-06).

⁹³⁹Counter-Memorial at ¶ 188.

⁹⁴⁰Witness Statement of Alvaro Méndez-Counter-Memorial-SPA at ¶17 (RWS-08).

⁹⁴¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 162-64 (CES-06).

845) At the time of the Invasion of HSF, INAGROSA had a standing forest. This standing forest operation involved cultivating and growing a sustainable private forest.⁹⁴² By the June 2018 invasion date, INAGROSA was not selling or exporting wood products from the forest trees.⁹⁴³ INAGROSA was cultivating trees in the standing forest.⁹⁴⁴ Accordingly, no forest use permit was required.⁹⁴⁵

b) No need for a Forest Regent or a Forest Supervisor

846) INAGROSA was a forest grower. While it had a market for its timber, it had not yet commenced sustainable forest harvests.⁹⁴⁶ Therefore, INAGROSA was not required to register with INAFOR and obtain a Forest Use Permit.⁹⁴⁷

847) Delegate Méndez noted that there is no record that Luis Gutierrez was registered as the forest regent or that INAGROSA filed an application for forest regent with INAFOR.⁹⁴⁸ Those statements are correct because there was no obligation upon INAGROSA to do either.⁹⁴⁹

848) A forest supervisor is only required for forest that are commercially exploited.⁹⁵⁰ Since INAGROSA was not exploiting the HSF forest area, INAGROSA was not required to register a Forest Management Plan, a Forest Regent, or a Forest Supervisor.⁹⁵¹

3. No forest products exports in 2018

849) Xiomara Mena, the CETREX Director, stated that INAGROSA failed to register as a timber exporter with CETREX.⁹⁵² That is a correct statement but it is irrelevant.

850) At the time of the Invasion, INAGROSA already was registered with CETREX for coffee. Adding another commodity product would be simple.

⁹⁴² Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 300-301 (**CWS-10**), Expert Witness Statement of Renaldy J. Gutierrez at ¶ 163 (**CES-06**).

⁹⁴³ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 163 (**CES-06**).

⁹⁴⁴ Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 117 (**CWS-09**); Expert Witness Statement of Renaldy J. Gutierrez at ¶ 163 (**CES-06**).

⁹⁴⁵ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 162 (**CES-06**).

⁹⁴⁶ Witness Statement of Carlos Rondón – Reply – ENG at ¶ 117 (**CWS-09**).

⁹⁴⁷ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 162 (**CES-06**).

⁹⁴⁸ Witness Statement of Alvaro Méndez-Counter-Memorial-SPA at ¶ 43 (**RWS-08**).

⁹⁴⁹ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 162 (**CES-06**).

⁹⁵⁰ Article 47 of the Regulation of Law No. 462, Law for the Conservation, Promotion and Sustainable Development of the Forestry Sector, November 3, 2003 (**RL-0015-SPA-ENG**).

⁹⁵¹ Article 43 of the Regulation of Law No. 462, Law for the Conservation, Promotion and Sustainable Development of the Forestry Sector, November 3, 2003 (**RL-0015-SPA-ENG**).

⁹⁵² Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 39 (**RWS-06**).

851) INAGROSA was not logging trees in private forests. As no trees were cut for export, INAGROSA had no reason to register with CETREX as a timber exporter with CETREX.⁹⁵³ It would have done so once it was closer to exporting a manufactured good (such as timber).

4. No Requirement for Export Permits in 2018

- 852) INAGROSA did not cut, extract, or destroy any endangered tree species on Nicaragua's national list or under international agreements such as the CITES Agreement.
- 853) At the time of the Invasion of HSF, INAGROSA was not commercially exploiting the forest- only growing trees. Therefore, INAGROSA did not require a CITES permit.⁹⁵⁴
- 854) Director Mena stated that an exporter that intends to export forest species protected by the International Convention on the Endangered Species of Flora and Fauna (CITES), such as mahogany, royal cedar, granadillo, yams, mountain almond, guayacán, and coyote need a CITES permit from MARENA.⁹⁵⁵ The exporter must have an inspection certificate from National Forestry Institute (INAFOR) for non-protected forest species.⁹⁵⁶
- 855) Director Mena explains that INAGROSA failed to register as a timber exporter with CETREX.⁹⁵⁷
- 856) At the time of the Invasion, INAGROSA was not logging the trees at the private forest for export. Consequently, INAGROSA was not required to register as a timber exporter with CETREX.⁹⁵⁸
- 857) HSF was an existing agricultural facility following sustainable agricultural practices. Commercial activity was not prohibited, and there was no change in land use.
- 858) INAGROSA would follow all international convention requirements under agreements such as CITES. There was no prohibition for the harvest of its rare woods under such treaties. Management would have applied for appropriated CITES permits as required.

⁹⁵³Expert Witness Statement of Renaldy J. Gutierrez at ¶ 172 (CES-06).

⁹⁵⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶ 165 (CES-06).

⁹⁵⁵Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 31 (RWS-06).

⁹⁵⁶Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 32 (RWS-06).

⁹⁵⁷Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 39 (RWS-06).

⁹⁵⁸Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 171-172 (CES-06).

859) INAGROSA was not required to obtain a CITES Export Permit up to the time of the Invasion.⁹⁵⁹ INAGROSA was not exploiting the forest area at HSF. INAGROSA was not exporting growing trees. Since INAGROSA did not have a product to export, it was too early to apply for a permit, which is applied to a good ready for export.⁹⁶⁰

a) INAGROSA did not require Certificates of Origin and Waybills

860) INAGROSA could not obtain a certificate of origin for a commodity yet to be harvested as the “good” for the certificate was yet to be “manufactured”.⁹⁶¹ Consequently, there was no need for a certificate of origin.⁹⁶²

861) Nicaragua complains about a lack of waybills for timber exports. The answer again is that INAGROSA was not exporting timber or other forest products yet.⁹⁶³ Thus, there would be no waybills that are created once finished goods are transported.⁹⁶⁴

5. INAGROSA was not required to register the forest nurseries with INAFOR

862) INAGROSA was not required to register the forestry nurseries with black walnut seedlings located at HSF.⁹⁶⁵ Contrary to Alvaro Mendez’s witness statement, it was not mandatory for forest tree growers to register with INAFOR. Registration was only to obtain the benefits of the law.⁹⁶⁶

863) At the time of the Invasion of HSF, INAGROSA was not commercially exploiting the nursery.⁹⁶⁷ It was not selling trees to others but using the saplings for its own internal purposes.⁹⁶⁸ Nursery registration is only required if the nursery is being commercially exploited.⁹⁶⁹ Therefore, INAGROSA was not required to register with the black walnut nursery with INAFOR.⁹⁷⁰

⁹⁵⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 165 (CES-06).

⁹⁶⁰Article 92 of the System of Environmental Evaluation of Permits and Authorizations for the Sustainable Use of Natural Resources, November 28, 2017 (RL-0009-SPA-ENG).

⁹⁶¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 174 (CES-06).

⁹⁶²Expert Witness Statement of Renaldy J. Gutierrez at ¶ 174 (CES-06).

⁹⁶³Expert Witness Statement of Renaldy J. Gutierrez at ¶ 174 (CES-06).

⁹⁶⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶ 174 (CES-06).

⁹⁶⁵Expert Witness Statement of Renaldy J. Gutierrez at ¶ 167 (CES-06).

⁹⁶⁶Article 47 of the Regulation of Law No. 462, Law for the Conservation, Promotion and Sustainable Development of the Forestry Sector, November 3, 2003 (RL-0015-SPA-ENG).

⁹⁶⁷Witness Statement of Carlos Rondón - Reply – ENG at ¶ 117 (CWS-09).

⁹⁶⁸Witness Statement of Carlos Rondón - Reply – ENG at ¶¶ 116-117 (CWS-09).

⁹⁶⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 167 (CES-06).

⁹⁷⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 167 (CES-06).

- 864) There is no need to obtain a certificate of origin until the forest becomes timber. That had not yet occurred, as there was no logging. This observation is not relevant.

E. Domestic Avocado Exports Requirements

- 865) INAGROSA did not require exports permits at the time of the Invasion. Prior to the Invasion, INAGROSA was not exporting Hass avocados.⁹⁷¹ INAGROSA planned to sell its harvested avocado crop into the Costa Rican market in 2018 and 2019.⁹⁷²
- 866) Since INAGROSA was not currently exporting Hass avocados, it had no requirement to complete pre-export requirements:
- a) Register with IPSA as an exporter.⁹⁷³
 - b) If the registration was approved, Phytosanitary Certification Department would perform, when required, an inspection of the site to certify compliance with the minimum requirements for the production and packing of the agricultural products to be exported.⁹⁷⁴
 - c) Change the export crop from coffee to avocado with IPSA.⁹⁷⁵
 - d) Register as an exporter with CETREX.⁹⁷⁶
- 867) In Counter-Memorial paragraphs 132 – 135, Nicaragua contends that the fact that INAGROSA had not registered avocado products with Nicaragua's Export Processing Center (CETREX) was proof that INAGROSA would not have exported avocados.
- 868) Nicaragua's reasoning is faulty. The lack of registration in June 2018 confirmed that INAGROSA had not yet exported Hass avocados from its successful 2017 harvest. That is not a fact in contention. INAGROSA did not export its first successful Hass INAGROSA crop in 2017.

⁹⁷¹ Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 23(m), 108 (**CWS-09**)

⁹⁷² Management Representation Letter from Riverside Coffee, LLC to Richter Inc. at ¶ 33 September 12, 2022 (**C-0055-ENG**).

⁹⁷³ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 169 (**CES-06**).

⁹⁷⁴ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 169 (**CES-06**).

⁹⁷⁵ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 169 (**CES-06**).

⁹⁷⁶ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 169 (**CES-06**).

869) Xiomara Mena Rosales is the Director of the Export Processing Center (“CETREX”).⁹⁷⁷ Nicaragua relies upon her witness statement to address INAGROSA’s lack of registration for export permits at CETREX for the Hass avocados.⁹⁷⁸

1. Export permits for Hass avocados

870) Director Mena explained that INAGROSA failed to have the following:

- a) Register with the IPSA for a Phytosanitary Certification Department for agricultural export products.⁹⁷⁹
- b) File a request for DUCA-F (export to Central America) or a Single Export Form (rest of the world) export permit.⁹⁸⁰

871) Export permits and export permit registration would be required after harvest as a requirement for export.

872) Director Mena stated that there are no export records of Hass avocados from INAGROSA or Carlos Rondón.⁹⁸¹ The lack of registration for avocados was not surprising. At that time, INAGROSA had yet to export its Hass avocado production.⁹⁸²

873) INAGROSA Management intended to export surplus production to its avocado seed needs from the 2018 and 2019 Hass avocado harvest to Costa Rica.⁹⁸³ That would have required registration of avocados with CETREX for a DUCA-F certificate for export to Central America.

874) INAGROSA was already registered for coffee with CETREX.⁹⁸⁴ Adding additional products was not complicated or time-consuming.⁹⁸⁵ The registration was rendered unnecessary by the destruction of INAGROSA’s Hass avocado harvest and its long-cycle fruit tree plantation (and the rare hardwood trees in its private forest) arising from the unlawful occupation of HSF.

875) Therefore, INAGROSA did not require registering as an exporter with CETREX, obtaining a DUCA-F (export to Central America), or a Single

⁹⁷⁷ Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 1 (**RWS-06**).

⁹⁷⁸Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 17 (**RWS-06**).

⁹⁷⁹Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 20 (**RWS-06**).

⁹⁸⁰Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 23 (**RWS-06**).

⁹⁸¹Witness Statement of Xiomara Mena-Counter-Memorial-SPA at ¶ 28 (**RWS-06**).

⁹⁸²Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 283-292 (**CWS-10**).

⁹⁸³ Witness Statement of Carlos J. Rondón – Reply – ENG at ¶ 23(m) (**CWS-09**).

⁹⁸⁴Certificate issued by CETREX No. 4 February 2, 2023 (**R-0023-SPA-ENG**).

⁹⁸⁵Witness Statement of Luis Gutierrez - Reply – SPA at ¶ 204 (**CWS-10**)

Export Form (rest of the world). The absence of such registration was not an impediment to operating the business at INAGROSA.⁹⁸⁶

- 876) INAGROSA would have registered as a Hass avocado exporter, complied with all the pre-export requirements, and obtain expert permits prior to the export of the harvested avocado crop to Costa Rica.⁹⁸⁷

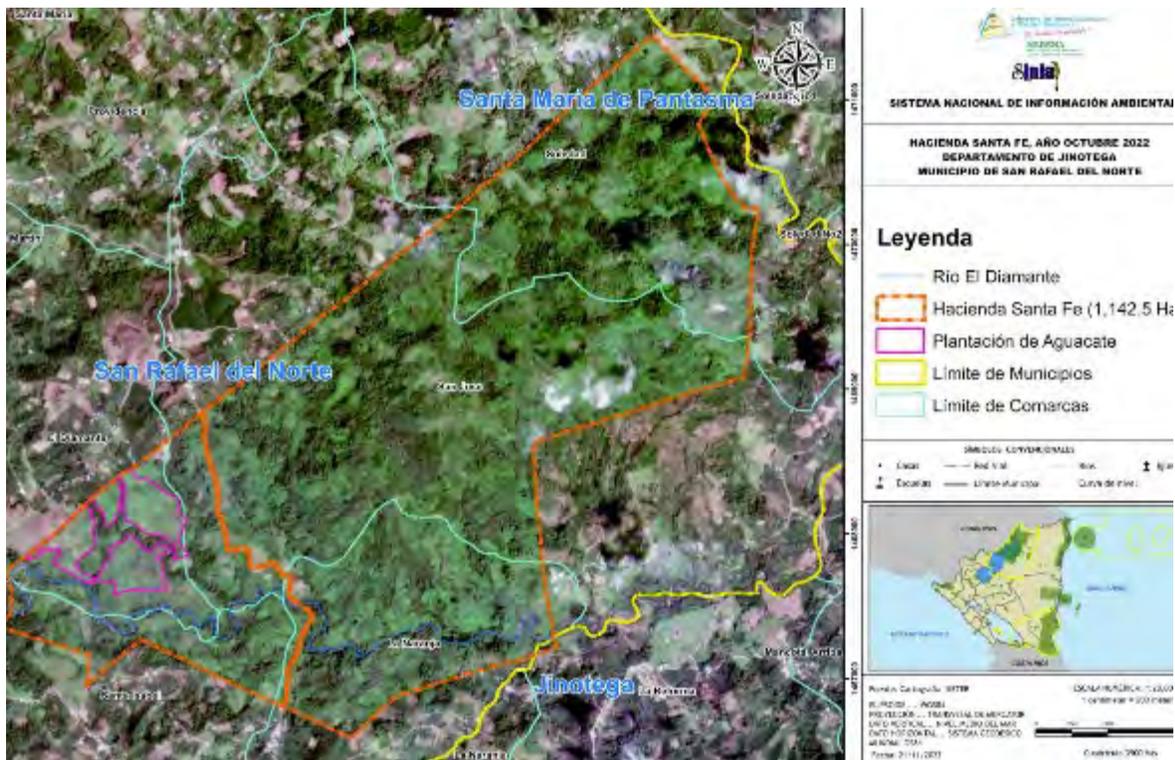
F. Non-Regulatory Forest Issues

- 877) Nicaragua has filed three witness statements that address the issue of forestry, among other issues.
- 878) In general, Nicaragua has challenged the following factual matters.
- a) No evidence of deforestation
 - b) The exploitation of a conservation area
 - c) Timing of the harvest and modality
 - d) Nicaragua's evidence shows the deforestation
- 879) Nicaragua has raised an issue that there is no proof of deforestation taking place at HSF. However, the evidence in this claim demonstrates that there was deforestation of valuable species which took place during the occupation of HSF.
- 880) The Witness Statement of Luis Gutierrez at ¶128 (d) says:
- There has been widespread destruction of the forests by cutting down the best woods, extracting them for the benefit of the invaders, and being organized by the Nicaraguan government.
- 881) Luis Gutierrez addresses the deforestation in the official inventory document dated August 14, 2018.⁹⁸⁸
- 882) However, Nicaragua disputes this claim. Nicaragua filed a satellite image of Hacienda Santa Fé from October 2022 (as R-0077-SPA), contending that there was no deforestation.

⁹⁸⁶Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 170-172 (**CES-06**).

⁹⁸⁷ Witness Statement of Luis Gutierrez - Reply – SPA at ¶¶ 205-208 (**CWS-10**).

⁹⁸⁸Inventory of damages at Hacienda Santa Fe August 14, 2018 (**C-0058-SPA**).



- 883) At paragraph 193 of the Counter-Memorial, Nicaragua argued that the satellite image above demonstrates that Hacienda Santa Fé was not deforested and that the forest was still there.
- 884) The satellite image presented by Nicaragua is its only evidence.
- 885) However, this image fails to demonstrate whether the forest is logged. The image in **R-0077-SPA** was taken four years after the invasion and taking of Hacienda Santa Fé. This is an area located in the tropics. It is impossible to determine from seeing that satellite image if any deforestation occurred.
- 886) Riverside did not argue that the entire forest was deforested-only that the rare woods were logged. This satellite image is irrelevant as it fails to demonstrate the presence or absence of the specific hardwood trees.
- 887) Nicaragua did not respond to the evidence filed by Riverside that the forest had been illegally logged, which was reported on social media (see below **C-0061-SPA**).

English translation:

#PICTURES| #Jinotega | Invaders are deforesting a forest in Hacienda Santa Fe.
#NotiPinolero | @PinoleroNoti



NOTIPINOLERO.BLOGSPOT.COM reported the following:

English translation:

NOTIPINOLERO.BLOGSPOT.COM

Deforestation of Hacienda Santa Fé is denounced| NotiPinolero

Hacienda Santa Fe is located to the north of the city of Jinotega, where invaders

...

- 888) This blog post corroborates Luis Gutierrez's statement that the invaders were logging the trees from the forest.

VI. INAGROSA'S BUSINESS OPERATIONS

A. INAGROSA Operations

- 889) Riverside owns and controls INAGROSA which owns HSF. INAGROSA owns this property.⁹⁸⁹ Riverside controls⁹⁹⁰ and owns INAGROSA, the registered owner of the 12,248,251.99 square meters plantation (an area of approximately 1224.8-hectares).⁹⁹¹ INAGROSA has a standing forest on approximately 140 hectares of the 1224.8 hectares area. That left 1084.80 hectares of land available for agricultural uses.⁹⁹²
- 890) At the time of the taking of its lands, INAGROSA planned to plant 700 ha with Hass avocados with a view to eventually expanding to 1000 ha.⁹⁹³ In 2018, INAGROSA had planted 44.75 hectares of avocados⁹⁹⁴ and was in the process of expanding its production on 200 hectares of land by 240,000 avocado trees per year.⁹⁹⁵ The additional 76 hectares of agricultural land was available for adjacent agricultural use but it was not a part of the initial 1000 hectare development plan.
- 891) INAGROSA's Hass avocado harvest was nearly ready for picking at the time of the Invasion.⁹⁹⁶
- 892) INAGROSA has three existing plant nurseries at HSF.⁹⁹⁷ The three nurseries were located approximately 50 meters away from the Casa Hacienda Santa Fé. The first nursery was established in 2013 and had capacity for 5,000 saplings at a time. INAGROSA could use the saplings or move them to temporary holding areas for planting. The second nursery was established in 2015 and had capacity for 8,000. The third nursery was established in 2016 and had capacity for 10,000.⁹⁹⁸ At the time of the first invasion, INAGROSA

⁹⁸⁹Public Auction Certificate No. 43, December 15, 1997 (**C-0042-SPA**); Forced Sale Agreement of Hacienda Santa Fe (Public Instrument No. 13, dated April 29, 1998) (**C-0173-SPA**).

⁹⁹⁰INAGROSA Share Certificate No. 22, August 28, 2022 (**C-0052-SPA**); Inagrosa Share Certificate No. 23, August 28, 2022 (**C-0053-SPA**).

⁹⁹¹Literal Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry, December 17, 2019 (**C-0080-SPA**); Related Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry dated June 30, 2022 at 0001037 (**C-0060-SPA**).

⁹⁹²Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 187. (**CWS-10**)

⁹⁹³Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 207 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶28 (**C-0055-ENG**).

⁹⁹⁴Witness Statement of Luis Gutierrez – Reply – SPA at ¶¶ 214-215 (**CWS-10**).

⁹⁹⁵Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶32 (**C-0055-ENG**).

⁹⁹⁶Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 177 (**CWS-01**).

⁹⁹⁷Witness Statement of Luis Gutierrez – Reply – SPA at ¶¶ 230-231 (**CWS-10**).

⁹⁹⁸Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 231 (**CWS-10**).

had 7,000 grafted avocado saplings and 3,000 non-grafted avocado trees maturing in its principal in-house nursery.⁹⁹⁹

- 893) INAGROSA was preparing to plant 240,000 new Hass avocado trees over the following 12 months as part of its overall expansion to 1000 hectares of Hass avocado trees.¹⁰⁰⁰ Hacienda Santa Fé had a corporate office, production facilities, residences for the field workers and administrative personnel, a weather data station, a warehouse, a mechanical workshop, a shed, and three nursery facilities.¹⁰⁰¹
- 894) In addition to the development of Hass avocado cultivation, Hacienda Santa Fé had a bio-reserve forest of over 35,000 hardwood trees being maintained for sustainable harvest.¹⁰⁰²
- 895) Avocado trees are a long-cycle fruit tree. They take approximately three years to produce mature fruit from grafting.¹⁰⁰³ The Hass avocado plantation was in the lower part of Hacienda Santa Fe, specifically in areas internally referred to as Lot 8, La Frijolera, El Mango, and Areas Nuevas.
- 896) INAGROSA first planted Hass avocado trees in January 2014 in Lot 8 over an area of 14.87 hectares. In 2015, INAGROSA planted 1,404 Hass avocado trees in El Mango in an area of 3.51 hectares. In 2016, INAGROSA planted 4,792 Hass avocado trees in Las Frijolera over 11.98 hectares. Finally, in 2017, INAGROSA planted 5,726 Hass avocado trees in Areas Nuevas in an area of 14.39 hectares¹⁰⁰⁴
- 897) Avocado harvest occurs once a year in Jinotega between July and November.¹⁰⁰⁵ The first avocado crop in 2017 was successful.¹⁰⁰⁶ That crop was tested for quality.¹⁰⁰⁷ The test results showed high ratings for dry matter

⁹⁹⁹Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 71 (**CWS-01**).

¹⁰⁰⁰Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶ 32 (**C-0055-ENG**).

¹⁰⁰¹Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 32 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 25 (**CWS-02**).

¹⁰⁰²Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 21 (**CWS-02**).

¹⁰⁰³Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 11, 119 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶16 (**C-0055-ENG**).

¹⁰⁰⁴Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 228 (**CWS-10**).

¹⁰⁰⁵Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 171 (**CWS-01**).

¹⁰⁰⁶Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 11, 73, 130, 137, (**CWS-01**).

¹⁰⁰⁷Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 176 (**CWS-01**); Laquisa Laboratory analysis results on 2017 avocado crop produced at Hacienda Santa Fe (**C-0054-SPA**).

content.¹⁰⁰⁸ A successful 2018 harvest was about to commence at the beginning of June 2018.¹⁰⁰⁹

- 898) Starting in 2015, INAGROSA Management considered raising capital to accelerate the development of over 672,000 Hass avocado trees¹⁰¹⁰ at Hacienda Santa Fé.¹⁰¹¹
- 899) Ultimately, INAGROSA was not reliant on capital from outside its existing ownership structure for this expansion to occur.¹⁰¹²
- 900) The expansion of the operations at Hacienda Santa Fé was underway in 2018 without capital investment from outside of the existing Investor.¹⁰¹³ However, INAGROSA was highly dependent on its existing investor which had capitalized the company and provided assurances for INAGROSA's financial future.
- 901) Management projected that Inagrosa would produce over 30 million kilograms of Hass avocados and generate almost US\$90 million in revenue through the overall planned expansion.¹⁰¹⁴

B. Financial capacity

- 902) Nicaragua then attacked the financial capacity of INAGROSA, saying that it was non-functional and “broke”.¹⁰¹⁵ It said that the avocado cultivation scheme was inconsistent with reports to MARENA¹⁰¹⁶ and that the Company had no financial capacity to carry out its unproven expansion.¹⁰¹⁷ In essence, Nicaragua says that INAGROSA was not a real business and had no track

¹⁰⁰⁸Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 176 (**CWS-01**); Laquisa Laboratory 2017 avocado crop test analysis results on the avocado crop produced at Hacienda Santa Fe, November 17, 2017 (**C-0054-SPA**).

¹⁰⁰⁹Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 287 (**CWS-10**); Witness Statement of Carlos Rondón - Reply – ENG at ¶ 23(g), 77(**CWS-09**).

¹⁰¹⁰Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 201 (**CWS-01**).

¹⁰¹¹Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶196 (**CWS-01**).

¹⁰¹²Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 208 (**CWS-01**); Management Representation letter from Riverside Coffee, LLC to Richter Inc. executed September 12, 2022, at ¶31 (**C-0055-ENG**).

¹⁰¹³Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 208 (**CWS-01**); Management Representation letter from Riverside Coffee, LLC to Richter Inc. executed September 12, 2022 at ¶ 31 (**C-0055-ENG**).

¹⁰¹⁴Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 203 (**CWS-01**); Management Representation letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022, at ¶ 30 (**C-0055-ENG**).

¹⁰¹⁵Counter-Memorial at ¶¶ 27 and 101.

¹⁰¹⁶Ministry of Environment and Natural Resources of Nicaragua (Ministerio del Ambiente y Recursos Naturales) (hereinafter “MARENA”)

¹⁰¹⁷Counter-Memorial at ¶ 474.

record.¹⁰¹⁸ Nicaragua also claims that there were no employees at INAGROSA.¹⁰¹⁹ All of its damages claims are speculative and exaggerated and without documentary support.¹⁰²⁰

- 903) There is no question that INAGROSA was involved in an investment cycle phase as it was undergoing its expansion of its Hass Avocado operations. However, the fact that there was augmentation to productive capacity does not mean that the business was neither operational nor valuable. This was all addressed in detail by Mr. Kotecha in his First Expert Damages Report.¹⁰²¹
- 904) On the issue of financial capacity, Riverside has filed substantive first person direct testimony from Riverside and its major unit holders confirming that they would backstop the investment for Riverside in Nicaragua up to \$17.5 million dollars.¹⁰²² This is also confirmed by contemporary corporate documentation. Nicaragua has completely ignored this evidence, and instead has conveniently relied on the operating results during the expansion period to claim that INAGROSA was not successful. This focus does not accurately reflect the ongoing nature of the business.
- 905) The total financing of \$17.5 million was structured as follows: Riverside committed up to \$16 million, as evidenced by a Members Resolution in March 2018.¹⁰²³ a further deferral of the payment of interest with interest forgiveness on the Riverside debt while the avocado transition was underway worth an additional \$1.5 million.¹⁰²⁴ This interest relief was intended to support INAGROSA during its intensive investment phase in Hass avocados, a period when the company had minimal to no revenue. Collectively, Riverside's augmented financial support for INAGROSA totaled \$17.5 million.¹⁰²⁵
- 906) Nicaragua is entirely misguided when it claims that INAGROSA had no one working at HSF. INAGROSA had many workers on site.¹⁰²⁶ This was addressed by Management in its Management Representation Letter and in witness statements.¹⁰²⁷ As of 2014, all the staff at Hacienda Santa Fé were paid through a separate management company, Santa Fé Estate Coffee

¹⁰¹⁸Counter-Memorial at ¶¶ 421 and 442.

¹⁰¹⁹Counter-Memorial at ¶ 421.

¹⁰²⁰Counter-Memorial at ¶ 518.

¹⁰²¹ Richter Reply Expert Damages Report at ¶¶ 3.32, 3.34 (**CES-04**).

¹⁰²²Witness Statement of Melva Jo Winger de Rondon -Memorial-ENG at ¶ 34 (**CWS-03**).

¹⁰²³ Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan March 7, 2018 (**C-0287-ENG**).

¹⁰²⁴ Witness Statement of Melva Jo Winger de Rondon–Reply – ENG at ¶ 88 (**CWS-08**).

¹⁰²⁵ Reply Witness Statement of Melva Jo Winger de Rondon at ¶ 83 (**CWS-08**).

¹⁰²⁶Witness Statement of Luis Gutierrez – Reply – SPA at ¶¶ 30, 248 (**CWS-10**).

¹⁰²⁷Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 32 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial-ENG at ¶20 (**CWS-02**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc. at ¶ 21 (**C-0055-ENG**).

Company S.A.¹⁰²⁸ There is simply no truth to the contention that there were no workers at the facility from 2013. This is a blatant untruth.

C. Cultivation – Land preparation:

- 907) There were three nurseries at Hacienda Santa Fé.¹⁰²⁹ As discussed above, the three nurseries were located approximately 50 meters away from the Casa Hacienda Santa Fé. The first nursery was established in 2013 and had capacity for 5,000. The second nursery was established in 2015 and had capacity for 8,000. The third nursery was established in 2016 and had capacity for 10,000.¹⁰³⁰
- 908) The main nursery was initially used for Hass avocado propagation and grafting.¹⁰³¹
- 909) The expansion plan contemplated the use of the large secondary nursery for additional 10,000 Hass avocado saplings commencing in 2018.¹⁰³²
- 910) That plan was revised in 2018.¹⁰³³ INAGROSA planned to expand Hass Production in 2018/2019 to plant the next 200 hectares with 140,000 Hass avocado saplings.¹⁰³⁴

D. Addressing the Duarte Report

- 911) Dr. Duarte's expert report analyzes the statements, figures, and projections in Riverside's Memorial regarding avocado production, expansion plans, and the viability of the avocado export business from Nicaragua to the North American market.
- 912) The Duarte Expert Report confirms the viability of INAGROSA's avocado production and its business. While Dr. Duarte has some differences over avocado yield and density, he confirms the underlying viability of the business provided that there was sufficient capital available.

1. Riverside addresses Dr. Duarte's Concerns.

¹⁰²⁸Witness Statement of Luis Gutierrez – Reply – SPA at ¶¶ 290-291 (CWS-10).

¹⁰²⁹Management Representation Letter from Riverside Coffee, LLC to Richter Inc. September 12, 2022 ¶ 19 (C-0055-ENG); Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 72 (CWS-01).

¹⁰³⁰ Witness Statement of Luis Gutierrez – Reply – SPA at ¶ 231 (CWS-10).

¹⁰³¹Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 72 (CWS-01).

¹⁰³²Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 72 (CWS-01).

¹⁰³³Witness Statement of Carlos Rondón – Reply – ENG at ¶ 100 (CWS-09).

¹⁰³⁴Witness Statement of Carlos Rondón – Reply – ENG at ¶100 (CWS-09).

a) Planting

- 913) Dr. Duarte concluded that INAGROSA's Hass avocado plantings were not completed in 2018 based on the avocado cultivation report by Rodrigo Jimenez from 2014.¹⁰³⁵
- 914) The avocado cultivation report mentions that the first lot had to be replanted, there were non-grafted trees in the second lot, the third was in process, and the fourth was full of fern that had to be cleared.¹⁰³⁶ Therefore, he concluded that INAGROSA did not have 16,000 Hass avocado trees planted in 2014; consequently, the 2017 and 2018 harvests could not include these 16,000 Hass avocado trees.¹⁰³⁷
- 915) Dr. Duarte's general assumptions are incorrect. Dr. Duarte mistakenly assumed that the avocado cultivation report by Rodrigo Jimenez was from 2016 when it was from 2014.¹⁰³⁸ Dr. Duarte's erroneous assumption invalidates his analysis of INAGROSA Hass avocado plantation.
- 916) The plantings commenced in early 2014, but INAGROSA planted a smaller initial area which it then expanded in 2015, 2016 and 2017.¹⁰³⁹ The area referred to as the "first lot" in the avocado cultivation report is Lot 8, which was the first area planted. The area described as "the lot at the end of the Hacienda" refers to El Mango, which was not planted at the time. Finally, the third area referenced in the avocado report as "sectors with brush" is New Areas, which was also not planted at the time.¹⁰⁴⁰
- 917) INAGROSA has operated a Hass avocado plantation since 2014. Notably, the company completed a harvest cycle in 2017 and had an initial immature harvest in 2018. INAGROSA was on the verge of an even more abundant harvest in 2018 until the disruptive occupation event occurred. This successful history affirmed INAGROSA's experience and technical proficiency in this specialized agricultural sector.
- 918) The main evidence on the 2017 crop comes from the Chief Agronomist who oversaw the harvest. Luis Gutierrez discusses the 2017 and 2018 harvest in his Reply Witness Statement.¹⁰⁴¹ To corroborate the above assertions, INAGROSA has adduced evidence demonstrating its successful Hass avocado production in 2017.

¹⁰³⁵Expert Report of Dr. Odilo Duarte at ¶ 7.6.2 (RER-01).

¹⁰³⁶Expert Report of Dr. Duarte at ¶ 7.6.1 (RER-01).

¹⁰³⁷Expert Report of Dr. Duarte at ¶ 7.6.2 (RER-01).

¹⁰³⁸Expert Report of Dr. Duarte at 6.22 (RER-01).

¹⁰³⁹Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 214 (CWS-10).

¹⁰⁴⁰Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 227 (CWS-10).

¹⁰⁴¹Witness Statement of Luis Gutierrez-Reply- SPA at ¶¶ 283-292 (CWS-10).

- a) Pictures of the 2017 harvest along with an email to Carlos Rondón regarding the delivery of the Hass avocados to the pressing plant in Diriamba.¹⁰⁴²
 - b) Email from Carlos Coronel to Carlos Rondón attaching a video of the first Hass avocado oil pressing.¹⁰⁴³
 - c) Results from Laquisa, an external testing lab, which analyzed Hass avocados from the 2017 harvest. Laquisa provided positive test results on the quality of avocado oil.¹⁰⁴⁴
- 919) Riverside has also introduced an updated planting schedule, further reinforcing its claims.
- a) Inagrosa Hass avocado planting schedule, September 2016.¹⁰⁴⁵
 - b) Report on 2018 Hass avocado harvest and future planting plan, August 28, 2020.¹⁰⁴⁶
 - c) Revised Hass avocado planting schedule 2013-2018.¹⁰⁴⁷

b) Yield Projections

- 920) INAGROSA planned to plant 700 Hass avocado trees per hectare. Dr. Duarte suggests a slightly reduced density of 666 trees without establishing that INAGROSA's proposed density is impractical or infeasible. His recommendations reduce the tree density by a mere 4.85%, but seemingly without substantial justification.
- 921) Concerning yield estimates, Dr. Duarte posits that the harvest yield should be significantly lowered. He based his determination on the yield numbers of six avocado plantations located in Perú (two plantations), Mexico, Guatemala, California, and Chile.¹⁰⁴⁸ However, his data lacks context as it omits comparative figures specific to Nicaragua. Instead, Dr. Duarte offers general anecdotal evidence from dissimilar conditions in other countries.

¹⁰⁴²Email from Luis Gutierrez to Carlos Rondón delivery of Hass avocado to pressing plant in Diriamba re October 27, 2017 **(C-0457-SPA)**.

¹⁰⁴³Email from Carlos Coronel Carlos Rondón regarding video of first oil pressing, November 7, 2017 **(C-0458-SPA)**; Video of first Hass avocado oil pressing 2017 **(C-0459-SPA)**

¹⁰⁴⁴Laquisa Laboratory 2017 avocado crop test analysis results on the avocado crop produced at Hacienda Santa Fe, November 7, 2017**(C- 0054-SPA)**. The lab results are discussed in the Memorial at ¶ 51.

¹⁰⁴⁵2016 INAGROSA Hass avocado planting schedule, September 2016 **(C-0662-SPA)**.

¹⁰⁴⁶Report on 2018 Hass avocado harvest and future planting plan August 28, 2020 **(C-0460-SPA)**.

¹⁰⁴⁷Revised Hass avocado planting schedule 2013-2018, January 26, 2023 **(C-0461-SPA)**.

¹⁰⁴⁸Expert Report of Dr. Duarte at ¶ 7.4.1 **(RER-01)**.

- 922) The Duarte Report sourced avocado yield information from plantations situated in Peru, Mexico, Guatemala, and California. The report encompasses yields from varying climatic regions, spanning both subtropical and tropical areas. For the purposes of this arbitration, it is pivotal to discern those plantations that might best represent the operations of INAGROSA at HSF.
- 923) It is pertinent to note that avocado yields can vary significantly depending on operative conditions, such as climate and planting density.
- a) **Cerro Prieto** –The conditions at Cerro Prieto bear similarities to the areas being developed at HSF. Both the planting density and the climate largely align. Trees that are six years old are spaced at 6 x 2.5m, resulting in 667 trees per hectare, a standard observed in Peru.¹⁰⁴⁹This planting density mirrors the high-density planting implemented in the new sectors of HSF.¹⁰⁵⁰
 - b) **TALSA –Peru** Talsa utilizes high-density planting techniques in Peru. Dr. Duarte references a website that reveals that the avocado production area is situated in a flat desert region. Although the plant density is akin to that of HSF, the overall growing conditions diverge substantially.¹⁰⁵¹
 - c) **Palo Blanco** - This is Talsa in Guatemala. Here, high-density planting is observed. The planting density is relatively lower than that of INAGROSA.¹⁰⁵² Yet, the climatic conditions bear resemblance, albeit at a lower elevation of roughly 789 meters.¹⁰⁵³ Agronomist Luis Gutierrez posits that INAGROSA offers more conducive growing conditions for Hass avocados, leading to superior yields than Talsa in Guatemala.¹⁰⁵⁴
 - d) **Plantation in Mexico** - The Mexican plantation, as delineated by Dr. Duarte, lacks vital comparative details such as growing location, planting density, and elevation. Consequently, it is unsuitable as a representative proxy.¹⁰⁵⁵
 - e) **Chile** –The data pertaining to this location is vague, only specifying the country, Chile, which encompasses a broad spectrum of climatic conditions. The incorporation of diverse rootstocks and the absence of

¹⁰⁴⁹ Newett, Simon, Report on Avocado Orchard Visits in Peru, Department of Agriculture and Fisheries, Queensland, at 0010397 (C-0577-ENG).

¹⁰⁵⁰ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 277 (CWS-10).

¹⁰⁵¹ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 278 (CWS-10).

¹⁰⁵² Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 279 (CWS-10).

¹⁰⁵³ Elevation of Palo Blanco, Guatemala (accessed on October 17, 2023) (C-0578-ENG).

¹⁰⁵⁴ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 278 (CWS-10).

¹⁰⁵⁵ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 280 (CWS-10).

specifics regarding plant density render this data non-analogous to HSF. It is, hence, unsuitable as a representative proxy.¹⁰⁵⁶

- f) **California** -The California data provides no planting density information. There is no location, again, which makes this information not valid as a proxy. California has a broad spectrum of climatic conditions. The imprecise data renders it inapplicable as a valid representative proxy.¹⁰⁵⁷

924) In summary, based on the information Dr. Duarte presented, the Cerro Prieto plantation in Peru emerges as the most analogous to HSF.¹⁰⁵⁸ High-density planting data suggests an average yield of approximately 39kg per tree by the fifth year.¹⁰⁵⁹

925) Finally, Mr. Gutierrez addresses Dr. Duarte's comments on a specific production. Dr. Duarte raises a concern that there was no evidence to support the claim that 100% of the planted trees produced the estimated quantities of Hass avocados. In any agricultural production, there cannot be 100% production from every producing tree. Dr. Duarte is correct but on a partial basis, and on this point so is INAGROSA. The experience at HSF was better than anticipated with better production, but that did not come from every tree. INAGROSA received a crop which yielded the full amount of INAGROSA's expectation, but this did not mean that every tree produced, It meant that the aggregate production came to the expected levels.¹⁰⁶⁰

c) Nursery capacity

926) Dr. Duarte noted that only 7,000 grafted saplings and 3,000 saplings were ready to be grafted in the nursery at the time of the invasion.¹⁰⁶¹ He observed that it would be difficult to plant 10 hectares with 700 trees per hectare with the grafted and non-grafted trees at the nursery.¹⁰⁶² Dr. Duarte concluded that nursery expansion was necessary.¹⁰⁶³

927) Dr. Duarte failed to note that INAGROSA had three nurseries available.¹⁰⁶⁴ The primary nursery was active but there were two additional plant nurseries which had been previously used for coffee cultivation. Those additional

¹⁰⁵⁶ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 281 (CWS-10).

¹⁰⁵⁷ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 282 (CWS-10).

¹⁰⁵⁸ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 277 (CWS-10).

¹⁰⁵⁹ Expert Report of Dr. Duarte at ¶ 7.4.2 (b) (RER-01).

¹⁰⁶⁰ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 275 (CWS-10).

¹⁰⁶¹ Expert Report of Dr. Duarte at ¶ 8.1.2 (RER-01).

¹⁰⁶² Expert Report of Dr. Duarte at ¶ 8.1.2 (RER-01).

¹⁰⁶³ Expert Report of Dr. Duarte at ¶ 8.1.2 (RER-01).

¹⁰⁶⁴ Witness Statement of Luis Gutierrez-Reply-ENG at ¶ 230 (CWS-10).

nurseries were functional and would have been used to cultivate plants for the avocado expansion.¹⁰⁶⁵

- 928) Considering that there was significant additional nursery infrastructure available, the conclusions on nursery capacity constraints in Dr. Duarte's report are not well taken.¹⁰⁶⁶
- 929) Dr. Duarte considered that the most limiting factor was obtaining the number of seeds necessary for the expansion.¹⁰⁶⁷ Another factor noted was obtaining the graft sticks, which are unavailable year-round. Dr. Duarte explained that the seed plants had to be ready to be grafted, and the graft sticks had to be in good condition.¹⁰⁶⁸
- 930) INAGROSA had sufficient internal capacity to generate avocado seeds and graft sticks from its own production.¹⁰⁶⁹ While Dr. Duarte's observations might have been accurate when INAGROSA first commenced planting its Hass avocado plantations, by the time of the invasion INAGROSA was able to satisfy its own demands from its own internal production.

d) General Agricultural Risks

- 931) Dr. Duarte alludes to the inevitable risks in agribusiness, such as variable climate conditions, diseases, and pests. These are non-specific general considerations applicable to all agribusinesses.
- 932) Dr. Duarte's concerns ignore that INAGROSA transitioned from coffee to Hass avocados because of the impact of climate change.¹⁰⁷⁰ INAGROSA transitioned to an avocado species based on native varieties endemic to Nicaragua. Further, the altitude at HSF would mitigate the impacts from climate change.¹⁰⁷¹
- 933) Further, Chief Agronomist Luis Gutierrez addressed the steps INAGROSA took to address diseases and pests at HSF.¹⁰⁷² These were active considerations, and Dr. Duarte's comments are not well-taken on those issues.

¹⁰⁶⁵Witness Statement of Luis Gutierrez-Reply-ENG at ¶ 230 (CWS-10).

¹⁰⁶⁶ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 230-231 (CWS-10).

¹⁰⁶⁷Expert Report of Dr. Duarte at ¶ 8.1.1 (RER-01).

¹⁰⁶⁸Expert Report of Dr. Duarte at ¶ 8.1.1 (RER-01).

¹⁰⁶⁹Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 270-271 (CWS-10).

¹⁰⁷⁰Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 273 (CWS-10).

¹⁰⁷¹Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 273 (CWS-10).

¹⁰⁷²Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 274 (CWS-10).

- 934) The Richter Reply Expert Damages Report has accounted for these variables within its discounted cash flow (DCF) analysis model, thereby mitigating the projected impact of these risks.

e) Issues Raised in the Avocado Cultivation Report

- 935) Nicaragua focuses on Rodrigo Jiménez's consultancy report. It was an initial assessment and does not reflect the full array of documentation that was prepared but rendered inaccessible due to the unfortunate occupation of HSF premises and the consequent destruction of corporate records.¹⁰⁷³
- 936) INAGROSA adhered to the Revised Planting Schedule and was in varying stages of plantation development,¹⁰⁷⁴ further affirming the viability of its operations. As an expansion of the productive Hass avocado plantations was underway, there were some plots in various stages of development.¹⁰⁷⁵ In addition, there were grafted and non-grafted saplings in the INAGROSA nursery,¹⁰⁷⁶ as expected, considering the expansion underway into the plantation.
- 937) Dr. Duarte states that it appeared that the avocado planting fields were not well prepared due to the existence of brush in a picture of one area in the avocado plantation. Dr. Duarte extrapolates this to mean that there was a lack of workers to clear the fields based on the photos included in Rodrigo Jimenez's avocado cultivation report.¹⁰⁷⁷
- 938) The picture was taken at an early part of the avocado plantation process. Luis Gutierrez explains that Dr. Duarte's criticism is unrepresentative. There were no weeding issues, and HSF had sufficient farm labor available to address such matters.¹⁰⁷⁸

f) Wind and Soil Conditions

- 939) Dr. Duarte generalizes wind-related concerns at HSF. The wind was not a systemic issue but confined to specific areas, as discussed in the Reply Witness Statement of Luis Gutierrez, outlining successful mitigation strategies, such as cane shielding.¹⁰⁷⁹
- 940) Dr. Duarte claims INAGROSA failed to address important factors such as the need for a pollinator variety and the use of beehives during flowering. There

¹⁰⁷³Witness Statement of Luis Gutierrez-Reply- SPA at ¶¶ 293-297 (CWS-10).

¹⁰⁷⁴Witness Statement of Luis Gutierrez-Reply- SPA at ¶¶ 214-215 (CWS-10).

¹⁰⁷⁵Witness Statement of Luis Gutierrez-Reply- SPA at ¶¶ 226-227 (CWS-10).

¹⁰⁷⁶Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 229 (CWS-10).

¹⁰⁷⁷Expert Report of Dr. Duarte at ¶ 7.6.4 (RER-01).

¹⁰⁷⁸Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 227 (CWS-10).

¹⁰⁷⁹Witness Statement of Luis Gutierrez-Reply- SPA at ¶¶ 268-269 (CWS-10).

were natural bee populations at HSF sufficient for the existing pollination needs. INAGROSA planted pollinator trees at every tenth tree.¹⁰⁸⁰ INAGROSA would have acquired beehives for the expansion areas.¹⁰⁸¹

- 941) Dr. Duarte mentions that the soil test was conducted in 2016 and that this indicated that there was a lack of prior planning.¹⁰⁸² Chief Agronomist Gutierrez knew the soil at HSF very well and it was suitable for the planting of Hass avocados.¹⁰⁸³
- 942) Dr. Duarte mentioned that the 2016 soil test results indicated that the soil was volcanic and had a low pH level.¹⁰⁸⁴ Chief Agronomist Gutierrez indicated that the acidity of the soil was managed with the application of nutrients.¹⁰⁸⁵
- 943) Soil conditions at HSF always have been a priority.¹⁰⁸⁶ Agrosat conducted a detailed soil analysis, and our agronomy team was closely involved in on-site supervision.¹⁰⁸⁷ The soil test results were delivered to INAGROSA on February 2016 but the works started prior to that date.¹⁰⁸⁸
- 944) INAGROSA knew its cultivating land well having cultivated them for more than twenty years.¹⁰⁸⁹ INAGROSA had done considerable soil testing when it was growing coffee.¹⁰⁹⁰ The soil of the area where the Hass avocado plantation was located was treated to reduce the acidity level.¹⁰⁹¹ This pre-existing knowledge reduced the need for significant testing of areas where replanting would occur.
- 945) Riverside filed a study of avocado issued by PRONicaragua, the Nicaraguan Government Investment Promotion and Export Agency. This government report, issued in 2019 admitted that San Rafael del Norte was the most suitable area in Nicaragua for avocado production due to its climatic conditions, altitude, and soil.¹⁰⁹²

¹⁰⁸⁰ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 265-267 (CWS-10).

¹⁰⁸¹ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 267 (CWS-10).

¹⁰⁸² Expert Report of Dr. Duarte at ¶ 7.3.4 (RER-01).

¹⁰⁸³ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 251-252 (CWS-10).

¹⁰⁸⁴ Expert Report of Dr. Duarte at ¶ 7.3.4 (RER-01).

¹⁰⁸⁵ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 258 (CWS-10).

¹⁰⁸⁶ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 253 (CWS-10).

¹⁰⁸⁷ Witness Statement of Luis Gutierrez-Reply-SPA at ¶ 253 (CWS-10).

¹⁰⁸⁸ Witness Statement of Luis Gutierrez-Reply- SPA at ¶253 (CWS-10).

¹⁰⁸⁹ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 252 (CWS-10).

¹⁰⁹⁰ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 252 (CWS-10).

¹⁰⁹¹ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 258 (CWS-10).

¹⁰⁹² Pro-Nicaragua- Avocado in Nicaragua Market Study at p. 16 (C-0085-SPA).

- 946) The PRONicaragua Report contrasts with contentions asserted by the Nicaraguan Agricultural Technology Institute¹⁰⁹³ (INTA) after this arbitration commenced. The INTA Report concludes that the soil for the Hass Avocado plantations was clay (*franco arcillosa*).¹⁰⁹⁴
- 947) Riverside requested production of the specific coordinates of the location for the soil samples in Document Request 78. Nicaragua agreed to look, and it reported that it could not provide any further documents with respect to this request.¹⁰⁹⁵ It appears that INTA did not take adequate steps to ensure that the soil analysis reflected the actual areas where the Hass avocados were planted. As a result, the Tribunal should give no weight to the conclusions from the INTA Report as they are non-representative and deeply flawed.
- 948) INAGROSA was aware of the soil analysis due to its earlier report from Agrosat. However, the INTA report does not establish insurmountable obstacles to avocado cultivation. It merely suggests that nutrients would need to be added to the Hass avocado crop. Any current nutrient deficiency is explained by the fact that the soil at HSF has not received any nutrients since the invasion and taking of HSF, four years prior to the INTA Report.
- 949) Dr. Duarte raises concerns over water usage and the environmental footprint. INAGROSA did not initially require artificial irrigation due to abundant hydrological resources, and excellent drainage conditions have been observed, mitigating the risk of root rot.¹⁰⁹⁶
- 950) Dr. Duarte notes that during the dry season all the water sources identified in the Hydrology Study would have been used. He considered that this would have caused problems with nearby plantations that also depended on these water sources.
- 951) Dr. Duarte points out that there was no mention of a gravity irrigation system.¹⁰⁹⁷ He notes that there was a reference to digging trenches in places where water accumulated. As a result, Dr. Duarte suggested that the land's physical characteristics were not optimal for good water drainage or root rot prevention.¹⁰⁹⁸

¹⁰⁹³Nicaraguan Agricultural Technology Institute (Instituto Nicaraguense de Tecnología Agropecuaria "INTA"). Technical Report of the Visual Evaluation of the Soil of Hacienda Santa Fe, (CRED-14). The report is undated, but the soil tests were conducted on December 14, 2022.

¹⁰⁹⁴INTA Report at p. 8 (CRED-14).

¹⁰⁹⁵CLDR No.78, Annex A, Procedural Order No. 6, May 29, 2023 (C-0549-ENG).

¹⁰⁹⁶Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 259-263 (CWS-10).

¹⁰⁹⁷Expert Report of Dr. Odilo Duarte at ¶ 7.6.5 (RER-01).

¹⁰⁹⁸Expert Report of Dr. Odilo Duarte at ¶ 7.6.5 (RER-01).

- 952) Dr. Duarte added that a government permit would have been needed for the total or partial use of the water sources.¹⁰⁹⁹
- 953) Riverside identified its hydrology resources and that it had sufficient water on site.¹¹⁰⁰ Dr. Duarte's observations are inconsistent with the evidence.
- 954) Luis Gutierrez notes that INAGROSA did not initially require irrigation for avocado cultivation, given the extensive hydrology resources available.¹¹⁰¹ INAGROSA would use labor to deliver nutrients to the avocado plants until drip irrigation was installed.¹¹⁰²
- 955) Mr. Gutierrez never witnessed root rot and noted the good drainage of the land.¹¹⁰³

g) Labour capacity at HSF

- 956) Dr. Duarte identifies that it was important to have sufficient trained workers for INAGROSA's avocado program to be effective. Dr. Duarte's comments are focused on concerns over having grafters in the avocado nursery.
- 957) Dr. Duarte outlines that one or two experienced grafters was vital. He considers that, since avocado was a new crop, that it was impossible to hire experienced grafters from nearby plantations.¹¹⁰⁴ Dr. Duarte provides no other support for his conclusion.
- 958) Dr. Duarte is incorrect in his assertion of a shortage of grafters. INAGROSA had trained in-house grafters at HSF. In 2018, the Hass avocado team was comprised of a number of workers. There were three grafters at the avocado nursery.¹¹⁰⁵
- 959) As part of every visit, Rodrigo Jimenez trained to grafters on grafting technique and good practices for approximately 2-3 hours.¹¹⁰⁶ In total, the grafters received approximately 30 hours of training from Rodrigo Jimenez.¹¹⁰⁷ After 2016, Luis Gutierrez also provided general training to the grafters prior to the grafting at the start of planting season.¹¹⁰⁸

¹⁰⁹⁹Expert Report of Dr. Odilo Duarte at ¶ 8.5.5 (RER-01).

¹¹⁰⁰Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 263 (CWS-10).

¹¹⁰¹Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 217 (CWS-10).

¹¹⁰²Witness Statement of Luis Gutierrez-Memorial- SPA at ¶ 253 (CWS-10).

¹¹⁰³Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 221 (CWS-10).

¹¹⁰⁴Expert Report of Dr. Odilo Duarte at ¶ 8.2.3 (RER-01).

¹¹⁰⁵Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 248 (CWS-10).

¹¹⁰⁶Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 249 (CWS-10).

¹¹⁰⁷Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 249 (CWS-10).

¹¹⁰⁸Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 249 (CWS-10).

- 960) The Hass avocado team grafters demonstrate a high level of skill and competence. The success rate of the 2017 Hass avocado grafting process was 86%.¹¹⁰⁹ In 2018, the success rate of the grafting process was 98%.¹¹¹⁰
- 961) Dr. Duarte fails to consider this sizeable actual expertise at HSF.¹¹¹¹ Further, should HSF require additional grafters, or other agricultural labor, that would not present a difficulty for INAGROSA.¹¹¹² There was no labor shortage that would restrict nursery operations.¹¹¹³
- 962) INAGROSA provided evidence of how INAGROSA used the coffee agricultural production team in its new job of cultivating Hass avocados. While Hass avocados are a different product line for INAGROSA, like coffee, avocados are an agricultural product. The core agricultural skills used for coffee cultivation were interchangeable for avocado production.¹¹¹⁴ These skills included land preparation, cultivation, nursery plant cultivation, planting, pruning, irrigation and fertilization, pest management, weed management, harvest, packing, processing, and transport.¹¹¹⁵
- 963) Dr. Duarte ignores INAGROSA's extensive agricultural expertise with coffee grafting and the highly skilled workforce available to INAGROSA for grafting.¹¹¹⁶
- 964) The Credibility Report points out that the Kotecha Report fails to explain how INAGROSA's experience in coffee farming translates to avocado farming, especially on the scale assumed in the report.¹¹¹⁷ Nicaragua's avocado expert, Dr. Odilo Duarte, expressed no similar concern. Credibility does not explain the basis for this concern in its Report.
- 965) Mr. Kotecha made inquiries of INAGROSA management when preparing his report on the issue of the convergence of coffee cultivation expertise and avocado cultivation expertise.¹¹¹⁸
- 966) Based on these inquiries, Mr. Kotecha formed his own view that the core skills in cultivating coffee formed a reliable basis to determine the ability to produce Hass avocados. This view was supplemented by the actual proven track record of the production of Hass avocados by INAGROSA at HSF in

¹¹⁰⁹Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 250 (CWS-10).

¹¹¹⁰Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 250 (CWS-10).

¹¹¹¹Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 245 (CWS-10).

¹¹¹²Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 292 (CWS-10).

¹¹¹³ Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 245-250 (CWS-10).

¹¹¹⁴Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 247 (CWS-10).

¹¹¹⁵See Part III of the Memorial. Witness Statement of Carlos Rondón – Memorial – ENG at ¶¶ 114-189 (CWS-01). Also Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 247 (CWS-10).

¹¹¹⁶Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 245-250 (CWS-10).

¹¹¹⁷Credibility Expert Valuation Report at ¶ 95 (RER-02).

¹¹¹⁸Richter Reply Expert Damages Report at ¶¶ 4.5, 4.6, 4.8, 4.9 (CES-04).

2017¹¹¹⁹ and the production of a crop up to the period of reaching harvest in 2018.¹¹²⁰

- 967) Dr. Duarte mentions the alleged lack of personnel, claiming that there were only 20 full-time employees as of June 2018.¹¹²¹ Dr. Duarte understates the number of full-time employees at HSF in his report.¹¹²²
- 968) Dr. Duarte ignores that INAGROSA historically had employed hundreds of temporary farm workers at harvest, and that it would have employed temporary harvest workers to harvest and process the 2018 Hass avocado harvest.¹¹²³ That harvest, and all subsequent harvests, would not have been done alone by the full-time INAGROSA employees. The Management Representation Letter **(C-0055)** in paragraph 21 reports that INAGROSA was planning on adding 60-70 workers and 7 field operators. As the production area increased, the amount of external workers at harvest also would increase significantly to address the added volumes from the larger cultivation areas.¹¹²⁴ Accommodating external workers was the reason why INAGROSA built worker housing that could house up to 1500 workers in the past.¹¹²⁵ That existing worker housing infrastructure would have been used to house temporary workers needed for all operations at HSF.¹¹²⁶

h) Planting Costs

- 969) It should be noted that the original financial records detailing INAGROSA's specific planting inputs and associated costs were unfortunately made inaccessible due to the occupation of HSF premises. Consequently, the cost data furnished by INAGROSA were estimations generated from internal management recollections and operational experience.¹¹²⁷ Dr. Duarte's insights into the cost structures prevalent in Peru led INAGROSA to revise its original cost estimates.
- 970) Dr. Duarte contends INAGROSA's estimated per-plant cost of \$14.55 for Hass avocado production as overly inflated.¹¹²⁸ The Credibility International Report examined this same calculation and came to the opposite conclusion.

¹¹¹⁹Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 283 **(CWS-10)**.

¹¹²⁰Witness Statement of Carlos Rondón-Reply-ENG at ¶ 287 **(CWS-09)**.

¹¹²¹Expert Report of Dr. Duarte at ¶ 8.3.1 **(RER-01)**.

¹¹²²Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 30 **(CWS-10)**.

¹¹²³Witness Statement of Carlos Rondón-Memorial-ENG at ¶ 42 **(CWS-01)**.

¹¹²⁴Management Representation Letter from Riverside Coffee, LLC to Richter Inc. at ¶ 21 **(C-0055-ENG)**.

¹¹²⁵Witness Statement of Carlos Rondón - Reply – ENG at ¶ 144 **(CWS-09)**.

¹¹²⁶Witness Statement of Carlos Rondón - Reply – ENG at ¶ 144 **(CWS-09)**.

¹¹²⁷Witness Statement of Luis Gutierrez- Reply- SPA at ¶¶ 239, 294-297 **(CWS-10)**.

¹¹²⁸Expert Report of Dr. Duarte at ¶ 9.1.2 **(RER-01)**.

Credibility International says that it was too low in comparison to costs in California.¹¹²⁹

- 971) Dr. Duarte's critique led to a comprehensive review and subsequent revision of INAGROSA's cost structures, now encapsulated in INAGROSA's updated planting cost schedule.¹¹³⁰ Some of INAGROSA's initial cost calculations relied on data from the year 2014, which does not accurately reflect the more advanced and cost-efficient state of Hass avocado orchards as of 2018.¹¹³¹
- 972) This updated framework has been addressed in the Reply Witness Statement of Luis Gutierrez (**CWS-10**).¹¹³² and it accommodates the efficiencies gained from economies of scale and scope, as well as the internal sourcing of avocado seeds and grafting canes.¹¹³³ The updated cost, as described in the Reply Witness Statement of Luis Gutierrez, is \$6.25 per plant.¹¹³⁴

i) Financial Resources

- 973) Dr. Duarte delves into the financial resources required for the projected expansion, estimating the costs to be around \$8 to \$10 million.
- 974) Riverside fully acknowledges the necessity for additional capital infusion to facilitate INAGROSA's transition from coffee to avocado production. As addressed above in the Reply Memorial, as of March 2018, Riverside had committed up to \$17.5 million for this purpose, thereby exceeding the amounts within Dr. Duarte's financial assessments.

j) The Expansion Plan

- 975) Dr. Duarte challenges Riverside's expansion timeline. He considers that the expansion only could have been accomplished in 3 to 4 years if everything went well.¹¹³⁵
- 976) INAGROSA commenced its Hass avocado operations in 2014. By the time of the invasion, INAGROSA already had been engaged in its Hass avocado operations for four years.
- 977) Dr. Duarte did not conduct any investigation at HSF. His report was based mostly on the 2014 avocado cultivation report.¹¹³⁶ His comments on the

¹¹²⁹Credibility International Expert Report at ¶152 (**RER-02**).

¹¹³⁰Expert Report of Dr. Duarte at ¶ 9.1.2 (**RER-01**).

¹¹³¹Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 234-241 (**CWS-10**).

¹¹³²Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 240 (**CWS-10**).

¹¹³³Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 237-241 (**CWS-10**).

¹¹³⁴Witness Statement of Luis Gutierrez- Reply- SPA at ¶¶ 239-240 (**CWS-10**).

¹¹³⁵Expert Report of Dr. Duarte at ¶ 8.3.3 (**RER-01**).

¹¹³⁶Expert Report of Dr. Duarte at ¶ 7.6.1 (**RER-01**).

viability of the business plan are at odds with avocado experts Management consulted, including the patent holder for the Hass Avocado, California-based Brokaw nurseries, and established Hass avocado producers in Mexico.¹¹³⁷

- 978) Russ Welty, INAGROSA's external CFO, drafted the business plans and was engaged in meetings about them. In his Witness Statement (CWS-11), he explains the nature of the business which was reflected in the projections. Mr. Welty's evidence demonstrates that the avocado business would have generated profit had it not been obstructed by the internationally wrongful events at HSF in 2018.¹¹³⁸
- 979) The report Credibility International provided also addressed production forecasts. The Credibility Report claims that forecasts for production and sales are unrealistic.
- 980) The Credibility Report has based its analysis of the Nicaraguan avocado operation by looking at avocado production levels in California. However, California has highly different regulatory, water access, elevation, soil, and climatic conditions which renders it an unrepresentative benchmark for comparison.

k) Regulatory and Market Access

- 981) Dr. Duarte's report touches upon the need for specific investments, permits, and certifications inside Nicaragua and for exporting to the U.S. market.
- 982) As discussed in Section III of the Reply Memorial, there were no material domestic regulatory obstacles to INAGROSA's business operations. Expert Gutierrez corroborates INAGROSA's adherence to local regulations, further substantiated by official documents showing the absence of any regulatory reprimands or infraction notices against INAGROSA. He concludes that there is no basis to the regulatory and permit allegations raised by Nicaragua in Section II of its Counter-Memorial and in the five witness statements filed by Nicaragua.¹¹³⁹ None of the regulatory matters affected the ability of INAGROSA to carry out its current business.¹¹⁴⁰ The evidence demonstrates that Nicaragua's own environmental officials confirmed INAGROSA's environmental compliance with Nicaraguan law as February 2018.¹¹⁴¹

¹¹³⁷ Witness Statement of Russ Welty–Reply–ENG at ¶ 57-60 (CWS-11).

¹¹³⁸ Witness Statement of Russ Welty–Reply–ENG at ¶¶ 14, 21, 31, 45, 49, 71, and 93.(CWS-11).

¹¹³⁹Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 183-188. (CES-06).

¹¹⁴⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 113 (CES-06).

¹¹⁴¹Memorandum– DAL – UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity (C-0285-SPA).

- 983) Nicaragua has confirmed that INAGROSA's prior expertise in exporting agricultural commodity products to foreign markets. INAGROSA would have applied that same know-how to the export of Hass avocados from Nicaragua.¹¹⁴²
- 984) Dr. Duarte states that an Animal and Plant Health Service (APHIS) authorization is necessary to access the United States market.¹¹⁴³ He noted that this is a long process and that usually a producers' association applies for the permit with the Government's political and economic support due to the high cost of obtaining the permit.¹¹⁴⁴
- 985) Riverside had budgeted for government relations and regulatory work to obtain market access in the United State, in addition to the efforts that it commenced with the USDA for US market access. Russell Welty, in his Witness Statement, projects that INAGROSA would have been able to obtain US market access in 2022 (four years out from 2018).¹¹⁴⁵
- 986) In 2018, INAGROSA would have the harvested seeds from its harvest for use in the Hass avocado expansion. Avocados utilized for seeds also could be sold for oil. Once the seed needs were met, the surplus in 2018 would have been sold in Costa Rica.¹¹⁴⁶
- 987) From 2019 to the end of 2021, INAGROSA would have exported its Hass avocados to Canada.¹¹⁴⁷ The transport logistics to Canada were similar to

¹¹⁴²Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 204-208 (**CWS-10**).

¹¹⁴³Expert Report of Dr. Duarte at ¶ 9.2.1 (**RER-01**).

¹¹⁴⁴Expert Report of Dr. Duarte at ¶ 9.2.1 (**RER-01**).

¹¹⁴⁵ Witness Statement of Russ Welty –Reply–ENG at ¶ 90 (**CWS-11**).

¹¹⁴⁶ Witness Statement of Russ Welty–Reply–ENG at ¶ 67 (**CWS-11**).

¹¹⁴⁷ Witness Statement of Russ Welty–Reply–ENG at ¶ 91 (**CWS-11**). For example, the target market is identified in the 2018 business plan (**C-0404-ENG**) at page 1. They are also noted in the following business plans: Email from Russ Welty re: RVHA Business Plan, August 16, 2016 (**C-0643-ENG**), Email from Russ Welty re: RVHA Business Plan, November 30, 2016 (**C-0644-ENG**).Email from Russ Welty re: RVHA Business Plan, December 13, 2016 (**C-0645-ENG**).Email from Carlos Rondon re: RVHA Business Plan, January 11, 2017, (**C-0646-ENG**).Email from Russ Welty re: RVHA Business Plan June 26, 2017, (**C-0647-ENG**).Email from Russ Welty re: RVHA Business Plan June 29, 2017 (**C-0648-ENG**).Email from Russ Welty re: RVHA Business Plan September 10, 2017 (**C-0649-ENG**).Email from Russ Welty re: RVHA Business Plan, October 6, 2017, (**C-0650-ENG**).Email from Russ Welty re: RVHA Business Plan, October 12, 2017, (**C-0651-ENG**).Email from Russ Welty re: RVHA Business Plan, October 23, 2017, (**C-0652-ENG**).Email from Russ Welty re: RVHA Business Plan, November 19, 2017 (**C-0653-ENG**).Email from Russ Welty re: RVHA Business Plan, November 21, 2017, (**C-0654-ENG**).Email from Russ Welty re: RVHA Business Plan, February 5, 2018 (**C-0655-ENG**).Email from Russ Welty re: RVHA Business Plan, February 26, 2018 (**C-0656-ENG**).Email from Russ Welty re RVHA Business Plan, March 15, 2018 (**C-0657-ENG**).Email from Russ Welty re: RVHA Business Plan, May 24, 2018 (**C-0658-ENG**). RVHA Business Plan sent to Fred Duboc June 29, 2017.(**C-0406-ENG**).RVHA Business Plan sent to Merrill Lynch Investments- Maziar Shams, March 5, 2018.(**C-0407—ENG**) RVHA Business Plan sent to MDB Capital –Group - Mike Donnelly, November 21, 2017. (**C-0408-ENG**). RVHA Business Plan sent to Thomas Wolf, October 23, 2017,(**C-0409-ENG**). RVHA Business Plan sent to Francisco Del Valle,

the United States, and the pricing for the product was virtually identical to the US pricing.¹¹⁴⁸ Unlike the United States, Canada had no significant market access issues to address.¹¹⁴⁹ INAGROSA also would have investigated markets in the EU. However, the projected target market was the United States from 2022 onwards.¹¹⁵⁰ Riverside would continue to sell to other markets like Canada if the pricing were like the US¹¹⁵¹.

- 988) At the time of the occupation, INAGROSA already had the ability to have a presence for its products in major Hass avocado markets globally, and efforts were underway to secure market access to the United States, including dialogue with U.S. federal offices and the Department of Agriculture.¹¹⁵²

E. Markets

- 989) The three major global markets for Hass Avocados include the United States, the EU, and Canada.¹¹⁵³ As noted above, INAGROSA sought to sell to the U.S. market but that would take time.
- 990) The US is the world's largest importer of avocados. The insufficiency of domestic production creates opportunities for other exporting countries.¹¹⁵⁴

F. The Standing Timber lands.

- 991) Black walnut is renowned for its strong, dark heartwood that is often used for high quality furniture and veneer.¹¹⁵⁵ The quantity and quality of the black

September 10, 2017 **(C-0411-ENG)**. RVHA Business Plan sent to Margaret, October 12, 2017 (**C-0412-ENG**); RVHA Business Plan sent to Edgard Cuadra, October 6, 2017 (**C-0413-ENG**); RVHA Business Plan sent to OPIC, Business Plan sent to OPIC, February 26, 2018 (**C-0414-ENG**); RVHA Business Plan sent to Aether Investment Partners – Sean Goodrich, June 26, 2017 (**C-0416-ENG**); RVHA Business Plan sent to Monica Navarrete- Inter-American Development Bank, November 19, 2017 (**C-0417-ENG**). RVHA Business Plan sent to OPIC, February 5, 2018 (**C-0418-ENG**).

¹¹⁴⁸ Witness Statement of Russ Welty at ¶ 88 (**CWS-11**).

¹¹⁴⁹ Witness Statement of Russ Welty at ¶ 88 (**CWS-11**).

¹¹⁵⁰ Witness Statement of Russ Welty at ¶ 90 (**CWS-11**).

¹¹⁵¹ Witness Statement of Russ Welty at ¶ 90 (**CWS-11**).

¹¹⁵² Email from Russ Welty to Laura Sherman (US Senator Bennet office) regarding USDA approval (**C-0462-ENG**); Email from Carlos Rondon and Russ Welty to Laura Sherman (US Senator Bennet office) regarding USDA approval, September 22, 2016 (**C-0463-ENG**); Email from Laura Sherman (US Senator Bennet office) Carlos Rondon and Russ Welty regarding USDA approval, September 22, 2016 (**C-0464-ENG**); Email from Laura Sherman (US Senator Bennet office) Carlos Rondon and Russ Welty regarding USDA approval, October 6, 2016 (**C-0465-ENG**); Email from Laura Sherman (US Senator Bennet office) Carlos Rondon and Russ Welty regarding USDA approval, October 18, 2016 (**C-0466-ENG**).

¹¹⁵³ Tridge, World Avocado Market information – (**C-0668-ENG**).

¹¹⁵⁴ Global Hass Avocado Market Report 2022-2027 at Bates 0004116, 0004118 (**C-0155-ENG**).

¹¹⁵⁵ Witness Statement of Tom Miller– Memorial – ENG at ¶ 11 (**CWS-07**).

- walnut forest were high. HSF had approximately 20,300 black walnut trees (*Juglans nigra*) growing on site.¹¹⁵⁶
- 992) According to a tree census Luis Gutierrez conducted on January 20, 2018, the 16,000 mature black walnut trees had an average diameter of 60 cm and a height of 10 meters.¹¹⁵⁷ The standing volume of black walnut in 2018 was total standing volume of black walnut trees was estimated to be 44,620 cubic meters.¹¹⁵⁸ Management estimated that there were 1000 mature granadillo trees.¹¹⁵⁹
- 993) Miller Veneer, a large veneer company in the United States, sent Tom Miller to visit the forest in 2012. Mr. Miller inspected the forest and had samples taken for evaluation in the United States.¹¹⁶⁰ Miller Veneer indicated its desire to purchase all the available granadillo wood in the HSF forest.¹¹⁶¹ Miller Veneer indicated that it was interested in other woods as well.
- 994) As a result of the invasion, these valuable hardwood trees were illegally harvested, resulting in deforestation of the valuable species.¹¹⁶² Inagrosa Management estimated the market value of the mature black walnut in the private forest reserve to be US\$5.1 million.¹¹⁶³
- 995) In addition, the nursery at Hacienda Santa Fé had 1,200 Black Walnut saplings to facilitate the sustainable future harvest of hardwood trees was destroyed.¹¹⁶⁴
- 996) HSF was home to a variety of hardwood tree species, including black walnut, (*Juglans nigra*), coyote wood (*Dalbergia tucurensis*), and two types of granadillo trees: (*Platymiscium parviflorum* and *Platymiscium pleiostachyum*). Both granadillo species are native to Nicaragua and thrive at the elevation found in HSF.¹¹⁶⁵

¹¹⁵⁶Tree Census at Hacienda Santa Fé prepared by Luis Gutierrez, January 20, 2018 (**C-0084-SPA**).

¹¹⁵⁷Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 59 (**CWS-01**); Witness Statement of Luis Gutierrez at ¶22 (**CWS-02**).

¹¹⁵⁸Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 60 (**CWS-01**).

¹¹⁵⁹Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 61 (**CWS-01**); Witness Statement of Tom Miller at ¶ 6 (**CWS-07**).

¹¹⁶⁰Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 62 (**CWS-01**); Witness Statement of Tom Miller at ¶¶ 8-10 (**CWS-07**).

¹¹⁶¹Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 62 (**CWS-01**); Witness Statement of Tom Miller at ¶13. (**CWS-07**).

¹¹⁶²Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 10 (**CWS-01**).

¹¹⁶³Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 60 (**CWS-01**).

¹¹⁶⁴Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 59 (**CWS-01**).

¹¹⁶⁵ Witness Statement of Luis Gutierrez-Reply-SPA at ¶ 295 (**CWS-10**); Witness Statement of Russ Welty-Reply-ENG at ¶ 109 (**CWS-11**),

- 997) Of note, *Platymiscium pleiostachyum* is categorized as a threatened species of concern under CITES Appendix II¹¹⁶⁶, whereas *Platymiscium parviflorum* is not considered at risk and is therefore totally exempt from the CITES treaty regulations.
- 998) Legally, while *Platymiscium pleiostachyum* and coyote wood can be harvested and exported with the necessary CITES export permit, the other granadillo species, *Platymiscium parviflorum*, does not necessitate such a CITES permit, as it is not at risk.
- 999) Any timber exports from Nicaragua mandatorily require standard permits via Nicaragua's CETREX system. INAGROSA was duly registered within this system.¹¹⁶⁷ Specifically, coyote wood (*Dalbergia tucurensis*) and grenadillo (*Platymiscium pleiostachyum*.) are covered by CITES Appendix II.
- 1000) CITES Appendix II species are allowed into international commerce with a CITES permit from the exporting state. The US does not require an CITES import permit, only the export permit from the exporting state.¹¹⁶⁸
- 1001) To secure market access in the United States for coyote wood and grenadillo, the Nicaraguan CITES export permit was essential. Additionally, appropriate filings with the US APHIS were necessary, typically encompassing an electronic submission of Form 621 application and PPQ Form 587. The original Nicaraguan CITES export certificate also would be submitted in tandem with the APHIS forms at the customs inspection.
- 1002) These procedural requirements did not impede US market access. Rather, they represent routine steps, seamlessly facilitated by freight carriers and customs brokers in the standard course of their operations.¹¹⁶⁹

G. Factual Basis for Damages in this Claim

- 1003) Riverside made capital infusions into its Nicaraguan investment, Inagrosa and Hacienda Santa Fé, since at least 1997.¹¹⁷⁰
- 1004) The principal operational attack upon INAGROSA comes from Dr. Odilo Duarte, an agronomy professor in Honduras and Perú. The Expert Statement of Dr. Odilo Duarte focuses on three areas:

¹¹⁶⁶ USDA APHIS CITES Timber Import Manual (2010) at 2-6 (C-0638-ENG).

¹¹⁶⁷ Witness Statement of Luis Gutierrez-Reply-SPA at ¶ 204 (CWS-10).

¹¹⁶⁸ USDA APHIS CITES I-II-III Timber Species Manual, 2010 (C-0638-ENG); Witness Statement of Russ Welty-Reply-ENG at ¶ 121 (CWS-11).

¹¹⁶⁹ Witness Statement of Russ Welty-Reply-ENG at ¶ 122 (CWS-11).

¹¹⁷⁰ Witness Statement of Mona Winger – Memorial – ENG at ¶ 10-11 (CWS-05); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 26 (CWS-03); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 8 (CWS-04).

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- a) The existing Hass avocado operations at HSF prior to the invasion and the taking.
 - b) The viability of the Expansion Plan; and
 - c) Export to the United States

1. Operations before the invasion

- 1005) The effect of Dr. Duarte's observations would increase the profitability of INAGROSA's operations, rather than reduce them.
- 1006) Regarding profits, Dr. Duarte concludes that INAGROSA's production in its first four years is low, and the costs exceed the profit.¹¹⁷¹ He states that it is only around the fourth or fifth year that the balance point is reached between what it costs to maintain a tree and what it produces. He maintains that there was very little profit per fruit sold before the fourth year.¹¹⁷²
- 1007) INAGROSA confirms that it was making significant investments in the build-out of its Hass Avocado operations and that this investment would affect its profitability initially. There is no dispute here. These observations also were considered and noted in the Richter Reply Expert Damages Report.
- 1008) Riverside filed a study of avocado in the Nicaraguan Market from ProNicaragua.¹¹⁷³ ProNicaragua admitted that San Rafael del Norte was a suitable area in Nicaragua for avocado production due to its climatic conditions, altitude, and soil.¹¹⁷⁴

2. Export to the United States

- 1009) Dr. Duarte states that an Animal and Plant Health Service (APHIS) authorization is necessary to access the United States market.¹¹⁷⁵ He notes that this is a long process and that usually a producers' association applies for the permit with the Government's political and economic support due to the high cost of getting the permit.¹¹⁷⁶
- 1010) On the export issue, INAGROSA Management had commenced working with the USDA to arrange for pre-approval of its Hass avocados.¹¹⁷⁷ This may have required the application of measures to ensure that no medfly

¹¹⁷¹Expert Report of Dr. Duarte at ¶ 9.1.1 (RER-01).

¹¹⁷²Expert Report of Dr. Duarte at ¶ 9.1.1 (RER-01).

¹¹⁷³ProNicaragua- Avocado in Nicaragua Market Study, undated (C-0085-SPA).

¹¹⁷⁴Pro Nicaragua- Avocado in Nicaragua Market Study, undated at 0000778 (C-0085-SPA).

¹¹⁷⁵Expert Report of Dr. Duarte at ¶ 9.2.1 (RER-01).

¹¹⁷⁶Expert Report of Dr. Duarte at ¶ 9.2.1 (RER-01).

¹¹⁷⁷Witness Statement of Russ Welty-Reply-ENG at ¶ 82 (CWS-11).

contamination occurred.¹¹⁷⁸ This would not affect the quality of the avocado fruit.

- 1011) Until avocados could enter the United States, INAGROSA would sell to the adjacent North American market in Canada.¹¹⁷⁹ Canada had no barrier to entry of Nicaraguan avocados and the pricing in Canada was like the United States.¹¹⁸⁰
- 1012) In addition, INAGROSA reinvested its profits into the business operations.¹¹⁸¹ This included approximately \$1 million invested in 2013 in building employee housing at Hacienda Santa Fé (funded by a fully paid off \$1 million loan from the Latin American Agricultural Development Bank)¹¹⁸² and in reinvested profits.
- 1013) The Latin American Agricultural Development Bank informed INAGROSA management at the time of its 2013 employee housing loan that the value of the Hacienda Santa Fé property was US\$22 million.¹¹⁸³
- 1014) INAGROSA's external CFO Ross Welty has commented on the value of HSF and its financial use for INAGROSA in paragraphs 75 and 76 his Witness Statement (CWS-12). He states:

75) Had we not had the financial commitment from Riverside, INAGROSA still would have been able to obtain funds through sales of hardwood logs and lumber from its forest. Also, INAGROSA had used the property at Hacienda Santa Fé in Nicaragua as collateral for loans before, and this was an option to obtain finance for INAGROSA's operations. Carlos told me that years ago, the Latin American Development Bank (LAAD), which took the lands at Hacienda Santa Fé as collateral, valued them at not less than \$22,000 per hectare (which was a value back in 2013 (which was an amount just under \$27 Million). By 2018, the value of Hacienda Santa Fé would have been considerably more valuable due to the successful introduction of commercial quantities of producing long-cycle Hass avocado fruit trees. As the external CFO of INAGROSA, I was able to see additional paths for ongoing solvency during the transition, but these concerns became moot with the large infusion of capital by way of the \$16 million investment commitment and the \$1.5 million loan interest relief from Riverside.

¹¹⁷⁸Witness Statement of Russ Welty-Reply-ENG at ¶¶ 86-87 (**CWS-11**).

¹¹⁷⁹ Witness Statement of Russ Welty-Reply-ENG at ¶ 91 and ¶ 93 (**CWS-11**).

¹¹⁸⁰ Witness Statement of Russ Welty-Reply-ENG at ¶ 91 and ¶ 93 (**CWS-11**).

¹¹⁸¹Witness Statement of Carlos J. Rondón- Reply-ENG at ¶ 104 (**CWS-09**).

¹¹⁸²LAAD loan payment and cancelation LAAD lien on Hacienda Santa Fé (Public Instrument No. 1 dated January 6, 2016) (**C-0181-SPA**).

¹¹⁸³Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 42 (**CWS-01**).

76) With debt relief and solid financial commitment, INAGROSA could concentrate unabated on its avocado expansion and its focus on sales to export markets.¹¹⁸⁴

¹¹⁸⁴ Witness Statement of Russell (Russ) Welty – REPLY-ENG at ¶¶75-76. (CWS-11)

VII. CONTROL

- 1015) Nicaragua presented a jurisdictional defense to Riverside's Claim in its Counter-Memorial. In this jurisdictional objection, Nicaragua raises two issues:
- a) This Tribunal did not have the jurisdiction to consider CAFTA Article 10.16(1)(b) claims INAGROSA raised by in its own name because of technical provisions in Article 25 of the ICSID Convention; and
 - b) The Tribunal did not have jurisdiction as Riverside did not meet the requirements of an Investor under the CAFTA with respect to its interest in INAGROSA.
- 1016) As discussed below, the first jurisdictional objection has been overtaken by subsequent events, rendering this objection entirely moot. The second objection is non-meritorious. There is no cognizable jurisdictional issue. Riverside has requested that Nicaragua to withdraw the meaningless objection to create efficiency and economy, but Nicaragua refuses even though, on its face, this objection cannot succeed.
- 1017) The discussion of the remaining jurisdictional issues necessitates a review of the long history of Riverside's interest in INAGROSA.

Riverside's longstanding interests in INAGROSA

- 1018) Riverside made its first investment in INAGROSA in 1997, and it made its last formal financial commitment to INAGROSA in March 2018 for US\$16 million.
- 1019) Riverside is an American limited liability company incorporated in Kansas. Riverside owned shares and debt in INAGROSA at the time of the expropriation in 2018.¹¹⁸⁵
- 1020) To obtain treaty protection by the CAFTA, an investor must be an investor of another party or have a covered investment under the treaty. The CAFTA defines an investor of a party as follows:

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a

¹¹⁸⁵Articles of Incorporation- Riverside Coffee, LLC, June 18, 1999 (C-0040-ENG); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022, at ¶ 3 (C-0055).

natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.¹¹⁸⁶

1021) Riverside's interest in INAGROSA was known to Nicaragua at least as of the filing of the Riverside's shares certificates in INAGROSA that Riverside filed with the Notice of Arbitration.¹¹⁸⁷ At Counter-Memorial paragraph 243, Nicaragua freely admits that Riverside owns at least 25.5% of the equity of INAGROSA. Nicaragua admits:

243. What we do know from the evidence submitted by Claimant and shown in the above chart, is that from at least January 30, 2013, until August 27, 2020, **Riverside only owned 25.5 percent of the shareholding in Inagrosa. That is undisputed. In fact, Claimant admits it.**¹¹⁸⁸

1022) Riverside has owned shares in INAGROSA since September 2003. Riverside plead ownership of shares in INAGROSA.¹¹⁸⁹ As an owner of shares in the equity of INAGROSA, Riverside is entitled to bring a claim under the CAFTA.

1023) Riverside has been the controlling shareholder of INAGROSA for many years before the June 2018 invasion.¹¹⁹⁰ Riverside controlled INAGROSA at the time of the Invasion. As the controlling shareholder, in 2018,¹¹⁹¹ Riverside can bring a claim arising from its control of INAGROSA.¹¹⁹²

1024) In addition to the investment in equity shares, there are additional bases that qualify Riverside as an Investor with an investment in INAGROSA. These include Riverside's long-term debt.¹¹⁹³ CAFTA Article 10.28 defines Investment. Paragraph (c) of this definition in Article 10.28 expressly includes "bonds, debentures, other debt instruments, and loans" within the definition. In Part IV of this Reply Memorial above, the long-term loans made

¹¹⁸⁶CAFTA, Article 10.28: Definitions.

¹¹⁸⁷INAGROSA Share Certificate No. 12, August 31, 2004 (**C-0043-SPA**); INAGROSA Share Certificate No. 13, August 31, 2004 (**C-0044-SPA**); INAGROSA Share Certificate No. 14, August 31, 2004 (**C-0045-SPA**); INAGROSA Share Certificate No. 15, August 31, 2004 (**C-0046-SPA**).

¹¹⁸⁸Counter-Memorial at ¶243 (footnotes removed).

¹¹⁸⁹Riverside Memorial on the Merits, October 21, 2022, at ¶¶ 41,83-85,87, 89, 91, 102, and 468 (hereinafter "Riverside Memorial").

¹¹⁹⁰Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (**CWS-03**).

¹¹⁹¹Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 37 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 30 (**CWS-04**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 212, 220 (**CWS-01**).

¹¹⁹²Witness Statement of Melvin Winger – Memorial – ENG at ¶ 32 (**CWS-04**); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 46 (**CWS-03**).

¹¹⁹³Expert Renaldy J. Gutierrez confirmed that Riverside's promissory note was a valid debt instrument under the law of Nicaragua. Expert Witness Statement of Renaldy J. Gutierrez in Question 4 at ¶195 (**CES-06**).

by Riverside to INAGROSA were reviewed in detail. These debt instruments, some spanning back more than twenty years, all independently qualify as an investment owned by Riverside in INAGROSA for the purposes of jurisdiction.

1. The legal definition of Control in the Treaty

- 1025) The term “control” is not defined in the CAFTA. The term “owns and controls” in the CAFTA is identical to the same term used in the US bilateral investment treaties and was used *verbatim* in the NAFTA.
- 1026) The official U.S. statement about control occurring when there is 50% or more equity shareholding is confirmed in the transmittal letter sent by U.S. President Clinton to the U.S. Senate concerning the implementation of the U.S. -Kazakhstan Bilateral Investment Treaty. It is also discussed in Kenneth Vandervelede’s treatise on U.S. International Investment Agreements
- 1027) The definition in the CAFTA also is the same as that in the Treaty Between the United States of America and The Republic Of Kazakhstan Concerning the Reciprocal Encouragement and Protection Of Investment, Signed in Washington on May 19, 1992 (US-Kazakhstan BIT).¹¹⁹⁴
- 1028) U.S. President Clinton stated in the Transmittal Letter:
- Investment
- The Treaty’s definition of investment is broad, recognizing that investment can take a wide variety of forms. It covers investments that are owned or controlled by nationals or companies of one of the Treaty partners made in the territory of the other. Investments can be made either directly or indirectly through one or more subsidiaries, including those of third countries. Control is not specifically defined in the Treaty. **Ownership of over 50 percent of the voting stock of a company, would normally convey control but in many cases, the requirement could be satisfied by less than that proportion.**¹¹⁹⁵ (emphasis added)
- 1029) Kenneth Vandervelede was the drafter of the U.S. Model BIT at the U.S. State Department. He wrote a comprehensive book on the subject, *U.S.*

¹¹⁹⁴Treaty Between The United States of America and The Republic Of Kazakhstan Concerning the Reciprocal Encouragement and Protection Of Investment, Signed in Washington on May 19, 1992 (US-Kazakhstan BIT) (C-0471-ENG).

¹¹⁹⁵Transmittal Letter issued by the State Department of the United States regarding the Treaty Between The United States of America and The Republic Of Kazakhstan Concerning the Reciprocal Encouragement and Protection Of Investment, May 19, 1992 (C-0575-ENG).

Investment Agreements.¹¹⁹⁶ Prof. Vandeveld examined the meaning of "control." He referenced the Kazakhstan transmittal letter, and he considered cases on the meaning of the term. He stated at pages 142-143:

Investment is protected only if owned or controlled by an investor. This is true whether the investment is a company, a minority interest in a company, or another asset. The meaning of owned or control was addressed in *international Thunderbird vs Mexico*. The issue arose in the context of determining whether the tribunal had jurisdiction under Article 1117 of NAFTA, which allows an investor to submit to arbitration a claim on behalf of an investment it owns or controls. The tribunal found that control could be established by demonstrating effective, or de facto, control although the tribunal believed that, in the absence of legal control, effective control must be established beyond any reasonable doubt. In that case, the Claimant owned only a minority of shares of companies the rights of which it was asserting in an international arbitration. The tribunal found, however, that the Claimant had the ability to exercise a significant influence on decision making and that it was the consistent driving force behind the company's business endeavors in Mexico. More specifically, the tribunal noted that the key officers of the investor and the investments were the same and that the initial expenditures, the know-how of the equipment, the selection of suppliers, and the anticipated return on the investment all were provided or determined by the investor. Thus, the investor was entitled to assert claims on behalf of the investments under Article 1117.

..... In *AES vs Argentina*, Argentina argued that sworn statements were insufficient to demonstrate ownership or control, but the tribunal rejected that argument.¹¹⁹⁷

The BITS cover investments where the investors' "ownership or control" is indirect, a fact that prompted one tribunal to give the concepts of ownership and control a broad interpretation.

In *S.D. Myers v Canada*,¹¹⁹⁸ the Claimant was S.D. Myers International, a U.S. company. The investment was Myers Canada, a separate Canadian company. S.D. Myers International did not own Myers Canada. Rather, the same family members owned and

¹¹⁹⁶Vandeveld, U.S. Investment Agreements, pp. 597-598 (Oxford University Press, 2009) (**CL-0265-ENG**)

¹¹⁹⁷Vandeveld, U.S. Investment Agreements, pp.597-598 (Oxford University Press, 2009) at 142-143. (**CL-0265-ENG**); Prof. Vandeveld references in *AES Corporation v. The Argentine Republic*, Decision on Jurisdiction, ICSID ARB/02/17, April 26, 2005 (**CL-0271-ENG**).

¹¹⁹⁸Prof. Vandeveld references *S.D. Myers v. Government of Canada*, Second Partial Award, October 21, 2002 (**CL-0064-ENG**).

controlled both companies. Relying on treaty language to the effect that ownership or control could be “indirect,” the tribunal held in *S.D. Myers International* could be considered an investor that owned or controlled an investment in Canada. The tribunal said that the choice of corporate form should not be a critical consideration and that it would look at the underlying economic reality, which was the same people who controlled *S.D. Myers International* also controlled *Myers Canada*.¹¹⁹⁹

1030) The facts in this case are like the factual situation in the *S.D. Myers* case: same family, same control. Melvin Winger was the President of INAGROSA and the Managing Operator of Riverside at the time of the invasion in 2018 (as occurred in *S.D. Myers*).

1031) The Riverside factual situation for control is even stronger than the *Myers* family because, in *S.D. Myers*, the Claimant had no shareholding at all, but the NAFTA Tribunal still found there to be an investment controlled by the Claimant. [Canada sought to set aside the award before the Canadian courts on this issue, and the argument was dismissed under the UNCITRAL Model Law].

1032) Riverside had 25.5% direct shareholding at the time of the invasion (down from an earlier 50%). Riverside also has external, contemporaneous evidence of control through IRS tax documents, financial control, and by witness evidence.

2. *De Facto* Control in Case Law

1033) Dolzer and Schreuer note that “the existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights, and management.”¹²⁰⁰

1034) In *S.D. Myers v. Canada*, notably where the Claimant did not directly own shares in the investment, the Tribunal stated the following reasons over which it accepted the investors argument that that *Myers* family continued to control the investment:

At the relevant time *Myers Canada* was undoubtedly an “enterprise”, but CANADA submitted that it was not owned or controlled directly or indirectly by SDMI. This is because the shares of *Myers Canada* were owned not by SDMI, but equally by four members of the *Myers* family. They also owned the shares in SDMI, but in different proportions. As

¹¹⁹⁹Vandeveldde, U.S. Investment Agreements, pp. 597-598 (Oxford University Press, 2009) (p. 143) (CL-0265-ENG).

¹²⁰⁰Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, Principles of International Investment Law (3rd Ed.)(Oxford University Press, 2022) at 71 (CL-0266-ENG).

noted previously, Mr. Dana Myers owned 51% of that company. His was the authoritative voice in SDMI, and the evidence of his brother, Mr. Scott Myers, was that Dana Myers was the authoritative voice in Myers Canada.¹²⁰¹

Considering the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organize the way in which it conducts its business affairs.

The uncontradicted evidence before the Tribunal was that Mr. Stanley Myers had transferred his business to his sons so that it remained wholly within the family and that he had chosen his son Mr. Dana Myers to be the controlling person in respect of the entirety of the Myers family's business interests.

On the evidence and based on its interpretation of the NAFTA, the Tribunal concludes that SDMI was an "investor" for the purposes of Chapter 11 of the NAFTA and that Myers Canada was an "investment".¹²⁰²

1035) In *Thunderbird v. Mexico*, the tribunal set out the following passage in relation to control:

107. Despite Thunderbird having less than 50% ownership of the Minority EDM Entities, the Tribunal has found sufficient evidence on the record establishing an unquestionable pattern of de facto control exercised by Thunderbird over the EDM entities. Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM's business endeavor in Mexico.¹²⁰³

108. It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise, and, under certain circumstances, control can

¹²⁰¹ *S.D. Myers, Inc. v. Government of Canada*, First Partial Award, UNCITRAL Arbitration, 2000 WL 34510032, November 13, 2000 at ¶ 227 (CL-0007-ENG).

¹²⁰² *S.D. Myers, Inc. v. Government of Canada*, First Partial Award, UNCITRAL Arbitration, 2000 WL 34510032, November 13, 2000 at ¶ 231 (CL-0007-ENG).

¹²⁰³ *International Thunderbird Gaming Corporation v. United Mexican States*, Award January 26, 2006 at ¶ 107 (CL-0267-ENG). Hereinafter "*Thunderbird v. Mexico*".

be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.¹²⁰⁴

109. In the present case, having regard to the record, the Tribunal finds that without Thunderbird's key involvement and decision-making during the relevant time frame, i.e., during the planning of the business activities in Mexico, the initial expenditures and capital, the hiring of the machine suppliers, the consultations with SEGOB, and the official closure of the EDM facilities, EDM's business affairs in Mexico could not have been pursued. Namely, the key officers of Thunderbird and the Minority EDM Entities were one and the same (see *Dramatis Personae* of 26 April 2004: Mr. Jack Mitchell was President and CEO of Thunderbird and the EDM entities; Mr. Peter Watson, counsel to Thunderbird, was shareholder in Thunderbird and the EDM entities). The initial expenditures, the know-how of the machines, the selection of the suppliers, and the expected return on the investment were provided or determined by Thunderbird. Likewise, legal advice regarding the operation of the EDM machines in Mexico was addressed to Thunderbird.¹²⁰⁵

1036) In *AdT v. Bolivia*, the majority of the tribunal purported to develop an autonomous test for control. That Tribunal stated:

The Tribunal ... concludes that the phrase "controlled directly or indirectly" means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held. In the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or

¹²⁰⁴ *Thunderbird v. Mexico* at ¶ 108 (CL-0267-ENG).

¹²⁰⁵ *Thunderbird v. Mexico* at ¶ 109 (CL-0267-ENG).

agreements such as the articles of incorporation or shareholders' agreements, or a combination of these.¹²⁰⁶

1037) In *AIG v. Kazakhstan*,¹²⁰⁷ under the US-Kazak BIT, the Tribunal stated that the terms "indirectly controlled" envisaged that jurisdiction could be asserted over a US company with an investment in a residential housing complex in Kazakhstan that was 'routed through a chain of other companies (whether US or non-US based).¹²⁰⁸ Control was not lost in this corporate chain when one entity had no majority ownership of shares in another entity if it could be demonstrated that control was nonetheless exercised by voting rights. Hence, for example, a 5 percent ownership stake in a company could still amount to control if the 5 percent stake were in Class A shares to which voting rights exclusively attached.¹²⁰⁹

1038) The US position set out in its treaty practice is that control of more than 51% of voting shares means that there is majority control, and a claimant may proceed for 100% of the damages. Control can be more than voting control, but voting control is the "gold standard" when looking at control. This has been followed as a minimum, although some tribunals have allowed proof of *de facto* control with less than 51% control in widely held corporations.

1039) The *Gramercy v. Peru* Tribunal concluded that:

Para. 628- [...] An investor can own any type of asset (including a corporation). But control can only be exercised with regard to a corporation in which the investor already has an ownership interest: a corporation is controlled by an investor when the investor **(through his majority or minority interest and/or by other means) is able to determine the corporate decisions.** (emphasis added)¹²¹⁰

3. Management control

1040) Part IV of this Reply Memorial detailed Riverside's control of INAGROSA. In summary, Part IV shows that Riverside dominated INAGROSA, establishing its effective control through the following:

¹²⁰⁶ *Agua del Tunari S.A. v. Bolivia*, Decision on Respondent's Preliminary Objections ICSID Case No. ARB/02/3 at ¶ 264 (CL-0268-ENG).

¹²⁰⁷ *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, Award, ICSID Case No. ARB 01/6, at ¶ 9.4.8 (CL-0269-ENG). Hereinafter referred as "AIG v. Kazakhstan".

¹²⁰⁸ *AIG v Kazakhstan* at ¶ 9.4.8 (CL-0269-ENG).

¹²⁰⁹ *AIG v Kazakhstan* at ¶ 9.4.8 (CL-0269-ENG).

¹²¹⁰ *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, Award, December 6, 2022 at ¶ 628 (CL-0270-ENG).

- a) Riverside's most senior officer was concurrently the President of INAGROSA.¹²¹¹
- b) Riverside was the principal financial investor in INAGROSA. Riverside's financial investment at the time of the invasion was over \$9.5 million.¹²¹²
- c) Riverside was INAGROSA's "lifeline." Nicaragua notes that INAGROSA's financial position worsened during INAGROSA's transition to Hass avocado production. At this time, INAGROSA had to incur investment costs and operating costs while having limited to no contribution of revenues from its established coffee operations.¹²¹³ Continued access to Riverside financial support was critical during INAGROSA's transition from coffee production to Hass avocado production. Riverside approved the transition from coffee to Hass avocados in a member's resolution in 2016,¹²¹⁴ which committed Riverside to providing a key financial lifeline to INAGROSA during this period when coffee revenues essentially had ended but costs for the development of the Hass avocado operation were underway.
- d) Riverside gave a binding financial commitment of up to \$16 million in March 2018.¹²¹⁵ This investment, in addition to the existing \$9.5 million Riverside already invested, was essential for INAGROSA's continuation.
- e) Riverside had voting control of the shares of INAGROSA. For years, Riverside held 50% of the shares, with other Riverside officers holding additional shares to guarantee voting control. At the time of the invasion and occupation in 2018, Melvin Winger (the Operating Manager of Riverside at the time and the President of INAGROSA) held 24.5% of the shares along with Riverside's 25.5% direct interest. This totaled 51% of the shares of INAGROSA. Riverside's former Operating Manager Ward Nairn (also a former President of INAGROSA) held another 24.% of INAGROSA shares,¹²¹⁶ which were consistently voted en bloc with

¹²¹¹Ward Nairn served concurrently as President of INAGROSA and as Operating Manager of Riverside (Riverside's most senior corporate officer). He was succeeded in 2013 in the dual roles by Melvin Winger, who served concurrently as President of INAGROSA and as Operating Manager of Riverside at the time of the invasion and the occupation.

¹²¹²Chart 5 of the Reply Damages Report (**CES-04**) details the value of Riverside's loans to INAGROSA as of June 2018.

¹²¹³Credibility International Report at ¶¶ 51-52. (**RES-02**).

¹²¹⁴Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (**C-0286-ENG**).

¹²¹⁵Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (**C-0287-ENG**).

¹²¹⁶Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 36 (**CWS-03**).

Riverside, resulting in an influential 75% control bloc for Riverside in votes.¹²¹⁷

- f) Riverside confirmed its voting control over INAGROSA in tax filings in 2015, 2016, 2017 and 2018.¹²¹⁸

1041) Riverside has been the controlling shareholder of INAGROSA for many years before the June 2018 invasion.¹²¹⁹ Riverside controlled INAGROSA at the time of the Invasion.

1042) As the controlling shareholder in 2018,¹²²⁰ Riverside can bring a claim arising from its control of INAGROSA.¹²²¹

1043) Nicaragua in Counter-Memorial paragraph 235 relies on *Union Fenosa Gas v. Egypt*, which concludes that 100% of damages can be recovered by a foreign investor if the investor controls the investment. This case, *Union Fenosa Gas v. Egypt*, held:

This is not a case of a claimant claiming as damages for a loss or expense incurred by a company in which it has only a minority interest and no direct control over that company. In such circumstances, a minority shareholder may make a claim for the diminution in the value of its shareholding;¹²²²

1044) Nicaragua and Riverside appear in agreement that 100% recovery of damages is available if the Investor can establish its control over its investment.

¹²¹⁷Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (**CWS-03**). Melva Jo Winger de Rondón voted the Riverside shares at the INAGROSA meetings as the legal representative of Riverside to INAGROSA.

¹²¹⁸2015 Riverside US Federal IRS Tax Return- Form 1065 (**C-0320-ENG**); 2016 Riverside US Federal IRS Tax Return- Form 1065 (**C-0321-ENG**); 2017 Riverside US Federal IRS Tax Return- Form 1065 (**C-0322-ENG**); and 2018 Riverside US Federal IRS Tax Return- Form 1065 (**C-0323-ENG**).

¹²¹⁹Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (**CWS-03**)

¹²²⁰Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 37 (**CWS-03**). Witness Statement of Melvin Winger – Memorial – ENG at ¶ 30 (**CWS-04**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 212, 220 (**CWS-01**).

¹²²¹Witness Statement of Melvin Winger – Memorial – ENG at ¶ 32 (**CWS-04**); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 46 (**CWS-03**).

¹²²²Counter-Memorial at ¶235 relying on *Union Fenosa Gas S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, August 31, 2018, ¶ 10.119 (**RL-0089**).

VIII. INTERNATIONAL LAW ISSUES

- 1045) Chapter Ten of CAFTA authorizes a Claimant to commence an investment claim under the CAFTA for a governmental breach of an obligation in Chapter Ten. This current investment claim raises violations of the expropriation and the fair and equitable treatment obligations in the Treaty.
- 1046) The international law of state responsibility has specific rules that confirm Nicaragua's responsibility in this claim.
- 1047) This assessment first considers the primary breach of the Treaty obligations and then considers the international laws on state responsibility.
- 1048) The most relevant CAFTA Chapter Ten investment obligations owed to the American investors in this claim are:
- a) Expropriation
 - b) Fair and Equitable Treatment
 - c) MFN Treatment
 - d) National Treatment
- 1049) Part VII of this Reply Memorial reviewed the facts of the invasion in detail. The evidence produced from Nicaragua confirms Nicaragua's direct connection and responsibility to the internationally unlawful acts had the issue in this claim.

State Responsibility

- 1050) The principles of state responsibility were set out in Part VI.A of the Investor's Memorial. ARSIWA Articles 4, 7,8 and 11 are applicable in this claim.
- 1051) Under ARSIWA Article 4, Nicaragua is responsible for all measures from persons who are part of any of the branches of its government. Under ARSIWA Article 8, Nicaragua is responsible for persons who are directed or controlled by members of the government. Under ARSIWA Article 11, Nicaragua is responsible for measures taken by persons that have subsequently been adopted by the state.¹²²³ All three of these situations are evident here.

¹²²³In the words of commentary 8 to the ARSIWA Article 4, "Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own." (CL-0017-ENG).

1052) There is no dispute between the disputing parties about attribution in respect of the conduct of State officials or organs. This means that any relevant acts or omissions of such individuals or entities will be attributed to Nicaragua for the purposes of considering liability. This includes:

- a) The police, including Commissioner Marvin Castro and Captain William Herrera.
- b) Elected members of the legislative branch of government which includes Deputies in the National Assembly, The Mayor of Jinotega, Léonidas Centeno, the Mayor of San Rafael del Norte, and Norma Herrera.
- c) The executive branch of government which includes the Attorney General and other government officials.
- d) The courts.

1053) Nicaragua has state responsibility under ARSIWA due to the following:

- a) Nicaragua admits the presence of the National Police. The obligations regarding full protection and security, National Treatment, and MFN Treatment involve the actions of the Nicaraguan police, for whom Nicaragua has state responsibility under ARSIWA Article 4.
- b) The invaders proclaimed at least five times that they had taken HSF in the name of the state.
- c) At least twice, the occupiers confirmed that Jinotega Mayor Leonidas Centeno gave the orders to invade HSF.
- d) The leaders of the armed unlawful occupiers wrote a letter in September 2018 to a senior elected Nicaraguan government official in which they confessed the actions were done for the state and their ongoing allegiance and control to the state.¹²²⁴
- e) Jinotega Police Commissioner admitted that National Assembly Delegate “Comrade” Edwin Castro gave direction to the invaders to remain in occupation at HSF in July 2018 during the invasion.¹²²⁵
- f) MAGFOR Agricultural Delegate Enrique Dario confirmed that HSF had been expropriated by the State because its owners were foreigners.

¹²²⁴Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua September 5, 2018 **(R-0065-SPA-ENG)**.

¹²²⁵Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 at NIC01939 **(C-0284-SPA-ENG)**.

- 1054) In November 2021, Nicaragua took measures before its courts in a legal action against Riverside to directly take possession of HSF to the exclusion of all others. The application was unknown to Riverside or to INAGROSA. The subsequent order issued by the Nicaraguan Court in December 2021 created a legal regime in which the State prohibited Riverside and INAGROSA from alienating or hypothecating their interests in HSF. Such actions were proposed by the executive branch and confirmed by the judicial branch. Under ARSIWA Article 4, they also create State Responsibility on the part of Nicaragua.
- 1055) In addition, there is firsthand testimony of state involvement including social media evidence and the witness statements of Luis Guterrez, Jaime Vivas, Domingo Ferrufino and Raymundo Palacios.
- 1056) In summary, there is direct state attribution from organs of the government:
- a) Because of the active and direct involvement of the state in state directed land invasions. In this case, the perpetrators declared that they were ordered to seize the lands at HSF in the name of the state by Jinotega Mayor Leonidas Centeno. The actions done at the direction of the mayor result in direct attribution to the state.
 - b) Because of the actions of the National Police, either in directly aiding and abetting the invasion (in breach of Fair and Equitable Treatment obligations) or in the failure of diligence to carry out their duties in violation of Full Protection and Security). The police activity also is relevant to the violation of national treatment obligations as there is significant and repeated evidence of more favourable police treatment in dealing with invasions of private lands at the same time in the summer of 2018. All these treaty violations are addressed in Part VIII of the Reply Memorial in detail.
 - c) Because of Nicaragua's executive branch of government in depriving INAGROSA and Riverside of their property rights to occupy, control, alienate or hypothecate HSF on account of the judicial seizure order, which is still in effect. This includes actions taken directly against Riverside as well as those taken to harm INAGROSA.
 - d) Because of the actions of National Assembly Delegate Edwin Castro who had the invaders remain in occupation of HSF in July 2018 with the promise that the government would obtain funds to buy HSF from its private owners.

All these acts constitute measures incurring state responsibility for Nicaragua under ARSIWA Article 4, 8 or 11.

1057) The extent of obligation of the state for acts of persons is broad. ARSIWA Article 7 clarifies that the measures at issue need not be *infra vires* of the person's duties for there to be state responsibility if that person is part of a branch of the government. Article 7 provides:

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person, or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."¹²²⁶

1058) Commentary 12 to ARSIWA Article 4 notes:

The term person or entity is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used to include in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term entity is used in a similar sense in the draft articles on Jurisdictional immunities of States and their property, adopted in 1991."¹²²⁷

1059) A 2022 tribunal cited ARSIWA Article 7 as "reflect[ing] the current state of international customary law."¹²²⁸ Therefore, customary international law does not permit States to avoid responsibility for their violations of treaty commitments simply because the acts of agents of the State or its agents are subsequently found to be *ultra vires*.

1060) The Tribunal in *Southern Pacific Properties v. Egypt* ("SPP") applied this principle to situations where persons relied upon government measures. There, the SPP Tribunal found that the government's acts, even if "considered legally nonexistent or null and void or susceptible to invalidation," were "cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments" and therefore created expectations that the investor reasonably relied upon.¹²²⁹ The SPP Tribunal found that "a determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts."¹²³⁰ The SPP Tribunal, citing a secondary source, concluded: "the

¹²²⁶ARSIWA Article 7 (CL-0017-ENG).

¹²²⁷ARSIWA, Commentary 12 to Article 4 (CL-0017-ENG).

¹²²⁸*BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022 at ¶1105 (CL-0237-ENG) stating: "As a matter of international law, the conduct of State officials is attributable to the State, even if these officials act *ultra vires*."

¹²²⁹*Southern Pacific Properties v. Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 at ¶¶ 81–85 (CL-0238-ENG) (hereinafter *SPP v. Egypt*).

¹²³⁰*SPP v. Egypt* at ¶ 83 (CL-0238-ENG).

practice of states has conclusively established the international responsibility for unlawful acts of state organs, even if accomplished outside the limits of their competence and contrary to domestic law.”¹²³¹ Subsequent tribunals, including *Arif v. Moldova*¹²³² and *Kardassopoulos v. Georgia*¹²³³ have relied upon the principles espoused in *SPP* regarding State Responsibility even for *ultra vires* acts.

1061) In addition to the direct evidence, there is additional evidence of the direction and control of the invaders by the government from direct witnesses during the invasion and by third parties who addressed the matter on social media.

a) The Occupiers admitted government instructions.

1062) The occupiers themselves admitted their connection to the State in the written letter to the Attorney General in September 2018. However, there were other confessions made by the occupiers consistently throughout the invasions and occupation.¹²³⁴

1063) Mayor Leonidas Centeno¹²³⁵ and Mayor Herrera¹²³⁶ were directly involved with the paramilitaries at Hacienda Santa Fé.

a) Mayor Leonidas Centeno sent the paramilitaries to invade Hacienda Santa Fé on behalf of the Government and was acting in his official capacity as he said the orders were given on behalf of the Government.¹²³⁷

¹²³¹ *SPP v. Egypt* at ¶ 85 (**CL-0238-ENG**). Citing to Sorensen (ed.), *Manual of Public International Law*, New York, 1968, at p. 548.

¹²³² *Franck Charges Arif v. Republic of Moldova*, ICSID Case No ARB/11/23, Award, 8 April 2013 at ¶539 (**CL-0068-ENG**) finding: “The international responsibility of a State is not determined by the legality of an act under domestic law, but by the principle of attribution in international law.

¹²³³ *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007) at ¶194 and following (**CL-0286-ENG**) (finding: “The reasoning in *Southern Pacific Properties* is apposite to this case in many respects. Thus, even if the JVA and the Concession were entered into in breach of Georgian law, the fact remains that these two agreements were “cloaked with the mantle of Governmental authority”. Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was approved by Georgian Government officials without objection as to their legality on the part of Georgia for many years thereafter. Claimant therefore had a legitimate expectation that his investment in Georgia was in accordance with relevant local laws. Respondent is accordingly estopped from objecting to the Tribunal’s jurisdiction *ratione materiae* under the ECT and the BIT on the basis that the JVA and the Concession could be void *ab initio* under Georgian law.”)

¹²³⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42, 73, 89 (**CWS-02**); Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 16, 35 (**CWS-06**).

¹²³⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 73, 106-107, 125 (**CWS-02**); Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶¶ 53-54 (**CWS-06**).

¹²³⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 98, 101 (**CWS-02**); Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶¶ 43, 47 (**CWS-06**).

¹²³⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (**CWS-02**).

- b) Mayor Herrera, while acting in her official capacity, came to Hacienda Santa Fé to give a speech telling the paramilitaries about her efforts to help them in getting electricity, water and allowing them to build housing on the Hacienda Santa Fé lands.¹²³⁸
- 1064) Both mayors were officials of organs of the State. As a result, Nicaragua has international law responsibility for the measures taken by these mayors with respect to measures against the Investor that were internationally wrongful.
- 1065) A summary of the admissions of government control in 2018 as set out below.

Chart E – Occupiers Confessions

June 16	Occupiers confess upon invasion to HSF security guards that the invasion was in the name of the government
June 16	6 occupiers confess the invasion was in the name of the government to the security chief Raymundo Palacios.
July 16	Comandante Cinco Estrella admits to Luis Gutierrez that the invasion was in the name of the government .
July 16	3 occupiers confess to Domingo Ferrufino that the invasion was in the name of the government
July 24	4 occupiers admit to Luis Gutierrez that the invasion was in the name of the government

- 1066) Nicaragua contends that it did not take HSF. Instead, Nicaragua blames counterrevolutionaries (the Contras) who were historically linked to US President Ronald Reagan for the taking. This counter-narrative makes little sense and is not supported by the evidence supplied by the very occupiers of HSF.
- 1067) Nicaragua also claims that invaders had been living in HSF since 2017¹²³⁹ (for over a year) before the invasion and that INAGROSA was not even aware [thus blaming the invasion on INAGROSA for lack of security rather than upon the measures of Nicaragua].

¹²³⁸Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (CWS-02).

¹²³⁹ Counter-Memorial at ¶ 97.

1068) Management disputes this claim. INAGROSA Security Team member Domingo Ferrufino testified that the INAGROSA Security Team did regular investigations at HSF in 2017 without evidence of any human habitation.¹²⁴⁰ He states:

Without question, I would have been aware of the presence of 170 occupiers at Hacienda Santa Fé in 2017. This is not a small number of people. They would leave signs of occupation that would have been quickly detected. As a member of the Security Team who was on patrol at that time in 2017, I can completely confirm that there was no occupation or even an attempt at an invasion of Hacienda Santa Fé in 2017.¹²⁴¹

1069) INAGROSA Chief Agronomist Luis Gutierrez also testified that he never saw any squatters residing in HSF in 2017 and he patrolled the area regularly.¹²⁴² INAGROSA's Carlos Rondon testified that on his visits to HSF in 2017, he saw no evidence of any persons squatting on HSF lands.¹²⁴³

1070) Other than the contention of Jose López in his unsubstantiated witness evidence, which has been relied upon by other witnesses without independent verification, there is no evidential support for the supposed year-long habitation within the perimeter of Hacienda Santa Fé.

b) Government Organs – ARSIWA Article 4

1071) ARSIWA Article 4 codifies the international law standards for international responsibility for acts taken by members of organs of the State. It provides:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.¹²⁴⁴

1072) A State is responsible for the measures of all persons or organs of a State that exercises its respective powers. State responsibility extends not only to acts of the state but to omissions of the state to act.

¹²⁴⁰ Witness Statement of Domingo Ferrufino -Reply- SPA at ¶ 46.(CWS-12).

¹²⁴¹ Witness Statement of Domingo Ferrufino -Reply- SPA at ¶46 (CWS-12).

¹²⁴² Witness Statement of Luis Gutierrez- Reply-SPA at ¶ 32 (CWS-10).

¹²⁴³ Witness Statement of Carlos Rondon – Reply- ENG at ¶¶ 50-57 (CWS-09).

¹²⁴⁴ ARSIWA at art. 4, p. 40 (CL-0017-ENG).

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- a) The police are an integral part of the executive branch of government. They are an organ of the State. Nicaragua's internal law confirms that the national police are an organ of the State.¹²⁴⁵ A State never can avoid international responsibility for the actions of the police.¹²⁴⁶
 - b) The legislative branch is an integral part of the government. In this claim, we address the acts of elected officials such as National Assembly Deputy Edwin Castro, Jinotega Mayor Leonidas Centeno, and San Rafael del Norte Mayor Norma Herrera.
 - c) Government officials are also a party of the executive branch of government. In this claim, we address the acts of Enrique Dario from the Agriculture department and the actions of the executive branch who proceeded with the judicial seizure of HSF in 2021, and who also declined to give notice of the application or the judicial order to INAGROSA (the owner of HSF) or Riverside, the foreign Investor in this CAFTA claim who was named as the Defendant in the application.
- 1073) Nicaragua is responsible for the actions and omissions of these government entities and persons under ARSIWA Article 4.
- 1074) Specifically, Nicaragua has responsibility for the actions of the police, the voluntary police, and government officials, including the mayor, in the taking of the lands at HSF.
- 1075) As described above, throughout the invasions of Hacienda Santa Fé, the national police engaged in multiple acts that assisted the occupiers. The assistance provided by the national police has been discussed at length in the CAFTA breaches section; however, some key events worth reiterating is:
- a) During the initial invasion, Police Captain Herrera informed management that Commissioner Marvin Castro gave an order to not evict the invaders from HSF.¹²⁴⁷
 - b) Police Inspector Calixto Vargas, and other members of the police, came to HSF and demanded that the HSF workers hand over their weapons without lawful orders or authorizations.¹²⁴⁸

¹²⁴⁵Ley de la Policía Nacional, 1996 at Articles 1, 9 (C-0222-SPA).

¹²⁴⁶Crawford, International Law Commission Commentary, p. 98 (CL-0019-ENG).

¹²⁴⁷Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 78 (CWS-01); Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (C-0012-SPA).

¹²⁴⁸Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 49-50 (CWS-02).

- c) On July 24, 2018, Cristobal Luque, a voluntary police officer, tried to disarm the security guard at HSF, and when he refused, Officer Luque violently assaulted the guard.¹²⁴⁹
- d) On August 4, 2018, members of the Nicaraguan National Police, including Mayor Herrera, escorted a paramilitary leader into HSF.¹²⁵⁰
- e) On August 6, 2018, the National Police escorted Mayor Herrera to HSF to give a speech on assisting the invaders to live at the HSF.¹²⁵¹
- 1076) Nicaragua is responsible for omissions of the duty to protect.¹²⁵² The rules of state responsibility create attribution to the State for the acts and omissions of State organs. The failure to provide treatment owed to foreign investors creates responsibility. This responsibility for omissions by the police was considered in detail in *von Pezold v Zimbabwe*:

Indirect liability for the acts of others can also occur under Article 4— for example, the failure to stop someone doing something that violated an obligation. It does not matter that a third party actually undertook the action, if a State organ (such as the police) was aware of it and did nothing to prevent it. The Tribunal finds, on the evidence before it, that this is the case here, as regards police inaction in the face of Settlers/ War Veterans coming on to the Zimbabwean Properties. (. . .) With respect to attributing acts of non- State organs to the Respondent, the acts of the Settlers/ War Veterans do not appear to fall within the scope of Article 8 of the ILC Articles. While there is ample evidence of Government involvement and encouragement, the Tribunal is not persuaded that the acts of the invaders were based on a direct order or under the direct control of the Government when they initially invaded the Claimants' properties. Rather, the Government appears to have encouraged (and endorsed) the action once it had begun. Encouragement would not meet the test set out in Article 8. However, the Tribunal agrees with the Claimants that the State action of encouragement and facilitation, etc. should be considered separately when it comes to treaty violations (this includes the inaction of the police). The actions of the invaders themselves need not be considered.¹²⁵³

- 1077) The *Ampal- American Israel Corporation v Egypt* Tribunal considered the conduct of a contract of supply and purchase of gas by the Egyptian Gas

¹²⁴⁹Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 67 (CWS-02).

¹²⁵⁰Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 98 (CWS-02).

¹²⁵¹Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (CWS-02).

¹²⁵²*Eureko BV v Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 June 2005, ¶ 185 et seq. (CL-0027-ENG).

¹²⁵³*Bernhard von Pezold et al v. Republic of Zimbabwe*, ICSID Case No ARB/ 10/ 15, Award, 28 July 2015, ¶¶ 445– 448 (CL-0162-ENG).

Holding Company (EGAS). EGAS was a holding company wholly owned by a state organ, the Egyptian General Petroleum Corporation (EGPC). The Tribunal determined that the confirmation of the EGPC's Board's termination of the contract (which comprised the Minister of Petroleum and other ministers of the Republic of Egypt), constituted sufficient grounds to substantiate attribution under ARSIWA Article 8.¹²⁵⁴ In this respect, the tribunal held that:

The Tribunal finds that there is overwhelming evidence that the decisions of EGPC and EGAS to conclude and terminate the GSPA were all taken with the blessing of the highest levels of the Egyptian Government. Such acts are attributable to the Respondent pursuant to Article 8 of the ILC Draft Articles on State Responsibility as EGPC and EGAS were '*in fact acting on the instructions of, or under the direction or control of the Respondent in relation to the particular conduct.*'¹²⁵⁵

- 1078) In *Karkey v Pakistan*, the tribunal decided that the conduct of Lakhra Power Generation Company Ltd (Lakhra) and Pakistan Electric Power Company Limited (PEPCO) relating to the performance of a contract was the result of 'direct and explicit instructions' and mandates by the government and, therefore, was attributable to the Republic of Pakistan.¹²⁵⁶
- 1079) The *UAB v Latvia* Tribunal found that bringing a freezing order against the investor by companies wholly owned by a Latvian municipality was an act attributed to the State under ARSIWA Article 8.¹²⁵⁷
- 1080) In this case, there is a freezing order and there are measures of the national police which overtly invoke article 4. There also is the expert evidence of Prof. Justin Wolfe in his Reply Expert Statement (CES-05) that the circumstances in this claim are similar to circumstances of state directed land invasions in Nicaragua.¹²⁵⁸ These acts demonstrate the integral governmental role of the police, which actively engaged in measures to assist the paramilitaries and harm Riverside's investment.

¹²⁵⁴ *Ampal- American Israel Corporation et al v. Arab Republic of Egypt*, ICSID Case No ARB/ 12/ 11, Decision on Liability and Heads of Loss, 21 February 2017, at ¶144 (**CL-0289-ENG**) (hereinafter *Ampal v. Egypt*).

¹²⁵⁵ *Ampal v Egypt*, Decision on Liability, at ¶146 (**CL-0289-ENG**).

¹²⁵⁶ *Karkey Karadeniz Elektrik Uretim AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/ 13/ 1, Award, 22 August 2017, ¶¶ 573, 590, 595 (**CL-0290-ENG**).

¹²⁵⁷ *UAB E Energija v. Latvia*, ICSID Case No ARB/ 12/ 33, Award, 22 December 2017, ¶¶ 827– 30 (**CL-0291-ENG**).

¹²⁵⁸ Expert Statement of Prof. Justin Wolfe – Reply– ENG at ¶¶116-118 (**CES-05**)

c) Direction of persons by the State - ARSIWA Articles 8

1081) ARSIWA Article 8 addresses the special situation where state responsibility stems from a factual relationship between the private entity or person(s) and the State.¹²⁵⁹ ARSIWA Article 8 on Conduct Directed, or Controlled by a State provides that:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.¹²⁶⁰

1082) The International Court of Justice ('ICJ') elaborated on this in the *Bosnian Genocide* case:

International responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. What must be determined is whether [FRY] organs ...originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.¹²⁶¹

1083) Under the ICJ's decision, a State is responsible when an organ of the State either instructed, directed, or controlled the violation of international law. To attribute conduct under this ARSIWA Article, it is not enough that the State supported or assisted with the execution of the wrongful action. Still, the responsibility is shown when the State caused the breach through its own conduct.

1084) In the *Bosnian Genocide* case, the ICJ asserted that instructions from a state organ must be given:

in respect of each operation in which the alleged violations occur, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.¹²⁶²

¹²⁵⁹ARSIWA at Art.8, p 47 (CL-0017-ENG).

¹²⁶⁰ARSIWA at art. 8, p. 47 (CL-0017-ENG); Crawford, *International Law Commission Commentary*, Article 8, p. 110 (CL-0019-ENG).

¹²⁶¹ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), February 26, 2007 (hereinafter, "ICJ, Bosnian Genocide Case"), ¶ 397 (CL-0043-ENG).

¹²⁶²ICJ, Bosnian Genocide Case at ¶ 400 ¹²⁶²ICJ, Bosnian Genocide Case at ¶ 400 (CL-0043-ENG).

- 1085) Prof. Wolfe has reviewed the historical evidence to confirm that the armed occupiers from the El Pavon Cooperative were persons operating under the control and direction of the government of Nicaragua.¹²⁶³
- 1086) Consequently, state responsibility occurs if a person or groups of persons are specifically instructed to commit an internationally wrongful act. Organs of Nicaragua sent paramilitary leaders to the Hacienda Santa Fé. Those leaders identified themselves as being sent by the “Government of Reconciliation and National Unity”.¹²⁶⁴ They proclaimed that they were occupying the HSF on the orders of Leonidas Centeno, Mayor of Jinotega, and on behalf of the Government of the Republic of Nicaragua.¹²⁶⁵
- 1087) Nicaragua has paid scant attention to Sandinista supporters who were part of the armed occupiers of HSF. Prof. Wolfe notes in paragraph 116 of his Reply Expert Statement¹²⁶⁶ that:

Further, in documents supporting the Witness Statement, Jinotega Police Commissioner Marvin Castro confirms that there were at least three armed Sandinista Party members in the leadership of the invaders:

- a) Comandante Toño Loco (Luis Antonio Rizo Reyes), a Comandante leading the invasion who supports the National Government¹²⁶⁷
- b) El chino (Ney Ariel Ortega Kuan)¹²⁶⁸
- c) Haniel Samuel Rizo Torrez¹²⁶⁹

- 1088) In paragraph 117 of his Reply Expert Statement, Professor Wolfe concludes that:

117) The presence of government supporters in the leadership of the occupation is entirely consistent with the discussion of government supported land invasions in the First Expert Statement.

¹²⁶³Expert Witness Statement of Prof. Justin Wolfe at ¶ 115 (**CES-02**). Prof. Wolfe stated, “The former Nicaraguan Resistance invading occupiers, writing on behalf of the entire El Pavon Cooperative, confirmed to the Attorney General in the September 5, 2018, letter (R-0065) that they were supporters of the Sandinista government, and they were acting under the direct control of Nicaraguan President Daniel Ortega.”

¹²⁶⁴Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (**CWS-02**).

¹²⁶⁵Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (**CWS-02**).

¹²⁶⁶Expert Statement of Prof. Justin Wolfe – Reply– ENG at ¶116 (**CES-05**)

¹²⁶⁷Characterization of Mr. Luis Antonio Rizo Reyes, Jinotega National Police, 2022 (R-0043-SPA-ENG)

¹²⁶⁸Characterization of Mr. Ney Ariel Ortega Kuan, Jinotega National Police, 2022 (**R-0044-SPA-ENG**)

¹²⁶⁹Characterization of Mr. Haniel Samuel Rizo Torrez, Jinotega National Police, 2022 (**R-0045-SPA-ENG**).

1089) For example, Tono Loco was a significant Sandinista supporter and one of the pre-eminent leaders. Prof. Wolfe notes in paragraph 64 of his Reply Expert Statement that: ¹²⁷⁰

As Police Commissioner Marvin Castro noted in his Witness Statement (RWS-02), several former Sandinista army members were also among the leadership of the Hacienda Santa Fé occupation, including Luis Antonio Rizo Reyes (also known as “Toño Loco”). According to a report in the newspaper La Prensa, following Rizo’s murder, Toño Loco was an active supporter of the government. He was deployed in Operation Clean-up against protestors in 2018. La Prensa writes:

Rizo, nicknamed “Toño Loco,” has been identified as one of the alleged participants in the so-called “*plan limpieza*” executed by Daniel Ortega’s regime to quash protests in the department of Jinotega.¹²⁷¹

1090) Yet again, it is simply misleading for Nicaragua to constantly refer to the leadership of the occupiers as being opponents of the government when the leadership consists of Sandinista supporters and former Nicaraguan Resistance members who now support the government and openly say that they are subservient to the government.

1091) A government official, Fabio Enrique Dario, admitted that the government took HSF to pressure the business sector.¹²⁷² These spontaneous statements by the paramilitary leaders and the State officials constitute admissions that Nicaragua instructed the taking of HSF.¹²⁷³ They also constitute acknowledgement of the measures.

1092) State responsibility under ARSIWA Article 8 can also be the result of a private person or group of persons acting under the State’s direction or control.¹²⁷⁴ The commentary to ARSIWA Article 8 states that:

¹²⁷⁰ Expert Statement of Prof. Justin Wolfe – Reply– ENG at ¶64 (**CES-05**)

¹²⁷¹ L.E. Martínez M., 'Al menos tres muertos tras un tiroteo en el Cuá, Jinotega', La Prensa, 31 December

2018 (C-0560-SPA); See also Shooting involving "parastatal leader" in Nicaragua left four dead, EFE News Service January 1, 2019 (C-0565-SPA). Operation Clean-up “(plan limpieza) was a combined and coordinated use of force by the State, including anti-riot police and paramilitaries to attack protestors to break up the roadblocks (tranques). Operation Clean-up is discussed in the First Expert Statement at paragraphs 43 – 46.

¹²⁷²Copy of the Facebook Profile of Fabio Enrique Dario Confirming that he is a Government Official, Last accessed May 7, 2019 (**C-0021-SPA**).

¹²⁷³Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42, 73, 89 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 16, 35 (**CWS-06**).

¹²⁷⁴Crawford, J, *State Responsibility – the General Part* (Cambridge University Press) at 10.4.3 (**CL-0021-ENG**).

More complex issues arise in determining whether conduct was carried out “under the direction or control” of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control.¹²⁷⁵

1093) According to the ARSIWA, the State’s direction or control must be directly related to the specific conduct of the private person.¹²⁷⁶

1094) The degree of control necessary to incur state responsibility was a key issue in the case of *Nicaragua v. The United States of America*. In the *Nicaragua* case, the ICJ found that responsibility is attributable if:

it would in principle have to be proved that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.¹²⁷⁷

1095) Effective control requires that the State be more than a mere influencer or supporter of the conduct.¹²⁷⁸ In order to meet the effective control test, the Claimant must demonstrate the existence of:

- a) *De facto* link by virtue of factors such as assistance, financing, organizing, training, selecting targets and planning.
- b) Control such that it is clear that the acts had been ordered or imposed on the relevant individuals and entities by the State.
- c) Effective control can also be shown in the level of operational control the state has throughout the act itself.¹²⁷⁹

¹²⁷⁵Crawford, *International Law Commission Commentary*, p. 110 **(CL-0019-ENG)**; ARSIWA at Art. 8, **(CL-0017-ENG)**.

¹²⁷⁶Crawford, *International Law Commission Commentary*, p. 113 **(CL-0019-ENG)**.

¹²⁷⁷ICJ, *Nicaragua v. United States of America, Military and Paramilitary Activities*, Judgement of 27 June 1986, ¶ 115 **(CL-0022-ENG)**.

¹²⁷⁸Boon, K. “Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines” (2014) 15(2) *Melbourne Journal of International Law* 329. **(CL-0024-ENG)** (Citing *Nicaragua* (Separate Opinion of Judge Ago) [1986] ICJ Rep 14, 188 [16]); See also Perova, N., “Disentangling ‘Effective Control’ Test for the Purpose of Attribution of the Conduct of UN Peacekeepers to the States and the United Nations” (2017), 86 *Nordic Journal of International Law*, 30-67, 54; **(CL-0025-ENG)** and Talmon S. “The Responsibility of Outside Powers for Acts of Secessionist Entities” (2009), 58(3), *International & Comparative Law Quarterly* 493-517. **(CL-0026-ENG)**

¹²⁷⁹Crawford, *International Law Commission Commentary*, p. 110-113 **(CL-0019-ENG)**.

- 1096) Here, Nicaragua exercised effective control over the paramilitaries that took the land at HSF:
- a) The State provided the means to assist the commission of expropriations and other violations;¹²⁸⁰
 - b) The State exercised control through local municipalities and the National Police;¹²⁸¹ and
 - c) The State controlled the occupiers.¹²⁸²
- 1097) Many of the occupiers confirmed they were acting on the government's instruction¹²⁸³ and that the land was gifted to them as a *quid pro quo* in exchange for their support.¹²⁸⁴
- 1098) Government official Fabio Enrique Dario also verified that the paramilitaries were at HSF at the direction of the government.¹²⁸⁵
- 1099) Inagrosa Management was told the State selected the target, in this case, HSF, as part of a plan to put pressure on businesses.¹²⁸⁶ As a result of the State's planning and instruction, the paramilitaries arrived at the HSF.
- 1100) According to information provided to Mr. Gutierrez by an anonymous employee from the Ministry of Agriculture, Cattle Raising and Forestry ('MAGFOR'), the police station of San Rafael del Norte provided guns to the paramilitaries at HSF.¹²⁸⁷

d) The State Exercised Control Through Municipalities

- 1101) Mayors play an essential role in instructing government-directed land invasions. Professor Justin Wolfe addressed this point in paragraphs 27, 52 and 53 of his First Expert Statement (**CES-02**).¹²⁸⁸ Nicaragua did not rebut Prof. Wolfe's report with any expert evidence and failed to rebut these contentions at all, which are thus deemed admitted. Professor Wolfe returns to this topic in his Reply Expert Statement. The First Expert

¹²⁸⁰Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 129 (**CWS-02**).

¹²⁸¹Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 73, 106, 125 (**CWS-02**).

¹²⁸²Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 106-107 (**CWS-02**).

¹²⁸³Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42, 73, 89 (**CWS-02**); Witness Statement of Jaime Francisco Henriquez Cruz – Memorial – SPA at ¶ 16, 35 (**CWS-06**).

¹²⁸⁴Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42, 73 (**CWS-02**).

¹²⁸⁵Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (**CWS-02**).

¹²⁸⁶Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (**CWS-02**).

¹²⁸⁷Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 129 (**CWS-02**).

¹²⁸⁸Expert Statement of Prof. Justin Wolfe – Memorial – ENG at ¶ 52 (**CES-02**).

Statement notes references to two different reports from Inter-American Commission on Human Rights experts confirming:

Another significant feature that could be observed was the mutual collaboration between several State organs or structures linked to the State: The National Police, Mayor's Offices, and parapolice groups.¹²⁸⁹

1102) Prof. Wolfe then notes in paragraphs 103 to 105 of his Reply Expert Statement that :

103) As noted by the Interdisciplinary Group of Independent Experts, there was "a network of actors, including parapolice groups, Mayor's Offices and civil servants from State institutions."¹²⁹⁰

104) Riverside's Memorial references a "proclamation" that made by the armed occupiers during their June invasion, where they claimed that they were taking Hacienda Santa Fe in the name of the Nicaraguan state and on the orders of Jinotega Mayor Leonidas Centeno.¹²⁹¹

105) Allegations of a role by local mayors in directing land invasions against nongovernment supporters would be consistent with examples of the active engagement of mayors in Nicaragua in 2018.¹²⁹²

1103) In addition to the central role played by Jinotega Mayor Leonidas Centeno in ordering the invasion and his continuing role of control over the armed occupiers in August 2018, San Rafael del Norte Norma Herrera also played an active role in facilitating the occupation and acknowledging the taking and formalizing roles to build infrastructure for the illegal occupants.

1104) The municipal authorities aided the taking of HSF. On August 6, 2018, Mayor Herrera came to HSF, escorted by the police, to give a speech to the paramilitaries in which she promised to provide water and electricity to them and stated that they could make plans of projects of what they wanted to do with the lands at HSF.¹²⁹³

¹²⁸⁹ Expert Statement of Prof. Justin Wolfe – Reply– ENG at ¶102 (**CES-05**); Prof. Wolfe references the Interdisciplinary Group of Independent Experts Report at page 78 (**C-0131-ENG**).

¹²⁹⁰ Interdisciplinary Group of Independent Experts, Report at page 187 (**C-0131-ENG**). See also Interdisciplinary Group of Independent Experts, "Report on Violent Events That Took Place in Nicaragua between April 18th and May 30th: Executive Summary" at page 2 (**C-0024-ENG**).

¹²⁹¹ Memorial at ¶¶ 62, 182, 271, and 293; Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 73, 125 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz- Memorial-SPA at ¶ 53; Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (**CWS-01**).

¹²⁹² Vivanco, Jose Miguel, EU, UK Sanction Top Nicaraguan Official, Human Right Watch May 9, 2020 (**C-0423-ENG**).

¹²⁹³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 51 (**CWS-02**).

e) The State Controlled the Occupiers

- 1105) After the occupiers successfully took the lands, the government-maintained control over them, including their meetings with Mayor Centeno in August 2018 and with National Assembly Delegate Edwin Castro in July 2018.
- 1106) The Government promised that it would legalize land that had been taken.
- 1107) Mayor Herrera, escorted by the police, promised that city hall would provide new water, electricity, and housing infrastructure for the paramilitaries.¹²⁹⁴ This promise was based on the condition that they organize themselves.¹²⁹⁵
- 1108) The Civic Alliance for Democracy and Justice statement said that Mayor Leonidas Centeno forced the paramilitary at HSF to attend a meeting on July 16, 2018.¹²⁹⁶ The Civic Alliance for Democracy and Justice Facebook post explained that if members of the paramilitary did not attend the rally, their land would be taken away.¹²⁹⁷

f) Article 11 Acknowledgment and Adoption

- 1109) Under ARSIWA Article 11, Nicaragua is responsible for measures taken by persons that subsequently have been acknowledged and adopted by the state.¹²⁹⁸
- 1110) ARSIWA Article 11 is often applied to governments that succeed from insurrectionist movements, but its terms are not so limited. The terms of ARSIWA Article 11 provide:

Conduct acknowledged and adopted by a State as its own Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

- 1111) The International Law Commission Commentary 3 to ARSIWA Article 4 discusses cases on the issue of attribution and acknowledgment. The limited cases referenced by the International Law Commission demonstrate that acknowledgment only requires acquiescence from the state. Thus, recognition and acknowledgement grounded state responsibility in the

¹²⁹⁴Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (CWS-02).

¹²⁹⁵Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 102 (CWS-02).

¹²⁹⁶Fig-re 2 - Civic Alliance Facebook Post – July 16, 2018 (C-0035-SPA).

¹²⁹⁷Fig-re 2 - Civic Alliance Facebook Post – July 16, 2018 (C-0035-SPA).

¹²⁹⁸In the words of commentary 8 to the ARSIWA, “Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.” (CL-0017-ENG).

Lighthouses Arbitration, where the state did not take active steps to disassociate itself from the measure causing the harm:

(3) Thus like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes nevertheless that conduct is to be considered as an act of a State if and to the extent that the State acknowledges and adopts the conduct in question as its own. Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses arbitration*, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been endorsed by [Greece] as if it had been a regular transaction and eventually continued by her, even after the acquisition of territorial sovereignty over the island.¹²⁹⁹

1112) The actions of National Assembly Deputy Edwin Castro in July 2018 exemplify acknowledgment and adoption. Not only was Castro a member of the National Assembly, but he also was the legal representative of the Sandinista Party to the CSE, the electoral commission. He was a frequent and prominent government spokesperson in public forums.¹³⁰⁰

1113) Nicaragua did not take any steps denounce the occupation. Like in the *Lighthouses Arbitration*, Nicaragua treated the occupation as the normal situation in July 2018 – when the damage to INAGROSA took place.

g) Conclusion on State Responsibility

1114) The fact that the voluntary police are a part of the executive branch of the government is a matter set out in Nicaraguan law.¹³⁰¹ This confirmation under Nicaragua's internal law means that state responsibility applies under ARSIWA Article 4 to the actions of the paramilitaries, as voluntary police as well as the actions of the national police.

1115) Nicaragua's responsibility is highlighted through Deputy Castro's decisions and inactions in several ways:

- a) **Instruction to Occupiers:** Directing the occupiers to maintain their occupation grounds Nicaragua's state responsibility under ARSIWA Article 4. If Nicaragua controlled the occupiers, then ARSIWA Article 8 also may

¹²⁹⁹ARSIWA, Commentary 3 to Article 11 (**CL-0017-ENG**). *Lighthouses Arbitration*, 12 RIAA 155, (Greece–France, 1956) at p. 198. (**CL-0211-FRE**).

¹³⁰⁰Reply Expert Statement of Prof. Justin Wolfe at ¶55 who confirms that Edwin Castro was a prominent spokesperson for the Sandinista Party and the government. (**CES-05**)

¹³⁰¹Ley de la Policía Nacional, (1996) at article 1 (**C-0222-SPA**); Expert Statement of Prof. Justice Wolfe at ¶ 33 (**CES-02**).

become relevant. However, the instruction from a government official itself establishes state responsibility. It is also notable that the occupiers adhered to instruction, maintaining their occupation, which subsequently resulted in damage to INAGROSA.

- b) **Failure to Protect Foreign Property:** Nicaragua acknowledges its international obligation to safeguard foreigners' property and ensure its return to its rightful owners. By neglecting to instruct the occupiers to vacate lands they did not own, Deputy Castro created state responsibility for Nicaragua. This omission is addressed by ARSIWA Article 4, considering Deputy Castro's position in the government.
- c) **Adoption of Occupiers' Actions and ARSIWA Article 11:** Jinotega Police Commissioner Marvin Castro's official report to the National Police Chief Diaz confirmed that in July 2018, Deputy Edwin Castro met with the occupier leaders at HSF. He endorsed their actions, recognized their continued occupation of land they did not own, and encouraged the continuation of the occupation. Further entrenching his commitment, he pledged the government's support in securing funds to purchase the lands for the occupiers. This overt endorsement contradicts Nicaragua's current alleged condemnation in the wake of this international arbitration claim. Notably, Nicaragua has not presented evidence of any official government statement during the HSF invasions in June or July 2018 that denounced the occupation.¹³⁰² Moreover, there is no documented order from August 2018 demanding the occupiers' departure from HSF. The only evidence is of a meeting arranged nearly two months post-invasion.¹³⁰³ Evidence of a meeting months after the fact is not evidence that Nicaragua met its self-professed international law commitments to protect the investments of foreign investors.
- 1116) As a matter of international law, these measures directly confirm state responsibility and subject matter jurisdiction for the Tribunal. The instructions from elected officials such as Jinotega Mayor Centeno create state responsibility under ASRIWA Article 8. The acknowledgement and recognition from Congressman Edwin Castro create responsibility under ASRIWA Article 11. The measures of the national police¹³⁰⁴ and elected

¹³⁰² The lack of evidence to support is an indication that this was a part of a state sponsored invasion of lands owned by an investment of a foreign investor.

¹³⁰³ Counter-Memorial at ¶¶337(b)¶. Summons to Gorgojo, Gerardo Rufino Arauz, Mauricio Mercado, José Estrada, Adrián Wendell Mairena Arauz, Yolanda del Socorro Téllez Cruz, José Dolores Zelaya, Gerardo Benicio Matus Tapia, August 9, 2019 (R-0049).

¹³⁰⁴ El 19 Digital, Promotion ceremony on occasion of the 39th anniversary of the National Police, September 12, 2018 (C-0213-SPA).

officials¹³⁰⁵ engaged actively in the unlawful taking of HSF¹³⁰⁶ and in the occupation of HSF. These create attribution of state responsibility under ASRIWA Article 4. Further the actions of the Attorney General with respect to the 2021 judicial measures at yet another further measure that creates state responsibility under ASRIWA Article 4., There is no lack of a nexus to Nicaragua for the purposes of state responsibility for the unlawful acts arising in this claim.

A. Most Favored Nation (MFN)

1117) CAFTA Article 10.4 imposes a Most Favored Nation or MFN Treatment obligation upon Nicaragua. The CAFTA describes this obligation:

Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

1118) CAFTA Article 10.4(2) imposes a requirement that the treatment provided by Nicaragua to the investment of American Investor, INAGROSA, must be as favourable as the best treatment provided to an investment of an investor, from another CAFTA Party or a non-Treaty Party (a "Third Country"). Article 10.4(1) applies this same requirement to the treatment provided to an American investor compared to better treatment provided to an investor from a Third Country.

1119) The scope of the CAFTA MFN obligation relates to "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments."

1120) MFN Treatment is also an "interpretive principle and rule" of the CAFTA.¹³⁰⁷ Thus, when interpreting MFN under the CAFTA, it is necessary to consider MFN as a fundamental principle that is embedded not only in CAFTA Article

¹³⁰⁵La Gaceta No. 221, List of Elected Citizens- Municipal Elections 2017- Jinotega Department, November 20, 2017 (C-0130-SPA).

¹³⁰⁶Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (C-0012-SPA).

¹³⁰⁷CAFTA Article 1.1.1 (CL-0001-ENG).

10.4, but which has a more structural function within the CAFTA as a whole.¹³⁰⁸

1121) The natural and ordinary meaning of the MFN obligation in CAFTA Article 10.4 requires that consideration is given to its terms.

1122) Often, in the case of investment obligations, the issue of MFN Treatment arises when a claimant seeks to rely on a provision of another investment treaty, with more favourable substantive, and most often, procedural provisions. While such situations arise in this arbitration, Riverside contends that the obligation was violated here when Nicaragua offered better treatment to investors from foreign countries as compared to the treatment provided to the Investment.¹³⁰⁹

1123) The term “measure” is defined by CAFTA Article 2.1 to mean: “measure includes any law, regulation, procedure, requirement, or practice”.

1124) Better treatment from Nicaragua to Russian Investors (and their investments in Nicaragua) is a practice. This offer of treatment is not hypothetical – but instead it is a binding treaty “requirement” and thus a measure on that basis as well. This the offer to Russians under the Russian BIT is at the same time a measure capable of consideration by this CAFTA Tribunal.

1125) As discussed below, Nicaragua provided treatment under other Investment Treaties to foreign investors that are more favourable to investments of Non-Treaty Parties than it provided in like circumstances to the Claimant and its Investment.

1. Nicaragua’s erroneous understanding of MFN

1126) Nicaragua has an erroneous understanding of the meaning of MFN. In paragraph 389 of the Counter-Memorial, Nicaragua argues that the MFN obligation can only apply if Riverside is able to demonstrate Nicaragua’s intent to discriminate against Riverside or its investment based on nationality.

1127) This assertion foundationally misunderstands MFN.

¹³⁰⁸Article 31(1) of the Vienna Convention on the Law of Treaties requires that the ordinary meaning of the words be considered in their context. Context includes the entirety of the treaty. **(CL-0121-ENG)**.

¹³⁰⁹The Investor relies upon the MFN Obligation contained in CAFTA Article 10.4 in this pleading and intend to rely upon this Treaty provision with respect to subsequent pleadings in this arbitration, as may be required.

a) Intentional discrimination is not required

- 1128) The cases upon which relied Nicaragua relies are not reflective of the ordinary meaning of the obligation in the Treaty. Nor do they reflect of overwhelming view in jurisprudence.
- 1129) It is necessary to have recourse to the Vienna Convention on the Law of Treaties (“VCLT”) to find the interpretative rules to understand the meaning of the MFN obligation. VCLT Article 31(1) requires that the ordinary meaning of the words be considered in their context. This context also requires that consideration be given to the fact that MFN is an interpretive principle of the entire CAFTA and that all its obligations are to be interpretive considering this principle (under CAFTA Article 1.1.1) On the basis of there is nothing in the wording of Article 10.4 that gives rise to any requirement that there be an intentional discrimination requirement.¹³¹⁰
- 1130) Riverside addressed the fact that there was no need to establish intentional discrimination in its Memorial. This position was supported by cases.
- 1131) Riverside addressed the fact that there is no requirement to provide intentional nationality-based discrimination in paragraphs 624 – 638 of the Memorial. As noted there, the ordinary meaning of the terms in CAFTA Articles 10.3 and 10.4 did not require the existence of intentional discrimination. Further, Riverside addressed the consideration of this issue before investment treaty and international economic law tribunals in a comprehensive manner.
- 1132) Nicaragua does not respond to any of the cases Riverside filed to explain why they were incorrectly decided.
- 1133) Nicaragua simply asserts a contrary view and then set out a series of cases which erroneously held that there was a need for intentional discrimination.

2. Likeness

- 1134) Riverside set out the jurisprudence on the issue of the likeness test in paragraphs 603-614 of the Memorial. Nicaragua again has not engaged in any evaluation of the cases set out by Riverside; it simply states that Riverside was wrong.
- 1135) In paragraph 607 of the Memorial, Riverside addressed the fact that likeness needs to be considered in the circumstances. Where the question of likeness arises in the context of government regulations, likeness requires the

¹³¹⁰CAFTA Article 10.4 (CL-0001-ENG).

Tribunal to consider all of those who are competing for similar regulatory permissions.

1136) Riverside provided cases to support its approach, but Nicaragua has not addressed any of them. These included *Occidental Petroleum v Ecuador* and *Grand River v USA*.¹³¹¹

1137) At Memorial Paragraph 609, Riverside set out its test for likeness.

For the purposes of National Treatment and MFN Treatment, all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa.

1138) Likeness must be considered in context. But Nicaragua's narrow consideration of likeness makes no sense. This case is about the treatment Riverside's investment received from the government. In this context, all those who have land rights are in similar circumstances.

1139) Nicaragua's has a contorted position on likeness unsupported by any cases. It says in paragraph 390 that:

For the purposes of National Treatment and MFN Treatment, all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa, the investment of the Investor, Riverside.¹³¹²

1140) Nicaragua does not explain why it refuses to accept public landowners or public possessors of land as being in the same circumstances as private landowners. The legal rights and privileges are indistinguishable.

1141) In any event, as set out below, even accepting Nicaragua's overly narrow sub-category of private landowners, Nicaragua is unable to meet the requirements under the treaty

a) Broader MFN Scope in the Swiss Treaty

1142) Riverside and its investment Inagrosa received less favorable treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments than that received by other locals and investments of other Parties and non-Parties in Nicaragua.

¹³¹¹ *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, Award (January 12, 2011) at ¶167 (**CL-0146-ENG**) (hereinafter *Grand River Enterprises*); *Occidental Production Company v. Republic of Ecuador*, Final Award, (July 1, 2004) at ¶ 173 (**CL-0058-ENG**) (hereinafter *Occidental*).

¹³¹² Counter-Memorial art ¶ 390.

- 1143) The treatment at issue is with respect to the management, conduct, operation, and other disposition of INAGROSA. In particular:
- a) Nicaragua's direct role in controlling the Occupiers who invaded HSF affecting the expansion, management, conduct, operation, and sale or other disposition of Riverside's investment at HSF.
 - b) Nicaragua's direct role in instructing the Occupiers who invaded HSF to continue their occupation during the second invasion affecting the expansion, management, conduct, operation, and sale or other disposition of Riverside's investment at HSF.
 - c) Nicaragua's failure to share information about the imminent invasion of HSF resulted in the substantial deprivation of HSF and thus constituted treatment affecting the expansion, management, conduct, operation, and sale or other disposition of Riverside's investment at HSF.
 - d) Nicaragua's failure to have its police carry out diligent policing duties during the first and second invasions of HSF resulted in affecting the expansion, management, conduct, operation, and sale or other disposition of Riverside's investment at HSF.
 - e) Nicaragua's judicial order has restricted the authority of INAGROSA to dispose or encumber HSF.
- 1144) All these measures fit within the scope requirement of the MFN Treatment obligation in the CAFTA.

3. Better treatment offered by Nicaragua.

- 1145) Nicaragua as a Treaty Party must provide the best treatment provided to foreign companies in like circumstances.
- 1146) In *Renta 4 S.V. S.A. v. Russian Federation*, Judge Charles Brower considered whether having a range of different dispute settlement options constituted more favourable treatment that would trigger the MFN Treatment requirement.¹³¹³ He concluded that having different options, was in itself, the provision of more favourable treatment than having fewer options. He wrote:

In any case, strictly speaking, it is not relevant, in my view, to attempt evaluation of whether one dispute settlement mechanism objectively is "more favorable" than another. What is relevant is that Danish and Spanish investors in Russia are afforded "different" dispute settlement options. The purpose and rationale of MFN clauses is, as the International

¹³¹³*Renta 4 S.V.S.A, et al. v. The Russian Federation*, SCC Case No. 24/2007, Separate Opinion of Charles N. Brower, at ¶ 21 (CL-0136-ENG).

Court of Justice has so clearly stated in Rights of Nationals of the United States of America in Morocco to “establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned., From this perspective, the mere existence of differences in the available dispute settlement mechanisms is sufficient to trigger an MFN clause and thereby to extend the treatment afforded by the Danish treaty to those benefitting from the MFN clause in the Spanish treaty.

- 1147) In this claim, there are more options available to the American Investor arising from certain obligations in the Nicaraguan-Russian BIT. That range of different options constitutes more favourable treatment.
- 1148) The Russian Federation -Nicaragua Bilateral Investment Treaty (“Russian BIT”) was signed on January 26, 2012, in Moscow and it came into force on September 3, 2013. The Treaty was authenticated in Russian, Spanish and English.¹³¹⁴
- 1149) Nicaragua did not meet its obligation to provide Most Favoured Nation Treatment to Riverside and its Investments under CAFTA Article 10.4. These failures to provide treatment as favourable to Riverside as provided to nationals of third countries, including those of Russians, is set out below. In every case, this treatment was provided in relation to “the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments.”
- 1150) Nicaragua provided better treatment to investors and investments in like circumstances from non-Treaty Parties in the following ways:
- a) By offering more favorable Expropriation terms than that offered in the CAFTA Treaty;¹³¹⁵
 - b) By offering broader and more expansive coverage for the national treatment and the fair and equitable treatment obligation than that offered in the CAFTA Treaty;¹³¹⁶
 - c) By offering broader and more expansive scope of coverage to those investments covered by the benefits of Treaty Protection.¹³¹⁷
- 1151) Riverside received less favourable treatment from the National Police than that provided to other private landowners whose lands had been unlawfully

¹³¹⁴Nicaraguan-Russian Bilateral Investment Treaty, 3 September 2013, (**CL-0033-ENG**) (hereinafter Russian BIT).

¹³¹⁵The Investor will address MFN in relation to Expropriation within the detailed discussion of expropriation below. The broader obligation is in the Russian BIT at ¶4 (**CL-0033-ENG**).

¹³¹⁶Russian BIT at ¶ 3 (**CL-0033-ENG**).

¹³¹⁷Nicaraguan-Russian Bilateral Investment Treaty, 3 September 2013 at ¶1 (**CL-0033-ENG**).

invaded in Nicaragua in 2018 at the Nejapa Country Club in Sábana Grande, Managua. Riverside provided the information through its Expert Witness, Prof. Wolfe, who relied on press reports of the police efforts to remove the unlawful invaders.¹³¹⁸

- 1152) Nicaragua complained that these media reports were not sufficiently probative to establish proof of better treatment.
- 1153) Nicaragua does not address the incident at the Nejapa Country Club in its Counter-Memorial at all. The Tribunal ordered Nicaragua to produce police reports of invasions of private land, yet no report regarding the Nejapa Country Club was filed, and no mention of the Nejapa Country Club was made in the Police Reports.
- 1154) Other than the media reports, information on police conduct at that specific venue are within the sole custody and control of Nicaragua.
- 1155) However, the Police Reports did provide information on another incident where more favourable treatment was provided.
- 1156) Nicaragua provided better treatment to the investment of Inversiones Nela S.A., which owned private lands in Nicaragua in the summer of 2018.¹³¹⁹ This invasion of private lands by more than 200 armed invaders is set out in Exhibit C-0326 -SPA /ENG) which was produced by Nicaragua.
- 1157) The owner of the land, Inversiones Nela S.A., is incorporated in Costa Rica.¹³²⁰
- 1158) The Police report regarding Inversiones Nela S.A indicates that in July 2018, the police took steps to repel the occupation and arrest invaders of private lands owned by Inversiones Nela S.A. This was more favorable treatment than that provided to INAGROSA at that very same time.
- 1159) As permitted by Article 10.4 of the CAFTA Treaty, the Investor in this arbitration claims the benefit of the better treatment offered by Nicaragua to the investment of investors from Costa Rica, which was in like circumstances to INAGROSA, the investment of Riverside.

¹³¹⁸Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 59 (CES-02); Prof. Wolfe relied upon Wilfredo Miranda Aburto, “Ortega ordena desalojar a tomatieras,” *Confidencial*, September 23, 2018 (C-0230-SPA).

¹³¹⁹The address of the property was identified in the Police Report as the west side of the Hotel Ticomo, 22510, Tomo 673, Folio 300, Asiento N° 13,

¹³²⁰The Costa Rican Business registry confirms that Inversiones Nela Sociedad Anonima is a Costa Rican company with registration number 3-101-179800 (C-0454-SPA).

4. The Effect of the MFN clause in this claim

1160) There is a substantive effect that this Tribunal must give to Nicaragua's sovereign decision to extend broader treatment under international law to Russian Investors and their Investments under the Russian BIT. Without limitation, Riverside is entitled to rely on and expect, at least, for treatment as favourable as that offered by Nicaragua regarding the following provisions in the Russian BIT:

- a) the more favorable definition of investment and the absence of such obligations on consents and waivers contained in Article 1 of the Russian BIT.
- b) the more favorable fair and equitable treatment obligation contained in Article 3(1) of the Russian BIT.
- c) the more favorable national treatment obligation contained in Article 3(2) of the Russian BIT; and
- d) the more favorable expropriation obligation contained in Article 4 of the Russian BIT.

a) Better Definition of Investment

1161) Article 1 of the Russian BIT provides a broader definition of Investment than that provided in the CAFTA. It provides a meaning of investment without the characterization test included in the CAFTA definition. This broader definition under the Russian BIT reads:

a) "investments" are all kinds of property assets invested by investors of the State of one Contracting Party in the territory of the State of the other Contracting Party in accordance with the legislation of the State of the latter Contracting Party, in particular:

movable and immovable property, as well as rights related with them; shares, stocks, and other forms of participation in the capital of enterprises; exclusive rights to intellectual property such as copyrights, patents, models and industrial designs, trademarks and service marks, "know-how", technology, and information having commercial value;¹³²¹

1162) This definition applies to all kinds of property assets, and it does not include the "characteristics of an investment" language that has been included in the definition found in CAFTA.

¹³²¹Russian BIT (CL-0033-ENG).

1163) In addition. Nicaragua provides more favorable treatment to investments of investors in like circumstances from Russia in Article 8 of the Russian Treaty by not imposing any requirement for the filing of consents and waivers under the Russia- Nicaragua BIT. That Russian BIT also does not impose any consultations or negotiation (which also would be less onerous and thus more favorable treatment). This treatment is more favorable than the treatment offered to Riverside Coffee, and thus the more favorable treatment must be offered by Nicaragua with respect to consultations, consents, and waivers under the CAFTA.

b) Better Fair and Equitable Treatment obligations

1164) Under Article 10.5 of the CAFTA, the CAFTA parties are obliged to “accord covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security”. The CAFTA sets out in Article 10.5.2 that this “prescribes the customary international law minimum standard of treatment to aliens as the minimum standard to be afforded to covered investments.”

1165) Under the terms of CAFTA Article 10.5.2(a), the obligation of fair and equitable treatment includes “the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” The fair and equitable treatment obligation is not limited to that example.

1166) Under Article 10.5.2(b), the CAFTA states that full protection and security requires each Party to provide the level of police protection required under customary international law. The full protection and security obligation is not limited to this example, it simply includes it.

1167) In an unusual treaty drafting approach, the definition of the international law standards is further influenced using a footnote. As a result of footnote 1 to the title above CAFTA Article 10.5, Article 10.5 is subject to interpretation under CAFTA Annex 10-B. CAFTA Annex 10-B discusses the methodology for determining whether a rule constitutes customary international law sufficient to be included within the coverage of CAFTA Article 10.5.

1168) States are sovereign. The International Court of Justice has confirmed that states freely can extend treaty protections under the fair and equitable treatment category beyond what is required by customary international law.¹³²²

¹³²² *Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo)*, Preliminary Objections Judgment, 2007 ICJ 582 at ¶ 60 (CL-0164-ENG).

- 1169) This Tribunal must give effect to the sovereign decisions of Nicaragua to accept an obligation for fair and equitable treatment and for full protection and security. The obligation for “fair and equitable treatment for the investments” or for full protection and security is not limited only to customary international law as expressly set out in CAFTA Article 10.5. The Russian BIT gives a definition and naturally follows the full sources of international law (such as treaty law, general principles of law, international tribunal decisions and scholarly writings) in addition to customary international law in giving meaning and content to the meaning of the term “fair and equitable treatment.”¹³²³
- 1170) The broader obligation for constant legal protection in Article 2(2) of the Russian BIT is broader than the obligation for full protection and security in CAFTA Article 10.5.
- 1171) The application of the full range of sources of international law is generally described as the autonomous standard for fair and equitable treatment. The autonomous standard is what is offered by Nicaragua in the Russian BIT. This must form the basis for Nicaragua’s obligations to its CAFTA Party partners under the CAFTA’s MFN obligation.
- 1172) As Article 3(1) of the Russian BIT provides a broader definition of fair and equitable treatment than that in the CAFTA, this autonomous fair and equitable treatment obligation must be extended to Riverside. Thus, any restriction of fair and equitable treatment only to “customary international law” contained in CAFTA Article 10.5 and CAFTA Annex 10-B are inapplicable, as the autonomous standard must apply.
- 1173) In the Russian BIT, Nicaragua agreed to the following:
- Each Contracting Party shall provide in the territory of its State fair and equitable treatment for the investments made by investors of the State of the other Contracting Party in respect of management, maintenance, enjoyment, use or disposal of such investments.¹³²⁴
- 1174) The autonomous obligation is based on the ordinary meaning of the treaty wording combined with the typically expressed purpose of BITs as set out by the interpretative rules codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.¹³²⁵ This is also consistent with the

¹³²³Article 38 of the Statute of the International Court of Justice, 26 June 1945 (**CL-0169-ENG**). Article 38 sets out at least four sources of international law. Customary international law is one of those four sources. Treatment in accordance with international law would require consideration of all four sources and not just one source, customary international law.

¹³²⁴Russian BIT at ¶ 3(1). (**CL-0033-ENG**).

¹³²⁵Vienna Convention on the Law of Treaties. Articles 31 and 32 (**CL-0121-ENG**).

interpretative approach to the CAFTA mandated under CAFTA Article 10.2.¹³²⁶

- 1175) The broader treatment under the Russian BIT applies only to the fair and equitable treatment part of CAFTA Article 10.5. The Russian BIT addresses in Article 2(2) full protection and security, and thus the broader obligations extend to this second elements of the international law standard of treatment. That obligation is still limited by the CAFTA obligation and the scope limitations obligation in CAFTA Annex 10-B. But the fair and equitable treatment obligation under the Russian BIT is significantly broader and offers more favourable treatment to investors and their investments located in Nicaragua.

c) Better National Treatment obligations

- 1176) Article 3(2) of the Russian BIT provides a broader definition of national treatment than that contained in the CAFTA. Nicaragua agreed to a broader obligation that was not limited by any reservations contained in the CAFTA or by additional scope limitations (upon the management, conduct, operation, maintenance, use, disposal, or alienation of the investments) within the CAFTA obligation. In the Russian BIT, Nicaragua agreed to the following:

The treatment referred to in paragraph 1 of this Article shall not be less favorable than a treatment granted by a Contracting Party to the investments of investors of its own State or to investments of investors of any third State.¹³²⁷

- 1177) This obligation in the Russian BIT is not limited to the “establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” as in the CAFTA. Also, there are no reservations or exceptions to the Russian BIT obligation, unlike those in the CAFTA.

d) Better Expropriation obligations

- 1178) Article 4 of the Russian BIT provides a broader definition of the obligations regarding expropriation than that contained in the CAFTA. Nicaragua agreed to a broader obligation that was not limited by additional scope limitations on the obligation in CAFTA Annexes 10-B or 10-C. In the Russian BIT, Nicaragua agreed to the following:

¹³²⁶CAFTA Article 1.1.2 provides that the CAFTA is to be interpreted in a manner consistent with international law. CAFTA Article 1.1.1 provides that “the objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency” (CL-0001-ENG).

¹³²⁷Russian BIT at ¶ 3(2) (CL-0033-ENG).

1. Investments of investors of the State of one Contracting Party made in the territory of the State of the other Contracting Party and returns of such investors shall not be expropriated, nationalized or subjected to any measures, having effect equivalent to expropriation or nationalization (hereinafter referred to as expropriation) except when such measures are carried out in the public interests and in accordance with the procedure established by the legislation of the State of the latter Contracting Party, when they are not discriminatory and entail payment of prompt, adequate and effective compensation.¹³²⁸

- 1179) Nicaragua's MFN reservation at Annex II-NI-5 does not apply as the Russia – Nicaragua BIT was signed and came into force after CAFTA's coming into force.
- 1180) Inagrosa is entitled to treatment as favorable as that provided to those in like circumstances to those investments and investors from Nicaragua and those from states other than the United States. Others in like situations were treated more favorably with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

5. Nicaragua 's Absurd Exception Arguments

- 1181) Nicaragua has asserted two CAFTA-based defenses which it purports to operate as exceptions to its international law obligations under the Treaty. The two defenses are:
- a) The operation of the essential security clause, and
 - b) The operation of civil strife clause.¹³²⁹
- 1182) Nicaragua contests the operative effect of the CAFTA due to the impact of its self-judging invocation of an essential security interest
- 1183) As detailed below, Nicaragua has offered more favorable treatment to Russian investors with investments in Nicaragua than it has offered to Americans under the CAFTA. Nicaragua provides better treatment to Investors from the Russian Federation than it provides under the CAFTA concerning exceptions as the Russian BIT contains no essential security interests exception. As Nicaragua provides treaty protections for expropriation, fair and equitable treatment, legal protection (Full protection and security), MFN and National Treatment in a broader fashion, without an essential security interests exception under the Russian BIT than under the

¹³²⁸Russian BIT at ¶ 4 (CL-0033-ENG).

¹³²⁹Counter-Memorial at ¶¶ 286-319.

CAFTA, Riverside is automatically entitled to receive this same preferential treatment.

- 1184) Nicaragua contests the operative effect of the CAFTA due to the impact of its self-judging invocation of the civil strife clause.
- 1185) Similarly, Nicaragua provides better treatment to Investors from the Russian Federation than it provides under the CAFTA concerning civil strife as the Russian BIT contains no exception that exempts the operation of Treaty obligations in the case of civil strife.
- 1186) The Russian BIT contains section Article 5 on Compensation for Loss. This provision reads:

ARTICLE 5

Compensation for Damages and Losses

Investors of the State of one Contracting Party whose investments and

returns suffer damages or losses owing to war, armed conflict, insurrection, revolution, riot, civil disturbance, a state of national emergency or any other similar event in the territory of the State of the other Contracting Party shall be accorded by the latter Contracting Party in respect of such damages or losses, as regards the restitution, indemnification, compensation or other settlements, a treatment no less favorable than that which the latter Contracting Party accords to investors of its own State or to investors of a third State, whichever investor considers as more favorable.

- 1187) The Compensation for Losses and Damages provisions in Article 5 of the Russian BIT does not limit the operation of treaty obligations in the Treaty in the event of the existence of civil strife.
- 1188) Article 5 refers to the Investor's choices of the benchmark of more favourable treatment operating under local law or under a treaty with a third party (other than the Russian Federation). Riverside has elected in this regard to select the treatment provided under a treaty with a third party. In this regard, more favourable treatment (by way of a double renvoi) occurs through the Nicaragua- Switzerland Treaty (the Swiss Treaty).¹³³⁰ The Swiss Treaty which contains requires in Article 5(2) of that treaty the following:

¹³³⁰Agreement between the Swiss Confederation and the Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments. (Swiss Treaty), signed November 30, 1998, and entered into force on May 2, 2000 (**CL-188-ENG**) (hereinafter Swiss Treaty). The Swiss Treaty was ratified by Nicaragua in Decree 101-99, published in La Gaceta Diario Oficial on September 2, 1999 (**C-0443-SPA**).

The investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or rebellion, which took place in the territory of the other Contracting Party shall benefit, on the part of this latter, from a treatment in accordance with Article 3, paragraph (2) of this Agreement as regards: restitution, indemnification, compensation, or other settlement.¹³³¹

1189) Article 3(2) of the Swiss Treaty requires that compensation be accorded

Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investor of the other Contracting Party. This treatment shall not be less favorable than that granted by each Contracting Party to investments made within its territory by its own investors, or, than that granted by each Contracting Party to the investments located within its territory by investors of the most favoured nation if this latter treatment is more favourable.¹³³²

1190) Thus, under the Swiss Treaty, there is no derogation from the operation of the treaty, or for the payment of damages, in the event of civil strife events such as war or any other armed conflict, revolution, state of emergency or rebellion.

1191) Under the Swiss Treaty, there are no substantive derogations permitted to Nicaragua in the case of Civil Strife. This is the standard that must be provided under the 2013 Russian BIT which is applicable due to CAFTA Article 10.2's MFN provisions.

1192) Thus, the operation of MFN under CAFTA Article 10.4 extinguishes Nicaragua's arguments that the civil strife clause excuses its international law obligations

6. Essential Security Provision (CAFTA ARTICLE. 21.2)

1193) Nicaragua relies on the Essential Security Provision in CAFTA Art 21.2(b). Nicaragua claims that this provision operates as a total defense to preclude its wrongfulness in this claim.

1194) CAFTA Article 21.2 provides:

Article 21.2: Essential Security

Nothing in this Agreement shall be construed:

¹³³¹Swiss Treaty, Article 5(2) (CL-188-ENG).

¹³³²Swiss Treaty, Article 3(2) (CL-0188-ENG).

(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

1195) Nicaragua asserts that CAFTA Article 21.2(b) is invoked due to:

Nicaragua's response to the illegal invasion and occupation of Hacienda Santa Fé was necessary to protect its own essential security interests is a matter to be determined by Nicaragua under Article 21.2(b).¹³³³

1196) Nicaragua claims that this Tribunal has no role in assessing whether the invocation and application is genuine as the Essential Security Provision is entirely self-judging.

1197) Nicaragua concedes that the Tribunal has a limited role to consider if the Essential Security Provision was invoked in good faith under Article 26 of the Vienna Convention on the Law of Treaties.¹³³⁴

1198) Nicaragua relies on two contexts for invoking the Essential Security Provision:

a) An unprecedented period of civil strife and nationwide unrest marked by high levels of violence that lasted several months in Nicaragua [in 2018];¹³³⁵

b) The impact of the Nicaraguan Resistance. Nicaragua addresses this in its own words in Counter-Memorial paragraph 300 as follows

300. Second, it should be emphasized that the invasion of Hacienda Santa Fé, though occurring in the midst of an outbreak of nationwide violence and disorder, was closely linked to an earlier and far worse conflict—Nicaragua's so-called "counter-revolution"—a bloody internal conflict that lasted from roughly 1979 to 1990 and that cost tens of thousands of Nicaraguan lives. That conflict pitted the Resistencia Nicaragüense against the government of Nicaragua led by President Daniel Ortega.¹³³⁶

¹³³³Counter-Memorial at ¶ 293.

¹³³⁴Counter-Memorial at ¶ 294.

¹³³⁵Counter-Memorial at ¶ 297.

¹³³⁶Counter-Memorial at ¶ 300.

- 1199) Nicaragua claims that the identity of the wrongdoers at HSF was integral to its good faith invocation of the Essential Security Provision. Nicaragua says that the occupiers were not only general opponents of the government but of a class “closely linked” to an “earlier and far worse conflict”.
- 1200) Thus, the treatment which Nicaragua seeks to allow is specifically goes to the measures applied by Nicaragua with respect to the expansion, management, conduct, operation, and sale or other disposition of HSF, Riverside’s investment in Nicaragua.
- 1201) Nicaragua appears to misunderstand the meaning of the Essential Security Provision. As set out below, Riverside contests Nicaragua’s application of the Essential Security Provision in this arbitration.
- a) **Section a** argues that Riverside is entitled to a higher standard of protection available in other Nicaraguan investment treaties that do not allow Nicaragua to escape liability because of essential security.
 - b) **Section b** explains that CAFTA’s Essential Security Provision does not impact this Tribunal’s jurisdiction or findings of liability, but only precludes the Tribunal from ordering Nicaragua to withdraw its measures (a remedy that has not been sought in this arbitration by Riverside).
 - c) **Section c** establishes that Nicaragua has failed to invoke the Essential Security Provision in good faith. The basis for the invocation was not made in good faith and the measures that are the subject of Riverside’s claims have nothing to do with the essential security interest invoked by Nicaragua.

a) Riverside is entitled to a higher level of protection under MFN

- 1202) MFN protection allows “every party to the treaty [to] demand from any other party to accord to it treatment equal to that extended to any third State, irrespective of whether that third State is a party to the treaty or not.”¹³³⁷
- 1203) Thus, by application of CAFTA Article 10.4, Riverside is entitled to the same level of protection granted to foreign investors and investments under other Nicaraguan investment treaties such as the Russian BIT. Tribunals have held that MFN provisions such as Article 10.4 can be used to import more favorable substantive treatment from third treaties.¹³³⁸

¹³³⁷ International Law Commission, Draft Articles on most-favoured-nation clauses, with commentaries (1978), pp. 19-20 (**CL-0227-ENG**).

¹³³⁸ *Paushok, v. Mongolia*, Jurisdiction and Liability at ¶ 254 (**CL-0114-ENG**) (“[T]he MFN clause of the Treaty allows for the integration into it of the broader provisions contained in the U.S. Mongolia BIT and

- 1204) There is a clear disparity between the treatment granted by Nicaragua to Russian investors in its territory in comparison to that offered to American investors under the CAFTA.
- 1205) The Russian BIT does not contain any non-precluded measures clause. As a result, Nicaragua offers vastly more favorable treatment to Investors from the Russian Federation who are entitled to international law treaty obligations from Nicaragua without a non-precluded measures exception of any kind. As a result, the CAFTA Article 21.2(b) non-precluded measures clause is non-operative because of the more favorable treatment offered by Nicaragua to Russian Federation investors, as this must similarly be extended to American Investors such as Riverside on CAFTA article 10.4 MFN obligation.
- 1206) Pursuant to the Russian BIT, American investors and their investments are entitled to similar treaty protections as available here,¹³³⁹
- 1207) If Nicaragua could be entitled to invoke Article 21.2 at any time, for any reason, without review, to eliminate justiciability or absolve itself of liability, (which is expressly denied by Riverside), then American investors are subject to less favorable treatment than Russian investors. In such circumstances, American investors can be left devoid of all treaty protections at Nicaragua's discretion, whereas Russian investors cannot be subject to the same vagaries.
- 1208) To harmonize the standard of treatment between Russian and American investors, the CAFTA s MFN protection operates to preclude the application of Article 21.2 in this Arbitration (assuming Nicaragua's interpretation of it, which Riverside maintains is incorrect).
- 1209) This more favorable treatment Nicaragua provided by to investors and investments of Russian Investors under the Russian Treaty in like circumstances to investors and investors of CAFTA investors under the

the Denmark-Mongolia BIT."); *MTD. v. Chile*, Award, at ¶ 104 (CL-0088-ENG). (noting the MFN provision may be used to import additional rights into FET provision "that can be construed to be part of the fair and equitable treatment of investors"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 155-57; (CL-0229-ENG) *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 575; (CL-0096-ENG), *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶¶ 551-52, 554-55. (CL-0230-ENG).

¹³³⁹Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, in *Investment Treaty Law: Current Issues III* (A. Bjorklund, I. Laird, S. Ripinsky eds., BIICL, 2009), 270 ("In that sense, access to arbitration is part of the rights granted under the treaty and there is hardly any difference in nature between the right to arbitrate one's dispute and the right to be treated fairly and without discrimination. In effect, the protection accorded in investment treaties would not be of great value without the right to arbitrate one's dispute before a neutral judge."). (CL-0228-ENG).

CAFTA must be extended to American Investors like Riverside and its investments.

1210) Thus, Nicaragua may not rely upon the CAFTA Article 21.2 essential security interests' exception.

b) CAFTA's Essential Security Provision does not impact this Tribunal's jurisdiction or findings of liability

1211) Nicaragua fundamentally misconstrues Riverside's request for relief in this arbitration. Riverside asks for compensation because Nicaragua has unlawfully exercised its sovereign powers in an arbitrary, unreasonable, and discriminatory manner and consequently, unlawfully expropriated HSF while failing to provide Full Protection and Security, Fair and Equitable Treatment and treatment equivalent to the most favorable offered to like investments in Nicaragua to INAGROSA.

1212) Nicaragua seeks to invoke the Essential Security Provision opportunistically to attempt to convert its substantive defense (which is reviewable by this Tribunal) to an Essential Security Defense (which Nicaragua alleges is not reviewable).

1213) Contrary to Nicaragua's assertions, nothing in CAFTA Article 21.2(b)'s essential security provision allows Nicaragua to absolve itself of liability for breaching the CAFTA or shield it from paying compensation as a remedy.

1214) All CAFTA Article 21.2(b) does is ensure Nicaragua can maintain its measures of its unlawful possession of HSF, however misguided and unlawful. Since Riverside is not asking for restitution, CAFTA Article 21.2(b) has no impact on these proceedings. The provision does not deprive this Tribunal of its jurisdiction and equally does not absolve Nicaragua of its liability.

1215) A self-judging provision allows a State to determine for itself which measures it requires for a stated goal. Here, CAFTA Article 21.2(b) allows the State to adopt measures "it considers necessary" for the protection of its essential security interests. However, Riverside is not disputing whether Article 21.2(b) is self-judging. That question is irrelevant to the analysis of the consequences of invoking Article 21.2(b).

1216) While a provision's self-judging nature may be relevant to the question of whether the State has properly invoked it, the provision has no impact at all on the consequence of the State's invocation.

1217) Nicaragua conflates the question of whether Article 21.2(b) is self-judging with whether it allows Nicaragua to escape liability and this Tribunal's review.

1218) This Tribunal can consider how to address the Essential Security Interest exception from the way in which the *Eco-Oro* Tribunal considered the application of the environmental exception in the relevant Columbia-Canada treaty.

1219) Nowhere in the *Eco Oro* decision does that tribunal rely on the non-self-judging nature of the clause there to find that Colombia must be liable for its breaches of the Treaty.¹³⁴⁰ Indeed, the *Eco Oro* tribunal found that Colombia had properly invoked the exception as it had taken the measures for the protection of its environment in that case.¹³⁴¹ Still, Colombia was liable for damages because, despite applying the exception properly, Colombia had failed to comply with its other obligations under the treaty in respect of the investors in that case. Accordingly, while “it cannot be prohibited from adopting or enforcing” those measures, Colombia had to compensate the investors.¹³⁴²

1220) The *Eco-Oro* Tribunal noted:

Whilst the Tribunal accepts that the State cannot be prohibited from adopting or enforcing an environmental measure in accordance with Article 2201(3), it cannot accept Canada’s statement that in such circumstances payment of compensation is not required. This does not comport with the ordinary meaning of the Article when construed in the context of the FTA as a whole and specifically in the context of Chapter Eight.” (*emphasis added*).¹³⁴³

1221) The *Eco-Oro* Tribunal also commented that:

Colombia also provided no justification as to why it is necessary for the protection of the environment not to offer compensation to an investor for any loss suffered because of measures taken by Colombia to protect the environment, nor explained how such a construction would support the protection of investment in addition to the protection of the environment.”¹³⁴⁴

¹³⁴⁰*Eco Oro Minerals Corp. v. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 623-699, 743-821, 826-837 (**CL-0225-ENG**) (hereinafter *Eco Oro*).

¹³⁴¹*Eco Oro* at ¶ 636 (**CL-0225-ENG**).

¹³⁴²*Eco Oro* at ¶ 836 (**CL-0225-ENG**).

¹³⁴³*Eco Oro* at ¶¶ 832-837 (**CL-0225-ENG**).

¹³⁴⁴*Eco Oro* at ¶ 832. The *Eco-Oro* Tribunal also noted “(¶ 833 (“To be an exception to Chapter Eight must equally mean there are applicable provisions in Chapter Eight, such that there must be circumstances in which an investor needs to seek recourse to arbitration with respect to a measure which comes with the meaning of Article 2210(3) [sic], which can only be to claim compensation for losses suffered as a result of such measure.”), ¶ 837 (“Accordingly, the Tribunal does not find that Article

- 1222) Whether those measures were necessary for the stated goal, and the *Eco Oro* tribunal accepted that they were, did not impact that tribunal's decision that Colombia was liable for breaching that treaty.
- 1223) It is worth noting that where States have intended to void jurisdiction and liability upon invocation of an essential security provision, they have done so expressly, and not relied on the self-judging nature of the clause (which has no logical or textual connection to the consequence of invoking the exception, as discussed above). For example, the letters of exchange to the Singapore-India Comprehensive Economic Cooperation Agreement. ("CECA") provides that:
- [W]here the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a security exception as set out in Article 6.12 of the Agreement, **any discussion of the disputing Party taken on such security consideration shall be nonjusticiable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation**, or an adjudication of any other issues referred to the tribunal.¹³⁴⁵
- 1224) There is treaty drafting practice that accomplishes what Nicaragua contends, but that language is not present. Indeed, none of the U.S. Treaty Provisions include such language. This demonstrates that the U.S. Treaty Provisions (which were followed in the CAFTA) do not intend to have such a wide-reaching impact, as they could have adopted such express language carving out jurisdiction and liability but did not do so.
- 1225) Article 21.2(b)'s ordinary meaning, as advanced by Riverside, is also consistent with the principle of *effet utile*. The principle of *effet utile* stands for the basic proposition that the interpreter must give provisions "their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text".¹³⁴⁶ This is precisely what Riverside's interpretation does. Its interpretation considers the ordinary meaning of every

2201(3) operates to exclude Colombia's liability to pay compensation to Eco Oro for its damages suffered as a result of Colombia's breach of Article 805"). (CL-0225-ENG).

¹³⁴⁵India-Singapore Comprehensive Economic Cooperation Agreement (signed 29 June 2005, entry into force 1 August 2005),— Chapter 6 – Investment (C-0247-ENG) and India-Singapore Comprehensive Economic Cooperation Agreement - exchange of letters on non-justiciability of Security Exceptions (C-0231-ENG)(*emphasis added*). (CL-0231-ENG).

¹³⁴⁶*Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16, UNCITRAL, Partial Award on Jurisdiction, 13 November 2013, ¶ 171 (CL-0226-ENG).

word of Article 21.2(b) in a manner that reduces conflict between the provision and the rest of the CAFTA.

1226) By contrast, Nicaragua's proposed interpretation forces into conflict the substantive provisions in Chapter Ten and Article 21.2 and deprives the substantive investment protections in CAFTA Chapter Ten of all meaning for the benefit of Chapter Twenty-One and Article 21.2(b). However, there is no need for any inconsistency to occur. Any conflict is obviated if Article 21.2 is given its ordinary meaning (as required under VCLT Article 31), which does not automatically give the respondent State in an arbitration unilateral power to divest the substantive parts of the investment protections in Chapter Ten of all effect, thus further weighing in favor of adopting the plain meaning of Article 21.2.

c) Nicaragua has failed to invoke the Essential Security Provision in good faith

1227) As noted above, Nicaragua relies on two contexts for invoking the Essential Security Provision:

- a) An unprecedented period of civil strife and nationwide unrest marked by high levels of violence that lasted several months in Nicaragua [in 2018];¹³⁴⁷
- b) The impact of the Nicaraguan Resistance.¹³⁴⁸

1228) Nicaragua can make neither of these invocations in good faith.

1229) To invoke Article 21.2.(b) in good faith, Nicaragua must show that there is a connection between the measure at issue and the essential security interest advanced as being necessary to protect.

1230) The measures at issue must meet a minimum requirement of plausibility in relation to the proffered essential security interests, *i.e.*, that they are not implausible as measures protective of these interests.¹³⁴⁹

1231) Investment tribunals likewise have demanded that States seeking to avoid liability through the invocation of treaty exceptions demonstrate a *bona fide* connection between the impugned measure and the relevant sovereign interest relied upon.⁹³ For example, the *Yukos v. Russia* Tribunal held that

¹³⁴⁷Counter-Memorial at ¶ 297.

¹³⁴⁸Counter-Memorial at ¶ 300.

¹³⁴⁹Russia – Measures concerning traffic in transit, Report of the Panel, WTO, WT/DS512/R, 5 April 2019, ¶ 7.138 (emphasis added). (CL-0233-ENG) See also Exhibit RL-201, Saudi Arabia – Measures concerning the protection of intellectual property rights, Report of the Panel, WTO, WT/DS567/R, 16 June 2020, ¶ 7.285. (CL-0234-ENG).

Russia could not characterize its unlawful conduct as a purported taxation measure to take advantage of a treaty carve out when in fact the conduct at issue was implemented for an ulterior purpose.¹³⁵⁰ The *Yukos* Tribunal reasoned that:

[A]ctions that are taken only ‘under the guise’ of taxation, but in reality, aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent), argue Claimants, cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1).

The Tribunal essentially accepts the latter interpretation of Article 21.

To find otherwise would mean that the mere labelling of a measure as ‘taxation’ would be sufficient to bring such measure within the ambit of Article 21(1) of the ECT and produce a loophole in the protective scope of the ECT. Since the claw-back in Article 21(5) of the ECT relates only to expropriations under Article 13 of the ECT, a State could, simply by labelling a measure as ‘taxation’, effectively avoid the control of that measure under the ECT’s other protection standards. It would seem difficult to reconcile such an interpretation with the purpose of Part III of the ECT.¹³⁵¹

- 1232) In this case, Nicaragua must discharge its burden of proof in demonstrating that there is a plausible connection between protection of its interest and the necessity of taking the unlawful measures in dispute in this Arbitration against Riverside and its investments. Nicaragua has not, and cannot, make such a showing because no such connection exists.
- 1233) First, there is no objective connection between the unlawful conduct and Nicaragua’s essential security interests.
- 1234) Nicaragua has articulated its essential security interest generally—”unprecedented period of civil strife and nationwide unrest”—but it has failed to ever explain how the lack of police response, the secret Judicial Application which effectively seized HSF and the invasion of HSF protected this interest.

¹³⁵⁰Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, ¶¶ 1430-33 (**CL-0232-ENG**) (hereinafter *Yukos Universal*).

¹³⁵¹ *Yukos Universal* at ¶¶ 1430-33 (**CL-0232-ENG**).

- 1235) The truth is Nicaragua cannot demonstrate any rational nexus between seizing HSF, the lack of police response or the gross unfair legal seizure of HSF and its stated goals.
- 1236) As addressed in Part I above, Nicaragua cannot show any rational nexus between its actions to address the opponents of the government (namely the former members of the Nicaraguan Resistance) when there is dispositive demonstrative evidence that the members of the Nicaraguan Resistance leading the invasion were docile and subservient supporters of the government.¹³⁵²

d) The Essential Security Clause cannot be used in this claim

- 1237) When interpreting the essential security interest exception in CAFTA, it is helpful to consider how similar provisions in other treaties have been understood and applied. For example, Article XXI of the GATT contains a security exception provision that has been subject to interpretation by the World Trade Organization (WTO) in dispute settlement proceedings. The WTO has emphasized that parties have a certain degree of discretion in determining their essential security interests, but this discretion is not unlimited. The measures taken must be necessary and genuinely related to the protection of essential security interests.
- 1238) Investor-state arbitration tribunals often scrutinize whether the measures taken genuinely are related to the protection of essential security interests and whether they are the least restrictive means to achieve that objective.
- 1239) The overall purpose and rationale remain like allow parties to prioritize their security interests over their obligations under the Treaty in specific circumstances. However, the interpretation and application of these exceptions are subject to the scrutiny of international courts, tribunals, and dispute settlement bodies, which assess the necessity, proportionality, and genuineness of the measures taken considering the treaty's objectives and the principles of international law.
- 1240) The key determination is the interpretation of the word "necessary." Some tribunals have equated the Essential Security Interests clause in BITs to ARSIWA Article 25 and other tribunals have interpreted the Essential Security Interests clause under terms of the Treaty or GATT Article XX.

¹³⁵² Expert Statement of Prof. Justin Wolfe – Reply– ENG at ¶ 52 (**CES-05**). Prof. Wolfe states " Since 2006, the Nicaraguan Resistance Party has been in a political alliance with the Sandinista Party. Rather than being opponents, the Nicaraguan Resistance Party is working under the direction of Sandinista President Daniel Ortega and Vice President Rosario Murillo".

e) Essential Security Interests clause equated to ARSIWA Article 25

1241) The first of set of cases in which tribunals addressed this question were the cases brought by investors against Argentina for the measures taken during its economic crisis, namely *CMS v Argentina*¹³⁵³, *Enron v Argentina*¹³⁵⁴, *Sempra v Argentina*¹³⁵⁵, *LG&E v Argentina*¹³⁵⁶ and *Continental Casualty v Argentina*¹³⁵⁷ (“Argentinian Cases”). In all five of these cases, Argentina argued that it was exempted from its treaty obligations under Article XI of the US-Argentina BIT and that the measures taken were for the protection of its essential security interests. The five tribunals interpreted the same clause under the US-Argentina BIT (Article XI) but reached conflicting conclusions.

1242) The *CMS*, *Enron* and *Sempra* tribunals found that the necessity aspect in the Essential Security Interests clause was to be equated with the customary international law meaning in ARSIWA Article 25.

1243) ARSIWA Article 25 states:

Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

the international obligation in question excludes the possibility of invoking necessity; or

the State has contributed to the situation of necessity.

¹³⁵³*CMS Gas Transmission Co. v Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 [CL-0053-ENG] (hereinafter “CMS”).

¹³⁵⁴*Enron Corporation Ponderosa Assets, L.P v Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007 (CL-0212-ENG).

¹³⁵⁵*Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Award September 28, 2007 (CL-0037-ENG) (hereinafter “Sempra”).

¹³⁵⁶*LG&E Energy Corporation and Others v Argentine Republic*, ICSID Case No. ARB/04/4, Award July 25, 2007 (hereinafter “LG & E Energy”) (CL-0116-ENG).

¹³⁵⁷*Continental Casualty Co. v Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008 (RL-0034-ENG).

7. War Losses Clause (CAFTA Article 10.6)

1244) CAFTA Article 10.6 contains a War Losses clause. This is a typical clause in bilateral investment treaties. The War Losses clause states:

Article 10.6: Treatment in Case of Strife

Notwithstanding Article 10.13.5(b),¹³⁵⁸ each Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

1245) Nicaragua claims that there was civil strife in June 2018.¹³⁵⁹ However, Nicaragua has not established that the harm arising at HSF arose from civil strife. It merely has proclaimed it.

1246) Due to the application of the Russian BIT, Nicaragua had to comply with its treaty obligations during periods of civil strife. As there is no civil strife provision in the Russian BIT (CL-0033), Nicaragua must extend treatment as favorable to American Investors and their Investments.

1247) Nicaragua may not rely upon CAFTA Article 10. 6 in such a circumstance.

1248) There is no civil insurrection exception language in the Russian Treaty. Thus, there is no *lex specialis* that governs the obligations of Nicaragua in this context due to the impacts of Nicaragua's treaty practice.

1249) Article 5 of the Russian Treaty has a War Losses Clause section addressing damages during civil insurrection. It reads:

Investors of the State of one Contracting Party whose investments and returns suffer damages or losses owing to war, armed conflict, insurrection, revolution, riot, civil disturbance, a state of national emergency or any other similar event in the territory of the State of the other Contracting Party shall be accorded by the latter Contracting Party in respect of such damages or losses, as regards the restitution, indemnification, compensation or other settlements, a treatment no less favorable than that which the latter Contracting Party accords to investors of its own State or to investors of a third State, whichever investor considers as more favorable.

¹³⁵⁸Article 10.13(5)(b) referenced in Article 10.6 addresses the fact that CAFTA "Articles 10.3, 10.4, and 10.10 do not apply to:(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance (CL-0001-ENG).

¹³⁵⁹Counter-Memorial at ¶¶ 317 – 319.

- 1250) The Compensation for Losses and Damages provisions in Article 5 of the Russian BIT does not limit the operation of treaty obligations in the Treaty in the event of the existence of civil strife.
- 1251) As Nicaragua provides treaty protections for expropriation, fair and equitable treatment, legal protection (Full protection and security), MFN and National Treatment in a broader fashion, without an essential security interests exception under the Russian BIT than under the CAFTA, Riverside is automatically entitled to receive this same preferential treatment.
- 1252) Article 5 refers to the Investor's choices of the benchmark of more favourable treatment operating under local law or under a treaty with a third party (other than the Russian Federation). Riverside has elected in this regard to select the treatment provided under a treaty with a third party. In this regard, more favourable treatment (by way of a double renvoi) occurs through the Nicaragua- Switzerland Treaty (the Swiss Treaty).¹³⁶⁰ The Swiss Treaty which contains requires in Article 5(2) of that treaty the following:
- The investors of one Contracting Party whose investments have suffered losses due. to a war or any other armed conflict, revolution, state of emergency or rebellion, which took place in the territory of the other- Contracting Party shall benefit, on the part of this latter, from a treatment in accordance with Article 3, paragraph (2) of this Agreement as regards: restitution, indemnification, compensation, or other settlement.¹³⁶¹
- 1253) Article 3(2) of the Swiss Treaty requires that compensation be accorded as follows:
- Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investor of the other Contracting Party. This treatment shall not be less favorable than that granted by each Contracting Party to investments made within its territory by its own investors, or, than that granted by each Contracting Party to the investments located within its territory by investors of the most favoured nation if this latter treatment is more favourable.¹³⁶²
- 1254) Thus, under the Swiss Treaty, there is no derogation from the operation of the treaty, or for the payment of damages, in the event of civil strife events such as war or any other armed conflict, revolution, state of emergency or rebellion.

¹³⁶⁰Agreement between the Swiss Confederation and the Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments. (Swiss Treaty), signed November 30, 1998 and entered into force on May 2, 2000 (CL-0188-ENG).

¹³⁶¹Swiss Treaty, Article 5(2) (CL-0188-ENG).

¹³⁶²Swiss Treaty, Article 3(2) (CL-0188-ENG).

- 1255) Under the Swiss Treaty, there are no substantive derogations permitted to Nicaragua in the case of Civil Strife. This is the standard that must be provided under the Russian BIT which is applicable due to CAFTA Article 10.2's MFN provisions.
- 1256) Alternatively, Riverside relies on Article 5(2) of the Nicaragua -Switzerland Treaty and its more favorable Civil Strife provisions in their entirety (though removing the renvoi requirement).
- 1257) Either way, the operation of MFN under CAFTA Article 10.4 extinguishes Nicaragua's arguments that the civil strife clause excuses its international law obligations.
- 1258) Nicaragua further claims that CAFTA Article 10.6 acts as a *lex specialis* to override all its other obligations and that this obligation is paramount to all the other obligation contained in the CAFTA.
- 1259) Nicaragua completely misunderstands the meaning of *lex specialis* in international law. Even if the civil strife clause in the CAFTA were to apply, (which the Investor pleads that it does not apply), even then the meaning ascribed by Nicaragua is also incorrect.
- 1260) Nicaragua relies on cases such as *LESI* to support its contention that the War Losses clause acts to replace the operation of all the obligations of the CAFTA.¹³⁶³ Nicaragua is mistaken. Nicaragua fails to disclose that the wording in the Algeria-Italy BIT at issue in the LESI claim was different from the wording in the CAFTA. The specific wording had an express notwithstanding class that create a *lex specialis* under the Treaty expressly. That situation does not arise in the current case. The War Losses clause in the same article as the Fair and Equitable Treatment obligation and there was no reference to any compensation for losses in the Algerian treaty, unlike in the CAFTA.¹³⁶⁴ Prof. Sébastien Manciaux noted the error of applying *lex specialis* in the LESI claim. He notes that the LESI Tribunal
- “discarded the FPS standard and applied the “Compensation for losses” provision instead. But is there really a contradiction between the FPS standard and the compensation for losses rule?”

¹³⁶³Counter-Memorial at ¶¶312-313. *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, November 12, 2008, ¶ 173 (RL-0041).

¹³⁶⁴See the discussion of this case in *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ Final Award.at FN 377 (CL-0192-ENG). The *Cengiz* Tribunal distinguished the LESI approach by noting that “the relevant treaty, the BIT between Italy and Algeria, had a drafting which differs from that of the Turkey-Libya BIT: the war clause (Article 4.5) was included in the same Article as the FPS standard (Article 4.1) and it lacks any reference to compensation for losses. The tribunal in Lesi invoked the dissenting opinion of Samuel Asante in AAPL”

This is far from obvious since the scope of application of these two rules are different. The FPS standard with its “due diligence” commitment has been developed to prevent the occurrence of loss. For a State, failure to exercise due diligence will be a breach of one of its international obligations under the applicable IIA, giving the right—under the same IIA—to foreign investors to claim for compensation. And the compensation for losses provision precisely applies at this stage.¹³⁶⁵

1261) Indeed, the position that the War Losses clause acts as a *lex specialis* that excludes the application of other substantive treaty obligations has been roundly rejected in *Strabag v Libya*, *Way2b v Libya*, *Cengiz v. Libya*, *Guris v. Libya*.¹³⁶⁶ Each of these cases is discussed in the following paragraphs.

1262) The predominate number of decisions under the case law fails to support Nicaragua’s assertions.

1263) The Tribunal in *CMS v. Argentina* considered the civil strife clause in Article IV (3) of the US-Argentina Bilateral Investment Treaty, which is like the clause in the CAFTA.

1264) The *CMS Tribunal* stated:

The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.¹³⁶⁷

1265) The Tribunal in *Suez v. Argentina* also carefully examined this argument.

¹³⁶⁵Sébastien Manciaux “The Full Protection and Security Standard in Investment Law: A Specific Obligation?” at page 226 (**CL-0189-ENG**).

¹³⁶⁶*Strabag v Libya*, ICSID Case No. ARB(AF)/15/1, Award. June 29, 2020 (**CL-0222-ENG**) Luke Peterson, *Way2B ACE v. Libya*, Award (24 May 2018) (not public), as reported by Peterson, ‘Tribunal Finds That BIT’s War-Losses Clause Does Not Exclude Operation of Other BIT Protections (Including Full Protection & Security) (**CL-0198-Mr.**)’. Mr. *Idris Yamantürk*, *Mr Tefik Yamantürk*, *Mr Müslük Hamdi Yamantürk*, *Güriş İnşaat ve Mühendislik Anonim Şirketi (Güriş Construction and Engineering Inc) v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ (Güriş v. Syria), Final Award, 31 August 2020 (**CL-0191-ENG**)., *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, dated 27 June 1990) at ¶ 114 (**CL-0147-ENG**).

¹³⁶⁷*CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, at ¶ 375; (**CL-0053-ENG**) See also Christoph Schreuer (Chapter 1) in Freda Baetens, (Ed.). (2013). *Investment Law within International Law: Integrationist Perspectives*. Cambridge: Cambridge University Press, p. 10. (**RL-0036**.)

The Tribunal cannot agree with Argentina's interpretation of the above quoted BIT provisions. The clear meaning of those provisions is to impose on Contracting Parties an obligation of equality of treatment of investments for losses resulting from war, civil disturbance, and national emergencies. The provision contains no reference whatsoever to other obligations imposed by the BITs on Contracting Parties, let alone to provide for an exemption from such obligations. Had the Contracting Parties, after carefully negotiating a complex set of legal obligations to protect and promote investments, intended that such obligations would not apply in times of war, civil disturbance, or national emergency, they certainly would have so stated specifically. Indeed, in many other BITs, contracting parties have included exception provisions to provide for limited exemptions from BIT obligations in particular situations. The Contracting Parties of the BITs in question in these cases could also have done so if they had wished, but they did not.

271. The Tribunal considers that the above-quoted BIT provisions mean what they say: they impose on Argentina an obligation of equality of treatment with respect to investment losses sustained as a result of war, civil disturbance, and national emergency. They do not exempt Argentina from its other treaty obligations under the BITs. The Tribunal therefore rejects Argentina's interpretation of the applicable BIT provisions and its claimed defense to its liability for violating such other provisions".¹³⁶⁸

1266) A similar approach was taken in *El Paso v. Argentina*. The position of Argentina was set out in paragraph 558 asserting that the civil strife clause in Article IV (3) of the US-Argentina Treaty displaced the provisions of the entire treaty. The Tribunal summarized this saying:

...."Article IV(3) provides for a special solution in the event of an exceptional situation, which proves that the general obligations contained in the treaty are only applicable in 'normal' circumstances."¹³⁶⁹

1267) The *El Paso* Tribunal rejected Argentina's contention, and upheld the position of the *CMS* Tribunal, in holding:

The Tribunal cannot accept the Respondent's interpretation, which goes against the plain meaning of the text, and it agrees with the

¹³⁶⁸Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, at ¶¶ 270-271, (**CL-0090-ENG**).

¹³⁶⁹*El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 at ¶ 558 (hereinafter "*El Paso v. Argentina*"). (**RL-0068**).

Claimant that Article IV (3) applies to measures adopted in response to a loss, not to measures that cause a loss. The plain meaning of the provision is that the standards of treatment of the BIT – national treatment and most favoured nation treatment – have to be applied when a State tries to mitigate the consequences of war or another emergency. This is in line with the analysis of the same provision made by the tribunal in CMS¹³⁷⁰

1268) In *Guris v. Syria*, the Tribunal considered this very issue and concluded in paragraph 235 that:

In sum, the Tribunal sees no foundation in the Treaty for concluding that the only protection available in circumstances of “war, insurrection, civil disturbance or other similar events” is under Article IV (3). Again, it would have been straightforward for the States Parties to say so if that had been their intention, but no such intention is apparent in the Treaty. As the ILC put it, “[f]or the *lex specialis* principle to apply... there must be some actual inconsistency between [the relevant provisions], or else a discernible intention that one provision is to exclude the other”. Neither of these tests is met under the Treaty.¹³⁷¹

1269) In *Cengiz v. Libya*, the Tribunal came to the same conclusion.¹³⁷² At paragraph 364, the *Cengiz* Tribunal relied on Newcombe and Paradell who wrote:

“This type of provision, therefore, does not create a ground for exemption from liability; rather, it ensures that when liability does not arise for another reason (for example, due to a successful plea of military necessity) the measures still give rise to a duty to compensate losses if compensation is provided to nationals or other foreign investors”.¹³⁷³

¹³⁷⁰ *El Paso v. Argentina* at ¶ 559. (RL-0068).

¹³⁷¹ Mr. Idris Yamantürk, Mr Tevfik Yamantürk, Mr Müsfik Hamdi Yamantürk, *Güriş İnşaat ve Mühendislik Anonim Şirketi (Güriş Construction and Engineering Inc) v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ (*Güriş v. Syria*), Final Award at ¶ 235 (CL-0191-ENG).

¹³⁷² *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ at ¶364 (CL-0192-ENG).

¹³⁷³ A. Newcombe, L. Paradell, “Chapter 10 - Defenses, VI. Fundamental Change of Circumstances (Rebus Sic Stantibus / Imprevisio), Law and Practice of Investment Treaties: Standards of Treatment, Kluwer Law International, 2009, p. 500. (CL-0193-ENG).

- 1270) The *Cengiz* Tribunal relied upon the *CMS*, *El Paso*, *Suez* decisions amongst others in coming to this conclusion. Countless tribunals expressly rejected this same approach but is Nicaragua nevertheless now raises it.¹³⁷⁴
- 1271) The Tribunal in *Strabag v. Libya* rejected the contention that the War Losses clause constitutes a *lex specialis* that excludes the operation of all the investment protection obligations of the investment Treaty.¹³⁷⁵
- 1272) Tribunals in *Guris* also rejected Nicaragua's argument that the civil strife clause displaces all other obligations of the CAFTA during times of civil strife.
- 1273) This was also addressed in a non-public award, *Way2B ACE v. Libyan Arab Jamahiriya*, Award (24 May 2018), which has been the subject of detailed media articles in the International Arbitration Reporter. That reporter confirms that *Way2B* rejected this argument.¹³⁷⁶
- 1274) However, Nicaragua's interpretation simply would convert the civil strife clause into a broad-based exception from government protections under the CAFTA.
- 1275) Tobias Ackermann in his recent article on Armed Conflict clauses draws a comparison with humanitarian law, where states destroying private property during armed conflict bear the burden to prove that their actions were 'demanded by the necessities of war' under Article 23(g) of the *Hague Regulations*.¹³⁷⁷
- 1276) Thus, in such a situation, the international law principle of necessity operates as an exception to a general prohibition. In the words of Tobias Ackerman "destruction is prohibited, and its illegality is presumed, unless the state can show that it was justified."¹³⁷⁸

¹³⁷⁴*Sempra Energy International v. Argentina*, ICSID, Case No. ARB/02/16, Award (28 September 2007), para. 363; **(CL-0037-ENG)** See also *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, at ¶ 65 **(CL-147-ENG)** and *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, at ¶ 104 **(CL-0195-ENG)**.

¹³⁷⁵*Strabag v Libya*, ICSID Case No. ARB(AF)/15/1, Award. June 29, 2020 at ¶ ¶ 224-228 **(CL-0222-ENG)**.

¹³⁷⁶*Way2B ACE v. Libya*, Award (24 May 2018) (not public), as reported by Peterson, 'Tribunal Finds That BIT's War-Losses Clause Does Not Exclude Operation of Other BIT Protections (Including Full Protection & Security), but Foreign Investor Fails to Meet Evidentiary Burdens' (Investment Arbitration Reporter, 8 January 2019). **(CL-0198-ENG)**.

¹³⁷⁷Ira Ryk-Lakhman, 'The Genealogy of Extended War Clauses' at pp. 76–77. **(CL-0199-ENG)**.

¹³⁷⁸Tobias Ackermann, Chapter 5 "Armed Conflict Clauses" *The Effects of Armed Conflict on Investment Treaties*, [Cambridge University Press, 2022] at 135. **(CL-0200-ENG)**. Ackermann references Clyde Eagleton, 'Responsibility for Damages to Persons and Property of Aliens in Undeclared War', (1938) 32 ASIL Proc 124, 135. **(CL-0201-ENG)**.

B. Full Protection and Security

- 1277) The Memorial has addressed the lengthy customary international law history related to the Full Protection and Security obligation. Full protection and security looks at whether the host state took adequate steps to apprehend a wrongdoer or otherwise adequately enforce a penalty¹³⁷⁹ and whether the standard of police protection for foreign nationals was less than that which is provided generally for a State's own nationals.¹³⁸⁰
- 1278) In this claim, the measures of the National Police demonstrate that the National Police was aware of the risks to physical security at HSF and that they failed to take reasonable steps in the circumstance to address those risks. These acts and omissions were non-compliant with the CAFTA Article 10.5 Full Protection and Security (FPS) obligation set out in CAFTA Treaty Article 10.5. As discussed further in this Reply Memorial, the CAFTA FPS obligation has been enhanced by the more favorable treatment Nicaragua accorded to investors and investments of nationals from the Russian Federation under the Russian BIT. As a result, the restrictions imposed in the CAFTA are not applicable to claims involving Nicaragua and the broader more favorable obligation arising from the Russian BIT applies.

1. A review of FPS Law

- 1279) The requirement of "FPS" is commonly incorporated in bilateral investment treaties. It requires a host country to exercise reasonable care to protect investments against injury by private parties.¹³⁸¹
- 1280) FPS standard requires that the host State is under an obligation to "take active measures to protect the investment from adverse effects" stemming from private parties or from actions of the Host State and its organs, including armed forces.¹³⁸² The relationship between FET and FPS reflects an element of ambiguity in the jurisprudence on whether full protection and

¹³⁷⁹*Francisco Mallén (The United Mexican States) v. United States of America*, US-Mexico Claims Commission, (1927) IV R.I.A.A. 173 (CL-0152-ENG). *Thomas H. Youmans (U.S.A.) v. United Mexican States*, RIAA IV (23 Nov. 1926) p. 110-117. (CL-0153-ENG). *S.J. Stallings (U.S.A.) v. United Mexican States*, RIAA IV (22 April 1929) p. 478-480. (CL-0154-ENG). *Richard A. Newman (U.S.A.) v. United Mexican States*, RIAA IV (6 May 1929) p. 518-520. (CL-0155-ENG). *Sarah Ann Gorham (U.S.A.) v. United Mexican States*, RIAA IV (24 October 1930) p. 640-645. (CL-0156-ENG). *Norman T. Connolly and Myrtle H. Connolly (U.S.A.) v. United Mexican States*, RIAA IV (15 October 1928) p. 387-388. (CL-0157-ENG). *Lillian Greenlaw Sewell, In Her Own Right and As Guardian of Vernon Monroe Greenlaw, a Minor (U.S.A.) v. United Mexican States*, RIAA IV (24 October 1930) p. 626-632. (CL-0158-ENG).

¹³⁸⁰*Too v. Greater Modesto Insurance Associates and the United States of America*, US-Iran Claims Tribunal, Award No. 460-880-2, 1989 WL 663898 (29 December 1989) at ¶ 2 (CL-0150-ENG).

¹³⁸¹UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (New York: United Nations, 1998). (CL-0151-ENG).

¹³⁸²Christoph Schreuer, "Full Protection and Security" in (2010) 1(2) *Journal of International Dispute Settlement* 353. (CL-0272-ENG).

security is the reflection of the FET standard or offers an independent standard that is separate from FET.¹³⁸³ Practically, this makes little difference. In general, there is a consensus that the FPS standard is not absolute, but rather one of due diligence, and that FPS does not imply any strict liability on the part of the Host State unless the host state is directly responsible for the wrongfulness.¹³⁸⁴ In such circumstances of direct harm, FET generally becomes the applicable standard over FPS.

- 1281) Full protection and security concerns first and foremost the physical protection of protected investors and their investments. Several arbitral tribunals have held States liable for their failure to protect the investor or its investment against private violence,¹³⁸⁵ but it has also been used to address violence by State organs.¹³⁸⁶
- 1282) In relation to private violence, the *von Pezold v. Zimbabwe* Tribunal held that the State's breach of FPS resulted from the failure of police to protect the claimant's property from occupation and the non-responsiveness of police to various violent incidents.¹³⁸⁷
- 1283) With respect to violence committed by State organs, a tribunal held that even if no force was used in removing the management from the offices or in the seizure of the claimant's premises, the acts were unnecessary and abusive and amounted to the respondent's violation of its obligation to ensure full protection and security.¹³⁸⁸
- 1284) In general, the state owes investors an obligation of due diligence to protect the investment from destructive aspects of a disturbance or conflict. The protection is owed against all threats, whether they come from the state or

¹³⁸³ *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, para. 187 (**CL-0058-ENG**); But this differs from *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* ICSID Case No. ARB/02/5, Award, January 19, 2007, para. 258. (**CL-0273-ENG**).

¹³⁸⁴ *Tulip Real Estate and Development Netherlands B.V v. Republic of Turkey* ICSID Case No. ARB/11/28, Award, March 10, 2014, at para 430; (**CL-0274-ENG**) *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* ICSID Case No. ARB/07/12, Award, June 7, 2012, para. 227. (**CL-0275-ENG**)

¹³⁸⁵ *Bernhard von Pezold and others v. Republic of Zimbabwe*. ICSID Case No. ARB/10/15, Award, July 28, 2015, paras. 597–99 (**CL-0162-ENG**); *Wena Hotels Ltd v. Arab Republic of Egypt* ICSID Case No. ARB/98/4, Award, December 8, 2000, para. 896. (**CL-0039-ENG**).

¹³⁸⁶ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, paras. 78–86 (**CL-0147-ENG**); *American Manufacturing & Trading, Inc. v. Republic of Zaire* ICSID Case No. ARB/93/1, Award, February 21, 1997, paras. 6.02–6.11. (**CL-0148-ENG**)

¹³⁸⁷ *Bernhard von Pezold v. Zimbabwe* at paras. 597–99. (**CL-0162-ENG**).

¹³⁸⁸ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* ICSID Case No. ARB/05/22, Award, July 24, 2008, at paras. 729–731 (**CL-0163-ENG**).

from third parties. This approach was taken by the *Eastern Sugar* Tribunal.¹³⁸⁹ The description of the FPS obligation is apt:

As the Tribunal understands it, the criterion in Art. 3(2) of the BIT concerns the obligation of the host state to protect the investor from third parties, in the cases cited by the Parties, mobs, insurgents, rented thugs and other engaged in physical violence against the investor in violation of the state monopoly of physical force. Thus, where a host state fails to grant full protection and security, it fails to act to prevent actions by third parties that it is required to prevent.¹³⁹⁰

1285) The *Asian Agricultural Products* Tribunal adopted the following description of the diligence standard that the host government is required to meet:

The “due diligence” is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances ...¹³⁹¹

1286) This standard is fact dependent.¹³⁹²

1287) In a recent scholarly writing, Emily Siporiski notes:¹³⁹³

The *Parkerings* tribunal indicated that a violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation, or to punish the author of the injury. The injury could be committed either by the host State, or by its agencies or by an individual.¹³⁹⁴

The extension of the standard of treatment was similarly followed by the *Biwater Gauff* tribunal, which did ‘not consider that the “full security” standard is limited to a State’s failure to prevent actions by third parties,

¹³⁸⁹*Eastern Sugar v Czech Republic*, SCC Case no 088/2004, Partial Award (27 March 2007) (hereinafter *Eastern Sugar*) (CL-0219-ENG). The Tribunal disregarded the applicability of FPS as the wrongful actions were committed by the Czech Republic’s Ministry of Agriculture and not by the police, These measures were found to be violations of fair and equitable treatment.

¹³⁹⁰*Eastern Sugar* at ¶ 203 (CL-0219-ENG)

¹³⁹¹*Asian Agricultural Products* at ¶ 77 (CL-0147-ENG).

¹³⁹²*Asian Agricultural Products* at ¶ 77 (CL-0147-ENG).

¹³⁹³Emily Siporiski. “Full Protection and Security “ Chapter 3 in *Investments in Conflict Zones Investments in Conflict Zones: The Role of International Investment Law in Armed Conflicts, Disputed Territories, and ‘Frozen’ Conflicts*. Tobias Ackermann and Sebastian Wuschka (eds) in Ira Rhyll-Lahnman at Section 2 , p. 94 (CL-0217-ENG).

¹³⁹⁴*Parkerings-Compagniet AS v Lithuania*, ICSID Case no arb/05/8, Award (11 September 2007) at ¶ 355, (CL-0094-ENG).

but also extends to actions by organs and representatives of the State itself.¹³⁹⁵

1288) The extension of the protection of FPS beyond physical security to also include legal security has been the subject of debate in recent jurisprudence. Much of this debate is answered through a careful review of the express treaty terms, and thus foundationally a question of treaty interpretation. The actual determination of whether there is an FPS breach always will be factually dependent.

a) CAFTA FPS before considering MFN

1289) In its Counter-Memorial, Nicaragua addressed the meaning of the CAFTA Full Protection and Security obligation. However, Nicaragua appears to disregard the critical operation of the MFN Treatment obligation to the resulting effective legal obligation.

1290) Sébastien Manciaux notes that recent treaties include provisions that limit the scope of the FPS standard to physical security alone.¹³⁹⁶ The CAFTA is an example of such a treaty given its specific wording and the impact of interpretative effect in Annex 10-B.

1291) The CAFTA creates a more limited scope to the operation of FPS through its terms and Annex 10-B. The CAFTA FPS obligation seeks to give a specific definition rather than an autonomous meaning to FPS. Article 10.5(2) expressly says:

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

¹³⁹⁵ *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case no arb/05/22, Award (24 July 2008) at ¶ 730 (CL-0163-ENG).

¹³⁹⁶ Sébastien Manciaux “The Full Protection and Security Standard in Investment Law: A Specific Obligation?” in K. Fach Gómez et al. (eds.), *International Investment Law and the Law of Armed Conflict*, European Yearbook of International Economic Law, (Springer, 2019) at page 224 (CL-0189-ENG).

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

- 1292) Annex 10-B confirms that the meaning of FPS only extends to that required under customary international law.
- 1293) In Counter-Memorial paragraph 325, Nicaragua expresses a view on the meaning of the FPS provision in Article 10.5 of the CAFTA. Nicaragua contends that no autonomous meaning should be given to the FPS obligation based on the wording of the CAFTA. Nicaragua also references legal positions the United States has taken in other CAFTA cases that had to deal with the application of narrow customary law definitions to Article 10.5.
- 1294) References to a non-autonomous FPS by Nicaragua are irrelevant given that the CAFTA definition has been expanded due to Nicaragua’s treaty practice and the more favorable treatment provided to the Russian Federation.
- 1295) Nicaragua in this same Counter-Memorial paragraph (paragraph 325) confuses another issue. Nicaragua suggests that there is a threshold for a breach of FPS. There is no threshold for breach of FPS. Instead, in a complete non-sequitur, Nicaragua imports (incorrectly) arguments about the existence of a “‘manifestly’ unfair, unreasonable, or inequitable conduct standard necessary to establish a violation of FET raised in in the *SunReserve Luxco Award*. Nicaragua relies on this decision to support its novel assertion of a customary international law high threshold to establish FPS violations.¹³⁹⁷ However, a review of the citation referenced by Nicaragua from the *SunReserve Luxco Award* confirms that there was no discussion of there being a threshold standard for FPS. There are no FPS allegations in the *SunReserve Luxco* claim, and the award does not deal with FPS.
- 1296) The threshold for a violation of an international obligation is a measure that is non-conformity with an international law obligation. There is no special standard. This issue is conclusively addressed in ARSIWA Article 2.¹³⁹⁸

b) Impact of the Russian BIT

- 1297) Nicaragua only gives the meaning to FPS as stated in CAFTA Article 10.5 but that CAFTA definition is not applicable in the instant case. Nicaragua’s meaning fails to consider the critical role played by Nicaragua’s sovereign decisions to extend better treatment to investments to investors from the

¹³⁹⁷Nicaragua purportedly relies on *SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, at ¶ 691 (RL-0049).

¹³⁹⁸-ARSIWA Art 2 (CL-0017-ENG) This provides “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

Russian Federation under the subsequent Russian BIT. The impact of the Russian BIT profoundly alters the substantive meaning of Nicaragua's obligation.

1298) Nicaragua ignores the operation of the more favorable treatment Nicaragua granted to foreign investors from the Russian Federation, and to their investments in like situation to those CAFTA Party investors, such as Riverside. Article 2(2) of the Russian BIT contains a different formulation of the FPS clause:

2. Each Contracting Party shall, in accordance with the legislation of its State, provide full legal protection in the territory of its State to investments of investors and to investors of the State of the other Contracting Party.

1299) The Russian BIT language is for full legal protection.” This Russian BIT Treaty language provides more extensive protection than the full protection and security language in the CAFTA.

1300) Sebastian Blanco in his treatise on Full Protection and Security confirms that the language of full legal protection originated from the German model bilateral investment treaties.¹³⁹⁹ It has been used in a wide number of treaties and generally is co-extensive with coverage of physical security as Full Protection and Security. However, the full legal protection standard gives additional indicia of protection to legal certainty and due process.¹⁴⁰⁰

1301) Nicaragua already was a party to the CAFTA when it entered the Russian BIT, which provided more favourable treatment to investors from the Russian Federation in like circumstances to CAFTA investors like Riverside. Not only is the scope of the obligation broader under the Russian BIT, the CAFTA Annex 10-B is inoperative considering the impact of the Russian BIT.

1302) In *Siemens v. Argentina*, the treaty at issue referred specifically to “‘legal’ security.” The *Siemens* Tribunal held that:

In the instant case, ‘security’ is qualified by ‘legal’. In its ordinary meaning ‘legal security’ has been defined as ‘the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.’ It is clear that in the context of this meaning the Treaty refers to security that it is not physical.¹⁴⁰¹

¹³⁹⁹Sebastian Blanco, *Full Protection and Security*, referenced in the Memorial as **(CL-0161-ENG)**, when it was referenced in the Memorial erroneously as **(CL-0160-ENG)**.

¹⁴⁰⁰Sebastian Blanco, *Full Protection and Security* at 546-548.**(CL-0160-ENG)**.

¹⁴⁰¹ *Siemens A.G. v. Argentine Republic*, ICSID No. ARB/02/8, Award, February 6, 2007, ¶¶ 362-389 **(RL-0105)**.

- 1303) The FPS standard has been invoked in connection with a broader scope that goes beyond the physical protection granted by police or similar forces to the availability of the judicial systems and to a more abstract kind of security. As discussed below, in this context, the words of the treaty can be particularly significant.
- 1304) Riverside pled the law and the application of Full Protection and Security covering both physical security and legal security in its Memorial.¹⁴⁰² The more favourable obligation in Article 2(2) of the Russian BIT expressly supports this position.
- 1305) Full protection and security must be read to include protection for the rule of law and fundamental fairness, and the legitimate expectation of an investor is to be afforded full protection and security in a manner corresponding to this understanding. This understanding was endorsed by the Tribunal in *Metalclad*:
- Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.¹⁴⁰³
- 1306) As the Tribunal in *CMS Gas v. Argentina* said, "[t]here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."¹⁴⁰⁴

c) Inter-relationship of FPS and Fair and Equitable Treatment

- 1307) The inter-relationship of fair and equitable treatment and full protection and security is clear. There is a relationship that was expressed by the *AWG Group v. Argentina* Tribunal as follows:

The present Tribunal, however, takes the view that under Article 3, quoted above, the concept of full protection and security is included within the concept of fair and equitable treatment, but that the scope of full protection and security is narrower than the fair and equitable treatment. Thus, State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment under the French BIT. On the other hand, all violations of fair and equitable

¹⁴⁰²Memorial at ¶¶ 561-594.

¹⁴⁰³*Metalclad* at ¶ 99 (CL-0087-ENG).

¹⁴⁰⁴*CMS Gas – Award*, ¶ 274 (CL-0053-ENG).

treatment are not automatically also violations of full protection and security.¹⁴⁰⁵

- 1308) For example, in *Wena Hotels*, the Tribunal saw the interaction, especially when there were acts and omissions on the part of the state:

The Tribunal agrees with *Wena* that Egypt violated its obligation under Article 2(2) of the IPPA to accord *Wena's* investment “fair and equitable treatment” and “full protection and security.” Although it is not clear that Egyptian officials other than officials of EHC directly participated in the April 1, 1991 seizures, there is substantial evidence that Egypt was aware of EHC’s intentions to seize the hotels and took no action to prevent EHC from doing so. Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to *Wena's* control. Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting Egypt’s approval of EHC’s actions.¹⁴⁰⁶

- 1309) Further in *Cengiz v Libya*, the Tribunal also rejected the approach that FPS addressed only security against non-state actors. The Tribunal found that FPS protected the “physical integrity of an investment against the use of force” and that the identity of the wrongdoer was irrelevant.¹⁴⁰⁷ The obligation with respect to organs of the state was an obligation of means, while the obligation with respect to others was one of effects.¹⁴⁰⁸
- 1310) Another key finding from the *Cengiz* Tribunal was that there was a duty upon Libya to exercise “reasonable care” to protect the foreigner’s property against the acts of non-state actors while still considering Libya’s means and resources and the general political and security situation in the country.¹⁴⁰⁹ The *Cengiz* Tribunal, after examining the facts, found a total failure to protect investments worth nearly \$90 million. The Tribunal considered that Libya did not deploy “any unit of the regular army, any police force nor government-controlled militia to protect such assets”.¹⁴¹⁰
- 1311) The *Cengiz* Tribunal concluded that during a period of heightened insecurity and unrest was a heightened obligation upon Libya to provide security and concluded that the absence of security resulted in repeated looting and

¹⁴⁰⁵ *AWG Group Ltd v Argentina*, Decision on Liability (30 July 2010) at ¶ 171 (CL-0194-ENG).

¹⁴⁰⁶ *Wena Hotels v. Egypt* ICSID Case No. ARB/203/98/4, Award, December 8, 2000 at ¶¶ 33,-34 and ¶¶ 47,-48, and ¶ 84. (CL-0039-ENG).

¹⁴⁰⁷ *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ Final Award, ¶403 (CL-0192-ENG) (hereinafter *Cegniz v. Libya*).

¹⁴⁰⁸ *Cengiz v. Libya* at ¶¶404, 437 (CL-0192-ENG).

¹⁴⁰⁹ *Cengiz v. Libya* at ¶¶ 404, 437 (*Libya* at ¶¶ 404, 437 (CL-0192-ENG).

¹⁴¹⁰ *Cengiz v. Libya* at ¶ 438 (*Libya* at ¶ 438 (CL-0192-ENG).

destruction of the foreigner's property. While the Tribunal acknowledged that there were challenges Libya faced by Libya at this time, Libya was liable for not providing basic security to deter plunder of equipment and materials from taking place.¹⁴¹¹

- 1312) In the non-public ICSID decision in *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*,¹⁴¹² Lisa Bohmer of the *International Arbitration Reporter* (IAR) confirms that the Tribunal concluded that Madagascar failed to meet the FPS obligation due to the "belated arrival, inaction and premature departure of Malagasy police forces during a riot leading to the destruction of the claimants' garment factory."¹⁴¹³
- 1313) The Tribunal noted that the local police station was only 8 km away from the claimant's facility and that the police took 90 minutes to arrive, with a second contingent arriving 75 minutes later.¹⁴¹⁴
- 1314) The IAR Report noted that the Tribunal emphasized that it had:
- "difficulties understanding" why the police offers took so long to arrive on site. According to the tribunal, if the police force had arrived earlier, they could have secured the site by blocking the factory's entrance points, which the rioters did not open until 5 pm.
- The claimants also submitted that, after their arrival, the police force remained passive."...For the Tribunal, this inactivity signaled to the rioters that they were free to act as they wished.¹⁴¹⁵
- 1315) The *(DS)2* Tribunal noted that there were steps that the police could have taken to deter the rioters such as "shooting in the air, blocking the access points to the factory and showing their presence in order to discourage the rioters."¹⁴¹⁶

¹⁴¹¹*Cengiz v. Libya* at ¶¶ 448, 451 (*Libya* at ¶¶ 448, 451 (**CL-0192-ENG**)).

¹⁴¹²*(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18 (non-public) discussed in Lisa Bohmer, "Kaufmann-Kohler chaired tribunal offers detailed review of FPS standard, finding that Madagascar failed to protect a garment factory from riots". *International Arbitration Reporter* May 6, 2021 (**CL-0221-ENG**).

¹⁴¹³Lisa Bohmer, "Kaufmann-Kohler chaired tribunal offers a detailed review of FPS standard, finding that Madagascar failed to protect a garment factory from riots". *International Arbitration Reporter* May 6, 2021 at p. 1 (**CL-0221-ENG**).

¹⁴¹⁴Lisa Bohmer, "Kaufmann-Kohler chaired tribunal at p. 8. (**CL-0221-ENG**).

¹⁴¹⁵Lisa Bohmer, "Kaufmann-Kohler chaired tribunal at p. 8. (**CL-0221-ENG**).

¹⁴¹⁶Lisa Bohmer, "Kaufmann-Kohler chaired tribunal at p. 8 (**CL-0221-ENG**).

- 1316) In conclusion, the (DS)2 Tribunal acknowledged that there were civil disturbance taking place that same day as the invasion, with several acts of looting deaths and injuries.¹⁴¹⁷
- 1317) Domingo Ferrufino, from the INAGROSA Security Team testifies that the distance from HSF to the nearest National Police station was approximately 20 km.¹⁴¹⁸
- 1318) The meaning of the FPS obligation arising because of the Russian BIT has the following effect:
- a) It does not limit the meaning of FPS to customary international law.
 - b) The provision of full legal protection extends the scope of FPS beyond physical security to legal security.
- 1319) Legal scholar Prof. Giuditta Cordero Moss explains that Tribunals have taken inconsistent approaches on whether FPS extends beyond physical security. There is no “one size fits all solution” and much depends on the wording of the specific FPS obligation and the factual antecedents. Prof. Cordero-Moss writes:
- Some awards explicitly exclude the standard of full protection and security from application beyond the physical safety of the investment, whereas others openly arm the opposite. Yet other awards do not take an express position on the question, but indirectly extend the scope of application of the standard.¹⁴¹⁹
- 1320) The augmentation of the CAFTA FPS standard, with the explicit legal protection standard in the Russian BIT, expressly creates protection for the rule of law, procedural fairness, and due process, in addition to those guaranteed by Fair and Equitable Treatment.

2. Nicaragua’s Breach of FPS

- 1321) In its Counter-Memorial, Nicaragua conspicuously refrains from challenging the foundational principles that underpin the significance of the Full Protection and Security doctrine, particularly concerning the imperative to prevent physical harm to individuals and property.¹⁴²⁰ Instead, Nicaragua endeavors to assert its compliance with the obligations, contending that it

¹⁴¹⁷Lisa Bohmer, “Kaufmann-Kohler chaired tribunal at p. 8 (CL-0221-ENG).

¹⁴¹⁸ Witness Statement of Domingo Ferrufino -Reply – SPA at ¶ 94 (CWS-12).

¹⁴¹⁹Giuditta Cordero Moss, ‘Full Protection and Security’ in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008) at 142 (CL-0220-ENG).

¹⁴²⁰Counter-Memorial at ¶ 361.

undertook “all reasonable or necessary measures to prevent an event from occurring.”¹⁴²¹

- 1322) In Counter-Memorial paragraph 371, Nicaragua contends that “DR-CAFTA’s FPS clause required nothing more than was done - peacefully and effectively – to restore the Hacienda Santa Fe to Riverside without bloodshed.” The facts tell a completely different story about what Nicaragua could have done, and did, in similar situations in the same general time.
- 1323) Looking at the facts, it is evident that Nicaragua’s actions and inactions fall egregiously short of aligning with the standard of Full Protection and Security. Notably, the evidence highlights Nicaragua’s egregious failure to act in good faith when it comes to safeguarding the property of INAGROSA at HSF. Nicaragua’s National Police’s failure to communicate essential advance intelligence of threats to INAGROSA, its own belated arrival, its subsequent inaction, and its premature departure all are fundamentally inconsistent with any reasonable definition of diligence in the FPS obligation.
- 1324) Nicaragua’s assertions of reasonableness within the circumstances crumble in the face of an irrefutable documented record demonstrating preferential treatment extended to other private landowners grappling with similar incursions.
- 1325) Whatever the circumstances that may have taken place in June and July 2018, they cannot excuse the fact that Nicaragua was actively providing protective services to other private landowners suffering intrusions while simultaneously doing nothing to assist INAGROSA. Nicaragua has not shown any legitimate basis for this abject failure to take any action.
- 1326) Considering the evidence to follow, it becomes abundantly clear that Nicaragua had available and feasible alternatives at its disposal. The contrast between the theoretical expectations of DR-CAFTA’s Full Protection and Security provisions and the practical actions undertaken by Nicaragua further underscores the deficiency in Nicaragua’s defense.
- 1327) Riverside will substantiate these contentions. Riverside will dissect the aspects that accentuate Nicaragua’s failure to adhere to the Full Protection and Security standard. It will elucidate the specific deviations from the standard and their implications under international law. Lastly, Riverside will establish conclusively the resultant breaches of Riverside’s rights and the corresponding entitlement to remedies and reparations.

¹⁴²¹ Counter-Memorial at ¶¶ 363 - 364.

3. 2018 National Police evictions

- 1328) In Counter-Memorial paragraph 321, Nicaragua boasts that its actions at HSF as favorable “when compared to the State’s response to other land invasions or injuries to property occurring at the same time.”
- 1329) Nicaragua is mistaken. The evidence Nicaragua provided demonstrates that the National Police did much more in response to other land invasions and injuries to property occurring at the same time in Nicaragua. There were many similar invasions of private property in Nicaragua occurring at the same general time as the invasion of HSF. In other situations, the National Police directly addressed unlawful invasions of private property in the summer of 2018.
- 1330) Further, there was much more that the National Police could have done as part of a timely and diligent response. These include timely requests for assistance from the local prosecutors for remedies such as police amparo and judicial notice of evictions.¹⁴²²

Chart C1 set out five examples of more diligent police measures taken during the summer of 2018.

Chart C1			
Summer 2018 Police Evictions:			
Property Owner	Details	Police Action	Exhibit
Inversiones Nela S.A.	Invasion by 200 people; multiple re-invasions”	Repeated evictions; Notable eviction on July 31, 2018	C-0326-SPA
Sucesiones Dscoto Brockman & Desarrollo Xolotklan S.A.	Invasion by 200 people on each property”	Police Eviction	C-0326-SPA
Seventh-day Adventist Mission of Nicaragua	Invasion by four individuals	Police Eviction	C-0326-SPA
DharmaLila Carrasquilla	Invasion by four families	Police Eviction	C-0326-SPA
Julio Cesar Zapata Quiñones	“Property invasion”	Eviction and three arrests	C-0326-SPA

¹⁴²²These were remedies noted in Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018, at NIC01927 (**C-0326-SPA**).

1331) Chart F sets out eighteen examples of more diligent police measures taken by the National Police to address unlawful invasions of private land in 2018. Chart F includes the incidents already reported in Chart C1. Following Chart F, there is a short discussion on each police interaction based on official police reports Nicaragua provided in document production.

CHART F – 2018 National Police Treatment to remove unlawful invaders

#	Entity	Exhibit	Location	Date
1	Inversiones Nela S.A.	C-0326-SPA	Managua Department	Before July 31, 2018
2	Inversiones Espanola S.A.	C-0326-SPA	Managua Department	Before July 31, 2018
3	Desarrollos Xolotlan S.A.	C-0326-SPA	Managua Department	Before July 31, 2018
4	Mangos Sociedad Anonima (MANGOSA) SA	C-0328-SPA	Leon Department	C-0449-SPA
5	Melones de Nicaragua S.A. (MELONICSA)	C-0328-SPA	Leon Department	C-0450-SPA
6	Productos Aliados S.A.	C-0326-SPA	Managua Department	Before July 31, 2018
7	Sociedad Liza Interprise S.A.	C-0326-SPA	Managua Department	Before July 31, 2018
8	Comercial Mantica S.A.	C-0326-SPA	Managua Department	Before July 31, 2018
9	Burke Agro Nicaragua S.A.	C-0326-SPA	Managua Department	Before July 31, 2018
10	Puma Energy Bahamas S.A.	C-0326-SPA	Managua Department	Before July 31, 2018

11	McDonald's Sistemas de Nicaragua S. A	C-0326-SPA	Managua Department	Before July 31, 2018
12	Misión Adventista del Séptimo Día de Nicaragua,	C-0326-SPA	Managua Department	Before July 31, 2018
13	Iglesia Cristiana Ministerio Leon de Judas	C-0326-SPA	Managua Department	Before July 31, 2018
14	Ángel Rafael Chávez and Alejandro Chávez	C-0330-SPA	Leon Department	
15	Carlos Callejas Rodríguez, Raquel Torrez, Benita Garcia	C-0327-SPA	Leon Department	
16	Mauricio Pallais and Jose Francisco Rodríguez	C-0332-SPA	Leon Department	
17	DharmaLila Carrasquilla	C-0326-SPA	Managua Department	Before July 31, 2018
18	Gonzalo German Duarte Bojorge	C-0326-SPA	Managua Department	Before July 31, 2018
19	Jose Eduar Pastora Lopez	C-0326-SPA	Managua Department	Before July 31, 2018
20	Julio Cesar Zapata Quiñones	C-0326-SPA	Managua Department	Before July 31, 2018
21	Banco del Fomento a la Producción	C-0329-SPA	Leon Department	

a) Inversiones Nela S.A.

1332) Inversiones Nela S.A. owned private property in Nicaragua that was invaded in the summer of 2018. Approximately 200 people invaded this property. The members of the National Police evicted the invaders from this property repeatedly (on 4 other occasions). According to the Police Report, this property was re-invaded again on July 31, 2018.¹⁴²³

b) DharmaLila Carrasquilla

1333) DharmaLila Carrasquilla owned private property in Nicaragua that was invaded in the summer of 2018. Four families were invading this private property at the time of the eviction. The National Police evicted them when the invaders did not show property ownership.¹⁴²⁴

c) Seventh-day Adventist Mission of Nicaragua

1334) Seventh-day Adventist Mission of Nicaragua owned private property in Nicaragua that was invaded in the summer of 2018. At the time of the eviction, there were four invaders. The National Police evicted them because the invaders did not show property ownership.¹⁴²⁵

d) Sucesiones Dscoto Brockman

1335) Sucesiones Dscoto Brockman owned private property in Nicaragua that was invaded. At the time of the eviction, there were 200 invaders. The National Police evicted them because the invaders did not show property ownership.¹⁴²⁶

e) Desarrollo Xolotklan S.A.

1336) Desarrollo Xolotklan S.A owned private property in Nicaragua that was invaded in the summer of 2018. At the time of the eviction, there were 200 invaders. The National Police evicted them because the invaders did not show property ownership.¹⁴²⁷

¹⁴²³Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018, at NIC01927 **(C-0326-SPA)**.

¹⁴²⁴Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018, at NIC01927 **(C-0326-SPA)**.

¹⁴²⁵Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018, at NIC01927 **(C-0326-SPA)**.

¹⁴²⁶Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018, at NIC01927 **(C-0326-SPA)**.

¹⁴²⁷Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

f) Julio Cesar Zapata Quiñones

- 1337) Julio Cesar Zapata Quiñones owned private land in Nicaragua that was invaded in the summer of 2018. During the eviction, three people were arrested. The National Police returned the private property to the owner.¹⁴²⁸
- 1338) The Nicaraguan National Police continued to successfully evict invaders from private property and return the lands to their rightful owners in October 2018.

g) Carlos Callejas Rodríguez, Raquel Torrez, and Benita Garcia

- 1339) Carlos Callejas Rodriguez, Raquel Torrez, and Benita Garcia were the owners of the Santa Natalia farm located in the Leon Department. Their property was invaded by a group of people led by Miguel Mendoza, Roberto Mendoza, Andres Mendoza, Cristian Valenzuela, Roger Mendoza, and Alba Maria Aguilera.¹⁴²⁹
- 1340) On October 12, 2018, the invaders were evicted, and the property was returned to its owners in the presence of Commissioner Major Fidel Dominguez Alvarez, Chief of the Leon Police Delegation and the Pablo Jose Ventura, Auxiliary Prosecutor of the Leon Department.¹⁴³⁰

h) Mangos Sociedad Anónima (MANGOSA) and MELONICSA

- 1341) MANGOSA and MELONICSA were the owners of a property located in the El Jicaral, Leon Department.¹⁴³¹ Their property was invaded by 30 members of the Pablo Rugama Cooperative led by Eugenio Marcial Orozco.¹⁴³²
- 1342) On October 24, 2018, the invaders were evicted, and the property was returned to its owners in the presence of Commissioner Major Fidel Dominguez Alvarez, Chief of the Leon Police Delegation, and the Pablo Jose Ventura, Auxiliary Prosecutor of the Leon Department.¹⁴³³

¹⁴²⁸Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴²⁹Certificate of Handover of Rural Land to Elvis Delgadillo, Raquel Torrez and Benita Garcia by the Leon National Police Delegation, October 12, 2018 **(C-0237-SPA)**.

¹⁴³⁰Certificate of Handover of Rural Land to MANGOSA and MELONICSA issued by the Leon National Police Delegation, October 24, 2018 **(C-0328-SPA)**.

¹⁴³¹Certificate of Handover of Rural Land to MANGOSA and MELONICSA issued by the Leon National Police Delegation, October 24, 2018 **(C-0328-SPA)**.

¹⁴³²Certificate of Handover of Rural Land to MANGOSA and MELONICSA issued by the Leon National Police Delegation, October 24, 2018 **(C-0328-SPA)**.

¹⁴³³Certificate of Handover of Rural Land to MANGOSA and MELONICSA issued by the Leon National Police Delegation, October 24, 2018 **(C-0328-SPA)**.

i) Banco del Fomento a la Producción

- 1343) Banco del Fomento is the owner of a property located in the El Chague County, Leon Department.¹⁴³⁴ Their property was invaded a group of people led by Bayardo Medina Centeno.¹⁴³⁵
- 1344) On October 18, 2018, the invaders were evicted, and the property was returned to its owners in the presence of Commissioner Major Fidel Dominguez Alvarez, Chief of the Leon Police Delegation and the Pablo Jose Ventura, Auxiliary Prosecutor of the Leon Department.¹⁴³⁶

j) Ángel Rafael Chávez and Alejandro Chávez

- 1345) Angel Rafael Chavez and Alejandro Chavez are the owners of a property located in the Lechecuagos County, Leon Department.¹⁴³⁷ Their property was invaded by a group of 260 families led by Rommel Eugenio Castaneda Martinez and Natividad Enrique Barrera.¹⁴³⁸
- 1346) On October 16, 2018, the invaders were evicted, and the property was returned to its owners in the presence of Commissioner Major Fidel Dominguez Alvarez, Chief of the Leon Police Delegation and the Pablo Jose Ventura, Auxiliary Prosecutor of the Leon Department.¹⁴³⁹

k) Evenor de Jesús Blanco Darce

- 1347) Evenor de Jesus Blanco Darce of a property located in the El Chague County, Leon Department.¹⁴⁴⁰ His property was invaded by a group of 25 families led by Carlos Méndez.¹⁴⁴¹
- 1348) On October 18, 2018, the invaders were evicted, and the property was returned to its owners in the presence of Commissioner Major Fidel

¹⁴³⁴Certificate of Handover of Rural Land to Banco de Fomento a la Production issued by the Leon National Police Delegation, October 18, 2023 **(C-0329-SPA)**.

¹⁴³⁵Certificate of Handover of Rural Land to Banco de Fomento a la Produccion issued by the Leon National Police Delegation, October 18, 2023 **(C-0329-SPA)**.

¹⁴³⁶Certificate of Handover of Rural Land to Banco de Fomento a la Produccion issued by the Leon National Police Delegation, October 18, 2023 **(C-0329-SPA)**.

¹⁴³⁷Certificate of Handover of Rural Land to Angel Rafael Chavez and Alejandro Chavez issued by the Leon National Police Delegation, October 16, 2018 **(C-0330-SPA)**.

¹⁴³⁸Certificate of Handover of Rural Land to Angel Rafael Chavez and Alejandro Chavez issued by the Leon National Police Delegation, October 16, 2018 **(C-0330-SPA)**.

¹⁴³⁹Certificate of Handover of Rural Land to Angel Rafael Chavez and Alejandro Chavez issued by the Leon National Police Delegation, October 16, 2018 **(C-0330-SPA)**.

¹⁴⁴⁰Certificate of Handover of Rural Land to Evenor Blanco issued by the Leon National Police Delegation, October 18, 2018 **(C-0331-SPA)**.

¹⁴⁴¹Certificate of Handover of Rural Land to Evenor Blanco issued by the Leon National Police Delegation, October 18, 2018 **(C-0331-SPA)**.

Dominguez Alvarez, Chief of the Leon Police Delegation and the Pablo Jose Ventura, Auxiliary Prosecutor of the Leon Department.¹⁴⁴²

I) Mauricio Pallais and Jose Francisco Rodríguez

- 1349) Mauricio Pallais is owner of a private property located in Abangasca County in the Leon Department. The property was invaded by fifteen families led by Rafael Santiago Orozco Arevalo, and Reynaldo José Campos Torrez.¹⁴⁴³
- 1350) On October 22, 2018, the invaders were evicted, and the property was returned to its owners in the presence of Commissioner Major Fidel Dominguez Alvarez, Chief of the Leon Police Delegation and the Pablo Jose Ventura, Auxiliary Prosecutor of the Leon Department¹⁴⁴⁴
- 1351) All these private landowners in Nicaragua received superior treatment from the state during the same social conditions accorded to INAGROSA. Each of these invasions was met with police vigilance. This materially different treatment was provided to other private landowners, but not to INAGROSA, which was in like circumstances. These police reports also conclusively demonstrate that there was no police sequestration order in effect in Nicaragua in July 2021

4. Where the Police considered eviction of unlawful occupiers.

- 1352) The Nicaraguan National Police proposed evictions in a few cases. These are set out in Chart C-3 and discussed below.

Chart C3 Police Potential Evictions			
Property Owner	Details	Police Action	Exhibit
Sociedad Liza Interprise S.A.	Invasion by 200 people	Potential eviction; Potential eviction	C-0326-SPA
Productos Aliados S.A.	Invasion by 300 people	with reinforcements	C-0326-SPA
Iglesia Cristiana Ministerio Leon de Judas	Invasion by neighbors	Potential eviction	C-0326-SPA
Burke Agro Nicaragua S.A.	Invasion by 50 families with weapons	Potential eviction with reinforcements	C-0326-SPA

¹⁴⁴²Certificate of Handover of Rural Land to Evenor Blanco issued by the Leon National Police Delegation, October 18, 2018 **(C-0331-SPA)**.

¹⁴⁴³Certificate of Handover of Rural Land to Mauricio Pallais and Jose Rodriguez issued by the Leon National Police Delegation, October 22, 2018 **(C-00332-SPA)**.

¹⁴⁴⁴Certificate of Handover of Rural Land to Mauricio Pallais and Jose Rodriguez issued by the Leon National Police Delegation, October 22, 2018 **(C-00332-SPA)**.

Gonzalo German Duarte Bojorge	Invasion by 30 people	Potential eviction	C-0326-SPA
Comercial Mantica S.A.	Invasion by 50 families	Potential eviction with reinforcements	C-0326-SPA
Jose Eduar Pastora Lopez	Invasion by 80 people	Potential eviction with reinforcements	C-0326-SPA
Inversiones Espanola S.A.	Invasion by 80 people	Potential eviction with reinforcements	C-0326-SPA

a) Sociedad Liza Interprise, S.A.

1353) Sociedad Liza Interprise, S.A. is the owner of private property located in Managua. This private property was invaded by approximately 200 people.¹⁴⁴⁵ The police determined that there was possibility of eviction.¹⁴⁴⁶ The police determined there might be serious disturbances to public order with politically negative repercussions because of the eviction.¹⁴⁴⁷

b) Comercial Mantica S.A.

1354) Comercial Mantica S.A. is the owner of private property in located in Managua.¹⁴⁴⁸ This private property was invaded by approximately 50 families. The police determined that there was possibility of eviction with police reinforcements.¹⁴⁴⁹ The police determined there might be serious disturbances to public order with politically negative repercussions because of the eviction.¹⁴⁵⁰

c) Iglesia Cristiana Ministerio Leon de Judas

1355) Iglesia Cristina Ministerio Leon de Judas is the owner of private property located in Managua.¹⁴⁵¹ This private property was invaded by neighbors.

¹⁴⁴⁵Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz, Deputy Director General of the National Police re: Land invasions complaints, July 31, 2018 **(C-0401-SPA)**.

¹⁴⁴⁶Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz, Deputy Director General of the National Police re: Land invasions complaints, July 31, 2018 **(C-0401-SPA)**.

¹⁴⁴⁷Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz, Deputy Director General of the National Police re: Land invasions complaints, July 31, 2018 **(C-0401-SPA)**.

¹⁴⁴⁸Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz, Deputy Director General of the National Police re: Land invasions complaints, July 31, 2018 **(C-0401-SPA)**.

¹⁴⁴⁹Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz, Deputy Director General of the National Police re: Land invasions complaints, July 31, 2018 **(C-0401-SPA)**.

¹⁴⁵⁰Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz, Deputy Director General of the National Police re: Land invasions complaints, July 31, 2018 **(C-0401-SPA)**.

¹⁴⁵¹Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

The police determined that there was possibility of eviction.¹⁴⁵² The police determined there might be serious disturbances to public order with politically negative repercussions because of the eviction.¹⁴⁵³

d) Burke Agro Nicaragua S.A.

1356) Burke Agro Nicaragua S.A. is the owner of private property in located in Managua.¹⁴⁵⁴ This private property was invaded by approximately 50 families armed with machetes, mortars, and clubs.¹⁴⁵⁵ The police determined that there was possibility of eviction with police reinforcements.¹⁴⁵⁶

e) Gonzalo German Duarte Bojorge

1357) Gonzalo German Duarte Bojorge is the owner of private property in located in Managua.¹⁴⁵⁷ This private property was invaded by approximately 30 people. The police determined that there was possibility of eviction.¹⁴⁵⁸

f) Productos Aliados S.A.

1358) Productos Aliados S.A. is the owner of private property in located in Managua.¹⁴⁵⁹ This private property was invaded by approximately 300 people. The police determined that there was possibility of eviction with police reinforcements.¹⁴⁶⁰

g) Jose Eduar Pastora Lopez

1359) Jose Eduar Pastora Lopez is the owner of private property in located in Managua.¹⁴⁶¹ This private property was invaded by approximately 80

¹⁴⁵²Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁵³Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁵⁴Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁵⁵Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁵⁶Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁵⁷Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁵⁸Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁵⁹Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁶⁰Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁶¹Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

people. The police determined that there was possibility of eviction with police reinforcements.¹⁴⁶²

h) Inversiones Espanola S.A.

1360) Inversiones Espanola S.A is the owner of private property located in Managua.¹⁴⁶³ This private property was invaded by approximately 80 people. The police determined that there was possibility of eviction with police reinforcements.¹⁴⁶⁴

5. Nicaragua's police obligations

1361) Nicaragua does not provide access to its general police standards and practices on its National Police website. However, Nicaragua is a member of international police organizations that set out practices and procedures for its members in carrying out their policing operations. As a member of these organizations, Nicaragua has set out its own expectations with respect to police protection.

1362) The primary FPS challenge is how the authorities handled the invasions at HSF. As noted in the discussion of the invasions, the police were aware of the invasions of HSF starting as early as June 16, 2018.

1363) The International Association of Chiefs of Police has issued a model policy on police standards of conduct and a concept and issue paper supporting that policy.

Police agencies must clearly define what is and is not acceptable conduct. It has long been acknowledged that, to do their job properly, law enforcement officers must accept and abide by a high ethical and moral standard that is consistent with the rule of law they are sworn to uphold.¹⁴⁶⁵

1364) The police, in the case of the invasion and occupation of HSF, did not perform their duty to uphold the rule of law that they are sworn to uphold.

1365) Nicaragua is a member of Interpol. The police conduct evidenced in this case does not meet the "honest, ethical and effective performance"

¹⁴⁶²Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁶³Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁶⁴Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 **(C-0326-SPA)**.

¹⁴⁶⁵International Association of Chiefs of Police, Model Policy on Standards of Conduct, Concepts and Issues Paper, pg. 8 **(C-0337-ENG)**.

standard which is part of Interpol's Global Standards to Combat Corruption in Police Forces/Services.

1366) Article 4.1 of the Standards states as follows:

Each Member of the Organization commits to “Establishing and maintaining high standards of conduct for the honest, ethical, and effective performance of policing functions”.¹⁴⁶⁶

Article 4.1.1. goes on to say:

Such standards should be mandatory and be directed towards an understanding and application of honest, ethical, and appropriate behavior, the avoidance of conflicts of interest, and the proper use of public resources in and in connection with the fair and impartial application of the law...¹⁴⁶⁷

1367) The invaders of HSF acted in a lawless manner during their occupation of HSF. They engaged in the destruction of property, theft, and trespass.¹⁴⁶⁸

1368) As confirmed in the witness evidence of both Luis Gutierrez and Domingo Ferrufino, the invaders destroyed the existing avocado trees INAGROSA planted.¹⁴⁶⁹ The invaders engaged in theft.¹⁴⁷⁰ All these actions violated Nicaraguan criminal law.

1369) One of INAGROSA's employees was assailed by a squatter with a rocket mortar, but the police failed to arrest the assailant.¹⁴⁷¹

1370) Because police are legally obliged to arrest persons engaged in criminal activity, it is difficult to imagine why they did not take any action of any kind to address the lawlessness at HSF during the summer of 2018.

1371) The failure of the National Police to act in these situations amounts to a blatant dereliction of duty. It is inconceivable that such neglectful behavior by the police might be seen as anything that even approximates the standard of diligence to which they should be held. The inadequacy of the

¹⁴⁶⁶Interpol Global Standards to Combat Corruption in Police Forces/Services, 2001 **(C-0338-ENG)**.

¹⁴⁶⁷Interpol Global Standards to Combat Corruption in Police Forces/Services, 2001 **(C-0338-ENG)**.

¹⁴⁶⁸Witness Statement of Luis Gutierrez - Memorial - ENG at ¶¶ 111-112, 128 **(CWS-02)**; Witness Statement Jaime Henrriquez Cruz -Memorial- ENG at ¶¶ 56-57 **(CWS-06)**.Inventory of damages at Hacienda Santa Fé, August 14, 2018 **(C-0058-SPA)**.

¹⁴⁶⁹Witness Statement of Luis Gutierrez -Memorial - ENG at ¶¶ 80, 96, 128 (c) **(CWS-02)**; Witness Statement Jaime Henrriquez Cruz -Memorial- ENG at ¶ 11 **(CWS-06)**.

¹⁴⁷⁰Witness Statement of Luis Gutierrez -Memorial - ENG at ¶¶ 111-112, 128 **(CWS-02)**; Inventory of damages at Hacienda Santa Fé, August 14, 2018 **(C-0058-SPA)**.

¹⁴⁷¹Witness Statement of Luis Gutierrez - Memorial - ENG at ¶ 67 **(CWS-02)**; Witness Statement Jaime Henrriquez Cruz -Memorial- ENG at ¶ 27 **(CWS-06)**.

police response in this case falls well short of accepted international standards. Nothing about the behavior exemplified by the police here reasonably can be characterized as either effective or appropriate.

1372) In the end, like any other police force in the world, police officers of the National Police, in their day-to-day work, are expected to enforce and comply with the law and facilitate criminal prosecution.

a) What the Police failed to do.

1373) In this case, the National Police failed to apply reasonable diligence to the invasion and occupation of HSF.

1374) The *Wena Hotels v. Egypt*, case is particularly relevant as here the Nicaraguan Police were aware of threats of invasion in advance but they did not share that information with INAGROSA. In *Wena*, Egypt violated its full protection and security obligation by withholding advance information of wrongful actions. The Tribunal found that Egypt had violated its obligation to provide FPS because Egypt was aware of the intentions of a third party (EHC) and took no actions to prevent it or to immediately return the property to the Investor.¹⁴⁷² The Tribunal weighed the following factors in determining liability:

- a) the delay on the part of the authorities to go to the investment to investigate.
- b) the failure to take any immediate act of protection.
- c) the delay in returning the investment to the investor.
- d) the damage to, and deterioration of, the investment.
- e) the failure of the Host State to provide compensation; and
- f) the lack of serious punishment for the perpetrators.¹⁴⁷³

1375) The lack of diligence, in this case, was not based on limitations on the National Police's capacity to do so; instead, it was more an issue of their willingness. Fundamentally, Nicaragua was aware, and ought to have been aware, of the risks posed to the physical security of HSF.

¹⁴⁷² *Wena Hotels v. Egypt* ICSID Case No. ARB/203/98/4, Award, December 8, 2000 at ¶¶ 89-95 (CL-0039-ENG).

¹⁴⁷³ *Wena Hotels v. Egypt*, ICSID Case No. ARB/203/98/4, Award, December 8, 2000 at ¶¶ 89-95 (CL-0039-ENG).

- 1376) The national police did not share their knowledge of the risk of an imminent invasion with INAGROSA.¹⁴⁷⁴ Police Captain William Herrera admitted his “advance knowledge” of the invasion of HSF through “police intelligence sources.” Yet when ordered to produce the evidence of the intelligence, Nicaragua inexplicably produced no evidence.¹⁴⁷⁵ Perplexingly, Police Captain Herrera never shared any of his advanced intelligence with INAGROSA, the target of the wrongful behavior. The failure to share this information prevented INAGROSA from taking steps to protect its business.
- 1377) Nicaragua took no immediate steps of protection. Nicaragua’s National Police did nothing. They were missing in action. As identified in (DS)2, there was much more that should have reasonably taken place.
- a) It is difficult to understand why the police officers did not arrive at HSF during the invasion. As noted by the (DS)2 Tribunal, “if the police force had arrived earlier, they could have secured the site by blocking the entrance points”.¹⁴⁷⁶ For the Tribunal, such police “inactivity signaled to the rioters that they were free to act as they wished.”¹⁴⁷⁷
 - b) The (DS)2 Tribunal noted that there were steps that the police could have taken to deter the rioters such as “shooting in the air, blocking the access points to the factory and showing their presence in order to discourage the rioters”.¹⁴⁷⁸
 - c) In concluding, the Tribunal acknowledged that there were civil disturbances taking place that same day as the invasion, “with several acts of looting deaths and injuries.”¹⁴⁷⁹
- 1378) None of these graduated approaches were taken by the National Police in June and July 2018.
- 1379) Returning to the *Wena Hotels* criteria,¹⁴⁸⁰ Nicaragua also acted woefully below the standard of reasonable and diligent treatment:
- a) the delay in returning the investment to the investor.

¹⁴⁷⁴Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG at ¶ 21 (**RWS-03**).

¹⁴⁷⁵CLDR No. 35, Procedural Order No. 6 – Annex A – at page 197-200 (**C-0549-ENG**).

¹⁴⁷⁶Lisa Bohmer, “ Kaufmann-Kohler chaired tribunal at p. 8. (**CL-0221-ENG**).

¹⁴⁷⁷Lisa Bohmer, “ Kaufmann-Kohler chaired tribunal at p. 8. (**CL-0221-ENG**).

¹⁴⁷⁸Lisa Bohmer, “ Kaufmann-Kohler chaired tribunal at p. 8. (**CL-0221-ENG**).

¹⁴⁷⁹Lisa Bohmer, “ Kaufmann-Kohler chaired tribunal at p. 8. (**CL-0221-ENG**).

¹⁴⁸⁰*Wena Hotels v. Egypt*, ICSID Case No. ARB/203/98/4, Award, December 8, 2000 at ¶¶ 89-95 (**CL-0039-ENG**).

- b) the damage to, and deterioration of, the investment which arose during the period when the National Police took no action.
 - c) the failure of the Host State to provide compensation; and
 - d) the lack of serious punishment for the perpetrators of the invasion.
- 1380) There are additional indicia of a failure to address matters in a diligent or reasonable manner. These include:__
- a) Nicaragua did not disclose any evidence that the National Police contacted other police detachments for support. Riverside has produced evidence that in July 2018, the National Police brought in some officers from La Concordia detachment as well as from San Rafael. However, there is no indication that National Police from other detachments, such as the detachment in the larger nearby city of Jinotega.
 - b) Nicaragua did not contact local auxiliary police support bodies for support.¹⁴⁸¹ The National Police and the Physical Protection Corp, an auxiliary force of the National Police, which the police had used to assist INAGROSA during the 2003 eviction.¹⁴⁸² The Nicaraguan authorities took none of these steps in 2018.
 - c) Nicaragua did not provide any evidence that it contacted the local district attorney so it could aid the police to address the unlawful invasion and occupation.¹⁴⁸³ It appears the first action from the local prosecutor took place in August 2018 – almost seven weeks later.
- 1381) The National Police had more than sufficient resources to address the unlawful actions occurring at HSF by squatters more effectively. As noted in the National Treatment discussion and detailed in this section below, the National Police effectively repelled invaders in more than eleven invasions on private lands in the summer and fall of 2018.
- 1382) The police could have ensured at an early date that squatters did not return to the property. They did so in other invasions in other locations, and they did so in the 2003 invasion.

¹⁴⁸¹Francisco Mendoza, Scorched Land in El Pavón, El Nuevo Diario, November 22, 2003 at p.1 (R-0036-SPA-ENG).

¹⁴⁸²Francisco Mendoza, Scorched Land in El Pavón, El Nuevo Diario, at p.1 (R-0036-SPA-ENG).

¹⁴⁸³Francisco Mendoza, Scorched Land in El Pavón, El Nuevo Diario, at p. 1 (R-0036-SPA-ENG).

- 1383) In 2004, the squatters from El Pavon were removed through a legal process. The police carried out an eviction with armed guards (the Physical Protection Force).¹⁴⁸⁴
- 1384) Further, Nicaragua could have augmented its National Police with support from its military forces. These could have been deployed under the direction of the National Police in a graduated manner that could have minimized or avoided bloodshed while preserving the peace and carrying out the rule of law. But Nicaragua chose not to take such actions.
- 1385) The issue in 2018 was one of a lack of police diligence. Unlike in 2003, the police did not fully exercise the resources and powers they granted to affect a permanent solution to the pressing issue at HSF.
- 1386) The invaders engaged in various unlawful actions at HSF. These included threats, arson, destruction of property, and trespass. The police could have and should have addressed all these matters in a more diligent and timely fashion.
- 1387) The police now claim that they were not required to take any action due to the absence of a criminal complaint from INAGROSA. However, this answer rings hollow when one reviews the written communications INAGROSA sent to the police during the invasion.
- 1388) On August 10, 2018, Mr. Rondón sent a letter to Police Captain William Herrera complaining about the lack of police action.¹⁴⁸⁵ Mr. Rondón's letter outlined the failure to take timely action, which would have protected the property (including the Hass avocado trees) and the workers' physical safety at HSF. Mr. Rondón never received a response to this letter.¹⁴⁸⁶
- 1389) At no time did the police communicate with INAGROSA seeking a criminal complaint to be filed.
- 1390) If a criminal problem becomes an annoyance, a drain on resources, and potentially harmful to safety and security, nothing short of swift and thorough action is acceptable.
- 1391) In this case, the agencies within the Nicaraguan criminal police and justice system acted with complete disregard for not only the rights of the property owners but also the safety of their employees. If action, within the bounds of allowable law, were taken quickly and without fear or favor, the economic damages to Riverside most certainly could have been limited.

¹⁴⁸⁴Francisco Mendoza, Scorched Land in El Pavón, El Nuevo Diario, at p.1 (**R-0036-SPA-ENG**).

¹⁴⁸⁵Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (**C-0012-SPA**).

¹⁴⁸⁶Memorial at ¶ 191.

- 1392) The National Police provide police protection and other state protective services to INAGROSA than it provided at that same time to at least eighteen other private landowners in Nicaragua.
- 1393) Nicaragua has no explanation as to why these other private landowners in Nicaragua received more favourable treatment from the Police during their land invasions while experiencing the same social conditions in Nicaragua as HSF. Indeed, one of the cases involved police action where there were 200 land invaders present. The *Pantehniki* case does not justify differential treatment experienced in the same conditions.
- 1394) Nicaragua had many nuanced and graduated ways of addressing the invasion of HSF. This might have included use of specialized police teams that were less than bringing in the military. It might have involved the use of the local district attorney or attempts or attempts at mediation. This is an absence of vigilance and diligence in the situation.
- 1395) All that we know from the Report to National Police Chief Diaz is that that a senior government leader met with the invaders and encouraged them to continue in their illegal actions with a government promise that Nicaragua would find the funds to buy the property. Surely, telling the wrongdoers to say put and continue their lawfulness could not be one of the appropriate routes available to Nicaragua in this circumstance.
- 1396) The full protection and security obligation is broader than simply police protection. It extends to all state protective obligations.
- 1397) Nicaragua failed to provide a vigilance and diligence in carrying out its protective functions to INAGROSA, something that it provided to other landowners at the same time. This failure to act constitutes a clear breach of the Full Protection and Security obligation (as well as other obligations noted in this Reply Memorial Part VIII discussion).

6. Evaluating what Nicaragua claims it did.

- 1398) At Counter-Memorial paragraph 328, Nicaragua states that

“The invasion of Hacienda Santa Fé emphatically did not occur at the instigation or with the encouragement of the State.” The National Police and other Nicaraguan officials acted diligently and ultimately successfully to relocate the invaders, avoid an escalation of violence, and restore the Property to Inagrosa peacefully, with limited resources and in the context of widespread and violent civil strife.”

- 1399) However, a review of the record demonstrates that Nicaragua has not accurately reported the facts.

a) The Role of the State

1400) In Paragraph 330-331 of the Counter-Memorial, Nicaragua claims the Riverside cannot show that Nicaragua acted in an unjustified manner.

330. As to the first element, Riverside cannot show that Nicaragua acted in an unjustified manner. Riverside's case is that the Nicaraguan State helped the illegal invaders and occupants to enter the property, that it provided them with weapons, and that it did not act to remove them.¹⁴⁸⁷

331. But the evidence shows that this is not true. Both Commissioner Castro and Deputy Commissioner Herrera confirm that the State has absolutely no ties to the invaders who were led by former Resistencia Nicaragüense commanders with a history of hostility to the State.¹⁴⁸⁸ They also explain that given the nationwide civil strife and violent unrest, the police did not have the force to immediately remove all the occupiers from the land peacefully and were in any case largely confined to barracks as part of an effort to de-escalate the violence.¹⁴⁸⁹

1401) A review of these statements demonstrates that they are fictive. As noted above:

- a) The expert testimony of Professor Justin Wolfe confirms that there were extensive ties between the State and the invaders, including written confirmation from the invasion leaders that the State controlled them, and direct instructions from the State that the unlawful occupiers remain in occupation of the property at HSF.¹⁴⁹⁰
- b) There is no evidence of any hostility between the invaders and the State at the time of the invasion. If there was any hostility between the Sandinista government and the Nicaraguan Resistance, that was long over by 2018. The expert testimony of Professor Justin Wolfe confirms that the invaders were Sandinista allies of the State. They were Sandinista supporters or former members of the Nicaraguan Resistance who were admitted allies of the State.¹⁴⁹¹
- c) Nicaragua persists in the fiction that its National Police were "in any case largely confined to barracks as part of an effort to deescalate the violence." However, Nicaragua was unable to produce any evidence of

¹⁴⁸⁷Memorial at ¶757.

¹⁴⁸⁸See Witness Statement of Commissioner Marvin Castro at ¶ 34 (**RWS-02**) (describing the profile of the leaders of the invaders as being ex-members of the Resistencia Nicaragüense).

¹⁴⁸⁹ Witness Statement of Police Commissioner M. Castro-Counter-Memorial-ENG, at ¶ 26 (**RWS-02**); Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG ¶ 9 (**RWS-03**).

¹⁴⁹⁰ Expert Statement of Prof. Justin Wolfe – Reply – ENG at ¶¶ 57-69 (**CES-05**).

¹⁴⁹¹ Expert Statement of Prof. Justin Wolfe – Reply – ENG at ¶¶ 113-125 (**CES-05**).

any orders to the National Police in Jinotega Department to remain confined to quarters, and evidence that has been produced contradicts this contention. In fact, there was extensive police activity underway in the summer of 2018 by the National Police and no evidence that they were confirmed to their quarters. There is no support to the contention that justifies the total absence of diligent police activity from the National Police or any other peacekeepers in the state.

- d) Nicaragua extensively relies on claims of nationwide civil strife and violent unrest. However, there is no evidence in the record of such strife that prevented the National Police and other security forces of the State from taking all action. The evidence is that the police were available and were doing their job throughout this period.

1402) On the issue of civil strife, in paragraph 334 of the Counter-Memorial, Nicaragua claims that the occupiers simply were beyond their capacity. There is simply no evidence of this at all.

1403) Nicaragua relies on the “Shelter Order,” which purportedly ordered all the National Police to their barracks and claims:

Besides the shelter order, the National Police were massively outnumbered and outgunned.¹⁴⁹² The Police did not have the force to *immediately clear Santa Fé*.¹⁴⁹³ *As the evidence shows, in Jinotega, and specifically in San Rafael del Norte, there were only eight members of the National Police assigned*.¹⁴⁹⁴ *It was not in bad faith to seek to avoid more violence and potentially civil casualties*.¹⁴⁹⁵

b) The National Police had additional capacity in Jinotega Department

1404) Nicaragua admits in the Counter-Memorial that the invasion and occupation of HSF was unlawful. Nicaragua contends that San Rafael only had eight police officers available to address the action at HSF.¹⁴⁹⁶

1405) The lack of staff is not dispositive with respect to the total failure of the police to take measures.

1406) Nicaragua’s explanation of its capacity constraints is not credible. Nicaragua states, without any proof, that the entire National Police complement in San

¹⁴⁹²Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG ¶ 25 (RWS-03).

¹⁴⁹³Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG ¶ 25 (RWS-03).

¹⁴⁹⁴Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG ¶ 25 (RWS-03). Certificate issued by the National Police of November 18, 2022 (R-0028) (showing that only eight agents were assigned to San Rafael del Norte).

¹⁴⁹⁵Counter-Memorial at ¶ 334.

¹⁴⁹⁶Counter-Memorial at ¶ 334.

Rafael del Norte was seven persons. However, Nicaragua does not disclose that there were additional police stations in Jinotega Department.

- 1407) On July 4, 2018, Luis Gutierrez sent an email to Carlos Rondón informing him that national police from the town of Concordia joined the national police from San Rafael.¹⁴⁹⁷
- 1408) The largest city in Jinotega Department is the nearby city of Jinotega. The National Police have a full complement of staff in Jinotega.
- 1409) The National Police website in Nicaragua is no longer accessible to the public. Requests to policia.gob.ni are returned with a message of “you have been blocked”. However, Google reports that there also are National Police stations in the following municipalities in Jinotega Department.¹⁴⁹⁸
- 1410) In June 2023, Police Commissioner Castro held an opening of a new police station. In that video, Commissioner Castro identified the names of the local police chiefs and he names the following stations:
- a) Jinotega
 - b) San Rafael de Norte,
 - c) La Concordia,
 - d) El Cuá,
 - e) San José de Bocay,
 - f) Santa María de Pantasma,
 - g) San Sebastián de Yali.¹⁴⁹⁹
- 1411) It would be reasonable to assume that these national police stations had staff and resources. On July 4, 2018, the National Police from San Rafael del Norte worked jointly with the National Police from Concordia.¹⁵⁰⁰

c) Many Reasonable Alternatives were available.

- 1412) The full protection and security obligation is broader than simply police protection. It extends to all state protective obligations.
- 1413) Nicaragua failed to provide vigilance and diligence in carrying out its protective functions to INAGROSA, something that it provided to other

¹⁴⁹⁷Email from Luis Gutierrez to Carlos Rondón re: invaders meeting with police on July 4, 2018, August 6, 2018 (C-0341-SPA-ENG).

¹⁴⁹⁸Screenshot search result for Nicaraguan National Police website (searched on September 25, 2023) (C-0543-ENG).

¹⁴⁹⁹Video of opening new police unit in La Rica Community in San Sebastian de Yali Municipality, Vision Policial Nicaragua (C-0670-SPA).

¹⁵⁰⁰UNCTAD, Bilateral Investment Treaties in the Mid-1990s (New York: United Nations, 1998). (CL-0151-ENG).

landowners at the same time. This failure to act constitutes a clear breach of the Full Protection and Security obligation (as well as other obligations noted in this Reply Memorial Part VIII discussion).

- 1414) Nicaragua had many nuanced and graduated ways of addressing the invasion of HSF. This might have included use of specialized police teams that were less than bringing in the military. It might have involved use of the local district attorney or attempts at mediation. This is an absence of vigilance and diligence in this situation.
- 1415) Nicaragua had many graduated ways available to it to address the invasion of HSF. This might have included use of specialized police teams that were less than bringing in the military. It might have involved mediation. All that we know is that a senior government leader met with the invaders and encouraged them to stay with the government promise that it would find the funds to buy the property. Surely, telling the wrongdoers to say put and continue their unlawfulness could not be one of the appropriate routes available to Nicaragua in this circumstance.

7. Nicaragua did not properly balance the interests.

- 1416) Nicaragua has relied on paragraph 367 of the Counter-Memorial on the *Pantechniki v Albania* case. In Paragraph 368, Nicaragua suggests that Riverside's expectations for police assistance should be lower in Jinotega than they would be in "London, New York or Tokyo."
- 1417) But INAGROSA was not seeking the level of protection expected in London, but the levels that were being provided in Nicaragua to others. Nicaragua failed to provide police protection and other state protective services to INAGROSA than it provided at that same time to at least thirteen other private landowners in Nicaragua.
- 1418) Nicaragua has no explanation as to why these other private landowners in Nicaragua received more favorable treatment from the Police during their land invasions while experiencing the same social conditions in Nicaragua as HSF. Indeed, one of the cases involved police action in which 200 land invaders were present. The *Pantechniki* case does not justify differential treatment experienced in the same conditions.

C. Expropriation

- 1419) In paragraph 33 of the Counter-Memorial, Nicaragua summarizes its defense to expropriation on the basis that Nicaragua did not formally take the title to HSF, that it formally recognized the title to HSF, and that it has offered to return the property.

1420) At Counter-Memorial Paragraph 380, Nicaragua states that “the evidence is that the State did not direct or control, and never acquiesced in the invasion or occupation of Hacienda Santa Fé.”

1. Nicaragua ignored Riverside’s Expropriation Argument

1421) The expropriation obligation in CAFTA Article 10.7 has two different components: direct (*de jure*) vs indirect (*de facto*) expropriation. The CAFTA expropriation obligation is restricted through narrow treaty language, an interpretative annex set out in Annex 10-C, and by a second restricted interpretative Annex 10-B with respect to its CAFTA Article 10.5 component.

1422) As set out in detail in the Memorial, the Russian BIT has an autonomous meaning for expropriation, and it does not have mandatory application of restrictive interpretative annexes.¹⁵⁰¹ The Russian BIT also has more favorable compensation provisions.¹⁵⁰²

1423) As addressed above, MFN protection allows “every party to the treaty [to] demand from any other party to accord to it treatment equal to that extended to any third State, irrespective of whether that third State is a party to the treaty or not.”¹⁵⁰³ Thus, by application of CAFTA Article 10.4, Riverside is entitled to the same level of protection granted to foreign investors and investments under other Nicaraguan investment treaties such as the Russian BIT.

1424) There is a clear disparity between the treatment Nicaragua granted to Russian investors in its territory in comparison to that offered to American investors under the CAFTA.

1425) Pursuant to the Russian BIT, Russian investors and their investments are entitled to treaty protections regarding expropriation. That same treatment is not extended by Nicaragua under the CAFTA *per se* other than through the operation of the CAFTA MFN clause.¹⁵⁰⁴ Because of CAFTA’s Article 10.4 MFN obligation, and Nicaragua’s better treatment afforded in same article of the Russian BIT, Nicaragua does not have the discretion to evade such

¹⁵⁰¹Memorial at ¶ 426-454.

¹⁵⁰²Memorial at ¶ 426-454.

¹⁵⁰³ International Law Commission, Draft Articles on Most-Favoured-Nation clauses, with commentaries (1978), pp. 19-20 (CL-0227-ENG).

¹⁵⁰⁴Yas Banifatemi, The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration, in Investment Treaty Law: Current Issues III (A. Bjorklund, I. Laird, S. Ripinsky eds., BIICL, 2009), 270 (“In that sense, access to arbitration is part of the rights granted under the treaty and there is hardly any difference in nature between the right to arbitrate one’s dispute and the right to be treated fairly and without discrimination. In effect, the protection accorded in investment treaties would not be of great value without the right to arbitrate one’s dispute before a neutral judge.”). (CL-0228-ENG)

better expropriation protections to Riverside and its investments in Nicaragua.

1426) With respect to Riverside's substantive expropriation argument, the Memorial sets out that that Nicaragua was required to pay Fair Market Value compensation with respect to government measures constituting a broad definition of expropriation. That definition made no distinction between *de jure* and *de facto* expropriation.

1427) Riverside set out how international tribunals generally have applied the sole effects doctrine to identify the types of circumstances that qualify as expropriations.

1428) Riverside argued that:

- a) Nicaragua had State Responsibility for the invasion and occupation of HSF.
- b) The internationally wrongful measures from the invasion and the occupation constituted substantial deprivation sufficient to fit within the meaning of expropriation.
- c) Nicaragua failed to pay prompt fair market value compensation to Riverside upon the expropriation; and
- d) Nicaragua failed to act in accordance with due process and CAFTA Article 10.5 with respect to the measures giving rise to the Expropriation.

1429) Applying the broader (and more standard) expropriation definition in the Russian BIT means that there is no distinction between *de jure* and *de facto* takings.

a) The Effect of the Russian BIT on Expropriation

1430) Nicaragua has ignored the detailed arguments Riverside advanced regarding the impact of the Russian BIT upon the meaning of its expropriation obligations owed to Riverside.

1431) The Russian BIT has an autonomous meaning for expropriation, and it does not have mandatory application of restrictive interpretative annexes.¹⁵⁰⁵ The Russian BIT also has more favorable compensation provisions.¹⁵⁰⁶

¹⁵⁰⁵ Memorial at ¶¶ 452-454.

¹⁵⁰⁶ Memorial at ¶¶ 452-454.

2. Nicaragua's limited response on Expropriation

- 1432) Nicaragua provides a very limited response on expropriation. The extent of its caselaw responding to the extensive memorial discussion of the law was contained within footnote 636.
- 1433) As a procedural matter, Riverside objects to Nicaragua's reservation of its "right" to defend its position more fully in the subsequent Rejoinder should Riverside further elaborate on its indirect expropriation theory. While Nicaragua is entitled to ignore arguments, it may not introduce new arguments not responsive to this Reply in its Rejoinder. To do so would circumvent the procedural rules. Such an approach would not only be grossly unfair to Riverside and would constitute a severe departure from a fundamental rule of procedure.
- 1434) In footnote 636, Nicaragua sets out its principle substantive defense on expropriation. Nicaragua contends that:
- a) Riverside presents contradictory arguments in its framing of an expropriation claim. While Riverside initially claims that the expropriation was "direct" due to seizure, it subsequently argues for a "de facto taking," confusing the two separate standards for direct and indirect expropriation.
 - b) Riverside fails to adequately explain how a "substantial" deprivation could result from occupying a largely vacant property or an unlawful but quickly rectified occupation.
- 1435) Nicaragua underscores that a mere reduction in the investment's value—even a significant one—does not equate to expropriation. Nicaragua's argument ignores that *de jure* and *de facto* expropriation are both expropriations. They are one integral legal concept Nicaragua failed to address by choice in its Counter-Memorial.
- 1436) Riverside set out in Memorial paragraphs 475 – 488 why the sole effects doctrine applies. Further, Riverside set out in Memorial paragraphs 495 – 503 how the occupation resulted in the economic devastation of INAGROSA's business. Again, Nicaragua fails to address either issue by choice in its Counter-Memorial. It simply pronounces that there was no substantial deprivation or devastating economic impact arising from the measures.
- 1437) The evidence before this Tribunal demonstrates that neither of the alleged facts relied upon which Nicaragua relies in footnote 636 is correct.
- a) HSF was not an abandoned property during the June 2018 invasion and subsequent occupation. INAGROSA was an ongoing business with

ongoing operations and ongoing staff, including security staff. INAGROSA's staff were forced out by armed persons who took over the facilities due to the failure of the police to stop them, or with the actual assistance of the Nicaraguan state.

- b) The unlawful occupation was not swiftly cleared. The occupation in the summer of 2018 (up to August 11, 2018) caused significant and irreparable damage to INAGROSA. But the occupation did not end on August 11, 2018. By Nicaragua's own admission, it continued well into 2021. In no way can a three-year occupation that destroyed the long cycle fruit plantation, cultivation capacities, business operations and the forty-year-long growth of the valuable hardwood species in the standing forest be considered a temporary matter.

1438) Riverside pled in the Memorial that it suffered precisely those facts required by the cases upon which Nicaragua relies in footnote 636. These four cases identify how the Riverside facts confirm an expropriation.¹⁵⁰⁷ There was a substantial deprivation of the foundational economic drivers of INAGROSA's investment. Those cases are:

- a) *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 233 (**RL-0068**).
- b) *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶¶ 361, 536 (**RL-0069**).
- c) *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, July 7, 2011, ¶ 151 (**RL-0070**).
- d) *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, January 12, 2011, ¶ 151 (**CL-0146**).

1439) By the time of the hearing, Riverside will have been deprived of the use and enjoyment of its investment for more than six years. As noted, there has been a destruction of the Hass avocado trees,¹⁵⁰⁸ the private forest reserve,¹⁵⁰⁹ and the widespread destruction of the facilities at HSF.¹⁵¹⁰ As set

¹⁵⁰⁷*El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 233 (**RL-0068**); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶¶ 361, 536 (**RL-0069**); *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, July 7, 2011, ¶ 151 (**RL-0070**); *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, January 12, 2011, ¶ 151 (**CL-0146**).

¹⁵⁰⁸Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 97 (**CWS-01**).

¹⁵⁰⁹Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 100 (**CWS-01**).

¹⁵¹⁰Witness Statement of Carlos Rondón – Memorial – ENG at ¶¶ 97-100 (**CWS-01**).

forth more fully below, in any sense, the interference at HSF was more than ephemeral.

- 1440) For clarity, Riverside claims the following measures to constituted uncompensated expropriation:
- a) The invasion of HSF resulting in the destruction of its economic resources, including but not limited to its Hass avocado plantation, its infrastructure, its nurseries, its equipment, its lands, and its valuable hardwoods in its private forest. These acts are attributable to Nicaragua due to the ordering of the invasion by the government.
 - b) The failure of the National Police to give timely warning and to share advance intelligence of invasions and serious risk of harm to INAGROSA and its property.
 - c) The acknowledgement and recognition of the invasion and occupation by Congressman Edwin Castro in July 2018 also would give rise to state responsibility for the expropriation.
 - d) The occupation of HSF resulting in the destruction of its economic resources, including but not limited to its Hass avocado plantation, its infrastructure, its nurseries, its equipment, its lands, and its valuable hardwoods in its private forest. These acts are attributable to Nicaragua due to the ordering of the ongoing occupation by Congressman Edwin Castro, or by the failure of the government to take steps to protect HSF, as it protected other private landowners in Nicaragua at the same time.
 - e) The de jure interference with the title over HSF done by the government in its implementation of the Judicial Order.
 - f) The de facto interference with the control, management, alienation, and hypothecation of HSF done under the Judicial Order which constituted a substantial deprivation of the property; or
 - g) The substantial harm caused to Riverside because of the abuse of rights in the Application and the Judicial Order (and its implementation) which has substantially deprived Riverside directly of rights in 2021 but which inextricably are in connection with the invasion in 2018. .
 - h) Fundamentally, Nicaragua offers no effective legal defense to the expropriation claim if the Tribunal determines that any of these seven different events took place.

3. Attribution for Expropriation

- 1441) Nicaragua bears direct state responsibility for actions that have resulted in the deprivation of HSF's interests in INAGROSA. The occupation was orchestrated by individuals aligned with the Nicaraguan Government and President Daniel Ortega, rather than being driven by forces opposed to the government. Such direct responsibility stems from:
- a) Occupiers who have expressly acknowledged being under state control; and
 - b) Occupiers who have remained in occupation upon directives from elected governmental officials, with implications that the state would financially compensate for the unlawfully seized lands.
- 1442) Nicaragua assumed ownership of HSF at the time of the substantial deprivation. That is why the treaty requires payment of FMV or *restitutio in integrum* (which cannot occur in this claim as HSF cannot be returned integrally). Consequently, Nicaragua is the legal owner of HSF. Notably, the concept of mitigation *post facto* is not applicable in expropriation matters. The date for assessing damage is immutably stipulated in the treaty governing the investment.
- 1443) In a supplementary context, Nicaragua's judicial seizure of HSF assets also constitutes a substantial deprivation, effectively amounting to an expropriation. While the state acknowledges its direct involvement in this deprivation, it endeavors to rationalize its actions, thus failing to mitigate its liability.
- 1444) Collectively, these actions by the Nicaraguan government fulfill the criteria that substantiated a claim of expropriation under the "sole effects doctrine."
- 1445) The substantial deprivation affecting Riverside transpired during the occupation in July 2018. Documentary evidence establishes a clear nexus between the Nicaraguan state and the substantial deprivation damages arising from the occupation controlled by persons for whom Nicaragua has state responsibility under international law.

4. CAFTA Article 10.7(c) Obligations

- 1446) Nicaragua's obligations under CAFTA Article 10.7(c), which mandates Fair and Equitable Treatment and protects against abuse of process. Of course, Riverside was unaware of the covert judicial seizure when Riverside filed its

Memorial, it already knew Nicaragua had an expropriation law and was not following it.¹⁵¹¹ .

- 1447) The evidence provided in the Report to National Police Chief Diaz from Jinotega Police Commissioner Marvin Castro (Document C-0284) that Deputy Edwin Castro was aware that HSF was privately owned and promised to find money to buy the lands supports the contentions raised in the Memorial.
- 1448) However, the revelation of Nicaragua’s previously covert conduct in its application for the seizure order also expressly violates these obligations. The Tribunal in *Procedural Order No. 4* already found that Nicaragua breached due process.¹⁵¹² A similar conclusion of an abuse of process can easily be drawn regarding Nicaragua’s bad faith “offer.”
- 1449) The temporal unfolding of these incidents is germane to the legal concept of *restitutio in integrum*, especially concerning Nicaragua’s subsequent, specious “offer” to restore possession of HSF.
- 1450) Clearly, Nicaragua aspires to recharacterize the issue from one of expropriation to mere delay. However:
- a) Nicaragua’s subsequent “offer” to restore HSF without any compensation would be rendered nugatory as Nicaragua incorrectly assumes that the damage occurred well before the specious offer.¹⁵¹³
 - b) Should the Tribunal determine that Nicaragua has violated its obligation under National Treatment—evidenced by disparate police protection treatment as confirmed in the available police reports—then its “offer” to restore HSF would similarly lose relevance.
 - c) If the Tribunal finds a breach of the Full Protection and Security obligation, particularly considering evidence indicating timely and superior protective services provided elsewhere in Nicaragua to other private landowners and the availability of additional police resources in Jinotega Department, Nicaragua’s specious “offer” to restore HSF would be inconsequential.

¹⁵¹¹These provisions were argued in the Memorial in paragraphs 734 – 739 and paragraph 464

¹⁵¹² Riverside Coffee *Procedural Order No. 4* at ¶ 37. The Tribunal notes, “...It appears undisputed that the Court Order was not formally served on the Claimant, which in itself is not in accordance with due process”.

¹⁵¹³ Nicaragua fails to consider that the internationally wrongful measures taken by its legal counsel and its Attorney General in the arbitration in connection with the 2018 occupation are systemic measures that constitute a composite act. The relationship of composite acts under ASRIWA Article 15 and compensation for expropriation under the treaty requires Nicaragua to compensate Riverside for the expropriation damages from 2018 in relation to wrongfulness that occurred in 2021....

5. De Jure title from INAGROSA

1451) Nicaragua states that it never interfered with the legal title to HSF.

a) Nicaragua states in Counter-Memorial paragraph 381,

381. In addition, it is undisputed that Nicaragua has always and at all relevant times to this dispute recognized Inagrosa as the sole owner of Hacienda Santa Fé. Riverside has not produced a single piece of contemporaneous evidence to refute that conclusion.

b) In Counter-Memorial paragraph 397,

397. Nicaragua has not interfered with Claimant's investment in any way. There has not been any seizure, administrative or judicial order or any regulatory measure that has prevented Claimant from pursuing its business objectives or interfered with its rights in Hacienda Santa Fé.

1452) However, a review of the legal title documents clearly confirms that Nicaragua has altered the *de jure* title to HSF making these statements factually inaccurate.

1453) The Judicial Order, which Nicaragua carried out in 2021, resulted in significant deprivation of core property rights, which would generally constitute an expropriation.

1454) INAGROSA was the sole owner of HSF. This was evidenced in the judicial sale of the property to INAGROSA in 1998. It is also clearly seen in the certificate which identifies INAGROSA as the sole owner of HSF before the issuance of the Judicial Order.¹⁵¹⁴

1455) That sole and exclusive ownership was disturbed formally by Nicaragua. A copy of a 2022 certificate from the property registry issued after the Judicial Order clearly shows that the ownership of HSF has been modified.

1456) Nicaraguan legal expert Renaldy Gutierrez has examined the literal certificate of title, which is filed as Exhibit C-0268-SPA. Mr. Gutierrez confirms that the certificate indicates that the legal title to HSF has been modified. INAGROSA lost its exclusive ownership rights to HSF. The property now purports to be jointly owned by INAGROSA and the Republic of Nicaragua.¹⁵¹⁵

¹⁵¹⁴Literal Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry, December 17, 2019 (C-0080-SPA).

¹⁵¹⁵Expert Witness Statement of Renaldy J. Gutierrez at ¶75 (CES-06).

- 1457) INAGROSA no longer holds exclusive title to HSF. Exclusive *de jure* title was taken by Nicaragua.
- 1458) As a result, INAGROSA's sole possession of the property, its exclusive ownership, its right to alienate or hypothecate were substantially modified by depriving INAGROSA of them.

6. De Facto Deprivation Effect of the Judicial Order

- 1459) Not only was there a *de jure* deprivation but the 2001 Judicial Order, which Nicaragua carried out in 2021, there also was a significant deprivation of core property rights, which on their own constitute a *de facto* expropriation.
- 1460) Nicaragua's covert legal proceedings in Nicaragua were manifestly abusive. Though ostensibly initiated to protect property rights, the judicial process culminated in an effective deprivation—transferring effective rights of title, such as possession or rights of alienation and hypothecation away from INAGROSA to the Trustee. INAGROSA had no notice of this process (either before or after), and neither did Riverside. This consequence stems from a skewed application of local law, as implemented by the presiding judge.
- 1461) Pursuant to the Judicial Order dated December 15, 2021, the Court designated the State of Nicaragua as the judicial depositary of HSF.¹⁵¹⁶ This Order consequently divested Riverside of its possessory rights over the said property, conferring them upon Nicaragua.¹⁵¹⁷
- 1462) The Order, however, remained ambiguous with respect to the statutory framework governing the term “judicial depositary.” Notably, neither the Nicaraguan Civil Code nor the Civil Procedure Code delineates the legal construct of a judicial depositary or stipulates the requisite procedures for such an appointment.
- 1463) Judge Julio Cesar Blandon Villagra's correspondence to the Jinotega Property Registry, directing a preventive annotation on the property title of Hacienda Santa Fé, substantiates that the Court's action was a precautionary measure.¹⁵¹⁸ Judge Julio Cesar Blandon Villagra's correspondence to the Jinotega Property Registry, directing a preventive

¹⁵¹⁶ Court Order seizing Hacienda Santa Fé issued by the Second Oral Court of the Civil District Court of Jinotega Northern District at **(C-0251-SPA-ENG)**.

¹⁵¹⁷ Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 74-79, 83-84, 96-101 **(CES-06)**.

¹⁵¹⁸ Literal Property Certificate of Hacienda Santa Fé property title (Farm No. 6145) issued at 1:03 PM and attachments— Originally filed by the Respondent as part of Exhibit B-SPA at Bates 0005802-0005803 **(C-0263-SPA)**.

annotation on the property title of Hacienda Santa Fé, substantiates that the Court's action was a precautionary measure.¹⁵¹⁹

For your due compliance and other legal effects, I hereby transcribe the dictated order within the process the action of innominate precautionary measure [...].¹⁵²⁰

- 1464) The Attorney General's petition construed the urgent precautionary measure request as a confluence of two separate legal notions, specifically, "intervention or judicial administration of productive, commercial, and industrial assets" under Article 343.3 of the Nicaraguan Civil Procedure Code and "deposit" under Article 3449 of the Nicaraguan Civil Code.¹⁵²¹
- 1465) We note that INAGROSA should have had a right of notice to the application and a right of appeal (opposition) when the order was made in December 2021, but neither time was INAGROSA given notice. This was profoundly in violation of due process and the rule of law, including the law of Nicaragua and international norms of fairness.

a) Intervention or Judicial Administration of Productive, Commercial, and Industrial Assets

- 1466) Article 343.3 of the Nicaraguan Civil Procedure Code authorizes the intervention or judicial administration of productive, commercial, and industrial assets as a precautionary measure. Although "intervention" and "judicial administration" appear to be used interchangeably, they embody distinct legal principles with disparate effects.
- 1467) Article 364 of the Nicaraguan Civil Procedure Code, the measure of intervention allows the intervenor to scrutinize all operations executed by the administrator and proffer objections thereto. Article 364 of the Nicaraguan Civil Procedure Code states:

With the measure of intervention of a company or productive assets, without altering the existing administration, the intervenor will take cognizance of each one of the operations carried out by the administrator and may oppose them.

¹⁵¹⁹ Literal Property Certificate of Hacienda Santa Fé property title (Farm No. 6145) issued at 1:03 PM and attachments— Originally filed by the Respondent as part of Exhibit B-SPA at Bates 0005802-0005803 (C-0263-SPA).

¹⁵²⁰ Literal Property Certificate of Hacienda Santa Fé property title (Farm No. 6145) issued at 1:03 PM and attachments— Originally filed by the Respondent as part of Exhibit B-SPA at Bates 0005802-0005803 (C-0263-SPA).

¹⁵²¹ Application for Urgent Precautionary Measures for appointment of judicial depository, November 31, 2021 at Bates 0005470-0005471 (C-0253-SPA).

1468) In the case of an intervention, the owner's management and control rights over the property are affected. The Nicaraguan Civil Procedure Code is silent on whether Nicaragua requires judicial authorization to use, dispose, or hypothecate the property. It is possible for Nicaragua to sell the property without the court's permission.

b) Judicial Administration

1469) Article 367 of the Nicaraguan Civil Code states:

When the judicial administration of a company or productive assets is agreed or named, it will be substituted for the pre-existing administrator and the rights, obligations, powers, and responsibilities of the judicial administrator, will be those that corresponded with ordinary character to the previous one. However, the administrator or the judicial administrator will need judicial authorization to dispose of or encumber a movable or immovable property, shares in the company or of this in others, to hire or fire personnel or any other act that its nature or importance, the judicial authority had expressly indicated.

1470) The property owner's rights to management and control are compromised. Importantly, judicial authorization is explicitly necessary for the property's disposition or encumbrance.

1471) The property owner's rights to management and control have been compromised. These are essential rights of private property. Judicial authorization is necessary for the property's disposition or encumbrance. As noted above, the disposition or encumbrance could occur under the intervention rights, and no court authorization would be expressly required.

c) Judicial Deposit of Property

1472) Deposit under Article 3449 of the Nicaraguan Civil Code means transferring possessory rights from the owner to the depositary, who is legally proscribed from utilizing the property.

1473) Article 3450 of the Nicaraguan Civil Code deals with the category of judicial deposits. If a public official makes the deposit, then the deposit is called sequestration. The judge who made the Judicial Order was a public official who created a judicial deposit, technically effected a sequestration.

1474) The legal effect of the sequestration of property is to transfer the possession of the property from the owner to the person in charge of the sequestration. Thus, under Article 3453 of the Nicaraguan Civil Code, the trustee obtained the core possessory and control rights over HSF. Under Article 3449 of the Civil Code, the Trustee is prohibited from using the property.

d) Judicial Seizure resulted in a taking from INAGROSA.

- 1475) The legal concepts cited manifest divergent impacts on property rights. While a deposit chiefly affects possessory rights, both intervention and judicial administration impact managerial and control rights. The rights to disposition and hypothecation ostensibly remain with the property owner but they cannot be effectively used. This is like a quarantine or blockage of the INAGROSA's property rights.
- 1476) The legal and practical deprivation effect of the Order resulted in a substantial deprivation of Riverside's property rights. This substantial deprivation suffered by Riverside had an effect equivalent to expropriation. The *de facto* taking of HSF on August 18, 2018, in addition to the substantial deprivation suffered due to the Judicial Order, constitutes a composite act that resulted in the indirect expropriation of HSF as the quiet possession, control right to alienation, and hypothecation have been removed from INAGROSA for a two-year period. This incremental encroachment is a creeping expropriation of HSF.
- 1477) Besides its legal effects, the Order has palpable ramifications. It severely curtails Riverside's financial flexibility in relation to HSF, which is presently under Nicaragua's control and subject to 24-hour surveillance. Financial institutions would be disinclined to accept the property as collateral in such circumstances. Likewise, prospective purchasers would be significantly deterred by the inability to exercise full ownership rights.

e) The Expropriation and Judicial Seizure effects upon Riverside.

- 1478) First, Riverside was directly affected by the invasion and occupation of HSF in June 2018. As noted in Part VII of this Reply Memorial (and elsewhere), Riverside controlled INAGROSA. Riverside had substantial financial investments in INAGROSA, which comprised a significant direct shareholding in its name and extensive debt in the company. As discussed above, Riverside was the financial lifeline of INAGROSA during the transition from coffee to Hass avocados. Riverside's principal investment was INAGROSA. Thus, a loss of INAGROSA through its taking was a loss directly to Riverside.
- 1479) Second, there is evidence from the July 31, 2018 police report of Jinotega Police Commissioner Marvin Castro that government congressman Edwin Castro acknowledged that the invasion of HSF was upon private lands and that Congressman Castro instructed the occupiers to remain in occupation while the government took measures to regularize their unlawful acts through

purchasing HSF from its legal owners.¹⁵²² This admission from the police of the actions of the government legislator demonstrates an overall plan that the government would obtain the title over HSF (which it knew that it did not have).

- 1480) Third, Riverside suffered direct harm from Nicaragua with respect to the Judicial Order in 2021. The impact of the unfairness and abuse of process by the Attorney General are discussed in Part IV of this Reply Memorial in detail.
- 1481) The Application to the Judicial Order freely disclosed that Riverside, an American company, was named as the party to the Application because it had brought a claim against the Republic of Nicaragua in international arbitration.¹⁵²³ The Attorney-General's application sought *inter alia* "to seek mechanisms for the immediate end of the arbitration".¹⁵²⁴
- 1482) The Judicial Order, its Application, and the implementation of the Judicial Order all raise grave violations of Fair and Equitable Treatment and Expropriation. Nicaraguan legal expert Gutierrez discusses the abuse of rights involved by the Attorney General and the deprivation of core property rights.¹⁵²⁵
- 1483) The abuse of rights involved failure to provide notice to Riverside of the Application, the inability to challenge evidence brought in that application that Riverside contends to be fabricated, and the failure to serve Riverside with the Judicial Order.¹⁵²⁶ In addition, Expert Gutierrez notes that the Attorney General acted arbitrarily and unfairly in appointing itself as the Trustee over HSF rather than appointing a neutral third party in the manner set out in Nicaraguan legal practice.¹⁵²⁷ The obvious conflict of interest and unfairness of having Nicaragua in charge of Riverside's main asset in the context of an international dispute that precipitated the Judicial Order is evident to Expert Gutierrez.¹⁵²⁸
- 1484) Expert Gutierrez describes the effect of the Judicial Order as creating a *de jure* change in title over HSF¹⁵²⁹ (which accomplished the objective that

¹⁵²²Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (C-0284-SPA-ENG).

¹⁵²³ Application for Urgent Precautionary Measures for appointment of Judicial Depository November 30, 2021, Section entitled Petition at p. 10 (C-0253-SPA-ENG).

¹⁵²⁴Application, Fact III, at p. 4 (C-0253-SPA-ENG).

¹⁵²⁵ Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 106-107 (CES-06).

¹⁵²⁶ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 104 and ¶107.(CES-06).

¹⁵²⁷ Expert Witness Statement of Renaldy J. Gutierrez at ¶67 (CES-06).

¹⁵²⁸ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 67 and ¶ 70. Gutierrez at ¶ 67 and ¶ 70 (CES-06).

¹⁵²⁹ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 104 (CES-06).

Congressman Castro sought in July 2018) as well as a *de facto* deprivation effect.¹⁵³⁰

- 1485) Melva Jo Winger de Rondon, the owner of 100% of the member units of Riverside noted in her Reply Witness Statement that one of the effects of the Judicial Order was to prevent Riverside from being able to raise money by obtaining debt finance and pledging HSF as collateral.¹⁵³¹ INAGROSA's external CFO Russ Welty confirms that INAGROSA pledged HSF as collateral to the LAAD for its 1 million dollar loan for worker housing at HSF that was paid off by 2016.¹⁵³²
- 1486) The Judicial Order made it impossible for INAGROSA to post HSF as collateral for any loans. This abusive act was yet another means to limit Riverside and INAGROSA's financial capacity during the arbitration. Nicaragua attempted to rely upon the financially limiting effects of judicially freezing Riverside's main underlying asset and then audaciously relied on this wrongful action to claim that HSF was now an "illiquid asset". This is part of the basis for Nicaragua's vexatious October 2023 Security for Costs Motion.¹⁵³³
- 1487) Together, the measures of Nicaragua's Attorney General are deeply troubling to the rule of law as a whole. They demonstrate an ongoing systemic approach Nicaragua has taken since the original occupation.
- 1488) There is a relationship between these internationally wrongful acts that occurred in 2021 and Nicaragua's role in the invasion and occupation of HSF. This role is addressed through the international law concept of composite acts.
- 1489) ASRIWA Article 15 deals with the identification and temporal effect of composite acts. Article 15 provides:

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

¹⁵³⁰ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 99 (**CES-06**).

¹⁵³¹ Witness Statement of Melva Jo Winger de Rondon REPLY-ENG at ¶ 39 (**CWS-08**)

¹⁵³² Witness Statement of Russell (Russ) Welty – REPLY-ENG at ¶ 75 (**CWS-11**). See also Witness Statement of Carlos Rondon – Reply- ENG at ¶137 (**CWS-09**), where Mr. Rondon discusses the historic use of HSF as collateral for finance for INAGROSA.

¹⁵³³ Nicaragua's Security for Costs Application, October 4, 2023, at 47 (**C-0573-ENG**).

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

1490) The International Law Commission comments on the nature of composite acts stating

“[w]hile composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation.”¹⁵³⁴

1491) A composite breach extends over a period, starting with the first act or omission and lasting for as long as these events are repeated and remain in non-conformity with the international obligation. Composite acts are materialized as a breach when the last of the acts or omissions necessary to constitute a wrongful act under the treaty occurs.

1492) However, the CAFTA provides a special rule to assist with the computation of damages arising from expropriation. Article 10;7(2)(c) provides that the fair market compensation for expropriation shall not “reflect any change in value occurring because the intended expropriation had become known earlier.” This CAFTA provision sets the valuation date at June 16, 2018, the date of the first invasion.

1493) ARSIWA Article 15 provides that the various separate acts considered above are linked. CAFTA Article 10.7(2)(b) provides specific compensation instructions that this Tribunal is to not reflect any change in value occurring because the intended expropriation had become known earlier.

1494) Thus, the valuation date for the expropriation caused to Riverside through the 2021 measures is the same as all other expropriations in this claim. That date is June 16, 2018 – the date of the invasion.

f) Conclusions On the Seizure

1495) The Judicial Order transferred the essential elements of title from the rightful owner, INAGROSA, to Nicaragua. INAGROSA had the title in name alone. Having title but not having the essential elements of private property ownership has long been established as constituting creeping expropriation.

1496) Nicaragua took full possessory title to the lands and other ancillary rights such as effective rights to alienation and hypothecation.

¹⁵³⁴ ARSIWA Art 15 and commentary (9) **(CL-0017-ENG)**.

1497) This was a substantial deprivation of property by any standard.

7. Facts Demonstrating Expropriation

- 1498) The invasions led by the occupiers, the National Police, and the other government officials resulted in the outright seizure of HSF.
- 1499) Nicaragua admits that it has taken total control of the HSF as recently as 2021, yet it refused to return HSF to Inagrosa unconditionally.¹⁵³⁵
- 1500) HSF was looted of items of value: the avocado crop was left in a condition where it was lost, including the Hass avocado tree plantation; and the contents of the nurseries were destroyed.¹⁵³⁶ Valuable farm equipment and infrastructure was looted and destroyed.¹⁵³⁷ The corporate officers were looted and ransacked, and the corporate records destroyed.¹⁵³⁸ The protected ecological reserve was deforested and destroyed putting wildlife and biodiversity at risk.¹⁵³⁹
- 1501) As discussed in the sections above, Nicaragua engaged in a non-compensated expropriation of HSF. Because of the operation of the CAFTA Article 10.4 MFN obligation and the better treatment Nicaragua provided to investors from the Russian Federation and investments of investors from the Russian Federation, it makes no difference whether the expropriation was a direct (*de jure*) or indirect (*de facto*) expropriation.
- 1502) Nicaragua engaged in *de jure* and *de facto* expropriations concerning HSF. As discussed above, the direct vs indirect taking issue is a distinction without any difference.
- 1503) The expropriation at HSF was unlawful. Nicaragua failed to comply with the four necessary obligations for a lawful taking.
- a) This was not a taking for a public purpose,
 - b) The actions were arbitrary and discriminatory

¹⁵³⁵Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe, September 9, 2021 (**C-0116-ENG**); Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 (**C-0018-ENG**)

¹⁵³⁶Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 96-98, (**CWS-01**).

¹⁵³⁷Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 95-97 (**CWS-02**).

¹⁵³⁸Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 99-100 (**CWS-01**).

¹⁵³⁹Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 10,233 (**CWS-01**).

- c) There was no due process, the measures were non-compliant with the obligations in CAFTA Article 10.5, and
 - d) no payment of fair market compensation was made for the taking.
- 1504) As a result, this was an unlawful expropriation.
- 1505) Riverside suffered considerable damage arising from the actions of Nicaragua. This damage is reviewed in the Damages Section below.

b) Improper Purpose

- 1506) The definition of public purpose is broad.
- 1507) The burden to establish that the taking for a public purpose falls on the Respondent. Nicaragua cannot meet that burden in these circumstances. Nicaragua asserts no public purpose for the taking because it wrongfully denies that it ever engaged in any kind of taking.

8. Arbitrary and discriminatory Treatment, Failure to Provide Due Process and Fair and Equitable Treatment

- 1508) Taking may not be arbitrary or discriminatory. Given the circumstances of this outright seizure, both the due process and arbitrary principles are interrelated and co-determinative.
- 1509) Nicaragua National Assembly Congressman Edwin Castro acknowledged and recognized the actions of the occupiers during his meeting with them in July 2018. He assured the occupiers of HSF that the government would find funds to purchase the property at HSF from its legal owners. Presumably, such an action would have been taken pursuant to the rule of law under the Nicaraguan expropriation law.
- 1510) As noted in the Memorial, Nicaragua has an expropriation law that it could have invoked to nationalize the lands at HSF.¹⁵⁴⁰ An expropriation process was set out under that domestic law that was not followed in this claim.
- 1511) But instead, Nicaragua took no legal action in 2018 under its expropriation law. As addressed in Part IV, Nicaragua put itself on the legal title of HSF in 2021 through egregious methods, involving the use of false evidence and an abuse of rights.¹⁵⁴¹

¹⁵⁴⁰Expropriation Law (Decree No.229), March 9, 1976 (**C-0249-SPA**).

¹⁵⁴¹ This theft of title is addressed in the Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 75-77 and the abuse of rights at ¶¶ 105-107 Gutierrez at ¶¶ 75-77 and the abuse of rights at ¶¶ 105-107 (**CES-06**).

- 1512) Congressman Castro instructed the occupiers to continue their illegal occupation of the land that he acknowledged was privately owned. These measures were confirmed in internal police records sent by Jinotega National Police Commissioner Castro to his superiors on July 31, 2018.¹⁵⁴²
- 1513) The Tribunal in *Procedural Order No 4* already confirmed that Nicaragua engaged in a violation of due process regarding its failure to provide notice of the Judicial Order to Riverside.¹⁵⁴³ In addition to that due process violation, Nicaragua engaged in other serious fairness violations.
- a) Nicaragua failed to give notice of the application process to Riverside.
 - b) Nicaragua failed to add INAGROSA as a party to the application.
 - c) Nicaragua offered and relied upon false evidence claiming an explicit refusal of an offer to reoccupy HSF. This not only included mischaracterization of the September 9, 2021 correspondence but wholesale fabrication of evidence purportedly obtained from counsel for Riverside.
 - d) This foundational unfairness of this false testimony was aggravated by Nicaragua's failure to give notice to Riverside or INAGROSA, which means that the fabricated evidence would go to the Nicaraguan courts unchallenged.
- 1514) Nicaragua did not use lawful measures to expropriate HSF. Instead, Nicaragua relied on false evidence and a secret judicial process.
- 1515) INAGROSA lost its possession of HSF. It also lost its exclusive legal title to HSF and its exclusive ancillary property rights associated with ownership such as the ability to use it as collateral or to sell HSF. INAGROSA has no possession of land.
- a) No one can profit from their own wrong.**
- 1516) The Latin phrase "*nullus commodum capere de sua injuria propria*" means that "no one can be allowed to take advantage of his own wrong". Bin Cheng confirms that this is a general principle of international law.¹⁵⁴⁴

¹⁵⁴² Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA**).

¹⁵⁴³ Riverside Coffee *Procedural Order No. 4* at ¶ 37. The Tribunal notes, "...It appears undisputed that the Court Order was not formally served on the Claimant, which in itself is not in accordance with due process".

¹⁵⁴⁴ Bin Cheng, *General Principles* at 149 (**CL-0028-ENG**); In this circumstance, he references The *Montijo* (1875) 2 Int. Arb. 1421 (**CL-0251-ENG**).

1517) Prof. Cheng also refers to the Permanent Court of International Justice's decision in the *Chorzow Factory* case, where the Permanent Court stated:

It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party had, by some illegal act, prevented the later from fulfilling the obligation in question.¹⁵⁴⁵

In the words of Prof. Bin Cheng, “[n]o one should be allowed to reap advantages from his own wrong”.¹⁵⁴⁶

1518) Prof. Cheng also notes that this same rule applies to situations where a state has been involved in the wrongfulness through “connivance.” In such a case, he says that “case the State is prevented from invoking the breach to the disadvantage of the other party either to found a right or as a defence”.¹⁵⁴⁷

1519) The *Schufeldt* claim came to a similar conclusion, focusing on Guatemala's consistent failure to take any regulatory action against environmental practices taken by Schufeldt before raising the matter in an international arbitration.¹⁵⁴⁸

1520) For greater certainty, the measures taken by Nicaragua that evidence a lack of good faith themselves constitute specific violations of fair and equitable treatment under CAFTA Article 10.5.

b) Lack of Compensation

1521) Nicaragua is required to provide compensation for any expropriation, whether lawful or unlawful, under CAFTA Article 10.7(1). Compensation is required,

¹⁵⁴⁵Case Concerning the Factory at Chorzów, Merits Award, Permanent Court of International Justice, September 13, 1928, PCIJ, Series A, No. 17. At 31 (CL-0249-ENG).

¹⁵⁴⁶Bin Cheng, *General Principles* at 150. (CL-0028-ENG). See also the Roberts Case (CL-0172-ENG), which came to the same conclusion.

¹⁵⁴⁷Bin Cheng, *General Principles* at 151. (CL-0028-ENG). Prof. Cheng also references Yukon Lumber Co. Case (1913) VI RIAA (CL-0252-ENG) and The Montijo (1875) 2 Int. Arb. p. 1421. (CL-0251-ENG)

¹⁵⁴⁸Shufeldt Case (1930) 2 UNRIAA 1079 at p. 1097 (CL-0250-ENG). In *Schufeldt*, Guatemala canceled a concession to extract chicle. One of the contentions put forward when the case was submitted to arbitration was that the claimants used machetes instead of a scratcher to bleed the chicle, in violation of Guatemalan law and regulations. *Held*: “ The Government having never taken any steps to put a stop to this practice which they must have known existed either under the law or by arbitration under the contract, and never having declared the contract canceled therefore, and having recognized the contract all through, and thus making themselves *participats criminis* in such breach (if any) of the law, they cannot now, in my opinion, avail themselves of this contention “ (p. 1097)

even if the taking is for a public purpose, non-discriminatory, and in accordance with due process of law.¹⁵⁴⁹

- 1522) Nicaragua confirms its possession and control over HSF.¹⁵⁵⁰ Riverside has confirmed that Nicaragua had not paid compensation for the taking.¹⁵⁵¹
- 1523) The HSF land invasions constitute an outright seizure of the lands and destruction of INAGROSA's business. Therefore, as outlined in both the Treaty and in the decisions of past cases, Riverside is entitled to compensation.

c) Impact

- 1524) As noted in the Memorial, there has been a *de jure* taking and a *de facto* taking. There is no need to address the impact of a *de jure* taking further. It speaks for itself.
- 1525) With respect to the *de facto* interference, Riverside has no ability to use or enjoy its investment. The occupation resulted in the destruction of INAGROSA's operating revenue-producing assets at HSF. As a result, of the harm to the property, INAGROSA has lost its value.¹⁵⁵²
- 1526) In particular, the long cycle fruit tree Hass avocado plantations have been utterly and rendered without economic value due to the lack of care, and their removal.¹⁵⁵³ Further, the valuable species in the standing forest was rendered valueless due to illegal and ecologically unsustainable logging. This resulted in destroying INAGROSA's ability to sustainably manage and obtain revenue from the forest.¹⁵⁵⁴
- 1527) INAGROSA has lost its initial investment in the avocado project at HSF, as well as all future projected profits. This has resulted in a total loss for Riverside.

¹⁵⁴⁹CAFTA Article.10.7.1(c), **(CL-0001-ENG)**; see also *Marvin Feldman v. Mexico*, Award, 2002 WL 32818521 (December 16, 2002) at ¶ 98. **(CL-0044-ENG)**.

¹⁵⁵⁰Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe, September 9, 2021 **(C-0116-ENG)**.

¹⁵⁵¹Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 231 **(CWS-01)**.

¹⁵⁵²Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 112 **(CWS-02)**; Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 96 **(CWS-01)**; Inventory of damages at Hacienda Santa Fe, August 14, 2018 **(C-0058-SPA)**.

¹⁵⁵³Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 59, 96 **(CWS-02)**; Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 97-98 **(CWS-01)**; Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 31-32 **(CWS-06)**.

¹⁵⁵⁴Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 128 **(CWS-02)**; Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 100, 233 **(CWS-01)**.

1528) As a result, the reality is that Riverside cannot use or enjoy HSF. It has lost its land and has had its business aspirations in the avocado industry virtually destroyed.

d) Duration

1529) The duration of the interference is now more than five years since June 2018. Not only did the occupation make the ability to operate the property impossible, Nicaragua's physical control of the property, confirmed through its judicial order has resulted in a *de jure* taking, and has continued the *de facto* prevention of INAGROSA's control of a destroyed investment.

9. Facts Demonstrating a Breach of Fair and Equitable Treatment

1530) Nicaragua has failed to provide the investments Riverside owned with fair and equitable treatment. This is demonstrated where:

- a) Nicaragua failed to act in good faith. Instead, Nicaragua acted with willful neglect of duty and engaged in an abuse of process and an arbitrary and unfair reliance upon form as part of this abuse of process.
- b) Nicaragua failed to provide due process to Inagrosa.
- c) Nicaragua wrongfully engaged in arbitrary, unfair, and capricious conduct.
- d) Nicaragua failed to consider the legitimate expectations of Inagrosa and its investor, Riverside.
- e) Nicaragua failed to provide full protection and security to Inagrosa.

1531) Riverside's investment in Inagrosa was harmed with respect to the following:

- a) The conspiracy where the State acted to facilitate and assist the paramilitaries in the seizure of the Hacienda Santa Fé and its continued occupation.¹⁵⁵⁵
- b) The failure of the State to protect the legitimate ownership expectations of the foreign investors.
- c) The failure of the State to take steps to remove the unlawful occupiers.¹⁵⁵⁶
- d) The positive steps the State took to arm and equip the occupiers,¹⁵⁵⁷ and

¹⁵⁵⁵Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (CWS-01).

¹⁵⁵⁶Letter from Carlos Rondón to Police Captain William Herrera, August 10, 2018 (C-0012-SPA).

¹⁵⁵⁷Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 129 (CWS-02).

- e) The steps the State took to assist the unlawful occupiers in the taking and continued occupation at HSF.¹⁵⁵⁸
- 1532) The actions and omissions of the state officials during the first invasion of HSF on June 16, 2018, constitute an abuse of rights and a violation of the duty to act in good faith under the obligation of Fair and Equitable Treatment.
- 1533) The police orders Commissioner Castro issued not to evict the paramilitaries from the HSF¹⁵⁵⁹ and to assist in disarming the HSF workers constituted an abuse of rights and a violation of good faith.¹⁵⁶⁰
- 1534) The police continued to act contrary to the principle of good faith when on August 4, 2018, they escorted paramilitary Comandante Cinco Estrellas into HSF.¹⁵⁶¹ This cannot be seen as anything other than a manifest failure to comply with FPS and FET obligations.¹⁵⁶²
- 1535) Nicaragua, through the police force, actively has taken steps to reduce the physical protection of the Investor's investments. They have failed to treat HSF fairly and equitably and have not acted in good faith.

D. International Law Treatment

- 1536) Article 10.5 of the Treaty provides treatment in accordance with customary international law, including Fair and Equitable Treatment ("FET") and Full Protection and Security ("FPS") to the investments of American investors in Nicaragua. The CAFTA Treaty obligation states:
1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by

¹⁵⁵⁸Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 101,129 (CWS-02).

¹⁵⁵⁹Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (CWS-01).

¹⁵⁶⁰Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (CWS-01).

¹⁵⁶¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 49 (CWS-02).

¹⁵⁶² J.F. O'Connor, *Good Faith in International Law* (Dartmouth Press), p. 124. (CL-0011-ENG). Prof. O'Connor defines good faith as, "The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time."

that standard, and do not create additional substantive rights. The obligation in paragraph 1 to 3 provides:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” require each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

1537) Article 10.5 of the CAFTA specifies that Fair and Equitable Treatment includes an:

a. obligation not to deny justice in criminal, civil, administrative adjudicatory proceedings in accordance with the principle of due process.

1538) CAFTA Annex 10-B limits the obligation only to “the customary international law principles that protect the economic rights of aliens.”¹⁵⁶³ Annex 10-B states:

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.¹⁵⁶⁴

1539) FPS has been addressed in detail in a separate discussion in this Reply Memorial above.

1. Nicaragua ignores the effect of the Russian BIT upon FET

1540) Nicaragua’s tactic to rebut Riverside’s demonstration of Nicaragua’s violation of the FET standard contained in CAFTA Article 10.5 is to argue that the legal standard is stricter than what Riverside outlined in its Memorial.¹⁵⁶⁵

¹⁵⁶³CAFTA, Chapter Ten, Annex B (CL-0001-ENG).

¹⁵⁶⁴CAFTA, Chapter Ten, Annex B (CL-0001-ENG).

¹⁵⁶⁵Counter-Memorial at ¶ 325.

1541) Nicaragua's attempt to narrow the legal standard ignores the operation of the MFN obligation in CAFTA Article 10.4 and the more favorable treatment offered by Nicaragua to investors and investments of Investors from the Russian Federation with respect to FET. As a result, there is no need for this Tribunal to entertain Nicaragua's laborious CAFTA-specific FET arguments, as the limitations in the CAFTA simply do not apply.

a) Impact of the Russian BIT

1542) Nicaragua only gives the meaning to FET as stated in CAFTA Article 10.5. but that CAFTA definition is not applicable in the instant case. Nicaragua's meaning fails to consider the critical role Nicaragua's sovereign decisions played to extend better treatment to investments to investors from the Russian Federation under the subsequent Russian BIT. The impact of the Russian BIT profoundly alters the substantive meaning of Nicaragua's obligation.

1543) Nicaragua ignores the operation of the more favorable treatment Nicaragua granted to foreign investors from the Russian Federation, and to their investments in like situations to those CAFTA Party investors, such as Riverside.

1544) As Article 3(1) of the Russian BIT provides a broader definition of fair and equitable treatment than that in the CAFTA.

1545) In Article 3(1) of the Russian BIT, Nicaragua agreed to the following:

Each Contracting Party shall provide in the territory of its State fair and equitable treatment for the investments made by investors of the State of the other Contracting Party in respect of management, maintenance, enjoyment, use or disposal of such investments.¹⁵⁶⁶

1546) The autonomous obligation is based on the ordinary meaning of the treaty wording combined with the typically expressed purpose of BITs as set out by the interpretative rules codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.¹⁵⁶⁷ This is also consistent with the interpretative approach to the CAFTA mandated under CAFTA Article 10.2.¹⁵⁶⁸

¹⁵⁶⁶Russian BIT at ¶ 3(1) (CL-0033-ENG).

¹⁵⁶⁷Vienna Convention on the Law of Treaties. Articles 31 and 32 (CL-0121-ENG).

¹⁵⁶⁸CAFTA Article 1.1.2 provides that the CAFTA is to be interpreted in a manner consistent with international law. CAFTA Article 1.1.1 provides that "the objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency".

- 1547) Due to the operation of the MFN obligation and the 2013 Russian BIT, the definition of FET under the CAFTA has been expanded to the broader and more generous definition under the Russian BIT.
- 1548) CAFTA Annex 10-B sets out interpretative limits upon CAFTA's fair and equitable treatment obligation. However, CAFTA Annex 10-B is not a limitation affecting the current case because of the operation of the MFN Treatment obligation in CAFTA Article 10.4 and Nicaragua's 2013 entry into the Russian BIT, which sets out an autonomous meaning to fair and equitable treatment that is not limited like that in CAFTA Annex 10-B.
- 1549) As a result, in this CAFTA claim, the Tribunal is free to follow the approach to fair and equitable treatment followed by hundreds of other international tribunals around the world. Such unfettered tribunals consider the meaning of the term considering the facts and circumstances of a case.¹⁵⁶⁹ In *Mondev International Ltd v. United States of America*, the Tribunal held:
- A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of a particular case. It is part of the essential business of courts and tribunals to make judgments such as these¹⁵⁷⁰
- 1550) In the Counter-Memorial at paragraph 324, Nicaragua takes the position that its conduct meets the requirements of FET under both the autonomous and the restricted meaning of that standard.¹⁵⁷¹
- 1551) Nicaragua has failed to provide the investments Riverside owned with fair and equitable treatment. This is demonstrated where:
- a) Nicaragua facilitated and assisted the occupiers of HSF during the seizure and ongoing occupation of HSF.¹⁵⁷²
 - b) Nicaragua acted with willful neglect of duty in not sharing advance intelligence of threats to HSF with INAGROSA.

¹⁵⁶⁹Cox J., *Expropriation in International Investment Treaty Arbitration*, (Oxford University Press 2019) p.255. **(CL-0003-ENG)**.

¹⁵⁷⁰*Mondev International Ltd v. United States of America*, Award, October 11, 2002, ¶ 118 **(CL-0006-ENG)**.

¹⁵⁷¹Nicaragua states at Counter-Memorial 324 that "Nicaragua's conduct complied fully with either understanding of the FET standard. Moreover, regardless of the differences that may ultimately exist between an autonomous standard of fair and equitable treatment and the minimum standard under customary international law, the standard of fair and equitable treatment requires that an investor-claimant exceed a very high threshold to show that a State has breached its obligation to accord fair and equitable treatment."

¹⁵⁷²Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 **(CWS-01)**.

- c) Nicaragua engaged in a breach of good faith by not taking executive action to halt the ongoing invasion and subsequent occupation of HSF.¹⁵⁷³
- d) Nicaragua failed to provide due process to Inagrosa.
- e) Nicaragua engaged in arbitrary and abusive acts in violation of FET.

2. Tribunal's existing finding of breach of FET

1552) The Tribunal itself already concluded in *Procedural Order No. 4* that Nicaragua breached due process in handling the Judicial Seizure Order.¹⁵⁷⁴

1553) There is also the issue of fair and equitable treatment and full protection and security. The measures taken by the government in the occupation of HSF, and in the failure to carry out executive functions of the state, such as the actions of district attorneys to carry out investigations and to seek court orders (as was done in other invasions of private property at the same time) not only raises questions of a breach of CAFTA Article 10.5 but also the National Treatment obligation in CAFTA Article 10.2. There is copious evidence to address these violations.

1554) Protecting foreign investors' property from actions attributable to the state is a question of Expropriation itself, or alternatively one of Fair and Equitable Treatment (depending on the effect of the internationally wrongful measures).

1555) The evidence of Professor Justin Wolfe in his First Expert Report identified the direct control of the National Police by President Ortega in carrying out internationally wrongful acts against those in Nicaragua.¹⁵⁷⁵ The Reply Expert Statement of Professor Justin Wolfe considers the further lack of independence of the police and the judiciary.¹⁵⁷⁶ This strategy to destroy the independence of the judicial branch of government is why National Police Chief Diaz (the recipient of the Police Reports from Jinotega National Police Commissioner Castro in this claim) has been sanctioned for human rights abuses by the UK government, the US Government, the Swiss, the EU, and the Canadians.¹⁵⁷⁷

¹⁵⁷³Letter from Carlos Rondón to Police Captain William Herrera, August 10, 2018 **(C-0012-SPA)**.

¹⁵⁷⁴Riverside Coffee *Procedural Order No. 4* at ¶ 37. The Tribunal notes, "...It appears undisputed that the Court Order was not formally served on the Claimant, which in itself is not in accordance with due process".

¹⁵⁷⁵Expert Statement of Prof. Justin Wolfe at ¶¶70, 76 and 78 **(CES-02)**.

¹⁵⁷⁶Reply Expert Statement of Prof. Justin Wolfe at ¶¶95, ¶¶ 123 – 124 and ¶ 15, where Prof. Wolfe quotes the conclusions from the March 7, 2023 Report of the UN Human Rights Committee's Group of Human Rights Experts on Nicaragua (GHREN) finding a lack of independence of the Nicaraguan judicial system. **(CES-05-ENG)**.

¹⁵⁷⁷Edmonson, Catie, U.S. Imposes Sanction on 3 Top Nicaraguan Officials after Violent crackdown, New York Times, July 15, 2018 **(C-0425-ENG)**.

- 1556) Police participation in the wrongdoing in the invasion and occupation at HSF put a focus on Nicaragua's compliance with its FET obligations. To that end, the Tribunal has the written admission of the occupiers to the Attorney General in September 2018, and the written evidence regarding the measures National Assembly Deputy Edwin Castro took in giving succor to the occupiers and extending the occupation with promises that the government would buy HSF.
- 1557) The FET violation has a nexus to the damage the occupation caused. As a result, the quantum of damage for the breach of these obligations is the same as the damage arising from expropriation.

3. The Application and the Judicial Order violated FET

- 1558) Nicaragua's wrongful actions after the issuance of the order (already covered by a finding of breach of due process in *Procedural Order No. 4*)¹⁵⁷⁸ constitute a violation of the CAFTA protections owed to Riverside.
- 1559) A review of the application for the Judicial Order demonstrates a breach of FET through Nicaragua's arbitrary and capricious behavior. This breach is in addition to the unfair legal effects of the Judicial Order, which is discussed separately,
- 1560) Riverside's principal contention is that seeking the Judicial Order was an arbitrary and abusive action and thus in violation of Fair and Equitable Treatment.
- 1561) As a preliminary matter, it is necessary to categorize the nature of the internationally wrongful acts Nicaragua took in connection with the application for the Judicial Order. Internationally wrongful measures taken by the Executive Branch of the government before a judicial order is entered are breaches of FET but are not in themselves denials of justice.
- 1562) International Legal scholar Bert Demirkol addresses such matters in his treatise on Judicial Acts. Professor Demirkol reviews cases and authorities. He states:

Since any judicial act violating international law, e.g., an international treaty provision, is an internationally wrongful act, a judicial act does not need to amount to a denial of justice for it to give rise to international responsibility of the state.

In *Diallo*, the ICJ found that the respondent state had breached the International Covenant on Civil and Political Rights (ICCPR) and the

¹⁵⁷⁸Procedural Order No 4 at ¶37.

African Charter on Human and Peoples' Rights (AfCHPR) by its domestic courts in the exercise of the judicial function; it did not, however, need to find a denial of justice.¹⁵⁷⁹ Although the context was slightly different, the Court in *Avena* found the breach of direct treaty rights of individuals under Article 36 of the *Vienna Convention on Consular Relations* without discussing a potential breach of due process rights or a denial of justice

By the same token, in a Law of the Sea Convention (UNCLOS) dispute, a tribunal found the breach of substantive rules of the UNCLOS, among others, for judicial acts of the respondent state resulting in prolonged detention of the master and the vessel, monetary sanctions and confiscation of the entire cargo. The tribunal was silent on the question of whether these acts amounted to a denial of justice. It seems that it did not require such threshold for state responsibility to arise for judicial acts against explicit treaty obligations under the UNCLOS.

Paulsson explains that '[w]hen national courts misapply international law, they commit substantive violations which should not be called denials of justice; the state [...] incurs direct international responsibility for the violation [...]'¹⁵⁸⁰

1563) Indeed, the full quotation from Jan Paulsson is worth reviewing. Mr. Paulsson says:

When national courts misapply international law, they commit substantive violations which should not be called denials of justice; the state from which they are emanations incurs direct international responsibility for the violation without regard to the branch of government which was involved. Since the acts or omissions of its courts are attributable to the state, their transgressions of international law are those of the state. Nothing is added by giving violations of international law a special appellation only because they are effected by a judicial body.¹⁵⁸¹

1564) Prof. Demirkol also points out that the *Saipem v Bangladesh* Tribunal¹⁵⁸² concluded that the wrongful conduct of the domestic courts amounted to unlawful expropriation. The Tribunal noted that such a breach by a court

¹⁵⁷⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Decision on Merits, 30 November 2010 (2010) ICJ Rep 639) at ¶¶ 75–82 (CL-0248-ENG).

¹⁵⁸⁰ Demirkol, B. (2018). *Judicial Acts and Investment Treaty Arbitration* (Cambridge International Trade and Economic Law). Cambridge: Cambridge University Press. (CL-0239-ENG). See Paulsson, Jan: Denial of Justice in International Law (Cambridge University Press, 2005) at 5. (CL-0240-ENG)

¹⁵⁸¹ Paulsson, Jan: Denial of Justice in International Law (Cambridge University Press, 2005) at 5. (CL-0240-ENG) “

¹⁵⁸² *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Award, 30 June 2009 (CL-0241-ENG).

does not necessitate a finding of denial of justice and, in consequence, a determination that local remedies have been exhausted.¹⁵⁸³

- 1565) As addressed in detail in the Memorial, tribunals have interpreted the scope of Article 10.5 to include several elements, including “regulatory fairness”;¹⁵⁸⁴ “stability of the legal environment” to “avoid sudden and arbitrary alterations of the legal framework”;¹⁵⁸⁵ “the host State to act] in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations” to “act consistently, i.e., without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities” ; and that bad faith “will certainly suffice” to find a violation.¹⁵⁸⁶
- 1566) Prior tribunals have stated that a gross violation [of FET] may occur when an investor is denied an opportunity to be heard or is not given notice.¹⁵⁸⁷
- 1567) The Tribunal has not had the opportunity to consider the effects of lack of notice of the Application and lack of notice of hearing. These elements of the abuse of rights are detailed by Expert Renaldy J. Gutierrez.¹⁵⁸⁸
- 1568) At paragraph 72 of his Expert Report, Nicaraguan law Expert Gutierrez states:

INAGROSA should have had a right of notice to the Application and a right of appeal (opposition) over any decision, including the December 2021 Judicial Order. The failure to notify INAGROSA of the Application and the Judicial Order profoundly was inconsistent with Nicaraguan rules on due process, the rule of law, and fairness.¹⁵⁸⁹

¹⁵⁸³ *Saipem v. Bangladesh* at ¶ 181 (CL-0241-ENG).

¹⁵⁸⁴ *Crompton (Chemtura) Corp. v. Canada*, PCA Case No. 2008-01, Award, 2 August 2010 at ¶ 179 (2008-01, Award, 2 August 2010 at ¶ 179 (CL-0245-ENG).

¹⁵⁸⁵ *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010) at ¶ 232 (CL-0246-ENG).

¹⁵⁸⁶ *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009 at ¶ 296. ARB(AF)/05/2), Award, 18 September 2009 at ¶ 296 (CL-0215-ENG).

¹⁵⁸⁷ *Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1, Submission of the United States at ¶ 40 (CL-0244-ENG)

¹⁵⁸⁸ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 105 and ¶ 107 (CES-06).

¹⁵⁸⁹ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 72 (CES-06). Gutierrez at ¶ 72 (CES-06).

1569) Expert Gutierrez also notes that the lack of notice deeply harmed the substantive fairness rights of Riverside and INAGROSA, the legal owner of HSF:

48) The Attorney General's failure to provide effective notice of the Application to INAGROSA and Riverside had a detrimental effect on the administration of justice and the rule of law in Nicaragua. This failure was the definition of a breach of due process.

49) The absence of notice to INAGROSA, the legal owner of the title to the property, was grossly unfair to INAGROSA's property rights. The absence of notice violated the most basic notions of due process and the rule of law in Nicaraguan¹⁵⁹⁰

1570) This gross unfairness of the lack of a hearing is heightened in this case as the Attorney General relied upon fabricated evidence as a foundation of the Judicial Order. Riverside's (and INAGROSA's) legal security and fairness rights were compromised due to the lack of a right of hearing (called the right of opposition by Expert Gutierrez) directly because of the lack of service and notice.¹⁵⁹¹

1571) The application to the courts was taken by Nicaragua's executive branch. Further, the failure to provide notice to Riverside, a party to the dispute, or to INAGROSA, a necessary party who never was named to the dispute, also are attributable to the Executive branch of Nicaragua's government.

1572) This does not exclude the possibility that the Judicial Branch also may be responsible for internationally wrongful measures. The Memorial discusses evidence on the Nicaraguan judiciary's lack of independence from the Executive Branch, but the issues in contention in this claim do not necessitate such an inquiry given the internationally wrongful actions of the Executive Branch.¹⁵⁹²

b) Nicaragua violated the Customary FET standard

1573) The narrowing of the legal standard is unsupported by most tribunals interpreting it. Instead, the Tribunal should adopt Riverside's articulation of the legal standard, which is supported by the text, follows the longstanding practice of tribunals, and is grounded in customary international law.

¹⁵⁹⁰Expert Witness Statement of Renaldy J. Gutierrez at ¶ 72 (CES-06).

¹⁵⁹¹Expert Witness Statement of Renaldy J. Gutierrez at ¶ 48 and ¶ 49 (CES-06).

¹⁵⁹²IACHR, Nicaragua: Concentration of Power and the Undermining of the Rule of Law at pages 39-40 (C-0192-ENG); See also Expert Statement of Prof. Justin Wolfe at ¶¶ 72-73 (CES-02).

- 1574) Yet, the classic distinction that respondent states in investment treaty cases attempt to draw between the minimum standard of treatment under customary international law (which is enshrined in CAFTA Article 10.5) and the autonomous FET standard is meaningless in this case, given the nature of Nicaragua's conduct.
- 1575) Even if this Tribunal were to apply the most restrictive meaning associated with the CAFTA definition of FET in Article 10.5 (which it should not do), Nicaragua's egregious actions still would fall afoul of its obligations.
- 1576) Nicaragua also seeks to distinguish between the legal standard Riverside articulated under CAFTA Article 10.5 and the customary international law standard. However, the standard Riverside articulated in the Memorial is indeed the legal standard for breaches of FET under customary international law, supported by tribunals' common application of that standard as derived from the *Waste Management* Tribunal's articulation of the standard.
- 1577) Riverside merely asks the Tribunal to apply the same legal standard as applied by several tribunals before it, which has become widely accepted. The *Windstream Canada* Tribunal aptly explains this issue:

The Tribunal agrees that it is in the first place for the party asserting that a particular rule of customary international law exists to prove the existence of the rule. However, in the present case the issue is not whether the relevant rule of customary international law exists. the minimum standard of treatment contained in Article 1105(1) of NAFTA is indeed a rule of customary international law, as interpreted by the FTC in its Notes of Interpretation. The issue therefore, is not whether the rule exists, but rather how the content of a rule that does exist - the minimum standard of treatment in Article 1105(1) of NAFTA - should be established. ***The Tribunal is therefore unable to accept the Respondent's argument that the burden of proving the content of the rule falls exclusively on the Claimant. In the Tribunal's view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence . . .***

. . . .

. . . the Tribunal must rely on other, indirect evidence in order to ascertain the content of the customary international law minimum standard of treatment; the Tribunal cannot simply declare *non liquet*. ***Such indirect evidence includes, in the Tribunal's view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship.***

. . . .

As to the terms used, Article 1105(1) provides that each State party

shall accord to investments of investors of another party “treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Consequently, while keeping in mind that the standard set out in the provision is the customary international law minimum standard of treatment, ***the Tribunal must also take into account the express language of the provision, which refers to “fair and equitable treatment”*** and “full protection and security.” The Tribunal therefore considers that the treatment required under Article 1105 (1) is fair and equitable treatment and full protection and security consistent with the minimum standard of treatment under customary international law. In other words, as stated by the FTC, the treatment required is not “in addition to or beyond” that which is required by the customary international law standard, but one that is in accordance, or consistent, with the standard, while remaining “fair and equitable” and providing “full protection and security.”¹⁵⁹³

1578) The *Windstream* Tribunal's articulation aligns with other NAFTA tribunals' views¹⁵⁹⁴

1579) The Memorial accurately articulates the FET standard under CAFTA Article 10.5. The minimum standard of treatment under international law includes the FET standard, which captures principles of “transparency, the protection of the investor’s legitimate expectations, freedom from coercion and harassment, procedural propriety and due process, and good faith.” The *Waste Management II* tribunal has articulated this oft-repeated standard under NAFTA Article 1105 as including conduct that is:

arbitrary, grossly unfair, unjust, or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome which offends judicial propriety . . . In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”¹⁵⁹⁵

¹⁵⁹³ *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award, 27 September 2016) (emphases added) at ¶¶ 350–351, 356 (CL-0242-ENG).

¹⁵⁹⁴ *Mondev International Ltd. v. U.S.A.*, ICSID Case No. ARB (AF)/99/2, Award, 11 October 2002) at ¶¶ 119, 123, 125 (CL-0006-ENG) (“the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals” and discussing “[a] reasonable evolutionary interpretation of Article 1105(1)”; *ADF v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003) (citing *Mondev*). At ¶ 184 ((CL-0134 -ENG).

¹⁵⁹⁵ *Waste Management, Inc. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/00/3, 2004 WL 3249803 April 30, 2004 at ¶ 98 (CL-0005-ENG).

1580) This accepted articulation of the FET standard by the *Waste Management II* tribunal was recently articulated by the *Nelson* tribunal as follows:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is **arbitrary, grossly unfair, unjust** or idiosyncratic, is **discriminatory** and exposes the claimant to sectional or racial prejudice, or involves a **lack of due process** leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a **complete lack of transparency and candour in an administrative process**. The [t]ribunal agrees with [c]laimant in that the Waste Management standard has been widely accepted and followed by other NAFTA tribunals.¹⁵⁹⁶

1581) For these reasons, the Tribunal should adopt the legal standard Riverside has outlined under CAFTA Article 10.5, which is in line with most of the tribunals' articulation of the correct standard.

1582) For completeness, as noted above, Nicaragua's conduct falls afoul of all possible interpretations of Nicaragua's obligations under CAFTA Article 10.5, even Nicaragua's unduly narrow and restrictive interpretation.

c) Tribunal's existing finding of breach of FET

1583) The Tribunal itself already concluded in *Procedural Order No. 4* that Nicaragua breached due process in handling the Judicial Seizure Order.¹⁵⁹⁷ Regarding the lack of service, the Tribunal notes, "It appears undisputed that the Court Order was not formally served on the Claimant, which in itself is not in accordance with due process."¹⁵⁹⁸

1584) The Tribunal did not have the opportunity to consider the other elements of abuse of rights detailed by Expert Gutierrez, including lack of notice of the Application and lack of notice of hearing by the owner of the land, INAGROSA.¹⁵⁹⁹ The use of fabricated evidence by Nicaragua's Attorney General as a foundation of the Judicial Order was also not challenged because Riverside's (and INAGROSA's) legal security and fairness rights were compromised due to the lack of a right of opposition on account of the lack of service and notice.¹⁶⁰⁰

¹⁵⁹⁶ *Joshua Dean Nelson v. Mexico*, ICSID Case No. UNCT/17/1, Award, 5 June 2020, which in turn cites to *Waste Management II*) (emphases added) at ¶¶ 321–322 (**CL-0243-ENG**).

¹⁵⁹⁷ *Riverside Coffee Procedural Order No. 4* at ¶ 37.

¹⁵⁹⁸ *Riverside Coffee Procedural Order No. 4* at ¶ 37.

¹⁵⁹⁹ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 105 and ¶107 (**CES-06**).

¹⁶⁰⁰ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 54, ¶93 and ¶¶105, 107 (**CES-06**).

- 1585) The International Court of Justice noted in the ELSI case that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.”¹⁶⁰¹
- 1586) In this case, the overwhelming connection of actions relating to making the rule of law ineffective is what breaches the Treaty’s FET standard. Nicaragua’s various breaches of n due process detailed by Expert Gutierrez in themselves are nothing less than shocking. The Attorney-General’s reliance on fabricated evidence before the Nicaraguan courts is egregious and goes directly to good faith and the rule of law. On their own, and certainly together, these acts are opposed to the rule of law itself.
- 1587) These issues are of concern as they are inconsistent with fair and equitable treatment and the full legal protection relevant under the FPS obligation in this arbitration (on account of the more favorable terms in the Russian BIT). The government measures failed to meet these standards in the handling of the occupation of HSF, and ongoing failure to carry out protective functions of the state, such as the actions of district attorneys to carry out investigations and to seek court orders (as was done in other invasions of private property at the same time) and in the measures the Attorney General took with respect to the mishandling of the Application and Judicial Order. These all raise questions of the inconsistency of the breach of CAFTA Article 10.5 but also violations of the National Treatment obligation in CAFTA Article 10.2.
- 1588) Protecting foreign investors’ property from actions attributable to the state is a question of Expropriation itself, or alternatively one of Fair and Equitable Treatment (depending on the effect of the internationally wrongful measures).
- 1589) The evidence of Prof. Justin Wolfe addresses the further lack of independence of the police and the judiciary.¹⁶⁰²
- 1590) Regarding the lack of service, the Tribunal notes, “It appears undisputed that the Court Order was not formally served on the Claimant, which in itself is not in accordance with due process.”

¹⁶⁰¹ Elettronica Sicula SpA (ELSI) (U.S v Italy) [1989] ICJ Rep 15, July 20, 1989, ¶ 128 (**RL-0057**).

¹⁶⁰² Expert Reply Witness Statement of Prof. Justin Wolfe at ¶15 (**CES-05**). Also, Expert Witness Statement of Prof. Justin Wolfe at ¶72.(**CES-02**) which references that the Inter-American Commission on Human Rights already noted the lack of independence of Nicaragua’s National Police Chief Francisco Diaz and the lack of independence of the judicial system. Edmonson, Catie, U.S. Imposes Sanction on 3 Top Nicaraguan Officials after Violent crackdown, New York Times, July 15, 2018 (**C-0425-ENG**). This is a reason that National Police Chief Diaz (the receiver of the Reports from Commissioner Castro in this claim) has been sanctioned for human rights abuses by the UK government, the US Government, the Swiss, the EU, and the Canadians

1591) The Tribunal did not have the opportunity to consider the other elements of abuse of rights detailed by the Expert report. Gutierrez, including lack of notice of the Application and lack of notice of hearing by the owner of the land, INAGROSA.¹⁶⁰³ The Nicaragua's Attorney General's use of false evidence as a foundation of the Judicial Order was also not challenged because Riverside (and INAGROSA) received no notice to oppose and thus their legal security and fairness rights were compromised .¹⁶⁰⁴

1592) Prof. Wolfe has commented in his Expert Reply Witness Statement on the frequent occurrences of reliance upon fabricated evidence by Nicaragua before its courts. Prof. Wolfe, in paragraph 13 of the Expert Reply Witness Statement, refers to the United Nations Human Rights Council Independent Group of Human Rights Experts on Nicaragua ("GHREN") who examined this issue and concluded:

The GHREN continued to address foundational abuses of due process and fairness by the state through a "concerted and systematic manner" by government institutions such as the Police, the Public Prosecutor's Office, and the Judiciary. This included reliance on fabricated evidence or on the interpretation of legislation. The Report notes:

113. The GHREN found that the justice system became a structured and organized mechanism to detain real or perceived opponents, acting in a concerted and systematic manner, and to accuse them, prosecute them, and execute the sentences against them, on the basis of legal processes based on *ad hoc* fabricated evidence, or on legislation interpreted and/or designed by the National Assembly in order to execute instructions from the Presidency of the Republic.

114. The GHREN documented how various government institutions, including the Police, the Public Prosecutor's Office, and the Judiciary, participated in the commission of arbitrary detentions and violations of due process in an articulated manner.¹⁶⁰⁵

1593) Nicaragua has relied on this same fabricated evidence in this arbitration. For example, Nicaragua says in Counter-Memorial paragraph 373 that "Since 2022, Nicaragua refers to Inagrosa's remarkable and continuing refusal to accept back its undisputed property." Jinotega Attorney General Diana

¹⁶⁰³Expert Witness Statement of Renaldy J. Gutierrez at ¶ 105 and ¶107 (CES-06).

¹⁶⁰⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶ 54, ¶93 and ¶¶105, 107 (CES-06).

¹⁶⁰⁵ Expert Reply Witness Statement of Prof. Justin Wolfe at ¶14 (CES-05). He was referencing the Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 at ¶114 (C- 0535-ENG).

Gutierrez, in paragraph 79 of her Witness Statement, directly relies on fabricated evidence when she states:

Furthermore, the Attorney General's Office, through its legal representatives, informed the owners of this situation on September 9, 2021, offering them to take possession of the Hacienda. However, the owners refused to receive the property at the time.¹⁶⁰⁶

1594) The record before this Tribunal is considered at length in this Reply Memorial. There was no refusal in 2021. Indeed, there was not even a comprehensive offer in 2021. Nicaragua could not even explain the content of its "offer" eighteen months later, in February 2023 and had to seek instruction from a government commission.¹⁶⁰⁷

1595) The evidence of Nicaragua's reliance on fabricated evidence before its local courts, as addressed in Part IV of this Reply Memorial, and Nicaragua's subsequent reliance on the fabricated refusal in this arbitration, is consistent with the similar fact evidence addressed by the independent experts. Such acts are a breach of the FET standard, and a failure of Nicaragua to carry out its CAFTA obligations regarding this arbitration in good faith (as required by the CAFTA itself and Article 26 of the *Vienna Convention of the Law of Treaties*¹⁶⁰⁸), and an abuse of process upon this Tribunal.

1596) Police participation in the wrongdoing in the invasion and occupation at HSF put a focus on Nicaragua's compliance with its FET obligations. To that end, the Tribunal has the written admission of the Occupiers to the Attorney General in September 2018, and the written evidence regarding the measures National Assembly Deputy Edwin Castro taken by took in giving succor to the occupiers and extending the occupation with promises that the government would buy HSF.

a) Good Faith

1597) The principle whereby a state acts in good faith and acts reasonably in addressing disturbances caused by private actors has been reaffirmed on multiple occasions.

1598) It has been reaffirmed by academics such as Prof. James Crawford:

In the case of localized riots and mob violence, substantial neglect to take *reasonable* precautionary and preventative action and inattention

¹⁶⁰⁶ Witness Statement of Jinotega Attorney-General Diana Gutierrez at ¶73 (RWS-01)

¹⁶⁰⁷ Email Gonzalez to Appleton "Hacienda Santa Fe" February 6, 2023 (C-0428-ENG).

¹⁶⁰⁸ Vienna Convention on the Law of Treaties, (CL-0121-ENG) also duplicated by Respondent as (RL-0113)

amounting to outright indifference or connivance on the part of responsible officials may create responsibility for damages to foreign public and private property in the area.¹⁶⁰⁹

- 1599) Professor Crawford's articulation of responsibility draws attention to the elements of a failure to take reasonable steps, as well as a lack of good faith on the part of the state comparable to "indifference or connivance."¹⁶¹⁰
- 1600) The measures taken by the government in the occupation of HSF, and in the failure to carry out executive functions of the state, such as the actions of district attorneys to carry out investigations and to seek court orders (as was done in other invasions of private property at the same time) not only raises questions of a breach of CAFTA Article 10.5 but also the National Treatment obligation in CAFTA Article 10.2. There is copious evidence to address these violations.
- 1601) The role of the National Police in participating in the wrongdoing changes the focus of the legal wrongs from FPS to FET and Expropriation.
- 1602) Direct police involvement is in connection to Nicaragua's Police Captain Herrera's admission of advance intelligence of harm to occur at HSF.¹⁶¹¹ None of that intelligence was shared with the affected party, INAGROSA, violating long-established international law obligations. This wrongfulness is directly attributed to Nicaragua.
- 1603) Other examples include:
- a) The measures of National Assembly Deputy Edwin Castro, who instructed the occupiers to remain in occupation in July 2018
 - b) The written admission of the Occupiers to the Attorney General in September 2018, and the written evidence regarding National Assembly Deputy Edwin Castro.

4. Protection Against Arbitrariness

- 1604) The fair and equitable treatment obligation also includes the obligation to protect arbitrariness with FET.

¹⁶⁰⁹Crawford, J., *Brownlie's Principles of Public International Law*, (Oxford University Press 2008), page 551 (CL-0010-ENG); citing Ziat, Ben Kiran (1924) 2 RIAA 729 (CL-0253-FRE); Youmans (1926) 4 RIAA 110 (C-153-ENG); Noyes (1933) 6 RIAA 308; (CL-0254-ENG) Pinson (1928) 5 RIAA 327 (CI-0255-ENG); *Sarropoulos v Bulgaria* (1927) 4 ILR 245. (CL-0256-ENG)

¹⁶¹⁰Crawford, J., *Brownlie's Principles of Public International Law*, (Oxford University Press 2008), page 551 (CL-0010-ENG).

¹⁶¹¹Witness Statement of Police Sub-Commissioner W. Herrera-Counter-Memorial-ENG ¶ 21 (RWS-03).

- 1605) The International Court of Justice noted in the ELSI case that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.”¹⁶¹²
- 1606) In this case, the overwhelming connection of actions relating to making the rule of law ineffective is what breaches the Treaty’s FET standard.
- 1607) The Attorney-General’s reliance on fabricated evidence before the Nicaraguan courts is egregious and goes directly to good faith and the rule of law. On their own, and certainly together, these acts are opposed to the rule of law itself.

5. Facts applied to the law

- 1608) Nicaragua has failed to provide the investments Riverside owned with fair and equitable treatment. This is demonstrated where:
- a) Nicaragua facilitated and assisted the occupiers of HSF during the seizure and ongoing occupation of HSF.¹⁶¹³
 - b) Nicaragua acted with willful neglect of duty in not sharing advance intelligence of threats to HSF with INAGROSA.
 - c) Nicaragua engaged in a breach of good faith by not taking executive action to halt the ongoing invasion and subsequent occupation of HSF.¹⁶¹⁴
 - d) Nicaragua failed to provide due process to Inagrosa and to Riverside before its courts and in this Arbitration..
 - e) Nicaragua failed to consider the legitimate expectations of Inagrosa and its investor, Riverside.
- 1609) The failure of Nicaragua to follow these foundational expectations of basic legality resulted in an abuse of process and an arbitrary and unfair reliance upon form over substance which formed a part of this abuse of process.

E. National Treatment

- 1610) CAFTA Article 10.3 establishes a non-discrimination norm of National Treatment. CAFTA Article 10.3 prescribes the treatment the CAFTA Parties are to provide to the investors of another Party and their investments. The CAFTA National Treatment obligation states:

¹⁶¹² Elettronica Sicula SpA (ELSI) (U.S v Italy) [1989] ICJ Rep 15, July 20, 1989, ¶ 128 (RL-0057).

¹⁶¹³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (CWS-01).

¹⁶¹⁴ Letter from Carlos Rondón to Police Captain William Herrera, August 10, 2018 (C-0012-SPA).

Article 10.3: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

- 1611) CAFTA Article 10.3 obliges the CAFTA Parties to treat investors from other CAFTA Parties and their investments as favorably as it treats domestic investors and their investments operating in like circumstances.
- 1612) The purpose of CAFTA Article 10.3 is to ensure that investors and the investments of investors from other CAFTA receive treatment equivalent to that provided to the most favorably treated Nicaraguan investor or its investment. The purpose of the obligation is clear: it is to ensure that the Nicaraguan government does not provide better treatment to locals than that provided to foreigners.
- 1613) CAFTA Article 10.4 on MFN Treatment provides a similar obligation to provide investors and their investments with the best treatment provided to investors of a third-party state.
- 1614) There are three elements which an investor or investment needs to establish for a CAFTA Party to be held in breach of CAFTA Article 10.3.
- a) The foreign investor or investment must be in like circumstances with local Investor or investments.
 - b) The CAFTA Party treated the foreign investor or investment less favorably than it treated local investors or investments; and

- c) The treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
- 1615) Nicaragua treated the Investor and its Investment less favorably than domestic investors operating in like circumstances. Other investors or Investments in like circumstances were treated more favorably.
- 1616) Each of the ways in which Nicaragua treated the Investor and its Investment less favorably than other Nicaraguan investors and investments in like circumstances constitutes a violation of CAFTA Article 10.3.

1. Nicaragua's Response does not address the test.

- 1617) National Treatment and Most Favored Nation are similar in structure. Nicaragua has set out a common three-part test for National Treatment (and MFN Treatment) in paragraph 388 of the Counter-Memorial. According to Nicaragua, there are three elements.

388. In this context, the standard for a national or MFN treatment claim is the same and includes three elements: (i) other investors or their investments must have been in like circumstances with Claimant or Inagrosa; (ii) Claimant or Inagrosa must have received a certain treatment from the State; and (iii) Claimant or Inagrosa must have been treated less favorably than the comparators in like circumstances.

- 1618) Nicaragua relies upon NAFTA *UPS* Tribunal for this three-part test in footnote 642.¹⁶¹⁵ However, the test that the *UPS* Tribunal stated in Paragraph 83 is not the same as that articulated by Nicaragua. The *UPS* Tribunal stated:

83. The Tribunal notes that there are three distinct elements which an investor must establish in order to prove that a Party has acted in a manner inconsistent with its obligations under article 1102. These are:

- a) The foreign investor must demonstrate that the Party [Canada] accorded treatment to it [the Claimant or UPS Canada] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

¹⁶¹⁵*United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award, May 24, 2007, ¶ 83 (CL-0015-ENG).

b) The foreign investor or investment must be in like circumstances with local investors or investments; and

c) The NAFTA Party must treat the foreign investor or investment less favorably than it treats the local investors or investments.

1619) Nicaragua duplicated the likeness element (the third factor) with what was set out as the first element of the *UPS* national treatment Test. The first element addresses whether the measure affected the establishment, acquisition, expansion, management, conduct, operation, and sale of the investment or investor.

1620) Further, Nicaragua has advanced an improperly narrow definition of likeness for consideration of like government treatment. In Counter-Memorial paragraph 390, Nicaragua claims that when, considering better treatment provided by the state, that the only like circumstances could arise from government actions which were provided to a class of private landowners, rather than to government actions taken to protect all landowners (without regard to whether the land is owned by the public or private sector).

1621) Nicaragua confuses claims that Riverside must demonstrate that it “competes” to acquire the land for there to be a national treatment obligation.

1622) Further, Nicaragua claims that national treatment would apply only to situations in which Nicaragua had seized the private land. Nicaragua states in paragraph 390:

Ownership or possession of land is an extremely broad category. But even then, it would only be relevant if the State had seized the property.

1623) Nicaragua does not show any difference in the nature or quality of land ownership between holders who are governmental or private. Nicaragua does not explain how this distinction is relevant to the overall question of how the state carries out its legal duties to protect property.

1624) The Tribunal in *Occidental Petroleum* well considered this question.¹⁶¹⁶ The Investor considered this issue in paragraph 607 of its Memorial as follows:

607. Likeness needs to be considered in the circumstances. Where the question of likeness arises in the context of government regulations, likeness requires the Tribunal to consider all of those who are competing for similar regulatory permissions. This was the approach

¹⁶¹⁶*Occidental Production Company v. Republic of Ecuador*, UNCITRAL Arbitration Rules, Final Award, 2004 WL 3267260 (July 1, 2004) (CL-0058-ENG)

taken by the NAFTA Tribunal in *Grand River*, and the approach taken in *Occidental Petroleum*.¹⁶¹⁷

- 1625) Nicaragua simply ignores when treatment must be considered to be like by all those entitled to the treatment. Thus, the class for likeness is those who have title to land.
- 1626) The test simply is whether the state provides treatment that is more favorable once likeness has been established.
- 1627) In this CAFTA claim, all those lawful possessors of private land in Nicaragua, like INAGROSA, are in like circumstances. This is the class of investments and investors whose treatment needs to be considered.
- 1628) In its Counter-Memorial, Nicaragua also does not bring to the Tribunal's attention the detailed explanation of the test set out in the Separate Statement by Arbitrator Ron Cass in that same *UPS Award*. Prof. Cass gave significant attention to the way a Tribunal should follow national treatment analysis.
- 1629) When considering the element of likeness, Prof. Cass examined the nature of the treatment.

59. Instead, NAFTA, like other international agreements designed to vouchsafe foreign investment, requires each Party to accord treatment to the investors and investments of other NAFTA Parties that is not less favorable than the treatment it grants its own investors and investments. That requirement plainly extends beyond formal parity. It commands an effective parity of foreign and domestic investors and investments.

60. Such parity does not exist where a NAFTA Party favors a national champion over other investors and investments. The violation is not mitigated by the existence of discrimination against other domestic investors or investments as well as against foreign investors and investments. It is, as UPS urges, enough to establish that a NAFTA Party has given one or more of its investors or investments more favorable treatment.¹⁶¹⁸

- 1630) Nicaragua does address the element of impairments to the operations of the investment in Counter-Memorial paragraph 397. Here, Nicaragua simply

¹⁶¹⁷Footnote 92 6 stated “ Grand River Enterprises Six Nations, Ltd. et al. v. United States of America, Award (January 12, 2011) at ¶167 (CL-0146-ENG) “ and footnote 927 stated: Occidental Production Company v. Republic of Ecuador, Final Award, (July 1, 2004) at ¶ 173 (CL-0058-ENG).

¹⁶¹⁸USP Award, separate statement of Arbitrator Ron Cass as ¶¶ 59 – 60 (CL-0015-ENG).

disclaims responsibility by claiming that it “did not impair the Claimant’s investment in any way.”¹⁶¹⁹

1631) Finally, Nicaragua addresses the fundamental issue of better treatment in paragraph 398. Here Nicaragua simply states that:

With respect to the third element, in both cases referred to by Prof. Wolfe, the illegal occupants were removed once the situation had eased, and the risk of violence was reduced, i.e., the illegal occupants were not removed at the height of the widespread unrest and civil strife that Nicaragua experienced in 2018. This is consistent with the peaceful and de-escalatory approach that the government took at Hacienda Santa Fé, and by which the police started to take steps to relocate the illegal occupants once the risk of violence was reduced.

1632) Nicaragua adds that it provided treatment to INAGROSA as favorable as that given to others. To this explanation, Nicaragua notes:

Third, the invasion of Hacienda Santa Fé by nearly over 300 people in June 2018 was led by heavily armed ex-members of the Resistencia Nicaragüense. Nicaragua entered peace accords with ex-members of the Resistencia Nicaragüense in 1990. Taking a non-violent approach in this context was especially important given Nicaragua’s recent history.

1633) Again, Nicaragua has attempted to misdirect the Tribunal. As has been pointed out repeatedly in this Reply Memorial, the persons who led the invasion were all supporters of the Nicaraguan government. They were either Sandinista supporters or former members of the Nicaraguan Resistance who were in alliance with the Nicaraguan government. Indeed, as pointed out repeatedly, the former Nicaraguan Resistance leaders wrote to the National Attorney proclaiming their fealty and direction by President Ortega and Vice President Murillo.

1634) Nicaragua also claims that it had to pay special attention to the former members of the Nicaraguan Resistance because Nicaragua entered a peace accord with them in 1990. Again, this is an entirely absurd argument designed to mislead the Tribunal. Professor Justin Wolfe addresses the history of the Nicaraguan Resistance in his Reply Expert Statement.¹⁶²⁰ He concludes that the (now former) Nicaraguan Resistance has not been opposed to the government since 2006.¹⁶²¹

¹⁶¹⁹Counter-Memorial at ¶ 397

¹⁶²⁰ Expert Statement of Prof. Justin Wolfe -Reply ENG (CES-05).

¹⁶²¹ Expert Statement of Prof. Justin Wolfe -Reply ENG at ¶ 52 (CES-05).

1635) Prof. Wolfe discusses the history and notes:

Prof. Héctor Cruz Feliciano describes the political alliance with its former enemies, the Contras, as a strategy of reconciliation meant to gain and retain power:

The second key alliance brokered by Ortega was with the former counterrevolutionary forces (popularly known as Contras) grouped in the Nicaraguan Resistance Party.... In his third bid for reelection Ortega gathered that there was no better way to remove the prospect of war from people's fears than to co-opt the former Contras into the Sandinista project. The first step in this direction was to invite the former Contra leader Jaime Morales Carazo to join Ortega as vice-presidential candidate on the FSLN ticket. Morales Carazo had been not only the civilian face of the Contras in the 1980s but also their chief negotiator during the peace conversations and a founding member of the Liberal Constitutionalist Party, one of the main contenders in the 2006 election.¹⁶²²

1636) The former Nicaraguan Resistance were in active alliance with the government at the time of the invasion. Prof. Wolfe states:

Since 2006, the Nicaraguan Resistance Party has been in a political alliance with the Sandinista Party. Rather than being opponents, the Nicaraguan Resistance Party is working under the direction of Sandinista President Daniel Ortega and Vice President Rosario Murillo.¹⁶²³

1637) As noted by Prof. Wolfe in his Reply Expert Statement:

Assessing the evidence leads to the reasonable conclusion that the occupation was not carried out by opponents of the State but by those controlled by or affiliated with the government of Nicaragua.¹⁶²⁴

1638) The Tribunal is respectfully cautioned against giving credence to Nicaragua's representations regarding the purported threat posed by the former Nicaraguan Resistance. The characterizations presented by Nicaragua are fundamentally at odds with the documented historical relationship between the government and the former Resistance. Far from adversaries, the former Nicaraguan Resistance were, in fact, partners and allies of the government.

¹⁶²² Expert Statement of Prof. Justin Wolfe -Reply ENG at ¶ 50 (CES-05). He cites Hector Cruz Feliciano, 'The Perils of Reconciliation: Achievements and Challenges of Daniel Ortega and the Modern FSLN', (2019) 46 Latin American Perspectives 250 (C-0558-ENG).

¹⁶²³ Expert Statement of Prof. Justin Wolfe -Reply ENG at ¶ 52 (CES-05).

¹⁶²⁴ Expert Statement of Prof. Justin Wolfe -Reply ENG at ¶ 119 (CES-05).

This alliance is well-established and negates the assertions of danger as advanced by Nicaragua in this proceeding.

2. Likeness

- 1639) The comparison between the circumstances of foreign and domestic investments needs only be “like”. There can be many differences in circumstances, but once the threshold of likeness is met, a comparison of treatment follows.
- 1640) Likeness needs to be considered in the circumstances. Where the question of likeness arises in the context of government regulations, likeness requires the Tribunal to consider all of those who are competing for similar regulatory permissions. This was the approach taken by the NAFTA Tribunal in *Grand River*,¹⁶²⁵ and the approach taken in *Occidental Petroleum*.¹⁶²⁶
- 1641) In this CAFTA claim, all those lawful possessors of private land in Nicaragua, like Inagrosa, are in like circumstances. This is the class of investments and investors whose treatment needs to be considered.
- 1642) For the purposes of National Treatment and MFN Treatment, all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to INAGROSA.
- 1643) The existence of a difference does not make one investor unlike another for the purposes of like circumstances. That is why the words used in the CAFTA are “like circumstances,” not “identical circumstances.”
- 1644) As the GATT has recognized, judgment needs to be applied.¹⁶²⁷ And the interpretation and application of the test of likeness must further the objectives of equality of competitive opportunity.¹⁶²⁸ In other words, the analysis is, in substance, a matter of functional common sense.

¹⁶²⁵ Grand River Enterprises Six Nations, Ltd. et al. v. United States of America, Award (January 12, 2011) at ¶167 (**CL-0146-ENG**).

¹⁶²⁶ Occidental Production Company v. Republic of Ecuador, Final Award, (July 1, 2004) at ¶ 173 (**CL-0058-ENG**).

¹⁶²⁷United States - Measures Affecting Alcoholic and Malt Beverages DS23/R, GATT Panel Report, (June 19, 1992) BISD 395/206 at ¶¶ 5.23 – 5.26 (**CL-0139-ENG**).

¹⁶²⁸The words “treatment no less favorable” were used in NAFTA Article 1102 as their meaning had been considered extensively in GATT jurisprudence. This jurisprudence had interpreted “treatment no less favorable” as requiring equality of competitive opportunities. See, for example, *United States - Taxes in Petroleum and Certain Imported Substances*, Report of the Panel 1987 WL 421960 (G.A.T.T.) (June 17, 1987) at ¶ 5.2.2 (**CL-0140-ENG**); *-C Asbestos - AB Report*, at ¶ 99 (**CL-0141-ENG**).

1645) Nicaragua advocates for an artificially limited "likeness" concept. Nicaragua proposes a constrained definition limited to those receiving preferential treatment linked to private land invasions. In the words of Nicaragua:

The proper question for any discrimination analysis is thus how the State responded to similar private land invasions during the 2018 disturbances. This is a fact-intensive enquiry that needs to consider the circumstances of the investors in question.¹⁶²⁹

1646) As noted in this discussion of likeness, such a definition does not accord with the jurisprudence on national treatment, nor the ordinary meaning of the words in the Treaty. Riverside challenges this narrow interpretation as not being consistent with the meaning of likeness under the Treaty,

3. Treatment No Less Favorable

1647) CAFTA Article 10.3's second element is the obligation to accord a foreign investor and its investments with "treatment no less favorable" than that provided to domestic investors in like circumstances.

1648) The context and objectives of the CAFTA make it clear that CAFTA Article 10.3 requires the CAFTA Parties to provide equality of competitive opportunities. The notion of equality of competitive opportunities allows for different treatment that is not less favorable treatment. It allows a regulatory process to produce different outcomes, if the process demonstrably treats the parties with evenhandedness, to ensure that investments are granted equal opportunities. To be evenhanded, the treatment need not be identical. Neither does the result need to be equal. But the opportunities must be equal.

1649) In footnote 397, Nicaragua suggests that the issue of nationality-based discrimination is essential to national treatment. The Investor addressed this issue in the Memorial. Nationality-based discrimination is not a requirement.

1650) The text of CAFTA Article 10.3 makes clear that it requires a difference of nationality between the more favorably treated local investor or investment and the Claimant investor or its investment. But it contains no requirement of intentional nationality-based discrimination. A violation of national treatment can be seen easily when there is actual nationality-based discrimination, but intentional nationality-based discrimination is not an element of CAFTA Article 10.3.

1651) The *Feldman* Tribunal pointed out that the similarly worded NAFTA Article 1102 does not require an investor to demonstrate explicitly that a distinction

¹⁶²⁹ Counter-Memorial at ¶390.

is a result of their foreign nationality.¹⁶³⁰ It also noted the *Pope & Talbot* Tribunal's observation that requiring proof of intent effectively would limit NAFTA Article 1102 national treatment obligation only to *de jure* violations, thereby severely limiting the effectiveness of the National Treatment concept in protecting foreign investors.¹⁶³¹

1652) The *Feldman* Tribunal also noted:

... requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason.¹⁶³²

1653) However, both *de jure* and *de facto* discrimination is covered by CAFTA Article 10.3.

1654) In these circumstances, it is entirely reasonable to require a full demonstration on Nicaragua's part that all differences of treatment between INAGROSA and other Nicaraguan entities were fully justified by objective regulatory considerations.

1655) As the difficulties with the discovery process in this case illustrate, the Investor cannot easily access the internal deliberations of governments to reveal all the considerations that affected the treatment INAGROSA received. This is exactly why the law puts the onus on the Responding State to prove that objective legitimate considerations fully can account for the difference in treatment.

1656) Nicaragua's obligation to provide Riverside and INAGROSA with "treatment no less favorable" required that Nicaragua accord treatment that was the same as the best treatment received by domestic investors in like circumstances as Riverside or INAGROS. This is not only required by the jurisprudence,¹⁶³³ but by the plain wording of CAFTA Article 10.3 itself:

The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than *the most*

¹⁶³⁰Feldman, Award, at ¶ 181 (CL-0044-ENG).

¹⁶³¹Feldman, Award, at ¶¶ 183, 184 (CL-0044-ENG), citing to Pope & Talbot, Award on the Merits of Phase 2, April 10, 2001, at paras. 78 and 79 (CL-0137-ENG) According to the Pope & Talbot Tribunal, was that showing discrimination based on nationality would "tend to excuse discrimination that is not facially directed at foreign owned investments—"

¹⁶³²Feldman - Award, at ¶ 183 (CL-0044-ENG).

¹⁶³³United States - Section 337 of the Tariff Act of 1930, General Agreement on Tariffs and Trade, Report of the Panel (November 7, 1989), ("US-Section 337"), at ¶ 511 (CL-0145-ENG).

favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part. [emphasis added]

4. “With Respect to the Establishment, Acquisition, Expansion, Management, Conduct, Operation, and Sale or Other Disposition of Investments”

1657) CAFTA Article 10.3 requires that the treatment involved must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The seizure of land is a disposition of an investment. The seizure here also affected the expansion, management, conduct, and operation of the investment.

1658) The Investment, however, was provided with less favorable treatment than those local private landowners who supported the FSLN and President Ortega. Riverside was entitled to receive such more favorable treatment in Nicaragua.

5. Facts Demonstrating National Treatment

1659) Others lawfully possessing or owning land in the territory of Nicaragua were treated more favorably than INAGROSA. All these measures were with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

1660) Such more favorable treatment to nationals of Nicaragua constituted a violation of Nicaragua’s national treatment obligation in Article 10.3.

a) Better treatment offered by Nicaragua.

1661) Nicaragua as a Treaty Party must provide treatment as favorable to the best treatment provided to locals in like circumstances.

1662) As noted above with respect to the MFN Treatment obligation, having different options was, the provision of more favorable treatment than having fewer options.

1663) Nicaragua did not meet its obligation to provide National Treatment to Riverside and its Investments under CAFTA Article 10.3. These failures to provide treatment as favorable to Riverside as provided to nationals of third countries, such as Russian nationals.

1664) In every case, Nicaragua provided more favorable this treatment was provided in relation to “the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments.”

- 1665) Nicaragua provided better treatment to investors and investments in like circumstances from non-Treaty Parties by offering broader and more expansive coverage for the national treatment and the fair and equitable treatment obligation than that offered in the CAFTA Treaty.
- 1666) Riverside received less favorable treatment from the National Police than that provided to other private landowners whose lands had been unlawfully invaded in Nicaragua in 2018 at the Nejapa Country Club in Sábana Grande, Managua. Riverside provided the information through its Expert Witness Prof. Wolfe, who relied on press reports of the police efforts to remove the unlawful invaders.¹⁶³⁴
- 1667) Nicaragua complains that these media reports were not sufficiently probative to establish proof of better treatment.¹⁶³⁵
- 1668) Nicaragua does not address the incident at the Nejapa Country Club in its Counter-Memorial at all. Nicaragua was ordered to produce police reports of invasions of private land, and no report regarding the Nejapa Country Club was produced, and no mention of the Nejapa Country Club was made in the Police Reports Nicaragua produced
- 1669) Other than the media reports, information on police conduct at that specific venue is within the sole custody and control of Nicaragua. However, the Police Reports Nicaragua produced did provide information on yet more incidents where more favorable treatment was provided.
- 1670) Nicaragua provided better treatment to at least ten local investments in owning private lands in Nicaragua in the summer of 2018.¹⁶³⁶
- 1671) Chart G sets out the ten examples of local Nicaraguan companies which received more favorable treatment as compared to INAGROSA/Riverside. The information was detailed in the police reports Nicaragua produced in this arbitration.

¹⁶³⁴Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 59 (CES-02). Prof. Wolfe relied upon Wilfredo Miranda Aburto, “Ortega ordena desalojar a tomatieras,” *Confidencial*, September 23, 2018. (C-0230-SPA).

¹⁶³⁵Counter-Memorial at ¶ 391.

¹⁶³⁶The address of the property was identified in the Police Report as the west side of the Hotel Ticomo, 22510, Tomo 673, Folio 300, Asiento N° 13,

Chart G- Nicaraguan Companies with More Favorable Treatment

#	Entity	Location	Police Ref doc	Nicaraguan nationality confirm
1	Inversiones Espanola S.A.	Inscrita N° 166,624, Tomo 2,331, Folio 181, Asiento N° 1°	C-0326-SPA	C-0448-SPA
2	Desarrollo Xolotklan S.A. (actual name Desarrollos Xolotlan)	Inscripción N° 22510, Tomo 3742, Asiento N° 14, Ubicación Comarca Ticomo, Frente a la garita Sur Km 8 ½	C-0326-SPA	C-0452-SPA
3	Mangos Sociedad Anonima (MANGOSA) SA		C-0328-SPA	C-0449-SPA
4	Melones de Nicaragua S.A. (MELONICSA)		C-0328-SPA	C-0450-SPA
5	Productos Aliados S.A.	Inscripción N° 24619, Tomo 331/599, Folio 209/74, Asiento N° 5, Ubicación Km 7½ carretera Sur 200 varas al este M/I	C-0326-SPA	C-0446-SPA
6	Sociedad Liza Interprise S.A.	Inscripción N° Finca N° 171.136, folio 52/3, tomo 2383, Asiento 1° Ubicación: KM 8 Carretera Sur -Nueva Pista Sub - Urbana, Entrada al Reparto San Patricio	C-0326-SPA	C-0444-SPA
7	Comercial Mantica S.A.	Inscrita N° 16,112, Tomo, 3,614, Folio 17/8, Asiento N° 11	C-0326-SPA	C-0445-SPA
8	Burke Agro Nicaragua S.A.	Inscripción: N° 4410, Tomo 3898, Folio 60/61, Asiento N° 19	C-0326-SPA	C-0447-SPA
9	Puma Energy Bahamas S.A.	Inscripción N° 117641-A, Tomo 1864, Folio 228, Asiento N° 2,	C-0326-SPA	C-0451-SPA
10	McDonald's Sistemas de Nicaragua S. A	Inscripción N° 14,163, Tomo 2754, Folio 35/6, 37, 179,180,183, Asiento N° 28	C-0326-SPA	C-0453-SPA

- 1672) Nicaraguan Legal Expert Gutierrez has reviewed the records from the Nicaraguan commercial registry which identify that each of these entities is a valid Nicaraguan corporation.¹⁶³⁷ The specific registry confirmation of status and the reference to the specific police report also is indicated on Chart G.
- 1673) Expert Gutierrez also confirms that persons identified in National Police Reports with a Nicaraguan identification number (cedula) were Nicaraguan citizens.¹⁶³⁸ The National Police Reports indicate that a number of these Nicaraguan citizens received more favorable treatment with respect to the protection of private property in June and July 2018 that had been invaded. The identity of these persons is set out in Chart F.
- 1674) Nicaragua admitted that private landowners in Nicaragua were in like circumstances with Riverside and INAGROSA in paragraph 390 of its Counter-Memorial. Nicaragua stipulates to a likeness test as follows: “The proper question for any discrimination analysis is thus how the State responded to similar private land invasions during the 2018 disturbances.” This admission addresses the requirement of likeness.
- 1675) In addition, Nicaragua’s police documents confirm that Nicaragua provided more favorable treatment to the Nicaraguan companies identified in Chart G and the Nicaraguan nationals identified in Chart H.

Chart H - Nicaraguan Citizens with More Favorable Treatment

No.	Person name	Cedula No.	Exhibit
1	Ángel Rafael Chávez	281-241050-0004M	C-0330-SPA
2	Alejandro Chávez	281-110249-0006P	C-0330-SPA
3	Mauricio Pallais	281-240447-0001L	C-0332-SPA
4	Jose Francisco Rodríguez	001-150664-0075X	C-0332-SPA

6. No support for justifications for not providing national treatment

- 1676) Nicaragua offers several purported reasons to justify its non-compliance with National Treatment obligations in Counter-Memorial paragraphs 400-410:

¹⁶³⁷Expert Witness Statement of Renaldy J. Gutierrez at ¶ 206 (CES-06).

¹⁶³⁸Expert Witness Statement of Renaldy J. Gutierrez in Question 5– at ¶ 210 (CES-06).

- a) The invasions occurred in diverse regions of Nicaragua. ¹⁶³⁹
 - b) There is ambiguity concerning the timeline of the illicit activities and a claim that certain acts of lawlessness trace back to events three decades prior. ¹⁶⁴⁰
 - c) The claims of preferential treatment do not specify the invaders, drawing a distinction between actions by the Nicaraguan Resistance and other wrongdoers. ¹⁶⁴¹
 - d) Potential existence of other “unspecified” factors that might be relevant to the discussion. ¹⁶⁴²
- 1677) These reasons are insufficient. They do not validly counter the principle of national treatment, and some are fragmented, lacking the coherence expected of principles in international law.
- 1678) The National Treatment principle mandates that Nicaragua afford treatment equivalent to the most favorable standard of treatment available domestically. Hence, arguing that better treatment might be granted in another region of Nicaragua is not a justification. Instead, it inadvertently acknowledges the preferential treatment within Nicaragua's borders.
- 1679) The only point warranting some examination is the second one. Contrary to Nicaragua's contention, there exists substantial evidence indicating when the favorable treatment occurred, as evidenced by official police records. Thus, the first part of the justification makes little sense. In the latter segment of the second point, Nicaragua implies that events tracing back thirty years somehow differentiate the nature of lawlessness. ¹⁶⁴³ The "likeness" criteria do not differentiate based on the historical genesis of the lawless act. If wrongdoers are involved, then both are like. Both scenarios represent clear violations of public order and law.
- 1680) Nicaragua's third justification, emphasizing the unique nature of threats from the Nicaraguan Resistance, is misleading.
- 1681) In Counter-Memorial paragraph 404, Nicaragua again attempts to mislead the Tribunal. Nicaragua attempts to differentiate invaders from the former Nicaraguan Resistance from others because of the need to preserve a peace accord from 1990. Nicaragua states:

¹⁶³⁹Counter-Memorial ¶ 392.

¹⁶⁴⁰Counter-Memorial ¶ 393.

¹⁶⁴¹Counter-Memorial ¶ 394.

¹⁶⁴²Counter-Memorial ¶ 395.

¹⁶⁴³Counter-Memorial ¶ 393.

Nicaragua entered into peace accords with ex-members of the Resistencia Nicaragüense in 1990. Taking a non-violent approach in this context was especially important given Nicaragua's recent history.¹⁶⁴⁴

1682) Nicaragua's defense is not only false, but it is a shameless calculated misdirection of this Tribunal. As outlined in Part II of this Reply Memorial, the Nicaraguan Resistance was an essential segment of Nicaragua's governing political alliance. There is no distinction in the "likeness" criteria between unlawful entities backing the government and those opposing it. Both display disregard for public order and law. There is no political acceptability test under international law. Both categories of wrongdoers are treated identically for the purposes of likeness.

1683) Nicaragua's fourth national treatment excuse is a justification for the number of police assigned to the San Rafael del Norte. Nicaragua fails to disclose that there were a number of national police stations in Jinotega Department. San Rafael del Norte was just one of these stations. There were additional police available in other stations.

1684) In addition, Prof. Justin Wolfe identifies that the protective services of the Nicaraguan state extend beyond the National Police alone. In his Expert Reply Witness Statement, Prof. Wolfe identifies the following:

100) As noted in the First Expert Statement, the government has a number of mechanisms to address police powers in the state. The First Expert Statement focused on the National Police and the Voluntary Police. However, for completeness, there are the following protective services:

a) The National Police

b) The Voluntary Police.

c) The Fire department.

d) The Physical Protection Force (Cuerpo de Protección Física);

e) The armed forces.¹⁶⁴⁵

1685) Nicaragua had many more resources available than the eight officers assigned to the rural San Rafael del Norte division.

1686) As noted by Luis Guiterrez in his Reply Witness Statement, the national police did not take any steps during the invasion and occupation in June or

¹⁶⁴⁴ Counter-Memorial at ¶ 404. (footnotes omitted)

¹⁶⁴⁵ Expert Reply Witness Statement of Prof. Justin Wolfe at ¶100 (**CES-05**) (footnotes omitted)

July 2018 to dissuade the occupiers.¹⁶⁴⁶ There were many graduated options available to the police. None of these were followed. In the absence of such efforts, Nicaragua cannot genuinely distinguish its failure to act from the many other instances of more favorable treatment occurring at the same time in Nicaragua and in the same circumstances.

- 1687) Nicaragua's primary contention revolves around the "likeness" concept, suggesting a constrained definition limited to those receiving preferential treatment linked to private land invasions. While Riverside challenges this narrow interpretation as not being consistent with the meaning of likeness under the Treaty, it is noteworthy that all instances of more favorable treatment align with Nicaragua's restricted definition of "likeness."
- 1688) Given the demonstrated similarities in circumstances and evidence of preferential treatment influencing investment behaviors in Nicaragua, Nicaragua's actions contravene the CAFTA National Treatment obligation. Nicaragua presents no valid defense against these national treatment infractions.
- 1689) This more favorable treatment was in connection with the conduct, management, and operation of the property, thus successfully qualifying under the third element of the test for National Treatment under CAFTA Article 10.03.
- 1690) INAGROSA received less favorable treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments than that received by nationals (natural and juridical) or investments of nationals (natural and juridical) in Nicaragua.
- 1691) INAGROSA was entitled to treatment as favorable as that provided to those in like circumstances to those investments and investors from Nicaragua. Others in like situations were treated more favorably with respect to the expansion, management, conduct, operation, and sale or other disposition of investments.
- 1692) As a result, Nicaragua has not met its National Treatment obligation owed to INAGROSA (and Riverside) with respect to the government protective treatment owed with respect to HSF. This National Treatment obligation is addition to the separate CAFTA obligation for FPS (which is addressed in CAFTA Article 10.5).

¹⁶⁴⁶ Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 152- 156 (CWS-10).

F. MFN Treatment

- 1693) In its Counter-Memorial paragraphs 384 to 411, Nicaragua has combined its defense of Most Favored Nation (MFN) Treatment with its defense of National Treatment. Nicaragua has extended its general defenses related to likeness and treatment in National Treatment to the realm of MFN Treatment.
- 1694) This section addresses MFN issues related to more favorable treatment provided by the police. It is in addition to the other relances upon MFN treatment addressed elsewhere in this Reply Memorial.
- 1695) The police report from Police Commissioner Major Cruz Sevilla provided to Nicaragua's National Police Chief Francisco Diaz reported that more favorable treatment had been provided to a private property owned by Inversiones Nela S.A. Inversiones Nela S.A. owned private property in Nicaragua that was invaded in the summer of 2018. Approximately 200 people invaded this property. The members of the National Police evicted the invaders from this property repeatedly (on 4 other occasions). According to the Police Report, this property was reinvaded again on July 31, 2018.¹⁶⁴⁷
- 1696) The Police report from Police Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz indicates that in July 2018, the police took steps to repel the occupation and arrest invaders of private lands owned by Inversiones Nela S.A.¹⁶⁴⁸ At this very same time, the national police admitted that they were not providing any assistance to INAGROSA. The fact that Nicaragua's National Police provided investigative and protective services to Inversiones Nela S.A. when no measures were taken with respect to INAGROSA confirms more favorable treatment extended to Inversiones Nela S.A than to INAGROSA at that very same time.
- 1697) As set forth in this section, Riverside has highlighted instances where investors (local and from other CAFTA states) received more favorable treatment than was accorded to it by Nicaragua. Additionally, Riverside has shown that such preferential treatment occurred under circumstances like those faced by a foreign investor such as Riverside, or in relation to that investor's Nicaraguan investment, INAGROSA.
- 1698) Lastly, Nicaragua broadly has invoked the operation of the CAFTA Article 10.6 war losses clause in its attempt to circumvent its obligations. However, as detailed in Part VIII, the war losses clause is not applicable due to its absence in the Russian BIT and because Nicaragua's interpretation of the war losses clause under the CAFTA is incorrect. Furthermore, as articulated

¹⁶⁴⁷Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018, at NIC01927 **(C-0326-SPA)**.

¹⁶⁴⁸Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018, at NIC01927 **(C-0326-SPA)**.

in Part VIII, the essential security measures exception, as enumerated in CAFTA Article 21.2(b), is not applicable to the circumstances at HSF similarly, due to its absence in the Russian BIT and, in any event, Nicaragua's interpretation of the effect of the CAFTA Article 20.1(b) non-precluded measures clause is incorrect. However, this Tribunal never needs to consider the meaning of CAFTA Article 20.1(b) in this arbitration on account of the effect of the absence of any non-precluded measures clause in the Russian BIT.

- 1699) As permitted by Article 10.4 of the CAFTA Treaty, Riverside claims the benefit of the better treatment Nicaragua offered to the investments of investors from Costa Rica, which was in like circumstances to INAGROSA, the investment of Riverside.
- 1700) The failure to provide the same treatment to INAGROSA as that provided to nationals of other CAFTA Parties constituted a violation of Nicaragua's Most Favored Nation treatment obligation in Article 10.4.
- 1701) For the purposes of National Treatment and MFN Treatment, all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa.
- 1702) Inversiones Nela S.A. is a juridical national of Costa Rica. A copy of the Costa Rican corporate registry information for Inversiones Nela confirms that the company is a Costa Rican juridical entity.¹⁶⁴⁹
- 1703) INAGROSA received less favorable treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments than that received by Inversiones Nela S.A., a juridical national of Costa Rica, an investment of other Parties in Nicaragua (and thus covered by Nicaragua's obligations under CAFTA Article 10.4).
- 1704) INAGROSA was entitled to treatment as favorable as that provided to those in like circumstances to those investments and investors from Nicaragua and those from states other than the United States. Others in like situations were treated more favorably with respect to the expansion, management, conduct, operation, and sale or other disposition of investments.

¹⁶⁴⁹The Costa Rican Business registry confirms that Inversiones Nela Sociedad Anonima is a Costa Rican company with registration number 3-101-179800. Inversiones Nela S.A, Registro Nacional de Costa Rica Search Result. (C-454-SPA).

IX. DAMAGES

- 1705) Riverside identified the foundational objectives for quantifying damages in Memorial paragraphs 768 to 801. The objective of the law is simple: compensation must wipe out all consequences of the unlawful conduct.¹⁶⁵⁰
- 1706) Riverside has instructed Vimal Kotecha of Richter Inc (“Richter”) to value the damages it suffered because of Nicaragua’s unlawful measures. As noted in the Memorial, Mr. Kotecha is a Chartered Professional Accountant and a Chartered Business Valuator with over 20 years’ experience in valuing business interests and quantifying economic damages.¹⁶⁵¹ He has qualified as an expert witness in domestic courts and international arbitration proceedings.¹⁶⁵²
- 1707) In this claim, the evidence both parties provided confirms that the essential information is available to model the loss Riverside suffered due to Nicaragua’s Treaty breaches. This information is presented in the Expert Damages Report of Vimal Kotecha (CES-01) filed with the Memorial and the Reply Expert Damages Report (CES-04) filed with this Reply Memorial. The Reply Expert Damages Report responds to the Credibility International Report (RES-02) filed with the Counter-Memorial. Perhaps the most significant difference between the experts is the issue of whether the Discounted Cash Flow (DCF) approach to valuation should be available for the losses in this claim.
- 1708) After considering this issue, the Credibility International Report makes several factual assertions that require review. Those contentions include:
- a) Mr. Kotecha allegedly failed to review the evidence before filing his First Expert Damages Report,
 - b) Riverside allegedly did not own or control INAGROSA.
 - c) No evidence supposedly exists of loans made by Riverside to INAGROSA
 - d) INAGROSA supposedly did not have business plans,
 - e) INAGROSA allegedly did not have sufficient financial capacity to carry out its business plan.

¹⁶⁵⁰Chorzów, Merits Award, Permanent Court of International Justice, September 13, 1928, PCIJ, Series A, No. 17, at pg. 22-23 (**CL-0054-ENG**).

¹⁶⁵¹Expert Valuation Statement of Vimal Kotecha– Memorial – ENG at Appendix 14 (**CES-01**).

¹⁶⁵²Expert Valuation Statement of Vimal Kotecha– Memorial – ENG at ¶¶ 1.12- 1.13 (**CES-01**).

- f) The designation of a Private Wildlife Reserve at HSF allegedly made the operation unlawful.
- g) Significant regulatory obstacles allegedly made the lawful operation of INAGROSA's business impossible.
- 1709) Each of these concerns is addressed in this Reply Memorial and, where appropriate, in the Reply Expert Damages Report filed with this Reply Memorial (**CES-04**).
- 1710) The remainder of this section is organized as follows:
- o **Section A** sets out the legal standard for the compensation payable to Riverside and the applicable date on which Riverside's damages are to be valued.
 - o **Section B** explains why an income-based approach, specifically a DCA model, is an appropriate method for valuing the damage that Riverside has suffered.
 - o **Section C** addresses the contentions regarding damages Nicaragua raises.
 - o **Section D** sets out Richter's approach to computing the damage that Riverside has suffered.
 - o **Section E** explains why a fully compensatory award must grant Riverside compound interest at a rate that wipes out all consequences of Nicaragua's unlawful conduct.
 - o **Section F** explains why the Tribunal's award should be made net of all applicable taxes; and
 - o **Section G** sets out Riverside's claim for its fees and costs associated with pursuing the present arbitration.

The DCF provides certainty to determine the amount of loss

- 1711) Riverside is entitled to compensation for its damages caused by Nicaragua's Treaty breaches. The applicable standard of compensation requires, among other things, evaluating the reduction in the fair market value of Riverside's investment because of Nicaragua's internationally unlawful measures found to have breached CAFTA.
- 1712) As established by the *Hydro S.r.l. v Albania* Tribunal, Riverside bears the burden of proving its claimed damages by establishing "the existence of the

fact of damage” and providing “a reasonable basis for the Tribunal to determine the amount of loss.”¹⁶⁵³

1713) A few paragraphs later, the *Hydro* Tribunal considered whether DCF valuation was the best way to address the valuation of damages. In *Hydro*, the tribunal had to consider how to address internationally wrongful acts that affected a nascent business operating for a short period. In *Hydro*, there were questions the experts raised as to whether there was sufficient evidence available to apply a DCF method of valuation.

1714) The *Hydro* Tribunal relied on an earlier decision in *Kardassopoulos*, where the Tribunal concluded that:

The Tribunal’s duty is to make the best estimate that it can of the amount of the loss, on the basis of the available evidence. That must be done even if there is no absolute documentary proof of the precise amount lost.¹⁶⁵⁴

1715) In *Hydro*, considering the situation before it, the Tribunal concluded that, even with a business that has been operating for a short period of time and with a non-detailed business plan, the DCF method was appropriate. The Tribunal stated:

848. The Tribunal sees some limitations in the application of the DCF method to value Agonset, namely that the 2012 Business Plan is not particularly detailed and both businesses have only been operating for a short period of time. Mr. MacGregor, a chartered accountant, says there is insufficient evidence to undertake a valuation using the DCF Method. However, the Tribunal has a mandate, having found breach of the BIT, to arrive at a valuation on such evidence as it has. The tribunal in *Kardassopoulos* drew a similar conclusion stating that “The Tribunal’s duty is to make the best estimate that it can of the amount of the loss, on the basis of the available evidence. That must be done even if there is no absolute documentary proof of the precise amount lost”.¹⁶⁵⁵ Further, discarding the DCF method for lack of sufficient

¹⁶⁵³ *Hydro S.r.l. et al. v. Albania*, ICSID Case ARB/15/28, Award, dated 24 April 2019) (hereafter “*Hydro*”) at ¶ 845 (CL-0202-ENG). The Hydro Tribunal noted “In light of the above, the Tribunal considers that the Claimants must prove the existence of the fact of damage with sufficient certainty and then provide a reasonable basis for the Tribunal to determine the amount of loss. The Tribunal considers this a fair outcome considering that any difficulty that the Claimants may face in proving the amount of loss will have flowed from the Respondent’s wrongdoing.”

¹⁶⁵⁴ *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, dated 3 March 2010 at ¶ 594. (Hereinafter “*Kardassopoulos*”) (CL-0197-ENG).

¹⁶⁵⁵ *Kardassopoulos* at ¶ 594. (CL-0197-ENG).

evidence in this case would, in effect, reward a State for expropriating promising businesses shortly after their founding.

849. On balance, the Tribunal considers that the DCF method is an appropriate method to value Agonset. While valuation is not an exact science, the DCF method is a widely accepted valuation method that can address the uncertainties that arise in this case.¹⁶⁵⁶

- 1716) In the present circumstances, Nicaragua's conduct destroyed the value of Riverside's existing investment in Nicaragua. The value of Riverside's investment was derived from income streams from INAGROSA's Hass Avocado operations, its ongoing expansion, and the standing timber forest at HSF.
- 1717) The destruction of the Hass Avocado trees, the loss of the 2018 crop, the losses arising from the damaged nurseries, and the replanting of the fields with incompatible crops destroyed the INAGROSA avocado business.¹⁶⁵⁷ Similarly, the illegal felling of rare timber species in the forest destroyed the commercial value of the standing timber forest lands.¹⁶⁵⁸ The effects of the occupation made the invasion a perfect storm, wiping out the economic value of the business.
- 1718) Valuing the damages Riverside suffered requires determining its investment's fair market value but-for Nicaragua's unlawful conduct.
- 1719) In July 2018, just a few weeks from the date of the invasion and occupation, INAGROSA would have commenced its 2018 Hass avocado harvest at HSF. The crop was growing well, and the benefits of a harvest would have significantly enhanced the operations of INAGROSA and the expanding area of Hass avocado plantations.¹⁶⁵⁹
- 1720) The value created by the years of work and investment into INAGROSA was observed by the financing commitment made three months earlier from INAGROSA's controlling foreign parent, Riverside.
- 1721) Further, INAGROSA management vetted its business plans and operational arrangements with external Hass avocado producers and with financial

¹⁶⁵⁶ *Hydro* at ¶¶ 848 – 849 (CL-0202-ENG). See also *Kardassopoulos* at ¶¶ 658, 667–668 (CL-0197-ENG).

¹⁶⁵⁷ Characterization of Mr. Ciro Manuel Montenegro Cruz, Jinotega National Police, 2022 (R-0040-SPA-ENG); Characterization of Mr. Sergio Roberto Zelaya Rourk, Jinotega National Police 2022 (R-0048-SPA-ENG).

¹⁶⁵⁸ *Hydro* at ¶¶ 131–133. (CL-0202-ENG).

¹⁶⁵⁹ Witness Statement of Russ Welty-Reply-ENG at ¶ 67 (CWS-11). Reply Witness Statement of Carlos Rondon at ¶ 23(g), 77 (CWS-09); Witness Statement of Luis Gutierrez-Reply-SPA at ¶ 287-288 (CWS-10).

industry experts with private and institutional equity.¹⁶⁶⁰ Russell Welty, the financial architect of the Hass Avocado expansion, used the benefit from these external expert meetings to refine and hone the final business plan.¹⁶⁶¹

1722) Riverside, however, was deprived of the ability to profitably operate or otherwise monetize its investment because, as of June 16, 2018, Nicaragua illegitimately controlled and facilitated the invasion of HSF. Further, Nicaragua failed to limit the widespread destruction arising from the occupation of HSF.

1723) The long-awaited 2018 Hass avocado harvest was ready to be rolled out in July 2018.¹⁶⁶² In fact, the first steps of the 2018 harvest already had commenced. With this harvest, INAGROSA could complete the second phase of its operations – focusing on its expansion, which would enable the successfully grown and cultivated Hass Avocados to be sold to foreign markets.¹⁶⁶³

1724) INAGROSA successfully prepared the plantation areas, grew, and grafted the avocado seedlings, tended the avocado trees as they rooted and developed, and obtained the first successful crop in 2017.¹⁶⁶⁴ The second, more mature harvest was on the trees and literally within grasp when the Invasion occurred.

1725) Riverside adverts in its Memorial that its Hass avocado production was planned for export sales.¹⁶⁶⁵ Export markets provided revenue in US dollars at global prices. INAGROSA was able to access the Costa Rican market easily. It was only a truck ride away and the border requirements (with respect to export from Nicaragua and import to Costa Rica) were simple formalities.¹⁶⁶⁶ However, the sales to Costa Rica were simply a temporary step. INAGROSA sought to access markets outside of the region.¹⁶⁶⁷ The INAGROSA business plan identified export markets in the United States, Canada, Asia, and the EU, in addition to Costa Rica.¹⁶⁶⁸ INAGROSA was able to access the markets in Canada without requiring special import market access permissions.¹⁶⁶⁹ INAGROSA only required the export formalities from CETREX, which were simple formalities. INAGROSA had previous experience with such formalities with its coffee export operations, and the

¹⁶⁶⁰Witness Statement of Russ Welty-Reply-ENG at ¶¶ 57-58 (CWS-11).

¹⁶⁶¹Witness Statement of Russ Welty-Reply-ENG at ¶ 47 (CWS-11).

¹⁶⁶²Reply Witness Statement of Russ Welty-Reply-ENG at ¶ 63, 67(CWS-11). .

¹⁶⁶³Witness Statement of Russ Welty-Reply-ENG at ¶ 67 (CWS-11).

¹⁶⁶⁴Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 250, 283 (CWS-10).

¹⁶⁶⁵ Memorial at ¶¶ 47, 97, 362, 369, 818.

¹⁶⁶⁶ Witness Statement of Carlos Rondon-Memorial-ENG at ¶ 183 (CWS-09).

¹⁶⁶⁷ Reply Witness Statement of Russ Welty-Reply-ENG at ¶ 95 (CWS-11).

¹⁶⁶⁸ Witness Statement of Russ Welty – Reply – ENG at ¶ 80 (CWS-11).

¹⁶⁶⁹ Witness Statement of Russ Welty – Reply – ENG at ¶ 88 (CWS-11) .

company was already registered with CETREX. INAGROSA would have started its sales to North America in 2019. Canadian markets would be accessed first as the transport process to Canada was like the transport logistics to the United States.¹⁶⁷⁰ INAGROSA anticipated that it would take up to four years to access the US market. Thus, the 2022 harvest would have been projected for sale to the United States as the market was larger and the transportation time to the United States would be slightly faster.¹⁶⁷¹ As noted in the Memorial, INAGROSA already had initiated steps to begin market access to its most desired market, the United States, before the Occupation.¹⁶⁷²

- 1726) With the imminent second harvest, there were no obstacles to overcome regarding cultivation and production of the Hass avocado crop. The consequence of Nicaragua's unlawful conduct prevented Riverside from receiving the profits from exploiting its agricultural investment in Nicaragua. Riverside therefore is entitled to receive compensation for those lost profits of which it was deprived.¹⁶⁷³

Riverside Is Entitled to The Full Reparation Standard Calculated By Reference to the Value of its Investment on June 16, 2018

- 1727) CAFTA provides that an investor may submit claims for breaches of the Treaty if it has "incurred loss or damage by reason of or arising out of [a] [...] breach" of a provision in CAFTA Chapter 10.¹⁶⁷⁴ However, the only compensation standard expressly set out in CAFTA is that for a lawful expropriation carried out in accordance with the criteria in Article 10.7.¹⁶⁷⁵
- 1728) As noted in the Memorial, CAFTA expresses a standard of compensation for lawful breaches of expropriation in CAFTA Article 10.7. Those breaches are predicated on Nicaragua's compliance with the four elements set out in that provision. As described in Part VIII, Nicaragua failed to meet those conditions in its dealings with INAGROSA and Riverside.
- 1729) CAFTA establishes no express compensation standard for Nicaragua's treaty breaches described above: namely, for its unlawful expropriation of Riverside's investment in breach of Article 10.7, for its unfair and inequitable treatment of Riverside's investment in breach of Article 10.5, or for its breach of the national treatment standard established in Article 10.3 and the MFN Treatment standard in Article 10.2.

¹⁶⁷⁰ Reply Witness Statement of Russ Welty-Reply-ENG at ¶ 88, 98, (CWS-11).

¹⁶⁷¹ Reply Witness Statement of Russ Welty-Reply-ENG at ¶ 90 (CWS-11).

¹⁶⁷² Witness Statement of Russ Welty-Reply-ENG at ¶ 81 (CWS-11).

¹⁶⁷³ Richter Expert Reply Damages Report at ¶ 8.7 (CES-04).

¹⁶⁷⁴ CAFTA Article 10.7.

¹⁶⁷⁵ CAFTA Article 10.7.

- 1730) In the absence of a treaty compensation standard for those breaches, customary international law provides the remedies for Nicaragua’s unlawful acts. This recently was articulated by the *Hydro* Tribunal, but numerous Tribunals have expressed it.¹⁶⁷⁶
- 1731) While the computation of damages under the customary international law standard differs from the Treaty standard of compensation for expropriation (under CAFTA Article 10.7), the two standards ultimately may lead to similar results as they both are ultimately designed to, at a minimum, compensate for the loss in the fair market value of the investment.
- 1732) Customary international law rules on remedies for breaches of international law are set out in the ARSIWA. The ARSIWA Articles provide that the primary remedies for breaches of international include, among others, the duty to make full reparation, preferably through restitution.¹⁶⁷⁷
- 1733) The duty to make “full reparation” for internationally wrongful acts was established in 1928 by the Permanent Court of International Justice (“PCIJ”) in the *Chorzów Factory* case. The PCIJ ruled as follows:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the

¹⁶⁷⁶*Hydro* at ¶ 825. **(CL-0202-ENG)** (In the Tribunal’s view, the standard of compensation outlined in Article 5.3 of the BIT does not apply to unlawful expropriations. Article 5.2 requires a number of conditions to be met for an expropriation, or similar measure, to be legal, inter alia, that the expropriation be: for a public purpose, in compliance with the State’s laws, made on a non-discriminatory basis, and with payment of immediate, full and effective compensation. In the Tribunal’s view, Article 5.3 is intended to provide the standard by which “effective” compensation is to be judged for the purposes of the final requirement for a lawful expropriation that is contained in Article 5.2) *ADC Affiliate Ltd. et. al. v. Hungary*, ICSID Case No. ARB/03/16, Award, dated 2 October, 2006) at ¶481, **(CL-0106-ENG)** (“The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate the compensation for a lawful expropriation with damages for an unlawful expropriation.”); *Vivendi II* at ¶8.2.3**(CL-0059-ENG)** (“The treaty [...] it does not purport to establish a *lex specialis* governing the standards of compensation for *wrongful* expropriations. As to the appropriate measure of compensation for the breaches other than expropriation, the Treaty is silent.”). See also *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15 (**(CL-0162-ENG)**).¹⁶⁷⁷ ARSIWA Articles 29–31, 34–39. **(CL-0017-ENG)**.

principles which should serve to determine the amount of compensation due for an act contrary to international law¹⁶⁷⁸

1734) ARSIWA Article 31 now encapsulates this full reparation obligation as follows:

The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.¹⁶⁷⁹

1735) ARSIWA Article 35 goes on to establish that when it comes to making full reparation for an internationally wrongful act, a State's primary obligation is to provide restitution.¹⁶⁸⁰

1736) As a preliminary matter, restitution was not possible in this case. The deforestation of the rare hardwoods in the forest and the destruction of the existing Hass avocado plantation made restitution impossible in this claim as the *status quo ante* cannot be returned.¹⁶⁸¹ Where restitution is impractical, as it is here, ARSIWA Article 36(1) states that:

The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution¹⁶⁸²

1737) Thus, a monetary award to Riverside should put it in a position it would have occupied had Nicaragua's internationally wrongful acts never occurred.¹⁶⁸³ As the tribunal in *Vivendi v. Argentina II* stated:

Based on these principles [of international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the

¹⁶⁷⁸ *Case Concerning the Factory at Chorzów*, Merits Award, Permanent Court of International Justice, September 13, 1928, PCIJ, Series A, No. 17, at ¶ 125 (CL-0054-ENG).

¹⁶⁷⁹ ARSIWA Article 31 (CL-0017-ENG).

¹⁶⁸⁰ ARSIWA Article 35 (CL-0017-ENG).

¹⁶⁸¹ Richter Expert Reply Damages Report at ¶ 3.2 (CES-04).

¹⁶⁸² ARSIWA Article 36(1) (CL-0017-ENG).

¹⁶⁸³ *Chorzów*, Merits Award, Permanent Court of International Justice, September 13, 1928, PCIJ, Series A, No. 17, at p. 47 (CL-0054-ENG).

affected party fully and to eliminate the consequences of the state's
action¹⁶⁸⁴

- 1738) Full compensation for harm caused by an international wrong is normally assessed based on the resulting diminution in “fair market value” of the affected asset.¹⁶⁸⁵ Tribunals tend to use this standard to calculate damages payable for breaches of expropriation,¹⁶⁸⁶ and breaches of other standards of treatment established in bilateral investment treaties.¹⁶⁸⁷ Fair market value has been defined as follows:

[T]he price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat. [The expert] appropriately assumed that the willing buyer was a reasonable businessman.¹⁶⁸⁸

- 1739) In this case, the Tribunal must consider the invasion and occupation under the broad broader expropriation obligations that Nicaragua extends to Russian Investors under the Russian BIT (as these obligations trump the more constrained expropriation obligations under CAFTA Article 10.7). However, there are at least five breaches that this Tribunal must consider, notably:
- a) The breach of expropriation obligations regarding Nicaragua's direct involvement in ordering the invasion of HSF.¹⁶⁸⁹

¹⁶⁸⁴Vivendi II at ¶ 8.2.7 (**CL-0059-ENG**).

¹⁶⁸⁵J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) at p. 225 (“Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”). Even if the expropriation is deemed lawful and the Treaty standard on compensation were to apply, there would be no substantive difference here. The Treaty provides that compensation for an expropriation shall be “equivalent to the fair market value of the expropriated investment.” (**CL-0019-ENG**).

¹⁶⁸⁶*CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (UNCITRAL), Final Award, dated 14 March 2003) at ¶¶ 496–99 (hereafter “*CME*”) (**CL-0038-ENG**); *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, dated 22 April 2009) at ¶ 124 (**CL-0195-ENG**).

¹⁶⁸⁷See, e.g., ¶ 410 (*CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, dated 12 May 2005) (hereafter “*CMS*”) (**CL-0053-ENG**); ¶ 424 (*Azurix v Argentina* at ¶ 424) (**CL-0095-ENG**); ¶¶ 359–63 (*Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, dated 22 May 2007) (hereafter “*Enron*”) at ¶¶ 359–363. (**CL-0212-ENG**); *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, dated 28 September 2007) at ¶¶ 403–406 (**CL-0037-ENG**) ; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, dated 31 October 2011 (hereafter “*El Paso*”) at ¶¶ 703–05 (**RL-0068-ENG**).

¹⁶⁸⁸*Starrett Housing Corporation, Starrett Systems, Inc, and others v. The Iran et al.*, Iran-US Claims Tribunal Case No. 24, Final Award, dated 14 August 1987).at ¶ 277 (**CL-0102-ENG**).

¹⁶⁸⁹ See Part II of this Reply Memorial for a discussion on the invasion of HSF.

- b) The breach of expropriation obligations regarding Nicaragua's direct involvement in the *de jure* and the *de facto* deprivation caused to Riverside because of the Judicial Order.¹⁶⁹⁰
- c) The breach of FET in connection with the National Police's failure to share advanced intelligence of harm to HSF and because of Nicaragua's instructions in July 2018 that the occupiers continue the occupation of HSF.¹⁶⁹¹
- d) The breach of the FPS Obligation arising from Nicaragua's failure to act diligently with respect to the operations of Nicaragua's protective services (such as the police and armed services, as well as prosecutorial services).¹⁶⁹²
- e) The failure to provide National Treatment and MFN Treatment due to Nicaragua's failure to provide treatment to INAGROSA as favorable at that given to other investments unlawfully invaded in Nicaragua at the same time in 2018.¹⁶⁹³

A. Proximate Causation

1740) Nicaragua incorrectly contends that Riverside has not shown a reasonably close causal link between the measures of the state and the internationally wrongful acts causing harm to INAGROSA and Riverside.¹⁶⁹⁴ The harm was causally linked to Nicaragua. In all instances. This causal link was present whether the harm arose from:

- a) the direct order of Jinotega Mayor Leonidas Centeno to invade HSF¹⁶⁹⁵ (as proclaimed by the invaders themselves); or
- b) the police by failing to share information in its possession about an imminent invasion of INAGROSA's property and failing to take diligent action considering that information that could have limited or prevented the occupation from taking place; or

¹⁶⁹⁰ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 80-89 (**CES-6**).

¹⁶⁹¹ Richter Expert Reply Damages Report at ¶¶ 5.18-5.23 (**CES-04**); Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 83 (**CWS-10**).

¹⁶⁹² See Part VIII of the Reply Memorial on the FPS obligation and Nicaragua's measures which failed to meet that Treaty standard.

¹⁶⁹³ See Part VIII of the Reply Memorial on the National Treatment and Most Favored Nation obligations and Nicaragua's measures which failed to meet those Treaty standards.

¹⁶⁹⁴ Counter- Memorial at ¶¶ 425 to 432.

¹⁶⁹⁵ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 108 (**CWS-10**).

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- c) the police by assisting the invaders, or failing to take diligent action while the occupation took place¹⁶⁹⁶ (at a time when the police were actively assisting others in like circumstances); or
 - d) The actions of National Assembly Deputy Edwin Castro who, according to Police Commissioner Castro, told the invaders to remain in occupation of HSF with the believe that the government would resolve the problem by paying INAGROSA for its seized lands¹⁶⁹⁷; or
 - e) the more favourable treatment provided by the police at the time of the invasion of HSF to actively address illegal invasions from private lands owned by Nicaraguan nationals in Nicaragua while refusing to assist INAGROSA and its controlling investor Riverside; or
 - f) the more favourable treatment provided by the police at the time of the invasion of HSF to actively address illegal invasions from private lands owned by Costa Rican's nationals in Nicaragua while refusing to assist INAGROSA and its controlling investor Riverside.
 - g) In each occurrence, Nicaragua was directly responsible for the wrongful acts. In each occurrence, the harm arising to INAGROSA and its business was identical. There was no independent or intervening event between the original invasion and the subsequent invasion that resulted in a limitation of the damage to INAGROSA and Riverside.
- 1741) Further, because of the totality of the harmful effects of the actions upon Riverside and INAGROSA, the extent of the economic damages arising from any of these actions was the same – an utter and total loss of the economic value of the investments because, in each instance, the existing Hass avocado productive areas were destroyed, the equipment and nurseries were rendered unusable, and the valuable hardwood species in the forests were deforested. What was left was an empty shell without any significant economic value.
- 1742) Extrinsic evidence substantiates that, as of August 14, 2018, there had been irremediable impairment to INAGROSA's principal economic assets—specifically the avocado plantation, the nursery, and the rare hardwood forests. In particular, the impairment to the Hass avocado trees did not commence until late July and after the second invasion.¹⁶⁹⁸

¹⁶⁹⁶ See Part VIII on FPS for examples of such treatment.

¹⁶⁹⁷ Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (C-0284-SPA-ENG).

¹⁶⁹⁸ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 137 (CWS-10)

- 1743) On August 14, 2018, Luis Gutierrez, accompanied by a Notary Public and Police Captain Herrera, conducted an on-site inventory to assess the damages inflicted upon INAGROSA's primary offices.¹⁶⁹⁹
- a) During this evaluation, a comprehensive inventory was compiled, detailing the damage to the office premises and the avocado plantation. Mr. Gutierrez was additionally apprised by INAGROSA staff of the devastation that had befallen the Hass avocado plantations, the nurseries, and the rare hardwood forests. As of August 14, it was confirmed that the avocado plantations and nursery saplings had been annihilated, while the rare hardwoods had been subject to illicit logging.
 - b) Jaime Vivas, a supervisory employee of INAGROSA, corroborates in his witness statement that, as early as July 16, 2018—the onset of the second unauthorized incursion—the occupiers commenced agricultural activities, namely the cultivation of beans and other primary agricultural products, in the coffee-growing areas of the northern section of HSF.¹⁷⁰⁰
- 1744) Irrespective of which of the Treaty contraventions is applied, the detriment inflicted upon Riverside remains qualitatively consistent across all breaches at issue in this claim.
- 1745) The specific dimensions of state responsibility germane to police failures mainly focus on the obligations of Full Protection and Security, National Treatment, and Fair and Equitable Treatment. Nicaragua's conduct—or lack thereof—in this matter is demonstrative of significant breaches of these international standards.
- 1746) **Timeline for Damages and State Inaction** — Evidence tendered by Nicaragua itself indicates that effective police action should have been initiated within the first four weeks leading up to the second invasion, which started on July 16, 2018. This is when the critical damage began as there was a complete occupation of HSF. Shortly after that time, Congressman Edwin Castro directed the occupiers to remain in place.¹⁷⁰¹ To put it succinctly, the critical period for potential damage spanned from July 16th to August 14th. The critical impairment to the long cycle Hass avocado trees from the actions of the occupiers did not commence until late July. Notably, it has been established that by August 14th, considerable damage already

¹⁶⁹⁹Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 138-140 (**CWS-10**); Inventory of damages at Hacienda Santa Fe, August 14, 2018 (**C-0058-SPA**).

¹⁷⁰⁰Jaime Vivas Witness Statement-Memorial-SPA at ¶ 31 (**CWS-06**).

¹⁷⁰¹ Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

had occurred. That damage included the Hass avocado plantations, the nurseries, and the rare hardwood species in the forest.¹⁷⁰²

- 1747) **Comparative Negligence in Law Enforcement** -- It is imperative to underscore that, during the same period, Nicaragua took substantive action to mitigate unlawful invasions on the properties of more than ten other private landowners. This contrasts starkly with the absence of preventative or remedial action at HSF.
- 1748) Furthermore, this neglect not only is conspicuous but is also **corroborated by Nicaragua's own internal police reports**. These reports document extensive intervention measures taken and contemplated in other large-scale invasions involving as many as 200 armed individuals. The juxtaposition of robust action in other instances with complete inactivity at HSF lends considerable weight to the argument that Nicaragua's conduct was not merely inadequate but wrongfully negligent and reckless, if not intentional.
- 1749) A credible and reliable evidentiary basis exists to establish Nicaragua's failure to uphold its international obligations within that critical timeframe. Such a lapse not only amounts to wrongful police conduct but also implicates the state in breaches of international standards regarding Full Protection and Security, National Treatment, and Fair and Equitable Treatment.
- 1750) INAGROSA's economic viability effectively was nullified when Nicaragua failed to forestall the illegal deforestation of the rare hardwood species after the July 16 second invasion and before August 14, 2018, and the economically productive Hass avocado orchards. The business's intrinsic worth lies in its capacity to generate economic returns through commodity production. With the most valuable species, which were under contract to an American veneer manufacturer gone, the practical value of the forest was decimated.
- 1751) The consequences of these internationally wrongful acts are undifferentiable:
- a) Nicaragua's overt participation in the HSF incursion led to the abrogation of its economic functionalities and appreciably depreciated the valuation of its tangible assets and real estate.¹⁷⁰³
 - b) Nicaragua's instructions to prolong the occupation of HSF occasioned an analogous degradation in economic potential and asset valuation. No appreciable divergence exists in the extent or magnitude of the damages

¹⁷⁰²Witness Statement of Luis Gutierrez- Reply- SPA at ¶ 144, 292 (**CWS-10**).

¹⁷⁰³Richter Expert Reply Damages Report at ¶ 5.12 (**CES-04**).¹⁷⁰³Richter Expert Reply Damages Report at ¶ 5.12 (**CES-04**).

accruing from the initial invasion and those ensuing from the protracted occupation of HSF.¹⁷⁰⁴

- c) As noted above, Nicaragua's dereliction of its duty to furnish adequate protective measures, violating the Full Protection and Security mandate, equally culminated in debilitating its economic functionalities and material assets. Again, no significant disparity is evident in the scale or scope of damages, whether they arose from the invasion *ab initio* or the subsequent failure of law enforcement measures.¹⁷⁰⁵
- d) Nicaragua's breach of its obligations concerning National Treatment and Most Favored Nation (MFN) treatment similarly engendered a debilitating impact on INAGROSA's economic capacities and material assets. The consequential damages are commensurate in scope and scale, irrespective of the specific breach invoked.¹⁷⁰⁶

1752) Legal scholar Irmgard Marboe articulates that, pursuant to the *Chorzow Factory* principle, in instances of non-expropriatory violations, the Tribunal is obligated to assess damages based on expectation loss—the hypothetical condition the claimant would find itself in but for the wrongful conduct.¹⁷⁰⁷

1753) Therefore, quantifying the damages for each of the four pillars underpinning Riverside's claim—be it the breach of MFN, National Treatment, international standards of treatment (Fair & Equitable Treatment or Full Protection and Security), or expropriation—necessitates the valuation of Riverside's but-for investment at its fair market value.¹⁷⁰⁸ In all instances, the quantum of Riverside's damages approximates the entirety of its fair market value investment.

¹⁷⁰⁴Richter Expert Reply Damages Report at ¶ 5.13 (CES-04).

¹⁷⁰⁵Richter Expert Reply Damages Report at ¶ 5.14 (CES-04).

¹⁷⁰⁶Richter Expert Reply Damages Report at ¶ 5.15 (CES-04).

¹⁷⁰⁷Irmgard Marboe in her chapter "Assessing Compensation and Damages in Expropriation versus Non-expropriation Case" states (By contrast, the Chorzów standard does not require putting the investor in the position he would be in if he had never entered into the investment project (i.e. , reliance loss), but instead in the situation he would be in if the unlawful act had not been committed (i.e. , expectation loss)). Irmgard Marboe, *Chapter 5: Assessing Compensation and Damages in Expropriation versus Non-expropriation Cases* in Christina L. Beharry (ed.) *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, , Brill, 2018. At page 137 (CLA-192-ENG).

¹⁷⁰⁸Ripinsky and Williams explain: "In a number of cases, a non-expropriatory violation has produced effects similar to those of an expropriation, i.e., the *total loss of the investment* In these circumstances, arbitrators have logically chosen to measure the loss, and therefore compensation, by focusing on the market value of the investment lost." S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008)) at 92. (CL-0203-ENG).

- 1754) The temporal unfolding of these incidents is germane to the legal concept of *restitutio in integrum*, especially concerning Nicaragua’s subsequent, specious “offer” to restore possession of HSF.
- 1755) Clearly, Nicaragua aspires to recharacterize the issue from one of expropriation to mere delay. However:
- a) If the Tribunal adjudges a substantial deprivation to have transpired, Nicaragua’s subsequent “offer” to restore HSF without any compensation would be rendered nugatory as the damage occurred well before the specious offer.¹⁷⁰⁹ A parallel outcome would follow from determining a breach of FET.
 - b) Should the Tribunal determine that Nicaragua has violated its obligation pursuant to National Treatment—evidenced by disparate police protection treatment as confirmed in the available police reports—then its “offer” to restore HSF similarly would lose relevance.
 - c) If the Tribunal finds a breach of the FPS obligation, particularly considering evidence indicating timely and superior protective services provided elsewhere in Nicaragua to other private landowners and the availability of additional police resources in Jinotega Department, Nicaragua’s specious “offer” to restore HSF would be inconsequential.
- 1756) State responsibility is addressed elsewhere in the Memorial, and this Reply Memorial, but actions directed and controlled by the state incur state responsibility, as do actions from the police. Further omissions from persons working for the government, such as the police, create responsibility in the area of full protection and security.

1. The International Law on Contribution

- 1757) Nicaragua references ARSIWA Article 39 in Counter-Memorial paragraphs 496 and 497 where it discusses contribution as a damages principle.
- 1758) First, Nicaragua omits the limitations on remoteness of damages from its discussion. It is notable that Nicaragua avoids any discussion of ARSIWA Article 31. The Commentary to ARSIWA Article 31 confirms that:
- unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held

¹⁷⁰⁹Richter Reply Expert Damages Report at ¶¶ 5.17, 6.8 (CES-04).

responsible for all the consequences, not being too remote, of its wrongful conduct.¹⁷¹⁰

1759) Relying on the Commentary, the *Yukos v Russia* tribunal held that “the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage.”¹⁷¹¹ Thus, contributory fault by the investor should not excuse a State’s breach of a treaty, but instead (at most) lead to a reduction of the amount awarded if appropriate based on the facts of each case.¹⁷¹²

1760) For there to be any contribution, the factor must be related to the damage.

1761) Nicaragua advances four arguments for contribution:

- a) INAGROSA was aware that there were longstanding claims over HSF and that was sufficient to put it on notice to take steps to prevent the 2018 invasion.¹⁷¹³
- b) INAGROSA actively deserted HSF in 2017,¹⁷¹⁴
- c) INAGROSA failed to secure HSF on August 11, 2018, thus allowing illegal occupants to return to re-occupy HSF.¹⁷¹⁵

1762) In addition, Nicaragua argues that there are mitigation factors that also need to be considered:

- a) INAGROSA failed to mitigate its losses by obtaining HSF in 2021 from Nicaragua.¹⁷¹⁶

¹⁷¹⁰ARSIWA Commentary to Article 31, at ¶ 13 (**CL-0017-ENG**).

¹⁷¹¹*Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014) at ¶1775. (**CL-0232-ENG**); see also *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011) at ¶163 (**CL-0072-ENG**) (it is the burden of “the offender to break the chain [of causation] by showing that the effect was caused—either partially or totally—not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim”).

¹⁷¹²*Micula et al. v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 at ¶ 926 (**CL-0235-ENG**) (“an intervening event will only release the State from liability when that intervening event is (i) the cause of a specific, severable part of the damage, or (ii) makes the original wrongful conduct of the State become too remote. Unless they fall under either of these categories, cases of contributory fault by the injured party appear to warrant solely a reduction in the amount of compensation.”).

¹⁷¹³Counter-Memorial at ¶ 499.

¹⁷¹⁴Counter-Memorial at ¶ 500 and ¶ 422 (ii). Nicaragua also claims that the application for the Private Wildlife Reserve was further proof of abandonment at ¶ 430.

¹⁷¹⁵Counter-Memorial at ¶ 501.

¹⁷¹⁶Counter-Memorial at ¶ 503.

- b) The forest and avocado businesses were illegal.¹⁷¹⁷
- c) INAGROSA failed to pay its property taxes.¹⁷¹⁸

1763) As set out above, none of these situations occurred.

- a) INAGROSA had lawful title to the lands at HSF, which were confirmed in a judicial sale in 1996. In 2003, the lands owned by INAGROSA were subject to unlawful occupation by squatters, an issue which predominantly impacted third parties who had been erroneously led to believe that they possessed legitimate rights to occupy these lands due to fraudulent representations. It is crucial to note that this issue was comprehensively addressed and resolved by the appropriate judicial and law enforcement authorities within the jurisdiction of Nicaragua in the subsequent year, 2004. Since that resolution, a span of fourteen years has elapsed without any recurrence of squatter activity on the lands specifically pertaining to HSF.

INAGROSA continued its operations at HSF in 2017, and there was never any abandonment of the property in light of the continuous fourteen-year period characterized by stability and undisputed ownership over the lands at HSF, any claims or insinuations by the Nicaragua regarding extant land disputes are not merely erroneous, but wholly without merit. Similarly, there was no secret invasion of HSF in 2017. To underscore the proactive measures undertaken to preserve the sanctity and inviolability of the property, INAGROSA has judiciously instituted a specialized Security Patrol tasked exclusively with safeguarding HSF. This Security Team is trained to execute regular, systematic patrols across the breadth of the property to ensure both its physical integrity and legal proprietorship, thereby decisively dispelling any residual or speculative allegations concerning property disputes or security lapses.

1764) Regarding the mitigation issue, any offer Nicaragua made was pretextual and in bad faith. There was no *bona fide* offer to return HSF, and Riverside was under no obligation to obtain the return of HSF.

- a) INAGROSA's business operations at HSF were lawful and not subject to regulatory peril.
- b) Nicaragua's Ministry of Treasury and Public Credit confirmed in writing in November 2019 that there were no taxes owing as of October 2019 on HSF.¹⁷¹⁹ Any documents asserting unpaid taxes were sent to INAGROSA

¹⁷¹⁷Counter-Memorial at ¶¶ 422 (iii), 423 and ¶ 430.

¹⁷¹⁸Counter-Memorial at ¶ 430.

¹⁷¹⁹Certificate of Tax Solvency. Ministry of Treasury and Public Credit October 17, 2019 (C-0468-SPA).

after the unlawful taking of its property and suspiciously in connection with this arbitration.¹⁷²⁰ There is no nexus between the internationally wrongful acts and the property taxes.

- 1765) In this case, no such reduction of damages is warranted. Riverside did not contribute any material error regarding its lands at HSF, resulting in their taking. To be certain, to show contribution, Nicaragua must demonstrate that there was an error that contributed to the harmful treatment. That treatment arose from the occupation, which was directed and encouraged by Nicaraguan officials, by the lack of timely sharing of the National Police's advance knowledge of the invasion that would have permitted protection from the occupation or from the utter lack of diligence of the National Police to address the unlawful situation at HSF during the second invasion, which resulted in the destruction of INGROSA's business.
- 1766) Allegations of contributory fault by the investor that is disconnected from the State's harmful conduct do not sever treaty rights.
- 1767) For example, as the tribunal in *Bear Creek Mining v. Peru* noted, "[f]or the international responsibility of a State to be excluded or reduced based on the investor's omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [the omission or fault] and the harm suffered."¹⁷²¹ As the tribunal found in *Occidental v. Ecuador (II)*, a mere breach of a contract concluded between the investor and State does not break the causal link between the State's unlawful actions and the harm suffered by the investor.¹⁷²²

a) The international law of contribution does not support Nicaragua

- 1768) Contributory fault is addressed under ARSIWA Article 39, which deals with "Contribution to the injury." The article states:

(1) In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the

¹⁷²⁰Certificate of Tax Solvency. Ministry of Treasury and Public Credit October 17, 2019 (C-0468-SPA).

¹⁷²¹*Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB 14/21, Award, 30 November 2017 at ¶ 410 (CL-0187-ENG) Bear Creek relied upon *Abengoa, S.A. and COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 at ¶ 670. (CL-0236-SPA).

¹⁷²²(*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012) at ¶¶ 297-452, 670-678 (CL-0058-ENG) (finding that claimant breached a participation contract with the State and violated local law, but "it is not any contribution by the injured party to the damage which it has suffered which will trigger a finding of contributory negligence. The contribution must be material and significant. In this regard, the Tribunal has a wide margin of discretion in apportioning fault. The Tribunal agrees that an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility").

injured State or any person or entity in relation to whom reparation is sought.”

(2) This rule does not apply to the breach of an international obligation which prohibits conduct irrespective of the existence or otherwise of fault of the responsible State, and which is for the protection of fundamental human rights.”

- 1769) Nicaragua neglects to note the existence of paragraph 2 of Article 39 when it raised its arguments with respect to the importance of the “offer.”
- 1770) This ARSIWA article suggests that the amount or type of reparation may be adjusted if the injured state (or a related entity) has contributed to its own injury through willful or negligent actions. However, ARSIWA Article 39(2) makes it clear that this does not apply when a state has breached an obligation that is designed to protect fundamental human rights, regardless of fault.
- 1771) Riverside denies that there is any application of contribution as it was not negligent. As noted above, Nicaragua brought its secret application within two months of the September 9th letter. At that time, Riverside promptly engaged with Nicaragua, seeking more information on what Nicaragua had in mind – while Nicaragua ignored Riverside. Nicaragua took Riverside’s responsive enquiry letter as a refusal, but Nicaragua never communicated that position to Riverside in the fall of 2021 because Nicaragua needed a refusal to ground its domestic court application (that it kept secret from INAGROSA and Riverside). An ordinary reading of the September 9th letter from Appleton does not represent a refusal, it represents some interest in the offer.¹⁷²³ Nicaragua’s determination that the same day response was a refusal is arbitrary and capricious. In any event, as detailed above, the communication of September 9th turned out to be a specious “offer,” which in August 2023 Nicaragua itself denied was an offer at all.
- 1772) Article 39(2) allows for considering contributory fault when determining reparations for internationally wrongful acts, except in situations involving the breach of obligations designed to protect fundamental human rights. The term “fundamental human rights” is not explicitly defined in ARSIWA.
- 1773) This property protection is an integral element of the objective of the CAFTA, but it is also a matter of international human rights.
- 1774) The Universal Declaration of Human Rights (UDHR) states in Article 17 that “Everyone has the right to own property alone as well as in association with others” and “No one shall be arbitrarily deprived of his property.” However,

¹⁷²³ Richter Reply Expert Damages Report at ¶¶ 6.2-6.3 (CES-04).

the UDHR is not a binding treaty but rather a declaration that sets forth common standards.¹⁷²⁴

1775) Nicaragua is a party to the American Convention on Human Rights. Article 21 of the American Convention on Human Rights states:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.¹⁷²⁵

1776) The right to property is itself a matter respected by international human rights law, and even Nicaragua itself, and thus fits within the derogation contained in ARSIWA article 39(2).

2. Nicaragua's harm resulted in the economic devastation of INAGROSA's business.

1777) With the matter of causation resolved, there is the question of how to value internationally wrongful actions Nicaragua took.

1778) Regardless of the legal characterization of Nicaragua's unlawful conduct—the harm Riverside suffered remains the same in all four instances. In all four instances, there has been a total loss of value in Riverside's investment in the operating business of INAGROSA.

1779) The INAGROSA business became valueless once Nicaragua failed to prevent the destruction of the rare hardwood forests and productive Hass avocado trees. Its value was in the economic capacity of that business to produce the commodities, which would generate economic returns.

1780) Therefore, the computation of damages for each of the four bases of Riverside's claim—breach of MFN, National Treatment, international law standards of treatment, and expropriation — requires valuing the fair market value of Riverside's investment but-for Nicaragua's unlawful conduct. In all four damage situations, the quantum of damage that Riverside's investment has suffered in connection with Nicaragua's breach is the entire fair market value of its investment.¹⁷²⁶

¹⁷²⁴Universal Declaration of Human Rights (1948) §17 (**CL-0123-ENG**). This human right to property is raised by Riverside in its Memorial at ¶ 532.

¹⁷²⁵Inter-American Commission of Human Rights, American Convention on Human Rights, 1969 § 21 (**CL-0125-ENG**).

¹⁷²⁶Richter Reply Expert Damages Report at ¶ 5.16 (**CES-04**).

3. Valuation Date

- 1781) To compute the fair market value of Riverside's investment but-for Nicaragua's unlawful conduct (*i.e.*, but-for the failure to prevent the continued occupation in the summer of 2018 or the invasion itself, and the various events described above that followed thereafter), the fair market value must be computed just before the unlawful conduct that crystallized into a breach of the Treaty.¹⁷²⁷
- 1782) The valuation date for the calculation of Riverside's damages for all bases of Riverside's claim is similar but not the same. However, Richter expressed in its Expert Statement that the quantum for these breaches was the same due to the timing of the breaches.
- 1783) There are four types of Treaty breaches that require dates for valuation, notably:
- a) **Expropriation:** The date for the breach of expropriation obligations was set under the Treaty as the first day of the invasion on June 16, 2018.¹⁷²⁸
 - b) **FET:** The date for the breach of FET in connection with Nicaragua's failure to share advance information of impending invasion began on June 16, 2018, making that the operative date.¹⁷²⁹ The date for the breach of FET in connection with Nicaragua's instructions that the invaders continue the occupation of HSF, which, based on the July 31, 2018, report from Jinotega Police Commissioner Castro, was set in mid-July 2018. That invasion began on July 16, 2018, making that the operative date.¹⁷³⁰
 - c) **FPS:** The breach of the FPS Obligation arising from Nicaragua's failure to act diligently concerning the operations of Nicaragua's protective services, which, based on the various reports from Regional National Police Commissioners was set concurrent with the date of the second invasion in mid-July, 2018,¹⁷³¹ That invasion began on July 16, 2018 making that the latest operative date.¹⁷³²
 - d) **MFN and National Treatment:** The failure to provide National Treatment and MFN Treatment due to Nicaragua's failure to provide treatment to INAGROSA as favorable as that given to other investments unlawfully

¹⁷²⁷ *Chorzów*, Merits Award, at p. 47 (CL-0054-ENG); *Santa Elena* at ¶¶ 77-78 (CL-0055 - ENG). *Crystallex International Corp. v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016) at ¶¶ 855, 891 (Hereinafter "Crystallex") (CL-0204-ENG).

¹⁷²⁸ Richter Reply Expert Damages Report at ¶ 5.20 (CES-04).

¹⁷²⁹ Richter Reply Expert Damages Report at ¶ 5.20 (CES-04).

¹⁷³⁰ Richter Reply Expert Damages Report at ¶ 5.20 (CES-04).

¹⁷³¹ Richter Reply Report at ¶ 5.20 (CES-04).

¹⁷³² Richter Reply Report at ¶ 5.20 (CES-04).

invaded at the same time in Nicaragua in 2018. Based on the various reports from Regional National Police Commissioners this was concurrent with a reasonable time to respond to the invasion, being set on the July 16, 2018,¹⁷³³

1784) Three of the dates commence on June 16, 2018, and two dates (for fair and equitable treatment, FET, and FPS) Full Protection and Security commencing shortly thereafter on or about July 16, 2018.¹⁷³⁴

1785) To compute the fair market value of Riverside's investment but-for Nicaragua's unlawful conduct (*i.e.*, but-for the failure to prevent the continued occupation in the summer of 2018 or the invasion itself, and the various events described above that followed thereafter), the fair market value must be computed just before the unlawful conduct that crystallized into a breach of the Treaty.¹⁷³⁵

1786) In the circumstances, Riverside has instructed Richter to compute damages that Riverside suffered using June 16, 2018, as the date of valuation ("Valuation Date"),¹⁷³⁶ reflecting the circumstances prevailing just before Nicaragua's breach of the Treaty.

b) Timing for the Composite Act occasioned to Riverside

1787) The impact of the Judicial Order occurred in 2021, years after the initial damage occurred. However, the Judicial Order did not occur in isolation. Because the 2021 Judicial Order is related to the claim arising from the 2018 invasion, the wrongful acts are related and together they constitute a composite act that taken together resulted in the expropriation of HSF going back to the June 2018 invasion.

¹⁷³³Riverside has received the following certificates of Handover from Nicaragua because of the document production process. The following are examples of handover certificates used by the Nicaraguan authorities to address unlawful invasions of private lands in the summer and fall of 2018. Certificate of Handover of Rural Land to Elvis Delgadillo, Raquel Torrez and Benita Garcia by the Leon National Police Delegation, October 12, 2018 (**C-0327-SPA**); Certificate of Handover of Rural Land to MANGOSA and MELONICSA issued by the Leon National Police Delegation, October 24, 2018 (**C-0328-SPA**), Certificate of Handover of Rural Land to Banco de Fomento a la Produccion issued by the Leon National Police Delegation, October 18, 2018 (**C-0329-SPA**); Certificate of Handover of Rural Land to Angel Rafael Chavez and Alejandro Chavez issued by the Leon National Police Delegation, October 16, 2018 (**C-0330-SPA**); Certificate of Handover of Rural Land to Evenor Blanco issued by the Leon National Police Delegation, October 18, 2018 (**C-0331-SPA**); and Certificate of Handover of Rural Land to Mauricio Pallais and Jose Rodriguez issued by the Leon National Police Delegation October 22, 2018 (**C-0332-SPA**).

¹⁷³⁴ Richter Reply Expert Damages Report at ¶ 5.21 (**CES-04**).

¹⁷³⁵ *Chorzów*, Merits Award, at p. 47 (**CL-0054-ENG**); *Santa Elena* at ¶¶77-78 (**CL-0055 - ENG**). *Crystallex International Corp. v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, dated 4 April 2016) at ¶¶ 855, 891 (Hereinafter "Crystallex") (**CL-0204-ENG**).

¹⁷³⁶ Richter Reply Expert Damages Report at ¶ 5.22 (**CES-04**).

- 1788) The International Law Commission comments on the nature of composite acts say “[w]hile composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation.”¹⁷³⁷
- 1789) A composite breach extends over a period, starting with the first act or omission and lasting for as long as these events are repeated and remain in non-conformity with the international obligation. Composite acts are materialized as a breach when the last of the acts or omissions necessary to constitute a wrongful act under the treaty occurs.
- 1790) However, the CAFTA provides a special rule to assist with the computation of damages arising from expropriation. Article 10;7(2)(c) provides that the fair market compensation for expropriation shall not “reflect any change in value occurring because the intended expropriation had become known earlier.” This CAFTA provision sets the valuation date at June 16, 2018, the date of the first invasion.
- 1791) ASRIWA Article 15 provides that the various separate acts considered above are linked. CAFTA Article 10.7(2)(b) provides specific compensation instructions that this Tribunal is to not reflect any change in value occurring because the intended expropriation had become known earlier.
- 1792) Thus, the valuation date for the expropriation caused to Riverside through the 2021 measures is the same as all other expropriations in this claim. That date is June 16, 2018 – the date of the invasion.

4. There are no intervening causation factors.

- 1793) Nicaragua argues that there are two mitigating factors which affect causation. Nicaragua calls these negative elements of proximate cause in paragraph 428 of its Counter-Memorial. The two factors Nicaragua alleges are:
- a) An alleged 2017 invasion was the cause of harm, and
 - b) INAGROSA abandoned HSF.
- 1794) Riverside disputes the veracity of the facts regarding these intervening factors. There is no way in which these unsupported allegations could be issue-determinative.

¹⁷³⁷ARSIWA Art 15 and commentary (9) (CL-0017-ENG).

a) There was no 2017 invasion.

- 1795) As noted in Part II above, there was no 2017 invasion of HSF. No extrinsic evidence supports Nicaragua's contention, as asserted in the Witness Statement of Jose Lopez.
- 1796) Riverside has presented direct testimony from INAGROSA employees to confirm that there was no invasion of HSF in 2017. The Reply witness statements of Luis Gutierrez and Domingo Ferrufino address this issue.¹⁷³⁸ Each of these employees had regular patrols of the grounds at HSF and had reason to be in the area where Mr. Lopez claims there was an invasion.¹⁷³⁹ Each of the witnesses dismisses the allegations of Mr. Lopez.¹⁷⁴⁰
- 1797) Further, there is no record in any police report or written communication from Police Commissioner Castro to National Police Chief Diaz in July 2018 mentioning a 2017 invasion. The only mention of this alleged event arises after the initiation of this arbitration. and not in any contemporary police documents.

b) INAGROSA never abandoned HSF.

- 1798) As noted below, INAGROSA did not abandon HSF. INAGROSA maintained staff and security at HSF throughout 2017 and 2018.¹⁷⁴¹ There were active patrols and business operations at HSF concerning the Hass avocado operations, the wind-down and transition from coffee operations, and about active work on the standing forest.
- 1799) Considering the productive Hass avocado harvest in 2017, it is hard to find any support for the contention at Counter-Memorial paragraph 430 that the Hass Avocado business was not pursued. Further, the purpose for the cultivation of the Hass avocado crop and the extensive nursery operations was to carry out the expansion of the existing Hass avocado business. The avocado business was successfully growing crops and obtaining harvests. That is the litmus test for business success given that the product was a commodity product sold into a global marketplace.
- 1800) Similarly, as addressed in Part III above, Riverside was consistent with all necessary permits. Nicaragua's contention in Counter-Memorial paragraph 430 that INAGROSA could not operate its Hass avocado business and forest

¹⁷³⁸ Witness Statement of Luis Gutierrez- Reply- SPA at ¶¶32-39 (CWS-10); Witness Statement of Domingo Ferrufino – Reply -SPA at ¶¶ 46-50 (CWS-12)

¹⁷³⁹ Witness Statement of Luis Gutierrez- Reply- SPA at ¶¶32-39 (CWS-10); Witness Statement of Domingo Ferrufino – Reply -SPA at ¶¶ 46-50 (CWS-12)

¹⁷⁴⁰ Witness Statement of José V. López-Counter-Memorial-ENG at ¶ 21 (RWS-04).

¹⁷⁴¹ Witness Statement of Luis Gutierrez- Reply- SPA at ¶¶ 24-31 (CWS-10); Witness Statement of Domingo Ferrufino – Reply -SPA at ¶¶ 44-45 (CWS-12).

business without being “subject to sever sanctions, including hefty fines and forced closures” is manifestly absurd.¹⁷⁴²

- 1801) Finally in Counter-Memorial paragraph 455, Nicaragua contends that INAGROSA had no staff in 2018 at the time of the invasion. INAGROSA’s staff for Hacienda Santa Fé since 2014 was managed through an associated company, Santa Fe Estate Coffee Company. This company, owned by Carlos Rondón and Melva Jo Winger de Rondón, provided payroll and HR services for INAGROSA at HSF.
- 1802) The records from Santa Fe Estate Coffee Company were maintained at HSF and in the computers at HSF that were lost in the occupation.¹⁷⁴³ The payroll documents in the possession of Mr. Rondón have been filed for 2016, 2016, and part of 2018.¹⁷⁴⁴ They demonstrate that there were employees at HSF engaged in agricultural cultivation.

¹⁷⁴² Expert Witness Statement of Renaldy J. Gutierrez at ¶185 and ¶187 (**CES-006**).

¹⁷⁴³ Witness Statement of Carlos Rondon-Reply-ENG at ¶ 12-13, 68, 123-125 (**CWS-09**).

¹⁷⁴⁴ Santa Fe Estate Company- Hacienda Santa Fe Payroll April 25-May 15, 2016 (**C-0354-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 16- May 29, 2016 (**C-0355-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 30- June 5, 2016 (**C-0356-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 6- June 19, 2016 (**C-0357-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 20- June 26, 2016 (**C-0358-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 27- July 3, 2016 (**C-0359-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll July 4- July 17, 2016 (**C-0360-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll July 18- July 31, 2016 (**C-0361-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll August 1- August 14, 2016 (**C-0362-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll August 15- August 28, 2016 (**C-0363-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll August 29-September 11, 2016 (**C-0364-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll September 12- October 2, 2016 (**C-0365-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 3- October 16, 2016 (**C-0366-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 17- October 30, 2016 (**C-0367-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 31- November 13, 2016 (**C-0368-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll November 14- November 27, 2016 (**C-0369-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll November 28-December 11, 2016 (**C-070-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll December 12- December 31, 2016 (**C-0371-SPA**); Santa Fe Estate Company- 2016 vacations payment (**C-0372-SPA**); Santa Fe Estate Company- 2016 Christmas extra payment (**C-0373-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll January 1- January 15, 2017 (**C-0374-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll January 16- January 31, 2017 (**C-0375-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll February 1 -February 12, 2017 (**C-0376-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll February 13- February 26, 2017 (**C-0377-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll February 26 -March 12, 2017 (**C-0378-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll March 13- March 31, 2017 (**C-0379-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll April 1- April 15, 2017 (**C-0380-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll April 16- April 30, 2017 (**C-0381-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 1- May 15 2017 (**C-0382-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 16- May 30, 2017 (**C-0383-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 16-June 30, 2017 (**C-0384-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll July 1-July 15, 2017 (**C-0385-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll July 16-July 30, 2017 (**C-0386-SPA**); Santa Fe Estate

1803) Nicaragua is grasping at straws. There is no support for the contentions that intervening events excuse Nicaragua from its responsibility for the internationally wrongful acts.

B. DCF Valuation Is an Appropriate Method for Valuing Damages

1804) The discounted cash flow (DCF) valuation method, which estimates future cash flows and discounts them to a present value, is the appropriate method for deriving the fair market value of Riverside's investments in Nicaragua at HSF.

1805) International investment arbitration tribunals have, for many years, relied on the DCF method to compute the damages owing to investors for breaches by states of investment protection treaties, including in cases involving expropriation,¹⁷⁴⁵ breach of the international law standard of treatment, which includes fair and equitable treatment and full protection and security,¹⁷⁴⁶ and breach of the national treatment and MFN treatment standards.¹⁷⁴⁷

1806) The tribunal in *Rusoro v. Venezuela* acknowledged the broad acceptance of the DCF method for valuing damages arising from investment treaty breaches:

Valuations based on the DCF method have become usual in investment arbitrations whenever the fair market value of an enterprise must be established. The Tribunal agrees that, where the circumstances for its use are appropriate, forward looking DCF has

Company- Hacienda Santa Fe Payroll August 1- August 15, 2017 (**C-0387-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll August 16- August 31, 2017 (**C-0388-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll September 1- September 15, 2017 (**C-0389-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 1- October 15, 2017 (**C-0391-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 16- October 31, 2017 (**C-0392-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll November 1- November 15, 2017 (**C-0393-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll November 16- November 30, 2017 (**C-0394-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll December 1- December 15, 2017 (**C-0395-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll December e Estate Company- Hacienda Santa Fe Payroll September 16- September 30, 2017 (**C-0390-SPA**); Santa Fe Estate Com 1- December 15, 2017 (**C-0396-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll January 1-January 15, 2018 (**C-0398-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll January 16-January 31, 2018 (**C-0399-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 16-May 31, 2018 (**C-0400-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 1-June 15, 2018 (**C-0401-SPA**)

¹⁷⁴⁴ Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 290-291 (**CWS-10**).

¹⁷⁴⁵ Crystallex at ¶¶ 877, 879 (**CL-0204-ENG**); Gold Reserve at ¶ 83 (**RL-0054-ENG**).

¹⁷⁴⁶ CMS at ¶¶ 411–17; (**CL-0053-ENG**), Enron at ¶ 385 (**CL-0212-ENG**); *National Grid p.l.c. v. Argentina* UNCITRAL Award, dated 3 November 2008 at ¶¶ 275 – 76. (**CL-0213-ENG**).

¹⁷⁴⁷ Cargill at ¶¶ 444–48 **CL-0215-ENG**).

advantages over other, more backwards looking valuation methods.¹⁷⁴⁸

1807) Thus, all that is required is that “the circumstances for its use [be] appropriate.”

1808) The DCF method is used almost uniformly by investment tribunals valuing business interests with historical cash flows to estimate future ones. However, historical cash flows are not a prerequisite to using the DCF method to compute damages. Indeed, investment tribunals have relied on the approach in cases involving pre-operational or pre-profitable business interests where there was nevertheless sufficiently reliable information to base an estimate of future cash flows.¹⁷⁴⁹

1. INAGROSA has an established record of successful cultivation of Hass Avocados.

1809) Determining the reliability of the DCF method for valuing pre-operating projects is a fact-specific inquiry into the project’s stage of development and whether the inputs for the DCF reflect “a reasonable basis for the Tribunal to determine the *amount of loss*.”¹⁷⁵⁰

1810) In a recent book chapter on valuation in investment treaty arbitration, Noah Rubins, Vasuda Sinha, and Baxter Roberts write:

Although the DCF method requires a tribunal to consider the value of future cash flows, the fact that a damaged investment may be a business that has no track record of profitability will not necessarily prevent a damages award from being calculated on this basis if there is sufficient information to permit reliable cash flow projections.¹⁷⁵¹

1811) To determine if there is sufficient information to allow the estimation of future revenues and costs to perform a DCF analysis, tribunals have considered factors such as whether the enterprise was able to produce the commodity at issue, whether there was a reliable indication of costs and revenues, and whether the source of revenues had already been identified. These criteria are examined in detail in the following pages of this Reply Memorial.

¹⁷⁴⁸*Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, dated 22 August 2016) (hereafter “*Rusoro*”) at ¶ 758 (CL-0206-ENG).

¹⁷⁴⁹ Richter Reply Expert Damages Report at ¶ 3.10 (CES-04).

¹⁷⁵⁰*Hydro* at ¶ 845 (CL-0202-ENG); See also *Crystallex* at ¶¶ 886 (CL-0204-ENG); *Tethyan Copper* at ¶ 310 (CL-0205-ENG).

¹⁷⁵¹Noah Rubins, Vasuda Sinha, and Baxter Roberts, Chapter 7: Approaches to Valuation in Investment Treaty Arbitration Valuation in *Christina Beharry (ed), Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, x Brill, 2018 at page 186. (CL-0287-ENG).

2. DCF Valuation is even used without a track record of financial performance.

- 1812) In a recent book chapter on the DCF method of valuation in investment treaty arbitration, Kai F. Schumacher and Henner Klönne considered situations where DCF valuation was applicable.¹⁷⁵² In so doing, several of the issues Nicaragua has raised were addressed:
- 1813) Schumacher and Henner Klönne consider the issue of whether there needs to be an established business or going concern as a threshold for DCF. The authors conclude that this is not necessary.

3.1 No Established Business or Going Concern is Needed

A frequently observed precondition in investor-State arbitrations is that the DCF method can only be applied to established businesses (i.e., when the going concern of a business is met). Many tribunals have shied away from the DCF method when the business has not been operating for “three years or more.” In fact, some tribunals even considered companies operating for slightly more than three years as insufficient because there had not been “a number of years of successful performance, “i.e., they did not demonstrate a sufficiently profitable business operation. The perceived lack of history makes it difficult for tribunals to assess the cash flow projections of the valuation subject with reasonable certainty.

While it is correct that the DCF method can only be applied to businesses which are profitable in the future, there is no precondition from a financial perspective regarding profitability in the past or in the early years. Young companies are often not (or hardly ever) profitable at the beginning of their operations. The reasons for this common observation include the lack of economies of scale (i.e., costs per product or service generally decrease with the size of the business), initial inefficiencies due to the organization’s learning curve, or the need for investments in the brand or customers. However, this does not mean that young companies have no significant value per se or cannot be quantified using the DCF method.¹⁷⁵³

- 1814) The *Rusoro* Tribunal acknowledged that the DCF method could be an appropriate valuation method even without a track record of financial

¹⁷⁵²Kai F. Schumacher and Henner Klönne. Chapter 8, “Discounted Cash Flow” in Christina Beharry (ed), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, Brill, 2018 (CL-0288- ENG).

¹⁷⁵³Kai F. Schumacher and Henner Klönne. Chapter 8 “Discounted Cash Flow” in Christina Beharry (ed), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, Brill, 2018 a– pages 212 - 213. (CL-0288- ENG).

performance and set out the relevant criteria for determining when the methodology might be appropriate: The Tribunal held:

DCF works properly if all, or at least a significant part, of the following criteria are met:

The enterprise has an established historical record of financial performance.

There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted in *tempore insuspecto*, prepared by the company's officers, and verified by an impartial expert.

The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty.

The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the availability of financing.

It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country.

The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash.¹⁷⁵⁴

a) Riverside meets the *Rusoro* test.

1815) The *Rusoro* test proposes that an enterprise should significantly meet most of the following six elements:¹⁷⁵⁵ Here is how Riverside meets each of them.

- a) A historical record of financial performance. As noted above, INAGROSA has historical records of financial performance in its coffee operations and historical records of commodity performance in terms of its capacity to produce and its actual production of Hass avocados.¹⁷⁵⁶ The historical records in the coffee operations give credibility to the ability of INAGROSA to expand into another agricultural product line. Also, concerning its

¹⁷⁵⁴*Rusoro* at ¶ 758 (CL-0206-ENG).

¹⁷⁵⁵*Rusoro* at ¶ 758 (CL-0206-ENG).

¹⁷⁵⁶Richter Reply Expert Damages Report at ¶ 3.23 (CES-04).

standing forest, INAGROSA had the working documents supporting its tree census to confirm the elements of the standing forest.¹⁷⁵⁷

- b) Detailed business plans: Riverside meets the second *Rusoro* element in that it had “reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted *in tempore insuspecto*, prepared by the company’s officers and verified by an impartial expert.” These documents were prepared by Russell Welty, a seasoned financial market professional. Mr. Welty had detailed business plans from 2015 until the invasion.¹⁷⁵⁸ Hass Avocado producers in Mexico met with Mr. Rondon, and they externally reviewed these plans.¹⁷⁵⁹ These plans included input from private equity investment entities who also reviewed the plans.¹⁷⁶⁰ The final version of these business plans was used in a basis of Riverside’s decision in March 2018 to commit up to \$16 million in additional equity to INAGROSA.¹⁷⁶¹
- c) Reasonable certainty for sale of products: Riverside meets the third *Rusoro* requirement to establish through independent market evidence “the price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty.” Riverside was selling a commodity product into a commodity market. Thus, it did not require established specific customers. It required a means to transport its goods from Nicaragua to the relevant market. The business plans produced identified a desire to sell into” plans to sell to worldwide markets, targeting US, China, Japan, Canada, Central America, and Europe.”.¹⁷⁶²Riverside relied upon reliable Hass avocado market pricing data supplied by the US Department of Agriculture.¹⁷⁶³ Richter confirmed Hass avocado market pricing through independent reliance on market

¹⁷⁵⁷Tree Census at Hacienda Santa Fe prepared by Luis Gutierrez January 20, 2018 (C-0084-SPA).

¹⁷⁵⁸ Witness Statement of Russ Welty-Reply-ENG at ¶ 41 (CWS-11).

¹⁷⁵⁹Witness Statement of Russ Welty-Reply-ENG at ¶¶ 46-47 (CWS-11).

¹⁷⁶⁰ Witness Statement of Russ Welty-Reply-ENG at ¶ 46-47 (CWS-11). Email from Russ Welty re: RVHA Business Plan, August 16, 2016 (C-0643-ENG).Email from Russ Welty re: RVHA Business Plan, November 30, 2016 (C-0644-ENG).Email from Russ Welty re: RVHA Business Plan, December 13, 2016 (C-0645-ENG).Email from Carlos Rondon re: RVHA Business Plan, January 11, 2017, (C-0646-ENG).Email from Russ Welty re: RVHA Business Plan June 26, 2017, (C-0647-ENG).Email from Russ Welty re: RVHA Business Plan June 29, 2017 (C-0648-ENG).Email from Russ Welty re: RVHA Business Plan September 10, 2017 (C-0649-ENG).Email from Russ Welty re: RVHA Business Plan, October 6, 2017, (C-0650-ENG).Email from Russ Welty re: RVHA Business Plan, October 12, 2017, (C-0651-ENG).Email from Russ Welty re: RVHA Business Plan, October 23, 2017, (C-0652-ENG).Email from Russ Welty re: RVHA Business Plan, November 19, 2017 (C-0653-ENG). Email from Russ Welty re: RVHA Business Plan, November 21, 2017, (C-0654-ENG).Email from Russ Welty re: RVHA Business Plan, February 5, 2018 (C-0655-ENG).Email from Russ Welty re: RVHA Business Plan, February 26, 2018 (C-0656-ENG).Email from Russ Welty re RVHA Business Plan, March 15, 2018 (C-0657-ENG).Email from Russ Welty re: RVHA Business Plan, May 24, 2018 (C-0658-ENG).

¹⁷⁶¹Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 83 (CWS-08).

¹⁷⁶²RVHA Business Plan sent to Glidepath Partners - Mark Soane at p.1 (C-0404-ENG).

¹⁷⁶³Richter Reply Expert Valuation Report at Appendix 2 – Sunk Costs (CES-01).

data from an independent avocado market reporter to confirm the reliability of the certainty of the sale of products.¹⁷⁶⁴

- d) No uncertainty about the availability of financing. Riverside meets the fourth *Rusoro* factor. There was no uncertainty about the basis of INAGROSA's source of finance. By March 2018, Riverside had invested millions of dollars in INAGROSA.¹⁷⁶⁵ Riverside's members issued a Members' Resolution in March 2018 to confirm Riverside's agreement to fund an additional \$16 million of finance to INAGROSA for its Hass Avocado plans.¹⁷⁶⁶
- e) The ability to calculate a Weighted Average Cost of Capital (WACC). Riverside meets the fourth *Rusoro* factor. Mr. Kotecha, in the Richter Report, generated a WACC for INAGROSA, including reliance on independent data for a reasonable country risk premium.¹⁷⁶⁷ In particular, the Duarte Report identifies that INAGROSA could produce Hass avocados for market. The variables noted in the Duarte Report deal with differences in factors that can be addressed within the DCF analysis such as yield and risk.

- 1816) The enterprise is active in a sector with low regulatory pressure. INAGROSA operated as an agricultural producer with a view to exporting Hass Avocados and, eventually, timber. INAGROSA had extensive prior experience as an agricultural producer of export coffee.¹⁷⁶⁸ INAGROSA successfully addressed the regulatory requirements in that product line.¹⁷⁶⁹ INAGROSA also had regular visits from Nicaraguan agricultural officials.¹⁷⁷⁰ The inspectors confirmed that INAGROSA did not have any substantive regulatory inconsistencies regulatory compliance during those visits.¹⁷⁷¹ Internal government documents produced in 2018 before the invasion also confirm that INAGROSA documents were reviewed for compliance with Nicaraguan law.¹⁷⁷² As noted above, INAGROSA had numerous markets

¹⁷⁶⁴Richter Expert Valuation Report from Vimal Kotecha at Appendix 2 for Avocado markets and Appendix 3 on revenues. (CES-01).

¹⁷⁶⁵Riverside Investment in Inagrosa 2001-2018, December 31, 2018 (C-0424-ENG).

¹⁷⁶⁶Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (C-0287-ENG); Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (C-0286-ENG).

¹⁷⁶⁷Richter Expert Valuation Report from Vimal Kotecha at Appendix 5 (CES-01).

¹⁷⁶⁸See ¶¶ of the Memorial and ¶¶ of this Reply Memorial. Also, see Carlos Rondon Witness Statement – ENG at ¶ 96, 106 (CWS-01).

¹⁷⁶⁹Witness Statement of Carlos Rondon-Reply-ENG at ¶ 94 (CWS-09).

¹⁷⁷⁰Witness Statement of Carlos Rondon-Reply-ENG at ¶ 95 (CWS-09).

¹⁷⁷¹Witness Statement of Luis Gutierrez-Reply-ENG at ¶ 171 (CWS-10); Witness Statement of Carlos Rondon-Reply-ENG at ¶ 95 (CWS-09).

¹⁷⁷²Memorandum DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity February 27, 2018 (C-0285-SPA).

targeting China, Japan, Canada, Central America and Europe to export its Hass avocados while it was obtaining its permits for U.S. export.

- 1817) While under the *Rusoro* test an enterprise does not need to meet each of the six criteria, Riverside and its investment in fact meet all of them.
- 1818) The facts here support the computation of damages using an income-based approach. INAGROSA was prepared from an operational readiness, financing, and regulatory perspective to continue full-scale operations of its avocado business in the summer of 2018. As of the Valuation Date, INAGROSA also had in place everything required to estimate future revenues and costs reliably.
- 1819) Indeed, when, as here, pre-operational or pre-profit businesses are sufficiently advanced in their development such that it is possible to estimate the inputs for a DCF valuation with sufficient reliability, investment tribunals have used the method to compute damages. This was most evident regarding disputes when the projects were about to commence operations, as was the case here.
- 1820) For instance, in *Crystallex v. Venezuela*, the tribunal was faced with the valuation of a gold mining project that “did not have a proven track record of profitability because [Crystallex] never started operating the mine.”¹⁷⁷³
- 1821) Yet, the tribunal found that Crystallex “if it had been allowed to operate, . . . would have engaged in a profitmaking activity and that such activity would have been profitable.”¹⁷⁷⁴
- 1822) The *Crystallex* Tribunal considered that “the development stage of the project” was such that its “costs and future profits [could] be estimated with greater certainty.”¹⁷⁷⁵ The *Crystallex* Tribunal thus concluded that “predicting future income from ascertained reserves to be extracted by the use of traditional mining techniques . . . can be done with a significant degree of certainty, even without a record of past production.”¹⁷⁷⁶ In concluding that the DCF method was appropriate, the *Crystallex* Tribunal made the following observations:

In short, the Claimant has established the fact of future profitability, as it had completed the exploration phase, the size of the deposits had been established, the value can be determined based on market

¹⁷⁷³ *Crystallex* at ¶ 877 (CL-0204-ENG).

¹⁷⁷⁴ *Crystallex* at ¶ 877 (CL-0204-ENG).

¹⁷⁷⁵ *Crystallex* at ¶¶ 877, 879 (CL-0204-ENG).

¹⁷⁷⁶ *Crystallex* at ¶ 879 (CL-0204-ENG).

prices, and the costs are well known in the industry and can be estimated with a sufficient degree of certainty.

The Tribunal considers that in this case only forward-looking methodologies aimed at calculating lost profits are appropriate in order to determine the fair market value of Crystallex's investment. By contrast, a backward-looking methodology such as the cost approach, while susceptible of being utilized in certain instances where there is no record of profitability and other methodologies would lead to excessively speculative and uncertain results, cannot be resorted to in this case. The cost approach method would not reflect the fair market value of the investment, as by definition it only assesses what has been expended into the project rather than what the market value of the investment is at the relevant time¹⁷⁷⁷

b) Riverside meets the *Crystallex* test.

1823) As noted below, Riverside can meet many of the following factors in the *Crystallex* Test.

- a) Riverside completed its "exploratory phase" and successfully reached commercial Hass avocado production in 2017.¹⁷⁷⁸
- b) The size of the avocado planting areas had been established. Satellite images confirm that Riverside had 44.75 hectares of planted Hass avocado.¹⁷⁷⁹ By the time of the June 2018 invasion, INAGROSA was in the process of its 200-hectare expansion.¹⁷⁸⁰
- c) Riverside can show that the value of avocado revenues can be determined based on market prices¹⁷⁸¹, and
- d) Riverside had two full years' experience in successfully producing Hass Avocados and more than two decades of experience in successfully producing crops.¹⁷⁸² Given its existing and established infrastructure at HSF, the costs are well known in the agricultural industry and were detailed by Management with sufficient certainty.

1824) The tribunal in *Gold Reserve v. Venezuela* considered the value of an adjacent mining project to the one at issue in *Crystallex*. That project also "was never a functioning mine and therefore did not have a history of

¹⁷⁷⁷Crystallex at ¶¶ 880, 882 (CL-0204-ENG).

¹⁷⁷⁸Reply Witness Statement of Russ Welty at ¶ 63, 67 (CWS-11).

¹⁷⁷⁹INAGROSA Planting Area Schedule updated with AGROSAT data, August 4, 2023 (C-0440-SPA).

¹⁷⁸⁰Witness Statement of Carlos Rondon-Reply-ENG at ¶ 99 (CWS-09).

¹⁷⁸¹Reply Witness Statement of Russ Welty-Reply-ENG at ¶ 78-79 (CWS-11).

¹⁷⁸²Witness Statement of Luis Gutierrez-Reply-ENG at ¶¶ 283-289 (CWS-10).

cashflow.”¹⁷⁸³ That notwithstanding, the *Gold Reserve* Tribunal accepted the use of the DCF method to compute damages, concluding that:

a DCF method can be reliably used in the instant case because of the commodity nature of the product and detailed mining cashflow analysis previously performed.¹⁷⁸⁴

1825) The *Gold Reserve* Tribunal applied DCF methods to valuation because the commodity at issue was known to have an existing market, and the project’s stage of development was such that detailed, contemporaneous cash flow analysis had been prepared in the ordinary course of business.¹⁷⁸⁵

c) Riverside meets the *Gold Reserve* test.

1826) Riverside meets the *Gold Reserve* test for applying the DCF method of income valuation. INAGROSA was producing commodity nature products, and a detailed cashflow analysis was developed as part of its business plans.¹⁷⁸⁶

1827) Riverside produced an agricultural commodity, with world prices paid in US dollars. As noted above, each of the awards in *Rusoro*, *Gold Reserve*, and *Crystallex* placed more certainty on businesses producing commodities, as there was less speculation concerning revenues and costs of production. In these commodity situations, the tribunals accepted that DCF valuation as the most appropriate and least speculative approach.

1828) Like *Crystallex* and *Gold Reserve*, the underlying facts in the dispute between *Tethyan Copper and Pakistan* considered adverse government measures affecting a project that had not yet become operational but was well developed. In considering the applicability of the DCF method for valuing the project, the tribunal observed “that the question whether a DCF method (or a similar income-based valuation methodology) can be applied to value a project which has not yet become operational depends strongly on the circumstances of the individual case.”¹⁷⁸⁷

1829) The *Tethyan* Tribunal described the inquiry as follows:

The first key question is whether, based on the evidence before it, the Tribunal is convinced that in the absence of Respondent’s breaches, the project would have become operational and would also have become

¹⁷⁸³ *Gold Reserve* at ¶ 830 (RL-0054-ENG).

¹⁷⁸⁴ *Gold Reserve* at ¶ 830 (RL-0054-ENG).

¹⁷⁸⁵ *Gold Reserve* at ¶ 830 (RL-0054-ENG).

¹⁷⁸⁶ Richter Reply Expert Valuation Report – ENG at ¶ 3.23 (CES-04).

¹⁷⁸⁷ *Tethyan Copper* at ¶ 330 (CL-0205-ENG).

profitable. The second key question is whether the Tribunal is convinced that it can, with reasonable confidence, determine the amount of these profits based on the inputs provided by the Parties' experts for this calculation.¹⁷⁸⁸

1830) The *Tethyan* tribunal applied DCF valuation because the “[c]laimant would have been able to obtain the necessary funds and would also have brought the necessary experience to successfully execute the project.”¹⁷⁸⁹ The Tethyan Tribunal was impressed by “several years of intensive work on the ground” in the years prior to the government’s measures.¹⁷⁹⁰ Consequently, in light of the project’s stage of development, the tribunal concluded that “it is appropriate to assume that [c]laimant’s investment would have been profitable and to determine these future profits by using a DCF method.”¹⁷⁹¹

d) Riverside meets the *Tethyan* test.

1831) Riverside meets the *Tethyan* test.

- a) INAGROSA had confirmation of ongoing financing for its expansion from Riverside.¹⁷⁹²
- b) INAGROSA had years of successful operations in growing and producing Hass avocados before the unlawful invasion and occupation of HSF.¹⁷⁹³
- c) Riverside also met the words of the *Tethyan* Tribunal, in that “in light of the project’s stage of development.” “It is appropriate to assume that [c]laimant’s investment would have been profitable and to determine these future profits by using a DCF method.”¹⁷⁹⁴

e) Riverside meets the *Hydro* test.

1832) Using an income approach to value projects not yet in the profit- generation stage is not limited to projects involving natural resources. In *Hydro v. Albania*, Albania expropriated the claimant’s digital broadcast business that it was launching in Albania, and it had only operated for a short period before

¹⁷⁸⁸ *Tethyan Copper* at ¶ 330 (CL-0205-ENG).

¹⁷⁸⁹ *Tethyan Copper* at ¶ 331 (CL-0205-ENG)

¹⁷⁹⁰ *Tethyan Copper* at ¶ 332 (CL-0205-ENG).

¹⁷⁹¹ *Tethyan Copper* at ¶ 335 (CL-0205-ENG).

¹⁷⁹² Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (C-0287-ENG); Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (C-0286-ENG).

¹⁷⁹³ *Tethyan Copper* at ¶ 335 (CL-0205-ENG).

¹⁷⁹⁴ *Tethyan Copper* at ¶ 335 (CL-0205-ENG).

the expropriation.¹⁷⁹⁵ The *Hydro* Tribunal observed that “[a]lthough not yet making a profit, [the business] had prospects to do so, and a reasonable likelihood of so doing.”¹⁷⁹⁶

1833) Albania, the respondent, argued that “the DCF method [was] inappropriate” to compute damages because the project “did not operate for sufficient time to generate adequate and reliable data.”¹⁷⁹⁷

1834) The *Hydro* Tribunal, however, considered it appropriate to use the DCF method. It observed that to otherwise cast aside the income-based approach in favor of an alternative method (such as the sunk costs approach) because of the business’s early stage would not adequately compensate the claimant under the applicable standard of compensation. The *Hydro* Tribunal also noted that not applying DCF would reward the State for expropriating a promising business shortly after its founding and creating uncertainty affecting a DCF valuation:

The Tribunal considers that awarding the Claimants their wasted costs would merely return them to the position they would have been in if the investments in Albania had never been made, rather than returning them to the position they would have been in had Albania not committed its illegal acts, which is what is called for by the Chorzów standard of full reparation. A similar conclusion was made by the tribunal in *Crystallex*, namely that it “would not reflect the fair market value of the investment, as by definition it only assesses what has been expended into the project rather than what the market value of the investment is at the relevant time.”

The Tribunal sees some limitations in the application of the DCF method to value Agonset, namely that the 2012 Business Plan is not particularly detailed and both businesses have only been operating for a short period of time. Mr. MacGregor, a chartered accountant, says there is insufficient evidence to undertake a valuation using the DCF Method. However, the Tribunal has a mandate, having found breach of the BIT, to arrive at a valuation on such evidence as it has. The tribunal in *Kardassopoulos* drew a similar conclusion stating that “The Tribunal’s duty is to make the best estimate that it can of the amount of the loss, based on the available evidence. That must be done even if there is no absolute documentary proof of the precise amount lost”. Further, discarding the DCF method for lack of sufficient evidence in

¹⁷⁹⁵ *Hydro* at ¶¶ 286 and 697 (CL-0202-ENG).

¹⁷⁹⁶ *Hydro* at ¶851 (CL-0202-ENG).

¹⁷⁹⁷ *Hydro* at ¶791 (CL-0202-ENG).

this case would, in effect, reward a State for expropriating promising businesses shortly after their founding.

On balance, the Tribunal considers that the DCF method is an appropriate method to value Agonset. While valuation is not an exact science, the DCF method is a widely accepted valuation method that can address the uncertainties that arise in this case.¹⁷⁹⁸

1835) Again, Riverside meets the *Hydro* test.

- a) INAGROSA had business plans.
- b) INAGROSA had years of successful operations in growing and producing Hass avocados before the unlawful invasion and occupation of HSF.¹⁷⁹⁹

1836) Determining the reliability of the DCF method for valuing pre-operating projects is a fact-specific inquiry into the project's stage of development and whether the inputs for the DCF reflect "a reasonable basis for the Tribunal to determine the *amount of loss*."¹⁸⁰⁰ To determine if there is sufficient information to allow the estimation of future revenues and costs to perform a DCF analysis, tribunals have considered how close the project was to generating revenues, including whether a feasibility study had been conducted, whether there was any evidence that revenues would outweigh costs and whether the source of revenues had already been identified.¹⁸⁰¹

1837) The analysis of whether the DCF method is appropriate for valuing a business interest is, of course, as noted above, fact specific.

1838) In contrast to the decisions in *Crystallex* and *Gold Reserve*, the *South American Silver v. Bolivia* Tribunal considered the DCF method

¹⁷⁹⁸*Hydro* at ¶¶ 847–49 (*Hydro*) (CL-0202-ENG) The tribunal in *Rumeli Telekom v. Kazakhstan* at ¶ 811 reached a similar conclusion in similar circumstances. (*Rumeli Telekom*) (awarding damages utilizing a DCF analysis even though "the enterprise had not been in existence for long enough to have generated the data required for the calculation of future income" and observing that "[s]ince the value of that asset was directly linked to its potential to produce future income, there is no realistic alternative to using the DCF method to ascribe a value to it."). (CL-0096-ENG).

¹⁷⁹⁹*Tethyan Copper* at ¶ 335 (CL-0205-ENG).

¹⁸⁰⁰*Hydro* at ¶ 845 ("In light of the above, the Tribunal considers that the Claimants must prove the existence of the fact of damage with sufficient certainty and then provide a reasonable basis for the Tribunal to determine the amount of loss. The Tribunal considers this a fair outcome considering that any difficulty that the Claimants may face in proving the amount of loss will have flowed from the Respondent's wrongdoing."); (CL-0202-ENG) See also *Crystallex* at ¶¶ 886 (CL-0204-ENG) *Tethyan Copper* at ¶ 310 (CL-0205-ENG).

¹⁸⁰¹*South American Silver* at ¶ 823 (RL-0016-ENG).

inappropriate. The facts of *South American Silver* address a situation where the project was much less advanced.

- 1839) *South American Silver* had an interest in ten different mining concessions forming the Khota Mining Project in Bolivia. Bolivian indigenous communities raised serious concerns that the proposed mining project would pollute their sacred spaces. The government issued a decree reversing the ownership of the mining concessions to Bolivia. As the Khota Mining Project was long away from the production stage, the *South American Silver* Tribunal disregarded what it accepted as the standard DCF method in favor of a sunk-costs approach.¹⁸⁰² The Tribunal stated:

In sum, the Tribunal finds that, at the time of Reversion, (i) the Project was not at an advanced stage since it only had the PEA 2011 and had not conducted a prefeasibility or feasibility study; (ii) it did not have mineral reserves, but merely resources, most of them inferred; and (iii) there was no certainty that the metals could be economically extracted through the Metallurgical Process. The Tribunal considers that the Project's state of progress cast serious doubt as to its economic viability, and, based on the reasons elaborated below, they preclude acceptance of the valuation presented by the Claimant.¹⁸⁰³

- 1840) As noted in the quote above, the *South American Silver* Tribunal made the following determinations about the Khota Mining Project.
- a) It had not started any operations when Bolivia issued its decree revoking the mining concessions,
 - b) There were no provable reserves (unlike in *Riverside* or the *Gold Reserve*, or *Crystallex* cases).
 - c) There was no certainty that the business could generate profits from its operations.¹⁸⁰⁴
- 1841) The Tribunal was swayed by the fact that there were many meaningful questions as to whether the Khota Mining Project could get underway.
- 1842) The facts in *Riverside* are unlike those in *South American Silver*. *Riverside* had an established record of commercial production of Hass avocados and a long-established standing forest with mature and ready-to-harvest trees.

¹⁸⁰² *South American Silver* at ¶ 823 (RL-0016-ENG).

¹⁸⁰³ *South American Silver* at ¶ 823 (RL-0016-ENG).

¹⁸⁰⁴ *South American Silver* at ¶ 823 (RL-0016-ENG).

1843) Further, INAGROSA has confirmed an increased production of Hass avocados and well-established historical production costs. Added to this is that Riverside had recent business plans that indicated profitability. The record of success with proven commodity resources, established costing, and strong indications of market pricing make Riverside unlike South American Silver. Because of these facts, Riverside is appropriate for DCF methodology for INAGROSA's operations at HSF.

3. The record shows that it is reasonable to apply DCF Methodology in this claim.

1844) It is appropriate to apply the DCF methodology in Riverside claim. The *Rumeli* Tribunal reached a similar conclusion in similar circumstances.¹⁸⁰⁵ The *Rumeli* Tribunal applied DCF methodology in calculating damages even though "the enterprise had not existed for long enough to have generated the data required for calculating future income."¹⁸⁰⁶

1845) The *Rumeli* Tribunal noted that "[s]ince the value of that asset was directly linked to its potential to produce future income, there is no realistic alternative to using the DCF method to ascribe a value to it."¹⁸⁰⁷

1846) The approach taken in *Rumeli* is a reasonable outcome in a situation like that in Riverside, where the value of HSF was tied directly to its potential to produce future income.

1847) INAGROSA completed the riskiest portion of its business operation: producing a high-quality commercial Hass avocado crop. INAGROSA's crop harvest records are unavailable due to the ransacking of INAGROSA's business offices at HSF. However, INAGROSA has produced the following:

- a) Reports from Luis Gutierrez, INAGROSA's chief Agronomist on the 2017 Harvest and the 2018 crop. Mr. Gutierrez was directly involved in cultivating and harvesting these crops throughout the two successful crop periods.¹⁸⁰⁸
- b) A planting report provided guidance on where the Hass avocado trees would be planted and how they would be cultivated.¹⁸⁰⁹

¹⁸⁰⁵ *South American Silver* at ¶ 823 (RL-0016-ENG).

¹⁸⁰⁶ *Rumeli Telekom v. Kazakhstan* at ¶ 811 (CL-0096-ENG).

¹⁸⁰⁷ *Rumeli Telekom v. Kazakhstan* at ¶ 811 (CL-0096-ENG).

¹⁸⁰⁸ Witness Statement of Luis Gutierrez-Reply-SPA at ¶ 283-289 (CWS-10).

¹⁸⁰⁹ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 216-218 (CWS-10).

- c) Testing results on the quality of the 2017 harvest¹⁸¹⁰ and a short video of the Hass avocado oil extraction took place in 2017.¹⁸¹¹
- d) Well before the invasion, Carlos Rondon presented a report on his successful 2017 harvest to PRONicaragua, the Nicaraguan chamber of commerce.¹⁸¹²
- 1848) The lack of the original 2017 crop harvest reports does not mean that INAGROSA did not have a successful crop. The extensive supporting information, along with the witness evidence of those involved in the harvest, is more than sufficient to establish that there was a successful 2017 crop.¹⁸¹³
- 1849) Similarly, the evidence of the Chief Agronomist is sufficient to address the quality of the 2018 harvest that was on the cusp of harvest at the time of the invasion and occupation.
- 1850) The 2017 Hass avocado harvest conclusively established that INAGROSA was not a greenfield operation. The successful cultivation of the 2018 crop reinforced this fact. INAGROSA demonstrated that it met the threshold of an established business with a proven non-speculative commodity product.
- 1851) The information about the successful Hass avocado production resulted in a non-speculative basis for financial projections addressing costs, yields, and revenues.
- 1852) The business plans INAGROSA prepared before the invasion relied upon the existence of extensive Hass avocado market data collected and published by the US Department of Agriculture. INAGROSA management attended significant avocado industry events to obtain the most recent market, production, and scientific data on Hass avocado production.
- 1853) INAGROSA has historical records of financial performance in its coffee operations and historical records of commodity performance in terms of its capacity to produce and its actual production of Hass avocados.
- 1854) INAGROSA had the working documents supporting its tree census to confirm the elements of the standing forest.

¹⁸¹⁰Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 176 (**CWS-01**); Laquisa Laboratory 2017 avocado crop test analysis results on the avocado crop produced at Hacienda Santa Fe, November 17, 2017 (**C-0054-SPA**).

¹⁸¹¹Video of first Hass avocado oil pressing 2017 (**C-0459-SPA**).

¹⁸¹²Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 207 (**CWS-01**)

¹⁸¹³ Witness Statement of Luis Gutierrez-Reply- SPA at ¶¶ 283-286 (**CWS-10**); Witness Statement of Domingo Ferrufino –Reply – SPA at ¶ 100 (**CWS-12**).

1855) Nicaragua attempts to prevent the use of DCF valuation in this claim, but to do so effectively would reward Nicaragua for destroying INAGROSA's access to its business records. This was discussed by the *Hydo* Tribunal, which held:

Further, discarding the DCF method for lack of sufficient evidence in this case would, in effect, reward a State for expropriating promising businesses shortly after their founding.¹⁸¹⁴

a) Reliable revenue and cost inputs for a DCF analysis:

1856) The inputs for a DCF valuation based on information available as of the Valuation Date are all cognizable and reliable. The various inputs underlying Richter's valuation are discussed in the Richter Reply Expert Damages Report.

1857) The reliability of the sources for the inputs more than satisfies the standard of proof that the Claimant is to meet to establish the damages that it has suffered. Richter's DCF analysis estimates future revenues based on two revenue streams: (a) revenues associated with avocado sales in Costa Rica and (b) revenues associated with avocado sales to other export markets in North America. These revenues can be estimated with a high degree of comfort based on independent market price data and the estimates of yield which have been provided by Nicaragua's avocado expert, Dr. Duarte.

1858) The costs are estimated based on historical costs from service providers already used by INAGROSA for its existing avocado operations and from its earlier coffee operations.¹⁸¹⁵

1859) Richter also independently investigated and evaluated transportation, cold chain transit to North American distribution centers when preparing its DCF analysis.¹⁸¹⁶

b) INAGROSA produced records that were available to it.

1860) Nicaragua focuses extensively on the obstacles before Riverside in producing full business records before this Tribunal. But the foundational reason for the absence of business records arises directly from the unlawful activity at issue in this arbitration. Not surprisingly, INAGROSA's primary business records were maintained in HSF.¹⁸¹⁷ The records in Nicaragua were mostly done on paper and then recorded in notes and materials

¹⁸¹⁴*Hydro* at ¶¶ 847–49 (CL-0202-ENG).

¹⁸¹⁵Richter Reply Expert Damages Report at ¶¶ 3.23, 3.31, 4.17 (CES-04).

¹⁸¹⁶Richter Reply Expert Damages Report at ¶ 4.33 (CES-04).

¹⁸¹⁷Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 239 (CWS-10)

maintained on computers in the office. Backups of the computers were kept at HSF.¹⁸¹⁸

- 1861) When the invasion occurred, INAGROSA was notable to locate its computers. They were valuable and were taken by the invaders. The business records were not available to INAGROSA and were presumed destroyed.¹⁸¹⁹
- 1862) Some copies of business records were sent to third-party local financial professionals. Riverside contacted them to obtain any documents and working papers. INAGROSA was informed that most historical records were destroyed before the invasion occurred.¹⁸²⁰
- 1863) After the preparation of the Memorial, some records were in the accounting offices. Initially, they were not discovered due to erroneous labeling on the file boxes done by the office of the third-party professionals. These accounting documents have been produced during document production and with this Reply Memorial. They address financial cost matters related to the Coffee business and the Hass avocado business operations.¹⁸²¹
- 1864) The absence of substantive and complete business records is not the fault of INAGROSA or Riverside. Those records were maintained in Nicaragua at HSF. The computers and backups were kept at HSF. Riverside did not have these documents in Kansas. It is unreasonable to contemplate that the unilingual English-speaking executives at Riverside in Johnson, Kansas would be reasonably expected to maintain copies of foreign language documents for its controlled investment.¹⁸²²
- 1865) In addition, after the invasion occurred, the corporate email of Carlos Rondón was hacked. This email was externally supported by Microsoft (MSN). Mr. Rondón was not able to access this email. Melva Jo Winger Rondón attempted to have the accounts re-established unsuccessfully.¹⁸²³
- 1866) During the document production process, Riverside engaged a third-party eDiscovery provider to attempt to access the emails that Mr. Rondón had not

¹⁸¹⁸ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 296 (CWS-10)

¹⁸¹⁹Witness Statement of Carlos Rondon -Reply- ENG at ¶ 124 (CWS-09).

¹⁸²⁰ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 296 (CWS-10).

¹⁸²¹Witness Statement of Carlos Rondon-Reply-ENG at ¶ 125 (CWS-09).

¹⁸²²Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 53 (CWS-08).

¹⁸²³Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 71 ¹⁸²³Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 71 (CWS-08).

been able to access. The third-party eDiscovery provider also was unable to access the email repository.¹⁸²⁴

1867) However, Riverside has reached out to third parties for emails where Mr. Rondón sent emails to them or copied them. That has resulted in additional documents.¹⁸²⁵ Where Nicaragua made document requests, those newly located documents were provided in time in response to Nicaragua's Document Requests.

1868) It is not appropriate to punish Riverside and INAGOSA for not supplying original documents when they are unavailable because of circumstances beyond Riverside's control and due to Nicaragua's conduct. Further, where original documents were no longer available, INAGROSA employees have provided witness evidence to address their recollections.¹⁸²⁶

1869) The materials produced in this arbitration were scavenged from records maintained by third parties such as accounting professionals or from working email repositories.¹⁸²⁷

1870) The Management Representation Letter provides more transparency. The Management Representation Letter (**C-0055-ENG**) was one mechanism where information known to INAGROSA management, but no longer available with original documents, was recorded in writing.¹⁸²⁸ The Management Representation Letter was produced for transparency purposes.¹⁸²⁹

1871) As noted by Mr. Kotecha in his Reply Expert Damages Report, Richter knew about the information contained in the Management Representation Letter long before the letter was drafted. Information was provided in response to the inquiries by the valuation team at Richter.¹⁸³⁰ While the content in the letter was consolidated was confirmed shortly before the Richter Expert Damages Report was filed, the information in the letter was not supplied just a few days before the Richter Report was filed. Richter carefully and independently evaluated the information in the Management Representation Letter before the information was considered for use in the Valuation Report.¹⁸³¹

¹⁸²⁴Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 72 ¹⁸²⁴Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 72 (**CWS-08**).

¹⁸²⁵Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 73 (**CWS-08**).

¹⁸²⁶Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 74 ¹⁸²⁶Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 74 (**CWS-08**).

¹⁸²⁷Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 75 (**CWS-08**).

¹⁸²⁸Witness Statement of Carlos Rondon-Reply-ENG at ¶ 16-17 (**CWS-09**).

¹⁸²⁹ Richter Reply Expert Damages Report at ¶ 4.9 (**CES-04**).

¹⁸³⁰Witness Statement of Carlos Rondon-Reply-ENG at ¶ 16 (**CWS-09**)

¹⁸³¹ Richter Reply Expert Damages Report at ¶¶ 4.7-4.8 (**CES-04**).

4. Extensive support for the DCF Valuation

1872) In the Riverside claim, the state of development of INAGROSA's Hass agricultural operation as of the June 16, 2018 Valuation date and all the relevant facts strongly support the use of the DCF method as the appropriate way to value Riverside's investment, based on the criteria discussed in the cases in this Reply Memorial above. These factors can be summarized as follows:

a) Established Production of commodity products:

1873) INAGROSA had a thriving Hass avocado plantation that was entirely in operation at the time of the invasion in June 2018. INAGROSA has produced the following:

- a) Reports from Luis Gutierrez, INAGROA's chief Agronomist, on the 2017 Harvest and the 2018 crop. Mr. Gutierrez directly was involved in cultivating and harvesting these crops throughout the two successful crop periods.¹⁸³²
- b) A planting report provided guidance on where the Hass avocado trees would be planted and how they would be cultivated.
- c) Testing results on the quality of the 2017 harvest¹⁸³³ and a short video of the Hass avocado oil extraction from 2017.¹⁸³⁴
- d) Well before the invasion, Carlos Rondón presented a report on his successful Hass avocado operation, after the 2017 harvest to ProNicaragua, the Nicaraguan government export agency.¹⁸³⁵

1874) INAGROSA was cultivating and successfully producing Hass avocados. This was not a speculative venture, but it was a venture with proven productive and operational capacity.

1875) The 2017 harvest was successfully developed into avocado oil, and the avocado seeds were retained and used in its nurseries and for further expansion of its planted areas.

¹⁸³²Witness Statement of Luis Gutierrez-Reply-ENG at ¶¶ 283-289 (CWS-10).

¹⁸³³Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 176 (CWS-01); Laquisa Laboratory 2017 avocado crop test analysis results on the avocado crop produced at Hacienda Santa Fe, November 17, 2017 (C-0054-SPA).

¹⁸³⁴Video of first Hass avocado oil pressing 2017 (C-0459-SPA).

¹⁸³⁵Witness Statement of Carlos J. Rondón -Reply-ENG at ¶ 207 (CWS-09)

1876) INAGROSA had an established standing forest at HSF. This standing forest could have been converted into timber on short notice by INAGROSA.

b) Significant investment made over several years:

1877) By June 2018, the Hass Avocado Operations at INAGROSA System had been under development for four years. Over that time, over USD 9 million had been invested into the transition and development of HSF's infrastructure,¹⁸³⁶ its three plant nurseries, its cultivation, and grafting, the successful planting of Hass Avocado plantations, the agricultural infrastructure for cultivation and harvest, and the hiring of personnel with the experience to realize the investment.

1878) In the months leading up to the 2018 harvest, INAGROSA had taken all the necessary steps to be ready to launch operations. For 2018, this was focused on a program, where obtaining access to avocado seeds for its expansion program was at a premium.¹⁸³⁷

1879) INAGROSA had an established standing forest at HSF. INAGROSA grew black walnut saplings in its nursery and added additional trees in 2016, 2017, and 2018.

1880) Riverside's investment in INAGROSA through equity investment and debt finance has been made over 20 years. This investment had all the hallmarks of activity meeting the definition of investment under Article 25 of the ICSID Convention.

c) Onsite Capacity was available.

1881) The areas for the expansion of lands that had been cultivated with coffee and other agricultural crops at HSF were ready and available at the time of the invasion.¹⁸³⁸

1882) At the time of the invasion, satellite images indicate that at the time of the invasion that INAGROSA had 44.75 ha of Hass avocados planted.¹⁸³⁹ The expansion from the 44.75 producing hectares into the next 200 hectares was underway at the time of the invasion.¹⁸⁴⁰

1883) In the months leading up to the 2018 harvest, INAGROSA had taken all the necessary steps to be ready to launch operations. For 2018, this was focused on a program, where obtaining access to avocado seeds for its

¹⁸³⁶ Richter Reply Expert Damages Report at ¶ 6.8 (CES-04).

¹⁸³⁷ Witness Statement of Russ Welty-Reply-ENG at ¶¶ 61-64 (CWS-11).

¹⁸³⁸ Witness Statement of Luis Gutierrez-Reply-ENG at ¶ 186-188 (CWS-10).

¹⁸³⁹ INAGROSA Planting Area Schedule updated with AGROSAT data, August 4, 2023 (C-0440-SPA).

¹⁸⁴⁰ Witness Statement of Luis Gutierrez-Reply-ENG at ¶ 283-288 (CWS-10).

expansion program was at a premium. In the future, this would have shifted from reinvestment to market sales.

1884) INAGROSA had existing agricultural land and an experienced workforce for the incremental expansion of its successfully producing operations. In this way, the expanded Hass Avocado business could use the economies of scope and scale from the existing agricultural lands and operations as INAGROSA continued its transition from growing coffee to growing Hass avocados.

d) Nurseries were developed and ready to go.

1885) INAGROSA had existing nurseries and capacity at HSF ready to grow seedlings.

1886) Based on its earlier production with its coffee nurseries, INAGROSA could grow and plant 60,000 new Hass avocado plants a month.

e) Regulatory approvals obtained.

1887) As considered in detail in Part III of this Reply Memorial, regulatory approvals and permissions were not a significant obstacle to INAGROSA's operations or its expansion.¹⁸⁴¹

1888) Government officials regularly inspected HSF. The inspectors had confirmed to INAGROSA staff that INAGROSA complied with all Nicaraguan environmental and agricultural requirements. Nicaraguan Legal Expert Gutierrez considered this issue and noted at paragraph 117 of his Expert Statement that:

Additionally, in 2018, MARENA's designated environmental evaluators assessed INAGROSA's alignment with Nicaraguan environmental regulations.¹⁸⁴² This assessment was part of their scrutiny related to the application for the Private Wildlife Reserve. These officials conclusively noted that INAGROSA had no outstanding Nicaraguan violations, and no pending infractions were noted as of February 2018.¹⁸⁴³

1889) Not only were the regulatory permits and authorizations Nicaragua raised non-applicable, but as noted above Nicaragua's own inspectors, evaluating

¹⁸⁴¹ Expert Witness Statement of Renaldy J. Gutierrez at ¶137 (CES-006).

¹⁸⁴² Memorandum— DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity February 27, 2018 (C-0285-SPA).

¹⁸⁴³ Memorandum— DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity February 27, 2018 (C-0285-SPA).

HSF for the private wildlife reserve application, found that INAGROSA had no inconsistency with Nicaraguan regulatory requirements in 2018.

f) Sources of revenue.

1890) INAGROSA was growing a commodity in Nicaragua for sale into a US dollar-denominated global marketplace. INAGROSA did not set the price for its Hass Avocados; it was a price taker rather than a price maker.¹⁸⁴⁴ The critical hurdle for INAGROSA was successfully cultivating high-quality Hass avocados. INAGROSA succeeded with a successful harvest in 2017 but for Nicaragua's invasion. It would have had another successful harvest in 2018. The production of Hass avocados was the driver for cash flows for the company.

g) Sufficiently capitalized.

1891) As a result of the commitment of its longstanding foreign investor, Riverside, INAGROSA had sufficient access to working capital and investment capital (of at least \$16 million) and a further deferral of the payment of interest with interest forgiveness on the Riverside debt while the avocado transition was underway worth an additional \$1.5 million,¹⁸⁴⁵ which would substantially exceed all capital needs associated with the launch of its expanded operations.¹⁸⁴⁶

h) Availability of contemporaneous business plans.

1892) Russ Welty, INAGROSA's external CFO speaks to INAGROSA's contemporaneous business plans in his Witness Statement (**CWS-11**). Mr. Welty's evidence demonstrates that the avocado business would have generated profit but for the internationally wrongful events at HSF in 2018.¹⁸⁴⁷ Mr. Welty prepared the business plan. These business plans were sent out to institutional equity for commentary and evaluation of participatory interest.

1893) Successful Hass Avocado producers in Mexico also reviewed the plans.¹⁸⁴⁸ Valuable input from the institutional equity and the third-party Hass avocado

¹⁸⁴⁴ Richter Reply Expert Damages Report at ¶ p.14 – paragraph 1 (**CES-04**).

¹⁸⁴⁵ Witness Statement of Melva Jo Winger de Rondón–Reply – ENG at ¶ 34 (**CWS-08**).

¹⁸⁴⁶Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (**C-0287-ENG**); Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (**C-0286-ENG**).

¹⁸⁴⁷ Witness Statement of Russell (Russ) Welty at ¶¶14, 21, 31, 45, 49,71 and 93 (**CWS-11**)

¹⁸⁴⁸Witness Statement of Russ Welty-Reply-ENG at ¶ 46 (**CWS-11**).

producers was used in the ongoing development of the INAGROSA Hass Avocado program.¹⁸⁴⁹

5. Conclusion

1894) The facts here support the computation of damages using an income-based approach. INAGROSA was prepared from an operational readiness, financing, and regulatory perspective to continue full-scale operations of its Avocado business in the summer of 2018. As of the date of the invasion in 2018, INAGROSA also had in place everything required to estimate future revenues and costs reliably.

1895) The only reason INAGROSA could not proceed with profitable operations is the Government's interference with the invasion and occupation of HSF. In the circumstances, to give effect to the compensation standard applicable here and wipe out all consequences of Nicaragua's unlawful conduct, Riverside's damages must be computed by reference to the present value of the profits it lost computed on an income-based approach. Anything less will not adequately compensate Riverside for the fair market value of its investment as of the Valuation Date.

C. Addressing Nicaragua's objections to damages

1896) Nicaragua has raised many concerns in its Counter-Memorial about the damages report filed by Richter. As addressed in this Part of the Reply Memorial, the allegations Nicaragua raises on damages consist mainly of groundless allegations, personal attacks, and smears.

1. The issue of contributory fault

1897) As noted in Section A of this Part of the Reply above, the facts and the international law of contribution does not support Nicaragua.

2. Evidentiary Issues

1898) As a preliminary matter, it is necessary to address again the intemperate comments made about the limited production of summary financial information. In the Reply Witness Statement of Melva Jo Winger de Rondón, the Operating Manager of Riverside, explains the challenges to obtaining primary documents that Riverside encountered and the steps it took to obtain material.¹⁸⁵⁰

¹⁸⁴⁹Witness Statement of Russ Welty-Reply-ENG at ¶ 46 (CWS-11).

¹⁸⁵⁰Witness Statement of Melva Jo Winger de Rondón-Reply-ENG at ¶¶ 49-70 (CWS-08).

- 1899) The underlying information was reported by INAGROSA management to Richter for its use in the Richter Valuation Report. This information was set out in witness statements¹⁸⁵¹ and the Management Representation letter for transparency.¹⁸⁵²
- 1900) Information discovered after the Memorial's filing, such as during the document production process, was provided to Richter for its review.¹⁸⁵³
- 1901) Richter's Reply Expert Damages Report analysis is based on primary documents (where available), as Nicaragua suggests is appropriate. Such reliance addresses the central point Nicaragua raises regarding objective evidence.
- 1902) These additional documents (as noted in the Richter Reply Expert Damages Report) include the following:¹⁸⁵⁴
- a) Various business plans circulated to private equity and institutional investors.¹⁸⁵⁵

¹⁸⁵¹ This information was confirmed in the Witness Statements of Carlos Rondon – Memorial – ENG (**CWS-01**), Luis Gutierrez – Memorial – SPA (**CWS-02**), Melva Jo Winger de Rondon – Memorial – ENG (**CWS-03**) Melvin Winger – Memorial – ENG (**CWS-04**) and Mona Winger – Memorial – ENG (**CWS-05**) and the Management Representation Letter (**C-0055-ENG**).

¹⁸⁵² Witness Statement of Melva Jo Winger de Rondón-Reply-ENG at ¶¶ 49-70 (**CWS-08**); Witness Statement of Carlos J. Rondón-Reply-ENG at ¶¶ 123-131 (**CWS-09**).

¹⁸⁵³ Witness Statement of Carlos J. Rondón-Reply-ENG at ¶ 16 (**CWS-09**).

¹⁸⁵⁴ Richter Reply Expert Damages Report at ¶ 4.10 (**CES-04**).

¹⁸⁵⁵ RVHA Business Plan sent to Glidepath Partners - Mark Soane, May 24, 2018 (**C-0404-ENG**); RVHA Business Plan sent to Monica Navarrete- Inter-American Development Bank, November 30, 2016 (**C-0405-ENG**); RVHA Business Plan sent to Fred Duboc, June 29, 2017 (**C-0406-ENG**); RVHA Business Plan sent to Merrill Lynch Investments- Maziar Shams, March 5, 2018 (**C-0407-ENG**); RVHA Business Plan sent to MDB Cal Group - Mike Donnelly November 21, 2017 (**C-0408-ENG**); RVHA Business Plan sent to Thomas Wolf, October 23, 2017 (**C-0409-ENG**); RVHA Business Plan sent to Invictus Initiative - Michael Kmita, December 13, 2016 (**C-0410-ENG**); RVHA Business Plan sent to Francisco Del Valle, September 10, 2017 (**C-0411-ENG**); RVHA Business Plan sent to Margaret, October 12, 2017 (**C-0412-ENG**); RVHA Business Plan sent to Edgard Cuadra, October 6, 2017 (**C-0413-ENG**); RVHA Business Plan sent to OPIC, February 26, 2018 2017 (**C-0414-ENG**); RVHA Business Plan sent to Amherst College Endowment Fund - Mauricio Geissler January 17, 2017 (**C-0415-ENG**); RVHA Business Plan sent to Aether Investment Partners – Sean Goodrich, June 26, 2017 (**C-0416-ENG**); RVHA Business Plan sent to Monica Navarrete- Inter-American Development Bank, November 19, 2017 (**C-0417-ENG**); RVHA Business Plan sent to OPIC, February 5, 2018 (**C-0418-ENG**); and RVHA Business Plan sent to Luisa Mayorga- Inter-American Development Bank, August 16, 2016 (**C-0419-ENG**). Email from Russ Welty re: RVHA Business Plan, August 16, 2016 (**C-0643-ENG**). Email from Russ Welty re: RVHA Business Plan, November 30, 2016 (**C-0644-ENG**). Email from Russ Welty re: RVHA Business Plan, December 13, 2016 (**C-0645-ENG**). Email from Carlos Rondon re: RVHA Business Plan, January 11, 2017, (**C-0646-ENG**). Email from Russ Welty re: RVHA Business Plan June 26, 2017, (**C-0647-ENG**). Email from Russ Welty re: RVHA Business Plan June 29, 2017 (**C-0648-ENG**). Email from Russ Welty re: RVHA Business Plan September 10, 2017 (**C-0649-ENG**). Email from Russ Welty re: RVHA Business Plan, October 6, 2017, (**C-0650-ENG**). Email from Russ Welty re: RVHA Business Plan, October 12,

- b) Updated INAGROSA annual financial reports, including profit and loss information.¹⁸⁵⁶
- c) Riverside corporate documents regarding Riverside's financial support for INAGROSA's transition to Hass Avocado production in 2016.¹⁸⁵⁷
- d) Riverside corporate documents regarding its commitment to invest up to \$16 million in March 2018.¹⁸⁵⁸ and Riverside had offered an additional \$1.5 million in interest relief.
- e) Copies of INAGROSA's promissory notes for investments made by Riverside and their extension.¹⁸⁵⁹
- f) Bank statements from Riverside.¹⁸⁶⁰

2017, **(C-0651-ENG)**. Email from Russ Welty re: RVHA Business Plan, October 23, 2017, **(C-0652-ENG)**. Email from Russ Welty re: RVHA Business Plan, November 19, 2017 **(C-0653-ENG)**. Email from Russ Welty re: RVHA Business Plan, November 21, 2017, **(C-0654-ENG)**. Email from Russ Welty re: RVHA Business Plan, February 5, 2018 **(C-0655-ENG)**. Email from Russ Welty re: RVHA Business Plan, February 26, 2018 **(C-0656-ENG)**. Email from Russ Welty re RVHA Business Plan, March 15, 2018 **(C-0657-ENG)**. Email from Russ Welty re: RVHA Business Plan, May 24, 2018 **(C-0658-ENG)**.

¹⁸⁵⁶ 2010 INAGROSA Profit & Loss Statement **(C-0473-ENG)**; 2011 INAGROSA Profit & Loss Statement **(C-0474-ENG)**; 2012 INAGROSA Profit & Loss Statement **(C-0475-ENG)**; 2013 INAGROSA Profit & Loss Statement **(C-0476-ENG)**; 2014 INAGROSA Profit & Loss Statement **(C-0477-ENG)**; 2015 INAGROSA Profit & Loss Statement **(C-0478-ENG)**; 2016 INAGROSA Profit & Loss Statement **(C-0479-ENG)**; 2017 INAGROSA Profit & Loss Statement **(C-0480-ENG)**; 2018 INAGROSA Profit & Loss Statement **(C-0481-ENG)**; **2010-2020 INAGROSA Profit & Loss Statement Summary (C-0504-ENG)**.

¹⁸⁵⁷ Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 **(C-0286-ENG)**.

¹⁸⁵⁸ Riverside Members Resolution-Continued Financial Support for INAGROSA Expansion Plan, March 7, 2018 **(C-0287-ENG)**.

¹⁸⁵⁹ INAGROSA Promissory Note to Riverside December 15, 2014 **(C-0288-ENG)**; and Extension INAGROSA Promissory Note to Riverside, December 1, 2019 **(C-0289-ENG)**.

¹⁸⁶⁰ Riverside- First National Bank statement- December 2013 **(C-0579-ENG)**; Riverside- First National Bank statement- January 2014 **(C-0580-ENG)**; Riverside- First National Bank statement- February 2014 **(C-0581-ENG)**; Riverside- First National Bank statement- March 2014 **(C-0582-ENG)**; Riverside- First National Bank statement- April 2014 **(C-0583-ENG)**; Riverside- First National Bank statement- May 2014 **(C-0584-ENG)**; Riverside- First National Bank statement- June 2014 **(C-0585-ENG)**; Riverside- First National Bank statement- July 2014 **(C-0586-ENG)**; Riverside- First National Bank statement- August 2014 **(C-0587-ENG)**; Riverside- First National Bank statement- September 2014 **(C-0588-ENG)**; Riverside- Dream First Bank Statement - June 30, 2015 **(C-0589-ENG)**; Riverside- Dream First Bank Statement - July 31, 2015 **(C-0590-ENG)**; Riverside- Dream First Bank Statement - August 31, 2015 **(C-0591-ENG)**; Riverside- Dream First Bank Statement - September 30, 2015 **(C-0592-ENG)**; Riverside- Dream First Bank Statement - October 31, 2015 **(C-0593-ENG)**; Riverside- Dream First Bank Statement - November 30, 2015 **(C-0594-ENG)**; Riverside- Dream First Bank Statement - December 31, 2015 **(C-0595-ENG)**; Riverside- First National Bank Statement - January 2016 **(C-0596-ENG)**; Riverside- First National Bank Statement - February 2016 **(C-0597-ENG)**; Riverside- First National Bank Statement - March 2016 **(C-0598-ENG)**; Riverside- First National Bank Statement - April 2016 **(C-0599-ENG)**; Riverside- First National Bank Statement - May 2016 **(C-0600-ENG)**; Riverside- First National Bank Statement - June 2016 **(C-0601-ENG)**; Riverside- First National Bank Statement - July 2016 **(C-0602-**

- g) US federal tax returns from Riverside.¹⁸⁶¹
- h) IRS schedules confirming that INAGROSA was a controlled foreign subsidiary of Riverside from 2015 and filed annually thereafter.¹⁸⁶²
- i) Updated information on planting area (supported with satellite images and reports)¹⁸⁶³
- j) Updated avocado planting schedules.¹⁸⁶⁴
- k) Updated Hass avocado planting costs from INAGROSA.¹⁸⁶⁵
- l) Updated harvest report information from INAGROSA.¹⁸⁶⁶
- m) Obtained information from Management regarding the comparisons between HSF and the various avocado-producing comparators provided as yield comparators in the Duarte Report.

ENG); Riverside- First National Bank Statement - August 2016 (**C-0603-ENG**); Riverside- First National Bank Statement - September 2016 (**C-0604-ENG**); Riverside- First National Bank Statement - October 2016 (**C-0605-ENG**); Riverside- First National Bank Statement - November 2016 (**C-0606-ENG**); Riverside- First National Bank Statement - December 2016 (**C-0607-ENG**); Riverside- First National Bank Statement - January 2017 (**C-0608-ENG**); Riverside- First National Bank Statement - February 2017 (**C-0609-ENG**); Riverside- First National Bank Statement - March 2017 (**C-0610-ENG**); Riverside- First National Bank Statement - April 2017 (**C-0611-ENG**); Riverside- First National Bank Statement - May 2017 (**C-0612-ENG**); Riverside- First National Bank Statement - June 2017 (**C-0613-ENG**); Riverside- First National Bank Statement - July 2017 (**C-0614-ENG**); Riverside- First National Bank Statement - August 2017 (**C-0615-ENG**); Riverside- First National Bank Statement - September 2017 (**C-0616-ENG**); Riverside- First National Bank Statement - October 2017 (**C-0617-ENG**); Riverside- First National Bank Statement - November 2017 (**C-0618-ENG**); Riverside- First National Bank Statement - December 2017 (**C-0619-ENG**); Riverside- First National Bank Statement - January 2018 (**C-0620-ENG**); Riverside- First National Bank Statement - February 2018 (**C-0621-ENG**); Riverside- First National Bank Statement - March 2018 (**C-0622-ENG**); Riverside- First National Bank Statement - April 2018 (**C-0623-ENG**); Riverside- First National Bank Statement - May 31, 2018 (**C-0624-ENG**); Riverside- First National Bank Statement - June 2018 (**C-0625-ENG**); Riverside- First National Bank Statement - July 2018 (**C-0626-ENG**); Riverside- First National Bank Statement - August 2018 (**C-0627-ENG**); Riverside- First National Bank Statement - September 2018 (**C-0628-ENG**); Riverside- First National Bank Statement - October 2018 (**C-0629-ENG**); Riverside- First National Bank Statement - November 2018 (**C-0630-ENG**); Riverside- First National Bank Statement - December 2018 (**C-0631-ENG**);¹⁸⁶¹ 2015 Riverside Coffee LLC ,US Federal IRS Tax Return (**C-0632-ENG**); 2016 Riverside Coffee LLC US Federal IRS Tax Return (**C-0633-ENG**); 2017 Riverside Coffee LLC US Federal IRS Tax Return (**C-0634-ENG**).

¹⁸⁶² 2015 Riverside US Federal IRS Tax Return- Form 1065 (**C-0320-ENG**); 2016 Riverside US Federal IRS Tax Return- Form 1065 (**C-0321-ENG**); 2017 Riverside US Federal IRS Tax Return- Form 1065 (**C-0322-ENG**); 2018 Riverside US Federal IRS Tax Return- Form 1065 (**C-0323-ENG**).

¹⁸⁶³ INAGROSA Planting Schedule 2014-2018 September 18, 2023 (**C-0441-SPA**).

¹⁸⁶⁴ INAGROSA Planting Schedule 2014-2018 September 18, 2023 (**C-0441-SPA**).

¹⁸⁶⁵ Hass avocado production chart per plant October 5, 2023 (**C-0576-ENG**).

¹⁸⁶⁶ INAGROSA Hass Avocado Harvest 2017-2018, September 19, 2023 (**C-0635-SPA**).

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- n) Nicaragua's confirmation that Melvin and Mona Winger had the financial capacity to meet the commitments made by Riverside.¹⁸⁶⁷
 - o) Riverside's Legal Expert confirmation that there were no material permit or approval obstacles to the business operations at INAGROSA related to Hass avocado export or timber export.¹⁸⁶⁸
 - p) Riverside's Legal Expert confirmation that the Private Wildlife Reserve was not legally effective.¹⁸⁶⁹
 - q) A copy of a government tax document confirming that INAGROSA had no outstanding municipal taxes owing on INAGROSA in 2018.¹⁸⁷⁰
 - r) Confirmation from Riverside's Legal Expert that the Judicial Order constituted a *de jure* and a *de facto* taking of the property at Hacienda Santa Fe.¹⁸⁷¹
 - s) Confirmation from Riverside's Legal Expert that the Judicial Order was related to Riverside's initiation of this CAFTA arbitration.¹⁸⁷²
- 1903) Historical financial statements, business plans, bank statements, and tax returns were produced during document production. Richter has relied upon them for its Reply Expert Damages Report.
- 1904) Nicaragua denigrates the independent evaluation of the chartered business valuers at Richter. Nicaragua's besmirching of the sterling reputations of counsel and experts is as astonishing as it is shameful. The Tribunal should be sure to consider such conduct when assessing costs and considering moral damages, and taking steps to ensure that the Tribunal award addresses the effects of such detrimental and unfounded comments.
- 1905) Nicaragua inappropriately suggests that Richter's adoption of a DCF analysis is unduly speculative.¹⁸⁷³ The analysis completed in the Richter Reply Expert Damages Report provides more support for the reasonability and achievability of the DCF forecast results. The Reply Valuation Report provides extensive additional support and analysis. These steps substantially have confirmed the reliability of the valuation analysis.

¹⁸⁶⁷ Nicaragua's Security for Costs Application, October 4, 2023, at 48 (**C-0573-ENG**).

¹⁸⁶⁸ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 188 (**CES-06**).

¹⁸⁶⁹ Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 29-33 (**CES-06**).

¹⁸⁷⁰ INAGROSA of Tax Solvency Certificate issued by the Ministry of Treasury and Public Credit of Nicaragua, October 17, 2019 (**C-0468-SPA**).

¹⁸⁷¹ Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 73-84, and 96-101 (**CES-06**).

¹⁸⁷² Expert Witness Statement of Renaldy J. Gutierrez at ¶ 37 (**CES-06**).

¹⁸⁷³ Counter-Memorial at Section 4.

1906) Richter has provided ample and abundant support for its conclusions. Considering the extent of the detailed documentary support, there is no substance to Nicaragua's suggestion that Richter's valuation approach lacks objective factual support.

3. Sufficiency of Evidence

a) INAGROSA produced records that were available to it.

- 1907) Nicaragua focuses extensively on the obstacles before Riverside in producing full business records before this Tribunal. But the foundational reason for the absence of business records arises directly from Nicaragua's unlawful activity in this arbitration. Not surprisingly, INAGROSA's primary business records were maintained at HSF, which was INAGROSA's principal base of operations.¹⁸⁷⁴
- 1908) INAGROSA's records in Nicaragua were mainly on paper. Other documents, summaries, and notes were stored on computers in the office at HSF.¹⁸⁷⁵ Backups of the computers were kept at HSF.¹⁸⁷⁶
- 1909) INAGROSA lost access to its office and its computers when the invasion began. The business records were not available to INAGROSA and were presumed destroyed.¹⁸⁷⁷
- 1910) Some copies of business records were sent to third-party local financial professionals. Riverside contacted them to obtain any documents and working papers. INAGROSA informed Riverside that most historical records were destroyed before the invasion occurred.¹⁸⁷⁸
- 1911) After the preparation of the Memorial, some records in the accounting offices in Nicaragua were located. Initially, they were not discovered due to erroneous labeling on the file boxes done by the office of the third-party professionals. These accounting documents have been produced during document production and with this Reply Memorial. They address financial cost matters related to the coffee business and the Hass avocado business operations.¹⁸⁷⁹
- 1912) The absence of substantive and complete business records is not the fault of INAGROSA or Riverside. INAGROSA's records were maintained in

¹⁸⁷⁴Witness Statement of Luis Gutierrez-Reply- SPA at ¶¶ 294-297 (CWS-10).

¹⁸⁷⁵Witness Statement of Luis Gutierrez-Reply- SPA at ¶¶ 296 (CWS-10).

¹⁸⁷⁶Witness Statement of Luis Gutierrez-Reply- SPA at ¶¶ 296 (CWS-10).

¹⁸⁷⁷Witness Statement of Carlos J. Rondón-Reply-ENG at ¶126 (CWS-09).

¹⁸⁷⁸ Witness Statement of Carlos J. Rondón-Reply-ENG at ¶ 124 (CWS-09).

¹⁸⁷⁹Witness Statement of Carlos J. Rondón-Reply-ENG at ¶ 125 (CWS-09).

Nicaragua at HSF. As noted, the computers and backups were kept at HSF.¹⁸⁸⁰

- 1913) Riverside obtained reports on INGROSA, which were done by telephone or in person.¹⁸⁸¹ Documents in Spanish were not forwarded to Riverside in Kansas, as no one in the Kansas office spoke Spanish.¹⁸⁸² Instead, reports were presented through Melva Jo Winger de Rondon during the period since 2013 when she was the legal representative of Riverside to INAGROSA.¹⁸⁸³

b) Addressing unavailable email

- 1914) After the invasion occurred, the corporate email of Carlos Rondón (cordilleracoffee@msn.com) was hacked by unknown persons making the account unavailable to Mr. Rondon.¹⁸⁸⁴ It is possible that the accounts were accessed from records or computers that were located at HSF, but the identity of the unknown assailant is not known.¹⁸⁸⁵ Mr. Rondón could not access his email as of January 2021.¹⁸⁸⁶
- 1915) As noted, Mr. Rondón's external email was supported by Microsoft (MSN – Hotmail) as INAGROSA did not maintain a corporate mail server, preferring to leave it to an outside service).¹⁸⁸⁷
- 1916) As a result of the hacking, Mr. Rondón was unable to access his principal email repository.¹⁸⁸⁸

c) Attempts to locate emails through third parties.

- 1917) However, Riverside has reached out to third parties for emails where Mr. Rondón sent emails to them or copied them.¹⁸⁸⁹ That has resulted in additional documents.¹⁸⁹⁰ Where Nicaragua made document requests, those newly located documents were provided in time in response to Nicaragua's Document Requests.

¹⁸⁸⁰ Witness Statement of Luis Gutierrez-Reply- SPA at ¶ 296 (CWS-10).

¹⁸⁸¹ Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 50 (CWS-08)

¹⁸⁸² Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 53 (CWS-08)

¹⁸⁸³ Witness Statement of Melva Jo Winger de Rondon at ¶ 54 (CWS-08).

¹⁸⁸⁴ Witness Statement of Carlos J. Rondón-Reply-ENG at ¶ 126 (CWS-09).

¹⁸⁸⁵ Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 71 (CWS-08).

¹⁸⁸⁶ Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 71 (CWS-08).

¹⁸⁸⁷ Witness Statement of Carlos Rondon-Reply-ENG at ¶ 126 (CWS-09).

¹⁸⁸⁸ Witness Statement of Carlos Rondon-Reply-ENG at ¶ 126 (CWS-09).

¹⁸⁸⁹ Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 75 (CWS-08).

¹⁸⁹⁰ Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 75 (CWS-08).

1918) Riverside and INAGOSA supplied original documents where available. Where documents were not available, they were on account of circumstances beyond Riverside's or INAGROSA's control.

d) Continuing attempts to locate the best available evidence.

1919) Further, where original documents were no longer available, INAGROSA employees have provided witness evidence to address their recollections.¹⁸⁹¹

1920) The materials produced in this arbitration were scavenged from records maintained by third parties such as accounting professionals or from working email repositories.¹⁸⁹²

e) The Management Representation Letter

1921) The search for the best available evidence resulted in the Management Representation Letter (C-0055-ENG).

1922) Nicaragua mischaracterizes the timing of the information in the Management Representation Letter, contained "a slew of unverifiable, self-serving factual assumptions, which the Kotecha Report adopted wholesale in its DCF model without qualification."¹⁸⁹³

1923) At paragraph 450 of the Counter-Memorial, Nicaragua demonstrates that it does not understand the purpose of the Management Representation Letter. Nicaragua states:

The Rondón Letter is an 8-page document that contains Mr. Rondón's assumptions and beliefs about what Inagrosa's businesses "would have" done had the invasion not occurred. The Rondón Letter was written in late 2022, about a month before Riverside submitted its Memorial and more than four years after the invasion occurred. The Letter encloses no attachments or exhibits. This Letter does not incorporate by reference any evidentiary documents. Nor does the Letter cite to any evidentiary support".¹⁸⁹⁴

1924) The information in the Management Representation Letter was information Richter solicited to carry out their independent expert duties in this

¹⁸⁹¹Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 74 (CWS-08).

¹⁸⁹²Witness Statement of Melva Jo Winger de Rondon-Reply-ENG at ¶ 75 (CWS-08).

¹⁸⁹³Counter-Memorial at ¶ 421.

¹⁸⁹⁴Counter-Memorial at ¶ 450.

arbitration.¹⁸⁹⁵ It precisely addressed information where original documentation was unavailable on account of the occupation of HSF.¹⁸⁹⁶

- 1925) The Management Representation Letter allowed for the recording of information made available by management to Richter to be recorded and disclosed for this arbitration. It expressly allowed information known to INAGROSA Management but no longer accessible via original documentation to be recorded.¹⁸⁹⁷ The Management Representation Letter was produced for transparency purposes so Nicaragua would have the benefit of the same information available to Richter.
- 1926) The Management Representation Letter content was finally confirmed and consolidated on September 12, 2022, shortly before the Richter Expert Valuation Report was filed. This was to ensure that the Management Representation Letter contained complete information on the issues where Richter sought confirmation from management.
- 1927) Further, the information contained in the Management Representation Letter was carefully and independently evaluated by Richter before the information was considered for use in the Valuation Report.¹⁸⁹⁸

4. Proof of a Successful Avocado harvest

- 1928) INAGROSA completed the riskiest portion of its business operation: producing a high-quality commercial Hass avocado crop.
- 1929) The 2017 Hass avocado crop was utilized in 2017, mostly to produce avocado oil.¹⁸⁹⁹ This allowed INAGROSA to retain the seeds for planting in its nurseries to support its expansion.¹⁹⁰⁰ A crop harvest record was maintained.¹⁹⁰¹
- 1930) INAGROSA's crop harvest records are unavailable due to the ransacking of INAGROSA's business offices at HSF.¹⁹⁰² However, INAGROSA had other records of its successful 2017 harvest:
- a) Reports from Luis Gutierrez, INAGROSA's chief Agronomist, on the 2017 Harvest and the 2018 crop. Mr. Gutierrez was directly involved in

¹⁸⁹⁵ Richter Expert Reply Damages Report at ¶ 4.5 (CES-04).

¹⁸⁹⁶ Richter Expert Reply Damages Report at ¶¶ 4.5-4.6 (CES-04).

¹⁸⁹⁷ Witness Statement of Carlos J. Rondón-Reply-ENG at ¶ 16-17 (CWS-09).

¹⁸⁹⁸ Richter Expert Reply Damages Report at ¶ 3.32 (CES-04).

¹⁸⁹⁹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 283 (CWS-10).

¹⁹⁰⁰ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 283 (CWS-10).

¹⁹⁰¹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 284 (CWS-10).

¹⁹⁰² Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 293 (CWS-10).

cultivating and harvesting these crops throughout the two successful crop periods.¹⁹⁰³

- b) A planting report provided guidance on where the Hass avocado trees were planted and their density.¹⁹⁰⁴
- c) Testing results on the quality of the 2017 harvest¹⁹⁰⁵ and a short video of the Hass avocado oil extraction took place in 2017.¹⁹⁰⁶

1931) Carlos Rondón presented a report on his avocado operations and mentioned the successful 2017 harvest in his remarks to ProNicaragua, the Nicaraguan government investment promotion and export agency.¹⁹⁰⁷

1932) The only evidence that is no longer available are the crop reports that were stored at the physical archives and laptops kept at the INAGROSA corporate offices at HSF.¹⁹⁰⁸

1933) The lack of the original 2017 crop harvest reports is not a reliable indication that INAGROSA did not have a successful crop. The extensive supporting information, along with the witness evidence of those involved in the harvest, is more than sufficient to establish that there was a successful 2017 crop.¹⁹⁰⁹

1934) In addition, the witness statement of Mr. Ferrufino a long-term INAGROSA employee at HSF, also confirms the existence of the harvest in 2017 and what was on the trees in expectation of the 2018 harvest.¹⁹¹⁰

1935) The evidence of Luis Gutierrez, INAGROSA's Chief Agronomist, addresses the quality of the 2018 harvest that was on the cusp of harvest at the time of the invasion and occupation.¹⁹¹¹

5. Funding for the Hass Avocado Expansion

1936) This issue has already been canvassed in PART IV of this Reply Memorial, which addressed financial control and its twenty-year long investment relationship with INAGROSA.

¹⁹⁰³ Witness Statement of Luis Gutierrez–Reply – SPA at ¶ 283-288 (CWS-10).

¹⁹⁰⁴ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 216-218 (CWS-10).

¹⁹⁰⁵ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 176 (CWS-01); Laquisa Laboratory 2017 avocado crop test analysis results on the avocado crop produced at Hacienda Santa Fe, November 17, 2017 (C-0054-SPA).

¹⁹⁰⁶ Video of first Hass avocado oil pressing 2017 (C-0459-ENG).

¹⁹⁰⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 207 (CWS-01)

¹⁹⁰⁸ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 284 (CWS-10).

¹⁹⁰⁹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ (CWS-10).

¹⁹¹⁰ Witness Statement of Domingo Ferrufino –Reply – SPA at ¶ 100 (CWS-12).

¹⁹¹¹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 287-288 (CWS-10).

- 1937) By the summer of 2018, Riverside had invested over U.S.\$9 million in the Nicaraguan investment and was prepared to provide significant additional capital for the INAGROSA Hass avocado expansion already underway in 2018.¹⁹¹²
- 1938) Riverside had a promissory note listing the investments Riverside made in INAGROSA. The INAGROSA Promissory Note to Riverside was executed on December 15, 2014¹⁹¹³ The Promissory Note's term was extended in December 2019.¹⁹¹⁴ On June 10, 2016, Riverside issued a Members' Resolution to provide financial support to INAGROSA in its conversion from Coffee to Hass Avocados.¹⁹¹⁵
- 1939) A second resolution occurred on March 7, 2018. It referred to the earlier June 2016 resolution and confirmed up to \$16 million to INAGROSA for its Hass Avocado expansion.¹⁹¹⁶ INAGROSA also had a further deferral of the payment of interest with interest forgiveness on the Riverside debt while the avocado transition was underway worth an additional \$1.5 million.¹⁹¹⁷ Further, Riverside held over \$9.5 million in existing loans in INAGROSA during the 2018 invasion.¹⁹¹⁸ .¹⁹¹⁹
- 1940) As noted on page 52 of the Richter Reply Expert Damages Report, Nicaragua argued in paragraph 235 of its counter-memorial that control of the investment would result in a successful claim of 100% of the underlying damages (reflective loss):

Nicaragua, Hart's client, does as well. In paragraph 235 of the Counter-Memorial, Nicaragua argues that there should be 100% recovery of damages in situations where control can be established. This case, *Union Fenosa Gas v. Egypt*, held:

This is not a case of a claimant claiming as damages a loss or expense incurred by a company in which it has only a minority interest and no direct control over that company. In such

¹⁹¹²Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (**C-0286-ENG**); Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (**C-0286-ENG**).

¹⁹¹³INAGROSA Promissory Note to Riverside December 15, 2014 (**C-0288-ENG**).

¹⁹¹⁴Extension INAGROSA Promissory Note to Riverside (**C-0289-ENG**).

¹⁹¹⁵Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (**C-0286-ENG**); Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (**C-0286-ENG**)

¹⁹¹⁶Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (**C-0287-ENG**).

¹⁹¹⁷ Witness Statement of Melva Jo Winger de Rondón–Reply – ENG at ¶ 18 (**CWS-08**).

¹⁹¹⁸Richter Reply Expert Damages Report at ¶¶ 3.23, 6.8 (**CES-04**).

¹⁹¹⁹Extension INAGROSA Promissory Note to Riverside (**C-0289-ENG**).

*circumstances, a minority shareholder may make a claim for the diminution in the value of its shareholding;*¹⁹²⁰

1941) Riverside owns and controls the Investment in Nicaragua. Accordingly, Riverside has the standing to bring this claim.

6. The Private Wildlife Reserve

1942) As discussed in detail in Part V of this Reply Memorial, INAGOSA did not require authorization from MARENA for work done in a private wildlife reserve. The Expert Witness Statement of Nicaraguan Expert Gutierrez confirmed that HSF was not effectively designated as a Private Wildlife Reserve by Nicaragua.¹⁹²¹

1943) MARENA Ministerial Resolution 021.2018 which purportedly declared HSF as a Private Wildlife Reserve, never entered into legal force.

7. Overblown Regulatory Risk Scenarios are unrealistic.

1944) Nicaragua falsely accuses INAGROSA of operating an illegal business. At Counter-Memorial paragraph 452, Nicaragua states:

452. Indeed, Inagrosa never secured any of the permits that it needed for either of these businesses. This fact means that Inagrosa's alleged activities with respect to these businesses –such as its alleged importation of seeds, creation of tree nurseries, plantation of 40 hectares of avocado trees, and supposed expansion of the avocado tree orchard – were illegal and subject to sanctions, which include the forced closure of Inagrosa.¹⁹²²

1945) Nicaragua's accusations of catastrophic effect due to regulatory prohibitions and the forced closure of INAGROSA have facial appeal at first as the contentions come from the government and its regulators, but a review of the contentions quickly shows that Nicaragua's illegality and sanctions arguments are of no substance. The specific allegations about the illegality and non-conformity of INAGROSA's Hass avocado and standing forest operations are considered in detail in Part VI above. There is no meaningful basis for Nicaragua's conjectures.

1946) It is apparent that Nicaragua tremendous effort on this illusionary defense. Nicaragua filed multiple witness statements from government officials. However, a careful review of Nicaragua's contentions demonstrates that

¹⁹²⁰ Counter-Memorial at ¶234 relying on *Union Fenosa Gas S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, August 31, 2018, ¶ 10.119 (**RL-0089**).

¹⁹²¹ Expert Witness Statement of Renaldy J. Gutierrez at ¶ 33 (**CES-06**).

¹⁹²² Counter-Memorial at ¶ 452.

INAGROSA's current and proposed Hass avocado and forest operations were completely legal, not subject to sanction, and not subject to regulatory impairment from Nicaragua.

- 1947) The Expert Witness Statement of Legal Expert Gutierrez confirms that INAGROSA had no material regulatory risk for its Hass avocado or standing forest operations at the time of the invasion and occupation of HSF. He notes:

The regulatory permissions and authorization issues raised by Nicaragua are immaterial and mostly irrelevant to INAGROSA's business operations at Hacienda Santa Fé., These permissions and authorization issues were not applicable and would not make INAGROSA's business activities unlawful or prohibited.¹⁹²³

- 1948) Expert Gutierrez also notes:

As a matter of Nicaraguan law, I cannot agree with Nicaraguan's characterization that INAGROSA would be subject to "crippling economic sanctions" or the "permanent closure of INAGROSA's operations."¹⁹²⁴

- 1949) Almost every alleged permit and regulatory requirement asserted by Nicaragua is inapplicable to INAGROSA. It is as if Nicaragua's lawyers simply picked up the Nicaragua regulatory code and picked provisions at random to say that there were obstacles to INAGROSA's success. The Regulatory obstacle defense is simply an illusion. There is no substance to it, as is demonstrated in Part V.

a) Nicaragua's officials did not raise any regulatory concerns.

- 1950) The ongoing communications between Nicaragua's officials before this arbitration occurred stands in stark contrast to the *ex post facto* position Nicaragua asserts in this arbitration.
- 1951) Nicaraguan government inspectors conducted an inspection of the agricultural and forestry operations as part of INAGROSA's application for private wildlife reserve. They never notified INAGROSA of any regulatory concerns.¹⁹²⁵
- 1952) Further, MARENA in its own internal notes concluded that the MARENA Legal Department reviewed all documents submitted by INAGROSA for compliance with the legal and the System for the Environmental Permits Evaluation and Authorizations for the Sustainable Use of Natural Resources

¹⁹²³Expert Witness Statement of Renaldy J. Gutierrez at ¶ 187 (CES-06).

¹⁹²⁴Expert Witness Statement of Renaldy J. Gutierrez at ¶ 185 (CES-06).

¹⁹²⁵Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 172 (CWS-10).

(Decree 20-2017).¹⁹²⁶ There is no mention of any non-compliance on behalf of INAGROSA in that internal communication.¹⁹²⁷ This internal communication aligns with the assurances INAGROSA received from government inspectors.

1953) The only regulatory requirements that merit any discussion are the following:

b) Water Regulations

1954) There is no indication that Nicaragua is correct with respect to water regulations affecting HSF. However, to the extent that INAGROSA had been inadvertently acting inconsistent with the regulations, the impact was a liability for a repeat offense of \$54.¹⁹²⁸

1955) Under these circumstances, Nicaragua's assertions that INAGROSA's business operations were illegal and subject to "crippling economic sanctions:" are simply not credible.¹⁹²⁹

c) Land use Regulations

1956) There is no indication that Nicaragua is correct with respect to land use regulations affecting HSF.

1957) The regulation came into effect in 2017. The regulations did not apply to previously cultivated lands.

1958) The lands for the 2018 expansion were previously cultivated agricultural lands. The land use regulations did not apply to them.

1959) The expansion of HSF after 2018 would have been on lands used for coffee cultivation and thus there would have been no change in usage. Thus, the land use regulations did not apply.

1960) INAGROSA did not require a land use permit in 2014. The 44.75 ha Hass avocados plantation was planted in an area previously planted with agricultural products.¹⁹³⁰ INAGROSA would have acted consistently with the land use regulations in all its future expansions, as it had in the past.

¹⁹²⁶Memorandum DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity, February 27, 2018 (C-0285-SPA).

¹⁹²⁷Memorandum DAL - UMA - 201- 26-2-2018, from Uriel Morales, MARENA Legal Department. to Carlos Mejia, MARENA Director of Natural Resources and Biodiversity, February 27, 2018 (C-0285-SPA).

¹⁹²⁸ Expert Statement of Renaldy J Gutierrez at ¶17(c) (v) and ¶186 (CES-06).

¹⁹²⁹ Expert Statement of Renaldy J Gutierrez at ¶¶186-188 (CES-06).

¹⁹³⁰Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 185 (CWS-10).

- 1961) INAGROSA did not require an Environmental Authorization for the Use, Management of Soils and Terrestrial Ecosystems in 2018. The 200 hectares that were staked were in an area that were previously cultivated.
- 1962) The areas previously cultivated did not require any environmental permission as there was no change of land use. If necessary, INAGROSA would have obtained the permits and authorizations for the execution of the expansion plan to the extent they were required.¹⁹³¹

8. Feasibility and Business Plans

- 1963) INAGROSA had extensive business plans which extensively evaluated the feasibility for its Hass avocado expansion. These business plans stand in stark contrast to Nicaragua's contention that there was no independent assessment that any of INAGROSA's business was viable.
- 1964) Russ Welty, INAGROSA's external CFO, speaks to INAGROSA's contemporaneous business plans in his Witness Statement (**CWS-11**). Mr. Welty drafted the business plans and was engaged in meetings about them. He explains the nature of the business which was reflected in the projections. Mr. Welty's evidence demonstrates that the avocado business would have generated profit had it not been obstructed by the internationally wrongful events at HSF in 2018.¹⁹³²

a) The business plans had external reviewed.

- 1965) The business plan was reviewed by more than ten different private equity enterprises before Riverside decided to fund the program in March 2018.¹⁹³³
- 1966) The business plan also was reviewed by a Mexican Hass avocado producer who were engaged in exports of Hass avocados to export markets, including the United States and by the leading Hass avocado nursery who is the holder of the Hass avocado patent .¹⁹³⁴
- 1967) The forestry plan was simple. INAGROSA made a site visit to Miller Veneers headquarters, and this resulted in a visit to HSF by the senior management of Miller Veneers. As noted in the Witness Statement of Carlos Rondon, and the Witness Statement of Tom Miller, Miller Veneers shipped containers of timber samples to the United States from Nicaragua. After assessing the quality of the timber, and viewing the standing timber forest *in situ*, Miller Veneers entered into an agreement to purchase all the available granadillo

¹⁹³¹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 189 (**CWS-10**).

¹⁹³² Witness Statement of Russell (Russ) Welty at ¶14, 21, 31, 45, 49,71 and 93 (**CWS-11**)

¹⁹³³Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶ 44 (**CWS-11**).

¹⁹³⁴Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶ 46 (**CWS-11**).

trees. At the time that INAGROSA was ready to sustainably harvest and export to them.¹⁹³⁵

1968) In such a case, with an absolute agreement to offload the wood to a major American supplier, INAGROSA would not require a third-party reviewed business plan for this sole sourced longstanding arrangement. to supply one of America's oldest veneer companies with timber supply.¹⁹³⁶

9. Proof of INAGROSA employees

1969) Finally in Counter-Memorial paragraph 455, Nicaragua contends that INAGROSA had no staff in 2018 at the time of the invasion. This is a corollary to the argument that HSF was abandoned by INAGROSA in 2017. INAGROSA's staff for Hacienda Santa Fe since 2014 was managed through an associated company, Santa Fe Estate Company.¹⁹³⁷ This company provided payroll and HR services for INAGROSA at HSF.¹⁹³⁸

1970) Payroll documents demonstrate that there were employees at HSF engaged in agricultural cultivation.¹⁹³⁹ The following payroll documents managed by Santa Fe Estate are provided for 2016, 2017, and part of 2018.¹⁹⁴⁰

¹⁹³⁵Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶ 110 (CWS-11).

¹⁹³⁶ Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶ 113 (CWS-11).

¹⁹³⁷Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 290-291 (CWS-10).

¹⁹³⁸ Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 291 (CWS-10).

¹⁹³⁹ Witness Statement of Luis Gutierrez –Reply – SPA at ¶¶ 290-291 (CWS-10).

¹⁹⁴⁰Santa Fe Estate Company- Hacienda Santa Fe Payroll April 25-May 15, 2016 (C-0354-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 16- May 29, 2016 (C-0355-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 30- June 5, 2016 (C-0356-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 6- June 19, 2016 (C-0357-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 20- June 26, 2016 (C-0358-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 27- July 3, 2016 (C-0359-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll July 4- July 17, 2016 (C-0360-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll July 18- July 31, 2016 (C-0361-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll August 1- August 14, 2016 (C-0362-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll August 15- August 28, 2016 (C-0363-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll August 29-September 11, 2016 (C-0364-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll September 12- October 2, 2016 (C-0365-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 3- October 16, 2016 (C-0366-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 17- October 30, 2016 (C-0367-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 31- November 13, 2016 (C-0368-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll November 14- November 27, 2016 (C-0369-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll November 28-December 11, 2016 (C-070-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll December 12- December 31, 2016 (C-0371-SPA); Santa Fe Estate Company- 2016 vacations payment (C-0372-SPA); Santa Fe Estate Company- 2016 Christmas extra payment (C-0373-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll January 1- January 15, 2017 (C-0374-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll January 16- January 31, 2017 (C-0375-SPA); Santa Fe Estate Company- Hacienda Santa Fe Payroll February 1 -February 12, 2017 (C-0376-SPA); Santa Fe Estate Company- Hacienda Santa Fe

10. Export Markets for Hass Avocados

- 1971) INAGROSA intended to cultivate Hass avocados in Nicaragua for export sale into foreign markets.¹⁹⁴¹
- 1972) Hass avocados requires a semi-tropical or tropical climate and thus there is a well-established process whereby avocados are grown abroad and imported into foreign markets.
- 1973) The market data indicates that the largest Hass avocado markets are the United States and the European Union, Canada, the United Kingdom.¹⁹⁴²
- 1974) Nicaragua has focused on one market in its criticism in the Counter-Memorial: market access to the United States, however INAGROSA was not limited to only sell to the United States.
- 1975) INAGROSA was largely indifferent to where it would have exported its Hass avocados if it was able to obtain world prices for its commodity. There was no “magic” to US exports *per se*, but US exports were a clear and expressed goal.¹⁹⁴³
- 1976) At Counter-Memorial paragraphs 478 – 480, Nicaragua addresses the process that would be required to import Hass avocados from Nicaragua into

Payroll February 13- February 26, 2017 (**C-0377-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll February 26 -March 12, 2017 (**C-0378-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll March 13- March 31, 2017 (**C-0379-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll April 1- April 15, 2017 (**C-0380-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll April 16- April 30, 2017 (**C-0381-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 1- May 15 2017 (**C-0382-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 16- May 30, 2017 (**C-0383-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 16-June 30, 2017 (**C-0384-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll July 1-July 15, 2017 (**C-0385-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll July 16-July 30, 2017 (**C-0386-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll August 1- August 15, 2017 (**C-0387-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll August 16- August 31, 2017 (**C-0388-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll September 1- September 15, 2017 (**C-0389-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 1- October 15, 2017 (**C-0391-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll October 16- October 31, 2017 (**C-0392-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll November 1- November 15, 2017 (**C-0393-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll November 16- November 30, 2017 (**C-0394-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll December 1- December 15, 2017 (**C-0395-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll December e Estate Company- Hacienda Santa Fe Payroll September 16- September 30, 2017 (**C-0390-SPA**); Santa Fe Estate Com 1- December 15, 2017 (**C-0396-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll January 1-January 15, 2018 (**C-0398-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll January 16-January 31, 2018 (**C-0399-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll May 16-May 31, 2018 (**C-0400-SPA**); Santa Fe Estate Company- Hacienda Santa Fe Payroll June 1-June 15, 2018 (**C-0401-SPA**)

¹⁹⁴¹ Witness Statement of Russ Welty – Reply -ENG at ¶ 19 (**CWS-11**)

¹⁹⁴² Richter Reply Expert Damages Report at ¶ 4.31 (**CES-04**).

¹⁹⁴³ Witness Statement of Russ Welty at ¶ 107-108 (**CWS-11**)

the United States. This issue was discussed in the Expert Report of Dr. Odilo Duarte (**RER-02**).

- 1977) Dr. Duarte addresses the fact that an Animal and Plant Health Service (APHIS) authorization is necessary to permit foreign avocados for obtaining market access to the United States.¹⁹⁴⁴ Dr. Duarte speculates that the time necessary for APHIS authorization would be lengthy and that there would be costs associated with obtaining market access.¹⁹⁴⁵
- 1978) INAGROSA understood it could not sell Hass avocados to the United States immediately. Carlos Rondon addresses this in his Witness Statement where he discusses the steps that were underway to arrange for US Department of Agriculture permission for the import of Hass avocados from INAGROSA's facilities at HSF.¹⁹⁴⁶ This is also addressed in the Witness Statement of Russ Welty who had the meetings and contacts on the market access issues.¹⁹⁴⁷
- 1979) INAGROSA Management had commenced working with the USDA to arrange for pre-approval of its Hass avocados. This may have required the application of measures to ensure that no medfly contamination occurred.¹⁹⁴⁸
- 1980) Until avocados could enter the United States, INAGROSA would sell to the adjacent North American market in Canada. It also would have explored accessing the EU and Japanese markets. Since the event of Brexit, market access to the UK was special situation that could provide access to a strong Hass avocado market.¹⁹⁴⁹
- 1981) What is clear is that INAGROSA did not have any market access barriers to these markets. Russ Welty also notes that the pricing for Hass avocados in Canada was like the United States and the logistics for shipment to Canada were like those to the United States.¹⁹⁵⁰

11. Addressing concerns in the Credibility Report

- 1982) The Credibility Report included section 4.1 on investment treaty cases to support Mr. Hart's opinion that the DCF Approach should not be applied. Mr.

¹⁹⁴⁴Expert Report of Dr. Duarte at ¶ 9.2.1 (**RER-01**).

¹⁹⁴⁵Expert Report of Dr. Duarte at ¶ 9.2.1 (**RER-01**).

¹⁹⁴⁶Witness Statement of Russ Welty at ¶¶ 81-87 (**CWS-11**).

¹⁹⁴⁷ Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶¶ 81-87 and ¶92 (**CWS-11**).

¹⁹⁴⁸ Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶¶ 84-87 and ¶ 92 (**CWS-11**).

¹⁹⁴⁹ Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶¶ 88-93 (**CWS-11**).

¹⁹⁵⁰Reply Witness Statement of Russ Welty-Reply-ENG at ¶ 91 (**CWS-11**).

Hart engages in a summary of six investment treaty cases. He summarized these cases to identify the following four factors:¹⁹⁵¹

- a) INAGROSA was not a going concern.¹⁹⁵²
- b) INAGROSA had insufficient finances to fund the business.
- c) There were uncertainties regarding future income and costs.
- d) Large disparity in the amount invested and the fair market value claimed.¹⁹⁵³

1983) To this list, Nicaragua rejects the application of the DCF method for a lack of consideration of contemporaneous financial records.¹⁹⁵⁴

1984) All these items have been addressed in Heading B of this Section above except for the contention that DCF valuation could not be applied as there was a large disparity in the amount invested in INAGROSA and the fair market value claimed.

1985) In essence, the argument Nicaragua proposes is that the Tribunal should not accept a damages methodology that arrives at fair market value if that value shows that the business is worth more than the original historical sunk cost in company. This argument makes no sense. The fact that Riverside made investments more than 25 years ago cannot form the basis of an argument that this early and longstanding investment should be speculative and thus the gains over time should be ignored.

12. There were no offsetting factors.

1986) Finally, Nicaragua attempted to reduce the damages that would otherwise be payable due to allegations of contributory negligence. Nicaragua advances four theories:

- a) INAGROSA abandoned HSF in 2017,¹⁹⁵⁵
- b) INAGROSA failed to mitigate its losses by obtaining HSF in 2021 from Nicaragua.

¹⁹⁵¹Credibility Report at ¶82 (i) to *iv).

¹⁹⁵²This also includes the arguments on pre-operational status of the avocado and forestry operations In paragraph 421 of the Counter-Memorial.

¹⁹⁵³Credibility Report at ¶90.

¹⁹⁵⁴Counter-Memorial at ¶ 421.

¹⁹⁵⁵Counter-Memorial at ¶ 422 (ii). Nicaragua also claims that the application for the Private Wildlife Reserve was further proof of abandonment at ¶430.

- c) The forest and avocado businesses were illegal.¹⁹⁵⁶..
- d) INAGROSA failed to pay its property taxes¹⁹⁵⁷.

13. INAGROSA was a going concern in 2018.

- 1987) Nicaragua's contention is that DCF methodology should not be applied to enterprises that are "pre-operational businesses or a greenfield project."¹⁹⁵⁸ INAGROSA was not a greenfield project, and its Hass avocado business was operating at the time of the invasion, as was its standing timber operation.
- 1988) Nicaragua and its experts have defined pre-operability as being since INAGROSA did not sell its Hass avocados to the market in 2017. But this is not the test of operability.¹⁹⁵⁹
- 1989) Nicaragua's contention is that DCF methodology should not be applied to enterprises that are "pre-operational businesses or a greenfield project."¹⁹⁶⁰ INAGROSA was not a greenfield project, and its Hass avocado business was operating at the time of the invasion, as was its standing timber operation. A review of the cases addressed in this part of the Reply Memorial demonstrates that tribunals routinely apply DCF methodology to business that have not yet operated precisely because DCF methodology allows for the Tribunal to address the operational risks in a precise and less speculative manner than other valuation approaches.
- 1990) Considering the established and proven ability of INAGROSA to cultivate a Hass avocado in 2017, it is not accurate to term INAGROSA as a greenfield project or as pre-operational.¹⁹⁶¹ Because the price for avocados is set on a world market basis and harvest could be predicted on the number of trees and area under cultivation, the tribunal has reliable basis for the use of DCF.¹⁹⁶² As a result, the Tribunal can rely on revenue projections that are based on historic production and thus not speculative.

¹⁹⁵⁶Counter-Memorial at ¶¶ 422 (i), 423 and ¶430.

¹⁹⁵⁷Counter-Memorial at ¶ 430.

¹⁹⁵⁸Counter-Memorial at ¶ 442.

¹⁹⁵⁹ Richter Reply Expert Damages Report at ¶ 3.32 (CES-04).

¹⁹⁶⁰Counter-Memorial at ¶ 442.

¹⁹⁶¹ Richter Reply Expert Damages Report at ¶ 3.34 (CES-04).

¹⁹⁶²As a result, the objections to DCF raised by the *PSEG v Turkey* Tribunal are inapplicable here (see Counter-Memorial ¶ 443 relying on *PSEG Global, Inc. & Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, (RL-0099). This equally addresses the main concerns to DCF raised by the *Metaclad (CL-0087-ENG)*, *Wena Hotels*, (CL-039-ENG) *TECMED* ((RL-0059) and *Phelps Dodge*(CL-0278-ENG) tribunals. Also, the *Wena Hotels* claim did not deal with a commodity market but a much less reliable hospitality market.

1991) INAGROSA was a successful Hass avocado cultivator with a proven track record by 2018 with two successfully grown crops.¹⁹⁶³

1992) Mr. Welty notes in his Witness Statement (**CWS-11**) that:

37) I was able to see that we had a successful 2017 Hass avocado harvest. This was the type of successful harvest from the long cycle Hass avocado fruit trees that would be necessary for INAGROSA to declare INAGROSA's transition a success.

38) In my opinion, being able to deliver a commodity agricultural crop to market was the hallmark for a successful company in this sector. The logistics companies would handle the refrigerated transport logistics to the export markets. Those companies had established capabilities and the services were available to access markets in North America, Europe and even Asia.¹⁹⁶⁴

1993) INAGROSA had a record of proven ability to grow long cycle fruit trees on a commercial scale to harvest repeatedly. Based on his personal observation of this fact, Mr. Welty concludes:

39) From a business perspective, the key milestone for success for INAGROSA was proof that it could deliver commercial Hass avocados from Hacienda Santa Fe. INAGROSA did that in 2017 and again in 2018 (albeit only with harvest of immature fruits before the invasion occurred in June 2018, before the primary harvest of the 2018 crop had begun).¹⁹⁶⁵

1994) Nicaragua and its experts have defined pre-operability as being since INAGROSA did not sell its Hass avocados to the market in 2017. But this is not the test of operability. INAGROSA sought to plant 60,000 avocado seedlings per calendar quarter. The ability to access the avocado seeds while selling the processed oil on a temporary basis provided INAGROSA with certainty on its Hass avocado expansion plans.¹⁹⁶⁶

1995) There was no barrier to INAGROSA's sale of its successfully grown Hass avocados. However, INAGROSA had a higher and better use for its 2017 and 2018 Hass avocado crop. INAGROSA could process the 2018 harvest

¹⁹⁶³ Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶ 39 (**CWS-11**).

¹⁹⁶⁴ Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶¶ 37-38 (**CWS-11**).

¹⁹⁶⁵ Witness Statement of Russell (Russ) Welty – Reply – ENG at ¶ 39 (**CWS-11**).

¹⁹⁶⁶ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 284 (**CWS-10**).

for avocado oil (which it could sell in 2018) while utilizing the retained avocado seeds for the ongoing expansion at HSF.¹⁹⁶⁷

14. INAGROSA never abandoned HSF.

- 1996) Nicaragua incorrectly contends that INAGROSA was not operating in 2017. To this end, Nicaragua contends that INAGROSA abandoned HSF in 2017.¹⁹⁶⁸
- 1997) The only support for this allegation is the uncorroborated witness statement of Jose Lopez who claims that INAGROSA abandoned its property which facilitated an invasion of 150 persons into HSF in 2017.
- 1998) Riverside addresses in detail in Part II of this Reply Memorial the reasons why there is no basis to the fiction of a secret invasion of HSF in 2017. Riverside relies on the firsthand evidence, which includes that of Domingo Ferrufino who was present in 2017 as a permanent member of the INAGROSA Security Team and who testifies that there was no 2017 invasion.¹⁹⁶⁹
- 1999) Nicaragua and its experts rely on the same Witness Statement of Jose Lopez to conclude that HSF had an unsuccessful avocado crop in 2017. This statement is simply untrue. Indeed, the evidence Riverside produced in its Memorial, including the dry matter test reports on the 2017 Hass avocado harvest conclusively dispels this wholly fabricated factual assertion. The 2017 Hass avocado harvest was successful.¹⁹⁷⁰
- 2000) On this point, Nicaragua states that the decision of INAGROSA to apply for Private Wildlife Reserve designation was an indication that INAGROSA's avocado and forest operations were failures.¹⁹⁷¹
- 2001) Nicaragua completely misconstrues Riverside's motivation for applying for the Private Wildlife Reserve status. As explained by Carlos Rondón, the reason for the application was not to operate the Private Wildlife Reserve as an alternative to INAGROSA's avocado and forest operations, but as a natural corollary of the existing avocado and forest operations.¹⁹⁷²

¹⁹⁶⁷Witness Statement of Russ Welty-Reply-ENG at ¶ 67 (**CWS-11**).

¹⁹⁶⁸Counter-Memorial at ¶ 23 p. 27.

¹⁹⁶⁹Witness Statement of Domingo Ferrufino – Reply -SPA at ¶¶ 46-50 (**CWS-12**).

¹⁹⁷⁰Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 176 (**CWS-01**); Laquisa Laboratory 2017 avocado crop test analysis results on the avocado crop produced at Hacienda Santa Fe, November 17, 2017 (**C-0054-SPA**).

¹⁹⁷¹Counter-Memorial at ¶ 430. Also, Credibility Report at ¶ 11.

¹⁹⁷²Witness Statement of Carlos Rondón-Reply-ENG at ¶ 120-122 (**CWS-09**).

15. INAGROSA had Sufficient Financial support.

2002) Nicaragua's avocado expert, Odilo Duarte, estimated that Riverside would require a minimum of "\$8 to 10 million dollars in the first years while the plantation is installed."¹⁹⁷³

2003) As noted in Part III, INAGROSA had a formal funding commitment from Riverside to provide up to \$17.5 million in additional funding.¹⁹⁷⁴ This was in addition to the over \$9.5 million already Riverside already invested in INAGROSA.¹⁹⁷⁵

16. Uncertain Future Income

2004) INAGROSA was a producer of commodities for sale in world markets. Thus, it had no issue obtaining revenue for its product if it could cultivate it and use third-party logistics to access global markets. As the amount of harvests of the commodities could be estimated, and there were independent commodity reporters available for pricing, revenues could be easily forecast.¹⁹⁷⁶

2005) At page 15 of the Richter Expert Reply Damages Report, Vimal Kotecha assesses the stability of the commodity revenue flows from INAGROSA. He states:

The market price for avocados, a commodity, is not set by the individual producers. The individual producers are essentially price takers on the international marketplace. The price of avocados is publicly available. The First Expert Damages Report relied upon independent Hass avocado commodity price reporters in calculating revenues for INAGROSA. Thus, I conclude that the price for the sale of Hass avocados can be determined with reasonable certainty. The foundational basis to establish revenue is the ability of INAGROSA to be able to cultivate Hass avocados on a commercial scale that would be ready to be put into the chain of commerce. I conclude that INAGROSA was able to do this by the time of the 2018 invasion. Similarly, the foundational basis to establish revenue is the ability of INAGROSA to be able to harvest the valuable hardwood species for export to its pre-established buyer in the United States. While INAGROSA had not done this, it had the mature standing timber. Thus, I conclude that INAGROSA was able to obtain these revenues by the time of the 2018 invasion.¹⁹⁷⁷

¹⁹⁷³Expert Report of Dr. Duarte at ¶ 9.1.8 (RER-02).

¹⁹⁷⁴ Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (C-0287-ENG). Witness Statement of Melva Jo Winger de Rondon – Reply -ENG at ¶83 (CWS-08).

¹⁹⁷⁵ Richter Reply Expert Damages Report at Chart 4 (CES-04).

¹⁹⁷⁶ Richter Reply Expert Damages Report at ¶ 3.23 (CES-04).

¹⁹⁷⁷ Richter Reply Expert Damages Report at page 15 (CES-04).

2006) Mr. Kotecha also notes that he could prepare a technical basis for estimating production based on the evidence submitted by Nicaragua's avocado expert, Dr. Duarte. Adopting Dr. Duarte's evidence, Mr. Kotecha had the ability to establish projections. Mr. Kotecha notes:

In the preparation of the First Expert Damages Report, I reviewed the business plan prepared by the Claimant and independently verified the various assumptions within the business plan using publicly available information. Furthermore, Duarte, the Respondent's own expert, confirms that the underlying assumptions used in the business plan can indeed be independently tested using industry / market data.¹⁹⁷⁸

2007) The income projections detailed within the business plan stand on solid ground, devoid of the usual uncertainties associated with future revenues. The foundational assumptions have been rigorously tested against industry and market data, some of which have been corroborated by the expert evidence presented by Nicaragua, further bolstering their reliability.

17. The Historical Financial Records

2008) Nicaragua contends in Counter-Memorial paragraph 518 that DCF valuation cannot be applied due to the absence of any historical financial records to support a DCF approach. It says,

“ A DCF analysis is wholly inapplicable and entirely speculative in the context of a greenfield project, like Inagrosa's avocado and forestry businesses. If the Tribunal does find that Riverside has proven liability, causation and entitlement to damages based on sufficient contemporaneous evidence, which it should not- it should adopt a far less speculative approach, as Credibility International puts forth, in its alternative valuation methodology.”¹⁹⁷⁹

2009) Richter set out clearly the sufficiency of the documentary evidence it reviewed, including the new evidence that it was able to review to support its Reply Expert Damages Report.¹⁹⁸⁰

18. Alternative Valuation Methodologies.

2010) In Counter-Memorial paragraphs 511 (starting at page 217) and following, Nicaragua contends that an alternative valuation methodology should be applied.

¹⁹⁷⁸ Richter Reply Expert Damages Report at page 15 (CES-04).

¹⁹⁷⁹ Counter-Memorial at ¶ 518.

¹⁹⁸⁰ Richter Reply Expert Damages Report at ¶¶ 2.1, 2.5 (CES-04).

- 2011) That alternative proposed in para 192 of the Credibility Report is to value the change in the value of the business from the valuation date to today or when Respondent requested INAGROSA to maintain it.¹⁹⁸¹ Nicaragua contends that there is no evidence of the change in value of the property.
- 2012) Thus, Nicaragua relies on the Credibility Report scenarios 1, 2, and 3.
- a) Scenario 1 looks at INAGROSA's balance sheet to value the infrastructure at Hacienda Santa Fe at the time of the taking.
 - b) Scenario 2 looks at non-maintained infrastructure during the occupation.
 - c) Scenario 3 looks at non-maintained infrastructure during the occupation up to the date of Nicaragua's purported offer to return Hacienda Santa Fe in September 2021.
- 2013) To the extent that alternative valuation methodologies are applied, this matter is addressed by Mr. Kotecha in the Reply Valuation Report.
- 2014) The Credibility International Damages Report supported an asset-based model for damages. This alternative valuation model considers an asset-based approach to value instead of the income approach.
- 2015) Mr. Kotecha presents a revised damages model considering information provided by Nicaragua and documents obtained after filing his First Expert Damages Report. Mr. Kotecha presents damages with respect to the internationally unlawful acts at HSF, applying an asset-based model as an alternative approach advocated by Nicaragua's damages experts in the Reply Expert Damages Report.¹⁹⁸²
- 2016) While Mr. Kotecha believes that an income-based model is a more precise approach to determining damages in this claim, Mr. Kotecha has provided an asset-based model that considers the value of the land at HSF. Chart 5 sets out this Alternative Calculation.

¹⁹⁸¹ Counter-Memorial at ¶ 512.

¹⁹⁸² Richter Reply Expert Damages Report at ¶ 3.8 (CES-04).

Richter Reply– Chart 5 – Alternative Calculation – Asset-based

Alternative Calculation, Asset Method			
	Hectares	FMV/Ha	
in \$USD			
Land			
Planted	245	85,621	20,977,145
Plantable	763	85,621	65,350,228
Additional Land	76	85,621	6,507,196
Sum			92,834,569
Standing Forest	140		5,100,000
Claimant Total			97,934,569
Semi-Annual Compounded Interest		9%	68,150,848
Total			166,085,418

2017) The asset-based method of valuation looks at the value of the land at HSF. It is set out, as an alternative calculation, in Chart 5. The value of the land is \$97,934,569.¹⁹⁸³ Interest has been calculated to mid -July 2024. The total pre-award interest comes to \$68,150,848. Thus, the total under this alternative valuation comes to **\$166,085,418**.¹⁹⁸⁴

D. Richter's Views on Damages

2018) Mr. Kotecha's view in his Reply Valuation Report was to carefully consider the position advanced in the Credibility Report. Richter's Reply Expert Valuation Report (**CES-04**) addressed the points raised in the Credibility Report. His conclusions were set out in Chart 7

Richter Reply– Chart 7 – Economic Loss, After Interest

Economic Loss - Summary		
in \$USD	1000 Hectares	245 Hectares
Economic Loss, before interest	130,498,929	22,419,564
Value of Standing Forest	5,100,000	5,100,000
FMV of unused land	6,507,196	71,857,424
Total before interest	142,106,125	99,376,988
Interest ⁽¹⁾	98,889,014	69,154,601
Economic Loss, including interest	240,995,140	168,531,589

¹⁹⁸³ Richter Reply Expert Damages Report, Chart 5 (**CES-04**).

¹⁹⁸⁴ Richter Reply Expert Damages Report, Chart 5 (**CES-04**).

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- 2019) This more limited valuation assesses a fair market value of not less than USD\$168.5 million in the summer of 2018.¹⁹⁸⁵
- 2020) The Credibility Report was premised on different legal and factual assumptions. The Credibility Report presumes that:
- a) Nicaragua was not involved in the taking and occupation of HSF.¹⁹⁸⁶
 - b) INAGROSA was unable to operate in lawful manner in Nicaragua for either of its core businesses:¹⁹⁸⁷
 - c) INAGROSA had abandoned its operating businesses one year before the invasion occurred.¹⁹⁸⁸
 - d) That HSF was a Private Wildlife Reserve.¹⁹⁸⁹
 - e) That INAGROSA had not paid off its \$1 million infrastructure loan to the Latin American Agricultural Development Bank.¹⁹⁹⁰
 - f) That there was a refusal of an unconditional offer Nicaragua made for the return of HSF in September 2021.¹⁹⁹¹
 - g) INAGROSA was a pre-feasibility business; and
 - h) Richter had not engaged in sufficient diligence and analysis of the operations of INAGROSA to be able to conduct a DCF quantification.
- 2021) This Reply Memorial has demonstrated that all these factual assumptions were not correct.
- 2022) Because Credibility was constrained by these seven incorrect presumptions, it did not provide a DCF valuation to compare with the DCF valuation Richter presented.
- 2023) The Credibility Damages Report supports an asset-based model for damages. This alternative valuation model considers an asset-based approach to value instead of the income approach. While Mr. Kotecha believes that an income-based model is a more precise approach to determining damages in this claim, Mr. Kotecha has provided an asset-based

¹⁹⁸⁵ Richter Expert Reply Damages Report, Chart 7 (CES-04).

¹⁹⁸⁶ Counter-Memorial at ¶¶ 286-305.

¹⁹⁸⁷ Counter-Memorial at ¶ 473.

¹⁹⁸⁸ Counter-Memorial at ¶ 471 and ¶ 475.

¹⁹⁸⁹ Counter-Memorial at ¶ 473.

¹⁹⁹⁰ Counter-Memorial at ¶ 474.

¹⁹⁹¹ Counter-Memorial at ¶ 506.

model that considers the value of the land at HSF. Chart 5 sets out this Alternative Calculation.

Richter Reply– Chart 5 – Alternative Calculation – Asset-based

Alternative Calculation, Asset Method			
	Hectares	FMV/Ha	
in \$USD			
Land			
Planted	245	85,621	20,977,145
Plantable	763	85,621	65,350,228
Additional Land	76	85,621	<u>6,507,196</u>
Sum			92,834,569
Standing Forest	140		5,100,000
Claimant Total			97,934,569
Semi-Annual Compounded Interest		9%	68,150,848
Total			<u>166,085,418</u>

2024) The asset-based method of valuation looks at the value of the land at HSF. It is set out, as an alternative calculation, in Chart 5. The value of the land is \$97,934,569.¹⁹⁹² Interest has been calculated to mid -July 2024. The total pre-award interest comes to \$68,150,848. Thus, the total under this alternative valuation comes to **\$166,085,418**.¹⁹⁹³

E. A Fully Compensatory Award Must Grant Interest

2025) An award of interest is an integral component of the full reparation principle under international law, because, in addition to losing its property and other rights, an investor loses the opportunity to invest funds using the money to which that investor was rightfully entitled.¹⁹⁹⁴ A State's duty to make full reparation arises immediately after its unlawful act causes harm; to the extent that payment is delayed, the claimant loses the opportunity to use the funds for productive ends. That loss must be compensated to restore the claimant to the position that it would have occupied had the State not acted wrongfully.

¹⁹⁹² Richter Reply Expert Damages Report, Chart 5 (CES-04).

¹⁹⁹³ Richter Reply Expert Damages Report, Chart 5 (CES-04).

¹⁹⁹⁴ *Vivendi II* (to give effect to "the Chorzów principle . . . it is necessary for any award of damages in this case to bear interest"), ¶ 9.2.1 ("the liability to pay interest is now an accepted legal principle") at ¶ 8.3.20. (CL-0059-ENG); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, dated 6 February 2007) at ¶¶ 396-401. (applying the principle of "full reparation for the injury suffered" to the interest rate, the starting date of interest, and the decision to award compound interest). (RL-0105-ENG)

2026) As such, an award of interest is not separate from full reparation under the *Chorzów Factory* standard; it is a component of, and gives effect to, full reparation.¹⁹⁹⁵ The requirement of full reparation must inform all aspects of an award, including the determination of the appropriate rate of interest, and whether such interest should be simple or compound.

2027) In the words of the ARSIWA:

[i]nterest on any principal sum due shall be payable when necessary, in order to ensure full reparation. The interest rate and mode of calculation shall be set to achieve that result.¹⁹⁹⁶

1. Rate of Interest

2028) As noted in Memorial Paragraph 802, under CAFTA Article 10.7 Nicaragua agrees that compensation for a lawful expropriation “shall include interest at a commercially reasonable rate . . . from the date of expropriation until the date of actual payment.”¹⁹⁹⁷

2029) Nicaragua argues in Counter-Memorial paragraph 520 that the interest rate must be set at the commercially reasonable rate for that currency. However, in Counter-Memorial paragraph 522, Nicaragua demands that the interest rate be set as the 10-year US Treasury Bond rate. There is no basis for this rate in the Treaty. It is simply arbitrary. Further, reference to the Russian BIT demonstrates that long term rates are not to be used in the place of short-term rates.

¹⁹⁹⁵See *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, dated 27 June 1990) at ¶ 114 (**CL-147-ENG**. (“[T]he case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself, and should run consequently from the date when the State’s international responsibility became engaged.”); *Middle East Cement at* ¶ 174) (“Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.”) (**RL-0106-ENG**).

¹⁹⁹⁶ARSIWA Article 38(1) (International Law Commission, *Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001)) (“Interest on any principal sum payable under this chapter shall be payable, when necessary, in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.”) (**CL-0017-ENG**).

¹⁹⁹⁷James. Crawford, *The International Law Commission’s Articles of State Responsibility: Introduction, Text and Commentaries* (2002)) at pp 235 -239. (**CL-0019-ENG**); J. Gotanda, *A Study of Interest* (2007) Working Paper Series 83) (“It is a settled principle that a respondent is liable for all damages that have accrued naturally as a result of the failure to perform its obligations. Liability includes the obligation to pay the claimant interest for its lost opportunity cost, which may be in the form of interest.”) at p. 34 (**CL-0214-ENG**)

- 2030) Mr. Kotecha disagrees with Credibility International's position on the rate of interest.¹⁹⁹⁸
- 2031) In Richter's Expert Damages Report (**CES-01**), Richter relied upon the Nicaraguan civil interest rate to best approximate commercial interest rates in Nicaragua in 2018. The domestic court interest rate was set by statute and, at the time of the invasion, was 9%.
- 2032) However, in Richter's Expert Reply Damages Report (**CES-04**) Richter relied upon Nicaragua's sovereign risk rate to develop a commercially reasonable interest rate. The sovereign risk rate is the criteria used by capital markets to address that US dollar deposits in Nicaragua are riskier than US dollar deposits elsewhere. The sovereign risk rate is a floor for the computation of interest, to which a reasonable premium should be added. This would provide a commercially reasonable interest rate in this case. This sovereign risk rate is publicly available.
- 2033) This forced loan from Riverside to the Government of Nicaragua was made in Nicaragua. That nexus to Nicaragua is relevant to determining the commercially relevant rate.¹⁹⁹⁹ Nicaragua fails to note that there is a commercially reasonable rate for US dollar loans in Nicaragua and that the commercially reasonable rate must reflect that the funds were for a business in Nicaragua. Richter contends that commercial reasonableness requires considering what is reasonable for an investment in Nicaragua. This requires consideration of the country's risk rate for Nicaragua.²⁰⁰⁰
- 2034) The loss to Riverside, for which an adequate award of interest must compensate, is the opportunity cost of being deprived of the funds in question.
- 2035) The Memorial set out the interest provisions of CAFTA Article 10.7(3), which require payment of interest at a "commercially reasonable rate for that currency."²⁰⁰¹ Nicaragua also relied on the same provision.
- 2036) The basis for the rate of interest this Tribunal must choose from two different formulations for interest rates. The words arise from the CAFTA and the Russia-Nicaragua Bilateral Investment Treaty.
- 2037) CAFTA Article 10.7(3) provides:

If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date

¹⁹⁹⁸ Richter Reply Expert Damages Report at ¶ 8.5 (**CES-04**).

¹⁹⁹⁹ Richter Reply Expert Damages Report at ¶ 8.6 (**CES-04**).

²⁰⁰⁰ Richter Reply Expert Damages Report at ¶ 8.6 (**CES-04**).

²⁰⁰¹ Memorial at ¶ 802. Nicaragua relies on the same provision in Counter-Memorial paragraph 520.

of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

2038) This area is where the Tribunal must consider the more favorable provisions in the Russian BIT may be relevant. Article 4 of the Russian BIT ²⁰⁰² provides that:

From the date of expropriation until the date of actual payment of the compensation, the amount of the compensation shall be subject to accrued interest at a market-defined commercial rate but no lower than LIBOR rate for six months US dollar credits.²⁰⁰³

2039) As a result of the CAFTA MFN obligation, this Tribunal must extend the most favorable treatment -be it “a commercially reasonable rate for that currency” or “a market-defined commercial rate but no lower than LIBOR rate for six months US dollar credits.”

2040) As Richter notes, LIBOR is no longer available as a rate, so this part of the wording should be considered to reflect a treasury bill rate that is given a premium to address commercial realities of a “market-defined commercial rate.”²⁰⁰⁴.

2041) This Tribunal may consider “a commercially reasonable rate for that currency” or “a market-defined commercial rate but no lower than LIBOR rate for six months US dollar credits.” Because of the nature of MFN, the Tribunal must award the more favorable rate.

2042) What is not addressed in this interest rate is whether the Tribunal should consider the commercial rate at the location where the investment is made. US dollars have an interest rate, but the reference to commercial and commercially reasonable require this Tribunal to consider where the investment is located.

2043) Richter concludes that “the location of the investment in Nicaragua must be considered as a matter in any commercially reasonable rate. This context is essential. To this end, the commercially reasonable rate for that currency” must be what is commercially reasonable for US dollars in Nicaragua.”²⁰⁰⁵

2044) As noted in the Expert Witness Statement of Justin Wolfe,

On balance, there is significant evidence of ongoing failures to respect the rule of law and human rights by the Government of Sandinista.

²⁰⁰² Russian BIT (CL-0033-ENG).

²⁰⁰³ Russian BIT at Article 4. (CL-0033-ENG).

²⁰⁰⁴ Richter Reply Expert Damages Report at ¶ 8.12 (CES-04).

²⁰⁰⁵ Richter Reply Expert Damages Report at ¶ 8.14 (CES-04).

Considering the international scrutiny, these failures would undoubtedly affect the perceptions of foreign investors seeking to initiate investment activity in Nicaragua.²⁰⁰⁶

2045) Richter notes that “Foreign investors with US dollars in Nicaragua would be aware of the government’s widespread violation of human rights and the erosion of the rule of law since the summer of 2018.²⁰⁰⁷ This would make holding investments, including US dollars, riskier in Nicaragua. This risk must be reflected in the commercial interest rate.”²⁰⁰⁸

2046) However, the “commercially reasonable rate” of interest is applicable only to damages owing for lawful expropriation. The Treaty does not provide guidance on the rate of interest payable on damages owing for unlawful expropriation or for a breach of the Fair and Equitable Treatment, National Treatment, MFN Treatment and Full Protection and Security standards. Thus, interest payable on damages flowing from such Treaty breaches must be calculated in a manner giving effect to the principle of full reparation and is not limited by the Treaty standard for lawful expropriations.

2047) This forced loan from Riverside to the Government of Nicaragua was made in Nicaragua. That nexus to Nicaragua is relevant to the determination of the commercially relevant rate.

2048) The loss to Riverside, for which an adequate award of interest must compensate is the opportunity cost of having been deprived of the funds in question. The focus on the investor’s opportunity cost has been endorsed by several investment arbitration tribunals. The tribunal in *Vivendi v. Argentina* confirmed the rationale underlying this approach:

The object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.²⁰⁰⁹

2049) In its Reply Report, Richter computes interest in accordance with the “commercial reasonable rate” standard,²⁰¹⁰ which reflects a floor and to which a premium should be added to give effect to the principle of full reparation. It is important to note that a commercially reasonable rate is not the same as a posted rate. If the Treaty intended a posted rate, it would have used such

²⁰⁰⁶ Reply Expert Statement of Professor Justin Wolfe at ¶28 (CES-005).

²⁰⁰⁷ Richter Reply Expert Damages Report at ¶ 8.16 (CES-04), Reply Expert Statement of Professor Justin Wolfe at ¶28 (CES-005)

²⁰⁰⁸ Richter Reply Expert Damages Report at ¶ 8.16 (CES-04).

²⁰⁰⁹ *Vivendi II* at ¶ 9.2.3 (CL-0059-ENG).

²⁰¹⁰ Richter Reply Expert Damages Report at ¶ 8.18 (CES-04).

language. A commercially reasonable rate must consider the reasonable circumstances of an investment. Those commercial circumstances are reflected in the sovereign risk rate, which is why Richter applies it.

2050) Considering Nicaragua's unlawful conduct and failure to pay Riverside compensation commensurate with its losses as of the Valuation Date, Nicaragua effectively had availed itself of a loan from Riverside (*i.e.*, a "forced loan"). In the circumstances, Richter considers that an appropriate rate of interest must consider the sovereign risk rate, which also is the premium on the interest rate at which Nicaragua borrows in the market.²⁰¹¹ Richer applied a rate of 9%, which is less than the current sovereign risk rate for Nicaragua at the date of this Reply Memorial filing on November 3, 2023, based on the average implied sovereign bond yield for Nicaragua is approximately 11.6%.²⁰¹²

2051) Mr. Kotecha notes:

The rate to be used should reflect the investment risk in the country where the operations occur. A US risk-free rate does not compensate the Claimant for the sovereign risk and assumes that the risk inherent in the US market is the same as the risk taken in another sovereign state, this assumption is far from the reality and is not consistent with standard valuation/finance practices.²⁰¹³

2052) Mr. Kotecha notes that very recent developments first reported in the press on November 1, 2023, that detrimentally affect the security of private property and corporations in Nicaragua and changes with the composition of the role and independence of the Supreme Court may also adversely affect this sovereign risk rate.²⁰¹⁴

2. Compound Interest

2053) As noted above, Tribunals have repeatedly affirmed that compound interest best gives effect to the customary international law rule of full reparation.²⁰¹⁵

²⁰¹¹Richter Reply Expert Damages Report at ¶ 8.18 (CES-04).

²⁰¹² Richter Reply Expert Damages Report at ¶ 8.18 (CES-04).

²⁰¹³ Richter Reply Expert Damages Report at ¶ 8.19 (CES-04).

²⁰¹⁴ Richter Reply Expert Damages Report at ¶¶ 8.19 – 8.21 (CES-04).

²⁰¹⁵*Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Ecuador*, ICSID Case No. ARB/06/11, Award, dated 5 October 2012) (hereafter "*Occidental Petroleum*") at ¶834. (CL-0058-ENG). ("[M]ost recent awards provide for compound interest. This practice accords with the *Chorzów* principle as an award of compound interest will usually reflect the damages suffered."), ¶ 840 ("In summary, it may be seen that compound interest is the norm in recent expropriation cases under ICSID."); see also *Marion Unglaube and Reinhard Unglaube v. Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, dated 16 May 2012) at ¶¶ 324–25 (CL-0208-ENG); *Quasar de Valores SICAV*

There is no longer any genuine debate that compound interest is the only way to compensate Riverside for the time value of its money.²⁰¹⁶ On this issue, the tribunal in *Gemplus v. Mexico*, noted that the awarding of compound interest is enshrined in investment arbitration:

[T]here is now a form of ‘jurisprudence constante’ where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.²⁰¹⁷

2054) In Memorial paragraph 807(b) Riverside seeks compound interest as the standard treatment for interest in investment arbitration. Nicaragua does not respond to this issue at all in its Counter-Memorial, but Nicaragua seeks compound interest itself in its prayer for relieve in paragraph 541 of the Counter-Memorial. Credibility International employed compound interest in its damages analyses in paragraph 164 of its report. Given Nicaragua’s use of compound interest, and its non-objection, and thus must be deemed to not contest the compound interest request.

2055) As noted by the authorities cited in Memorial footnote 1121 by Riverside, compound interest has been consistently applied in recent cases. Fundamentally, compound interest reflects economic reality in modern times,” where “the time value of money in free market economies is measured in compound interest.²⁰¹⁸ In *Kardassopoulos*, the tribunal was required to award interest under Article 13(1) of the Energy Charter Treaty, which required interest to be awarded at a “commercial rate.” The tribunal decided to order that interest be compounded semi-annually.²⁰¹⁹

2056) Based on the above, Riverside claims pre-award interest on the principal sum claimed at an annual interest rate of 9%, compounded

SA et al. (Formerly Renta 4 S.V.S.A et al.) v. Russia, SCC Case No. 24/2007, Award, dated 20 July 2012) at ¶¶ 226, 228, (CL-0209-ENG); *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award, dated 5 September 2008) (hereafter “*Continental Casualty*”) at PP 307-316. (RL-0034-ENG); *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, dated 21 June 2011) at ¶¶382 – 384 (CL-0120-ENG); *El Paso* at ¶ 746 (RL-0068-ENG).

²⁰¹⁶*Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, dated 1 June 2009) at ¶595. (“[T]he Tribunal is certain that in recent times compound interest has indeed been awarded more often than not and is becoming widely accepted as an appropriate and necessary component of compensation for expropriation.”). (RL-0030-ENG).

²⁰¹⁷*Gemplus, S.A. et al. v. Mexico*, ICSID Case Nos. ARB(AF)/04/3 and ARB (AF)/04/4, Award, dated 16 June 2010) at ¶¶16 – 26 (CL-0207-ENG); see also *Occidental Petroleum* at ¶¶ 843-845 (noting that “more recent awards have also favoured annual or semi-annual compounding” and, “not without hesitation,” conservatively awarding annual compounding “given the large amount of the Award and the number of years that have passed since the violation”). (CL-0058-ENG).

²⁰¹⁸*Continental Casualty* at ¶ 309 (RL-0034-ENG).

²⁰¹⁹*Kardassopoulos* at ¶¶ 658, 667–668 (CL-0197-ENG).

annually.²⁰²⁰ Based on the above, Riverside claims pre-award interest on the principal sum claimed at an annual interest rate of 9%, compounded semi-annually.²⁰²¹

3. Impact of new disclosure Amended Relief on damages

- 2057) Furthermore, new evidence came to light after the filing of the Memorial due to the discovery of the Application filed before the Nicaraguan courts. Nicaragua suppressed knowledge of this application from Riverside, and despite being a named party to the local dispute, Riverside was never served with notice of the process or with service of the court's order.
- 2058) In *Procedural Order No. 4*, the Tribunal concluded that the failure to provide notice of the court decision was a breach of due process.²⁰²²
- 2059) The Tribunal granted leave to Riverside to address matters arising from the application in this Reply Memorial.²⁰²³
- 2060) Expert Gutierrez has confirmed the abuse of rights from Nicaragua. Prof. Wolfe has provided confirmation from UN-appointed independent experts of the regular utilization of fabricated evidence by Nicaragua before the courts. Nicaragua's Counter-Memorial was replete with disruptive, misleading, and downright deceptive arguments on the part of Nicaragua in this arbitration. Given these extraordinary and egregious circumstances, there is a meaningful risk that Nicaragua will continue not to comply with the orders of this Tribunal in good faith.
- 2061) The Richter Reply Expert Damages Report has considered the recent press revelations, dated November 1, 2023, regarding the ousting of Supreme Court justices and the consequent undermining of judicial supervision over the registration processes for real estate and corporate entities. These events have been recognized as pertinent factors in evaluating the sovereign risk going forward that is associated with investments in Nicaragua. These events were underway as this Reply Memorial was being filed and they appear to still be incomplete. The erosion of judicial independence signaled by these events casts serious doubts on potential adherence to an award rendered by this Tribunal.²⁰²⁴

²⁰²⁰Richter Reply Expert Damages Report at ¶ 8.26 (CES-04).

²⁰²¹Richter Reply Expert Damages Report at ¶ 8.26 (CES-04).

²⁰²² Riverside Coffee *Procedural Order No. 4* at ¶ 37.

²⁰²³ Riverside Coffee *Procedural Order No. 4* at ¶ 39.

²⁰²⁴ Richter Reply Expert Damages Report at ¶ 8.19 and ¶ 8.20 (CES-04). Referring to La Prensa. "The transfer of the public registry to the Attorney General's office means that the dictatorship will be able to confiscate directly." (C-0666-SPA-ENG) and La Prensa, "Dictatorship imposes Judge Marvin Aguilar as acting president of the CSJ" November 1, 2023 (C-0667-SPA-ENG)

2062) As a result, and to the extent that Nicaragua may not immediately satisfy an eventual damages award issued by the Tribunal, Riverside clearly is entitled to compound interest accruing on such an Award from the date of the award until payment is made in full. The threat of post-award interest removes any incentive on the part of the Respondent to further delay the compensation to which Riverside is entitled.²⁰²⁵

4. The Award Should Be Net of All Applicable Nicaraguan Taxes

2063) The Tribunal granted leave to Riverside to address matters arising from the Judicial Order and its Application in this Reply Memorial.

2064) It is abundantly clear that there is a risk that Nicaragua will continue with its established practice of non-compliance with due process. As a result, Riverside seeks additional protective provisions to protect the Tribunal's award from the imposition of confiscatory taxes.

2065) The valuation set out in the Richter report has been prepared net of Nicaraguan taxes and then recalculated to consider the tax effect.²⁰²⁶ Consequently, any taxation by Nicaragua of the eventual Award in this arbitration would result in the Investor being effectively taxed twice for the same proceeds. That would subvert the purpose of the Award—*i.e.*, to place the Investor in the financial position in which it would have been had Nicaragua not breached its obligations under the Treaty.

2066) In the circumstances, Riverside requests that the Tribunal declare that:

- a) its Award is made net of all applicable Nicaraguan taxes; and that Nicaragua may not tax or attempt to tax the Award.²⁰²⁷
- b) Further, and in addition to the above, Claimant seeks an indemnity from Nicaragua in respect of any adverse consequences that may result from

²⁰²⁵ See, e.g., CMS at ¶¶ 470-471 (CMS) (awarding separate post-award interest to be compounded); (CL-0053-ENG); *Metalclad* at ¶ 131 (applying monthly compounding frequency arguably to expedite Mexico's payment) (CL-0087-ENG); *Occidental Exploration – Final Award* (increasing simple interest rate from 2.75 percent (pre-award) to 4 percent (post-award)) at pp. 73-74. (CL-0058-ENG); see also S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008) (hypothesizing that such “changes can be explained by the desire of some tribunals to ensure prompt compliance with the award by adding a punitive interest and thereby turning the post-award interest from a purely compensatory instrument into a sanction.”) at page 389.. (CL-0203-ENG).

²⁰²⁶ See Richter Reply Expert Damages Report at ¶ 8.29 (CES-04).

²⁰²⁷ Tribunals have recognized that this is a risk against which claimants in investor-state arbitrations require protection. See, e.g., *Chevron Corp. (USA) and Texaco Petroleum Co. (USA) v. Ecuador*, (UNCITRAL) PCA Case No. 34877, Partial Award on the Merits, dated 30 March 2010) at ¶¶ 552–53 (CL-0216-ENG); *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, dated 7 February 2017) at ¶¶ 544-547 (CL-0210ENG); *Rusoro* at ¶¶ 850-855. (CL-0206-ENG).

the imposition of a double taxation liability by the Nicaraguan tax authorities, if the declaration in the Tribunal's Award recognizing that the Award is net of Nicaraguan taxes is not accepted as the equivalent of evidence of payment.

2067) As noted in paragraph 828 of the Memorial, the corporate tax rate in Nicaragua is 30%.²⁰²⁸

F. The Award Should Award Claimant Costs and Fees For The Arbitration On An Indemnity Basis

2068) The Tribunal has broad discretion to award costs and fees, including the costs of the tribunal and the fees of attorneys, experts, and legal assistants. Article 61(2) of the ICSID Convention states:

In the case of arbitration proceedings, the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees, and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.²⁰²⁹

2069) Riverside seeks an Award of costs covering all the costs and fees incurred in connection with the arbitration on an indemnity basis. The only reason that Riverside must incur such costs and fees is due to Nicaragua's unlawful conduct and Nicaragua's failure to pay compensation for the damages that Riverside suffered due to Nicaragua's unlawful conduct.

2070) Riverside will provide its full costs submission at the conclusion of this arbitration, or as otherwise directed by the Tribunal.

G. Moral Damages

2071) Moral damages apply to the harm, stress, humiliation, and suffering caused to the Claimant, Riverside, including those arising from the invasion of private property and for damages for loss of reputation.

2072) Nicaragua summarily dismisses the claim for moral damages in its Counter-Memorial in paragraph 525 by claiming that the type of harm advanced by Riverside as damages was suffered by INAGROSA, rather than Riverside.

2073) However, Nicaragua is in factual error.

²⁰²⁸Nicaraguan Corporate Tax Rates at BATES page 0004300 (C-0168-ENG).

²⁰²⁹ICSID Convention, Article 61(2)

- 2074) The legal basis for moral damages was set out in the Memorial and need not be repeated here. The law is clear that moral damages may be awarded in situations where there has been harm to the corporate officers of the company and to their families.
- 2075) Riverside has produced firsthand evidence of harm in the Reply Witness Statement of Melva Jo Winger de Rondón and the Reply Witness Statement of Carlos Rondon regarding harm that occurred to Riverside. This harm occurred to Melva Jo Winger de Rondón the legal representative of Riverside to INAGROSA since 2013, and to Melvin Winger, the Operating Manager of Riverside at the time of the invasion.
- 2076) Melva Jo Winger de Rondón discusses the impact caused to her and her family of death threats, the invasion of the home made available by INAGROSA to Riverside at the Casa Hacienda and the smear tactics that have caused a stain upon the reputation of Melvin Winger and his family.²⁰³⁰ Further, Carlos Rondón, a member of Melva Jo Winger de Rondón's family and a direct recipient of death threats himself, also addresses this matter in his witness statement.²⁰³¹
- 2077) All these measures are directly caused by Nicaragua. Nicaragua's attacks on the reputation of the Winger-Rondon family are directly done by the state. Nicaragua has attacked the good faith and reputation of Melvin Winger in its Application for Security for Costs, accusing Riverside of acting mala fide by improperly bringing this claim in a manner to protect Melvin Winger's assets from attachment. This statement affects the long-standing reputation of Mr. Winger and his entire family, including his wife, Mona Winger, his daughter Melva Jo Winger de Rondón and his son-in-law, Carlos Rondón.
- 2078) Melva Jo Winger de Rondon discusses the pain, suffering and humiliation suffered by herself and her family because of Nicaragua's internationally wrongful acts. She was never a part of INAGROSA until after the occupation. Melva Jo Winder de Rondon's only role was on behalf of Riverside where she was the legal representative of Riverside to INAGROSA. In that capacity she suffered:
- a) invasion of her privacy and home at HSF.
 - b) Death threats to her husband.
 - c) Threats to the safety, privacy, and wellbeing of her family.

²⁰³⁰ Witness Statement of Melva Jo Winger de Rondón – Reply at ¶¶27 and ¶¶ 87-93 (**CWS-08**).

²⁰³¹ Witness Statement of Carlos J. Rondón – Reply at ¶¶ 163-166 (**CWS-09**).

- d) smears on her unblemished business and personal reputation, upon her father, Melvin Winger and her husband, Carolos Rondon.
- 2079) The resulting anxiety and nervous suffering and disgrace to her reputation and that of her family caused by Nicaragua are answerable as non-economic damage under the moral damages heading.²⁰³²
- 2080) Melva Jo Winger de Rondon reports “I have grappled with feelings of loss and anxiety, attributable directly to the unwarranted breach of our private sanctuary. I have problems sleeping and I am concerned about the future and safety of my family.”²⁰³³ She also notes the impact on her husband, Carolos Rondon, the recipient of death threats.
- 2081) As the evidence in the Reply Memorial demonstrates, Nicaragua has acted in bad faith in this claim. It had relied upon fabricated evidence before this tribunal and attacked the good name and reputation of Melvin Winger in the process without consideration of the impact its actions would have on this man’s well-earned and sterling reputation. This is shameful.
- 2082) This is a case where the suffering caused is widespread and without color of right or due process of law. This is a case where moral damages are warranted and appropriate.

H. Conclusions on Fair Market Value

- 2083) Based on Richter’s Reply Expert Damages Report of Vimal Kotecha, the fair market value considers the productive capacity of HSF, the fact that there were successful avocado harvests and the market value of Hass avocados.
- 2084) The revised calculation in the Reply Expert Damages Report has accepted specific observations made by Nicaragua’s experts with respect to avocado yield and planting density. Hass avocados are a commodity that obtains market pricing. These prices are recorded and monitored by independent price monitoring services. These revised calculations have applied the actual independent price monitoring service data to obtain the most accurate revenue information for the INAGROSA business.
- 2085) Chart 7 in the Richter Reply Expert Damages Report provides a total value with respect to the area of active Hass avocado operations and the standing forest. This model provides value for the entire operation as set out in the business plan and a second value for a subsection of the entire area of HSF.

²⁰³² Witness Statement of Melva Jo Winger de Rondón – Reply at ¶89 (CWS-08).

²⁰³³ Witness Statement of Melva Jo Winger de Rondón – Reply at ¶89 (CWS-08).

Table 7 – Richter Reply– Chart 7 – Economic Loss

Economic Loss - Summary in \$USD	1000 Hectares	245 Hectares
Economic Loss, before interest	130,498,929	22,419,564
Value of Standing Forest	5,100,000	5,100,000
FMV of unused land	6,507,196	71,857,424
Total before interest	142,106,125	99,376,988
Interest ⁽¹⁾	98,889,014	69,154,601
Economic Loss, including interest	240,995,140	168,531,589

2086) The first column in this chart assesses a fair market value for the full 1224 hectares taken during the occupation. The damages are USD\$142,106,125, plus pre-award interest of 98,889,014 for a total of **\$240,995,140**.²⁰³⁴

2087) In addition, Chart 7 provides a second column that only values the loss of 244.75 hectares which was the area of active Hass avocado operations as an alternative. This 244.75 hectares was the area of business expansion that commenced at the time of the taking. This more limited valuation assesses a fair market value of not less than USD\$199,376,988, plus pre-award interest of 69,145,601 for a total of **\$168,531,589**.²⁰³⁵

2088) None of these totals include additional items such as a tax gross-up, moral damages or costs as may be assessed by the Tribunal.

2089) The value of the DCF damages considering the gross-up of 30% is set out in Chart 8.

²⁰³⁴ Richter Reply Expert Damages Report, Chart 7 (CES-04).

²⁰³⁵ Richter Reply Expert Damages Report , Chart 5 (CES-04).

Richter Reply– Chart 8 – Economic Loss with Gross Up

Economic Loss - Summary		
in \$USD	1000 Hectares	245 Hectares
Economic Loss, before interest	130,498,929	22,419,564
Value of Standing Forest	5,100,000	5,100,000
FMV of unused land	6,507,196	71,857,424
Total before interest	142,106,125	99,376,988
Interest ⁽¹⁾	98,889,014	69,154,601
Economic Loss, before tax gross-up	240,995,140	168,531,589
Tax Gross-up	30.0%	30.0%
Economic Loss	344,278,771	240,759,413

(1) 9% semi-annual compounded interest was applied to the Economic Loss and FMV of unused land from the Invasion Date.

2090) The Credibility International Damages Report supported an asset-based model for damages. This alternative valuation model considers an asset-based approach to value instead of the income approach. While Mr. Kotecha believes that an income-based model is a more precise approach to determining damages in this claim, Mr. Kotecha has provided an asset-based model that considers the value of the land at HSF. Chart 5 sets out this Alternative Calculation.

Richter Reply– Chart 5 – Alternative Calculation – Asset-based

Alternative Calculation, Asset Method			
	Hectares	FMV/Ha	
in \$USD			
Land			
Planted	245	85,621	20,977,145
Plantable	763	85,621	65,350,228
Additional Land	76	85,621	6,507,196
Sum			92,834,569
Standing Forest	140		5,100,000
Claimant Total			97,934,569
Semi-Annual Compounded Interest		9%	68,150,848
Total			166,085,418

2091) The asset-based method of valuation looks at the value of the land at HSF. It is set out, as an alternative calculation, in Chart 5. The value of the land is \$97,934,569.²⁰³⁶ Interest has been calculated to mid -July 2024. The total

²⁰³⁶ Richter Reply Expert Damages Report, Chart 5 (CES-04).

pre-award interest comes to \$68,150,848. Thus, the total under this alternative valuation comes to **\$166,085,418**.²⁰³⁷

2092) The value of the asset-based method of valuation damages considering the gross-up of 30% is set out in Chart 10.²⁰³⁸

Richter Reply– Chart 9 – Alternative Method Loss with Gross Up

Alternative Calculation, Asset Method			
	Hectares	FMV/Ha	
in \$USD			
Land			
Planted	245	85,621	20,977,145
Plantable	763	85,621	65,350,228
Additional Land	76	85,621	6,507,196
Sum			92,834,569
Standing Forest	140		5,100,000
Claimant Total			97,934,569
Semi-Annual Compounded Interest		9%	68,150,848
Total			166,085,418
Total including Tax Gross Up		30%	237,264,882

2093) None of these totals include additional items such as moral damages or costs as may be assessed by the Tribunal.

2094) Costs for legal representation and arbitration costs are not included in this total. The Investor will submit such costs at a time noted in the *Procedural Order No. 2* when deemed appropriate by the Tribunal.

²⁰³⁷ Richter Reply Expert Damages Report, Chart 5 (CES-04).

²⁰³⁸ Richter Reply Expert Damages Report, Chart 9 (CES-04).

X. COUNTER MEMORIAL ON JURISDICTION

- 2095) Nicaragua presented a jurisdictional defense to Riverside's Claim in its Counter-Memorial on Merits. In this jurisdictional objection, Nicaragua raised two issues:
- a) This Tribunal did not have the jurisdiction to consider CAFTA Article 10.16(1)(b) claims raised by INAGROSA in its own name because of technical provisions in Article 25 of the ICSID Convention; and
 - b) The Tribunal did not have jurisdiction as Riverside did not meet the requirements of an Investor under the CAFTA with respect to its interest in INAGROSA.
- 2096) As discussed below, the first jurisdictional objection has been overtaken by subsequent events, rendering this objection entirely moot. The second objection is non-meritorious. There is no cognizable jurisdictional issue. Riverside has requested that Nicaragua withdraw the meaningless objection to create efficiency and economy, but Nicaragua has refused even though, on its face, this objection cannot succeed.
- 2097) Riverside withdrew its CAFTA Article 10.16(1)(b) claim which dispositively disposed of Nicaragua's first objective.²⁰³⁹
- 2098) Nicaragua's second objection over the term "owns or controls" in the definition of investment must be dismissed. Given Nicaragua's admission that Riverside owns shares in INAGROSA (which is recorded in Nicaragua's own Mercantile Registry), this jurisdictional objection is without any legal merit as it does not disclose a cognizable jurisdictional issue.
- 2099) This Tribunal has full jurisdictional competency to rule on this claim.

A. Withdrawal of Riverside's Article 10.16(1)(b) claim

- 2100) On March 16, 2023, Riverside withdrew those specific parts of its claim which asserted a separate claim by INAGROSA.²⁰⁴⁰ The withdrawal of this limited and specific claim effectively and completely disposed of Nicaragua's Article 10.16(1)(b) jurisdictional objection in its entirety.
- 2101) The removed CAFTA Article 10.16(1)(b) claim was expressed in paragraphs 770, 934, and 946(d) of the original version of the Memorial.

²⁰³⁹Riverside fully maintained its CAFTA Article 10.16(1)(a) claim which was not affected by the withdrawal of the Article 10.16(1)(b) claim.

²⁰⁴⁰Letter from Riverside to Tribunal withdrawing CAFTA Art 10.16(1)(b) claim, March 16 2023 (C-0472-ENG).

- 2102) There was little mention of the CAFTA Article 10.16(1)(b) claim in the Memorial. With Riverside's withdrawal, the following parts of the Memorial were modified:
- a) Paragraph 770 -removed the words "and (1)(b)" in two places in this paragraph.
 - b) Paragraph 934 -in paragraph (a) –the third sentence, in paragraph (b) was struck, "and (1)(b)," in paragraphs (b) and the second sentence and
 - c) paragraph 946(d) was struck.²⁰⁴¹
- 2103) The withdrawal of the INAGROSA CAFTA Article 10.16. (1)(b) claim dispensed all of Nicaragua's jurisdictional and admissibility objections Nicaragua raised under ICSID Convention Article 25, which were contained in Part III of its Counter-Memorial.

B. Bringing a Claim on a Claimant's own Behalf (10.16(1)(a))

- 2104) Nicaragua asserts in Counter-Memorial paragraph 237 that "the Claimant cannot now seek recovery for losses or damages sustained by Inagrosa beyond the extent of its claimed shareholding in Inagrosa."²⁰⁴² This statement is incorrect.
- 2105) Arbitral practice in investor-state proceedings overwhelmingly supports permitting claims from investors for damages arising to their investments.²⁰⁴³
- 2106) The CAFTA language for the espousal of claims by an investor with respect to its investment under Article 10.16.1(a) and (b) is in the same form as the NAFTA Articles 1116 and 1117. The *Pope & Talbot v Canada*, Tribunal applied the NAFTA language to the Investor's claim for damages arising to its investment in Canada by stating that 'it could scarcely be clearer' that such claims could be brought pursuant to Article 1116.²⁰⁴⁴ The *Pope & Talbot* Tribunal pointed to the non-mandatory language of Article 1117, and the waiver provision in NAFTA Article 1121 which contemplates that an Article 1116 claim could be brought by a shareholder.²⁰⁴⁵ All of these same features are also present in the virtually identical CAFTA language.

²⁰⁴¹Letter from Riverside to Tribunal withdrawing CAFTA Art 10.16(1)(b) claim, March 16 2023 (C-0472-ENG).

²⁰⁴²Counter-Memorial at ¶ 237.

²⁰⁴³*Mondev v United States of America*, Award (CL-0006-ENG); *Antoine Goetz and others v Republic of Burundi I*, ICSID Case No ARB/95/3, Award (1 February 1999) (CL-0263-FRE); *Webuild SpA (formerly Salini Impregilo SpA) v Argentine Republic*, ICSID Case No ARB/15/39, Decision on Jurisdiction and Admissibility (23 February 2018) (CL-0264-ENG); *CMS Gas v Argentina* (Jurisdiction). (CL-110-ENG).

²⁰⁴⁴*Pope & Talbot v Canada*, Damages at ¶ 80 (CL-0014-ENG).

²⁰⁴⁵*Pope & Talbot v Canada*, Damages at ¶ 80 (CL-0014-ENG).

2107) In *Daniel Kappes v Guatemala*, the CAFTA Tribunal found that the shareholder's claim for damages for the loss to the investment was admissible.²⁰⁴⁶ The claim was in respect of a gold mining project in Guatemala that was disrupted by protests and blockaded by non-governmental groups, before the investment's mining licenses were ultimately suspended by a decision of the Guatemalan Courts. The *Kappes* Tribunal allowed the shareholder claim, stating:

The difficulty is that the majority of the Tribunal finds no textual basis in either Article 10.16.1(a) or 10.16.1(b) for the Respondent's conclusion that the Treaty 'requires' the use of the latter where available, such that the company 'has to' pursue that path and is prohibited from invoking the former instead.²⁰⁴⁷

2108) There is no risk of double recovery in this CAFTA claim. At the time of making the claim, and filing the CAFTA waiver, Riverside owned 95% of the shares of INAGROSA. The additional 5% is owned personally by Carlos Rondon. Mr. Rondon is unable to bring a claim under the CAFTA with respect to his interest due to the temporal limitations in that treaty. There could be no risk of double recovery if Riverside is successful in its claims and is awarded damages.

2109) To reach this point, in Counter-Memorial paragraph 235, Nicaragua relies on a case which confirm that reflective loss claims may be brought if the Investor controls the investment. Nicaragua notes that in *Union Fenosa Gas v. Egypt*, the tribunal found that:

This is not a case of a claimant claiming as damages for a loss or expense incurred by a company in which it has only a minority interest and no direct control over that company. In such circumstances, a minority shareholder may make a claim for the diminution in the value of its shareholding;²⁰⁴⁸

2110) As set out in Part VII of this Reply Memorial, Nicaragua has ignored the fact that Riverside controls INAGROSA due to its voting control, financial control, and its shared senior most corporate officer. Further, Riverside filed regulatory documents with the IRS confirming its proof of control over INAGROSA for years before the invasion occurred.

²⁰⁴⁶ *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's preliminary objections, (March 13, 2020) at ¶159 (CL-0258-ENG).

²⁰⁴⁷ *Kappes* at ¶136 (CL-0258-ENG).

²⁰⁴⁸ Counter-Memorial at ¶234 relying on *Union Fenosa Gas S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, August 31, 2018, ¶ 10.119 (RL-0089).

- 2111) An Investor may bring a CAFTA claim under Article 10.16.1(a) to recover for injuries to the shareholder(s). Such shareholder injury results from violations to rights as shareholders²⁰⁴⁹
- 2112) Nicaragua argues that, only if the injury to the company is “direct,” does CAFTA allow the claim to be submitted by the investor on the company’s behalf under 10.16(a); and, if the claimant’s injury is only indirect, that is, the shares lost value as a result of injury to the company,²⁰⁵⁰ that claimant has to bring a claim on behalf of the enterprise that sustained the injury under Article 10.16(b) of CAFTA.²⁰⁵¹ However, this argument was flatly rejected by the Tribunal in *Kappes*.²⁰⁵²
- 2113) Shareholders can suffer two types of loss: direct loss and indirect, or reflective, loss. Shareholders incur direct loss when they are deprived of or restricted in their rights as shareholders, such as the right to vote or to share proceeds upon dissolution of the company. Shareholders also suffer direct loss when their shares are cancelled or expropriated.²⁰⁵³
- 2114) International investment law allows shareholders to bring in arbitration claims for damages or “reflective loss”—that is, loss incurred by shareholders indirectly as a result of injury to their company.²⁰⁵⁴ This is known as a reflective loss claim and it is a claim for a decrease in the value of a shareholding caused by injury to the company in which the shares are held.²⁰⁵⁵ A Shareholder suffer reflective loss when there is an injury to “its” company that affects the company’s value or profitability, but the loss to the

²⁰⁴⁹ *Kappes*, Respondent’s preliminary objections under article 10.20.5 of CAFTA-DR, (August 16, 2019), ¶ 42 (**CL-0259-ENG**), citing *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v. Spain)*, Judgment, 5 February 1970, 1970 I.C.J. Rep. 3, ¶ 47. (**CL-0260-ENG**). See also Chapter 4 of Lukas Vanhonnaeker, *Shareholders’ Claims for Reflective Loss in International Investment Law* (Cambridge University Press, 2020) (**CL-0261-ENG**).

²⁰⁵⁰ *Kappes* (**CL-0258-ENG**). Citing to M. Clodfelter and J. Klingler, *Reflective Loss and Its Limits under International Investment Law*, in C. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and valuation in International Investment Arbitration* (2018), p. 58 (defining reflective loss as “a decrease in the value of a shareholding caused by injury to the company in which the shares are held.”) (citations omitted). (**CL-0262-ENG**).

²⁰⁵¹ *Kappes* citing to M. Clodfelter and J. Klingler, *Reflective Loss and Its Limits under International Investment Law*, in C. Beharry. (**CL-0262-ENG**).

²⁰⁵² *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s preliminary objections, ¶¶ 126-130 (March 13, 2020) (internal citations omitted). (**CL-0258-ENG**).

²⁰⁵³ Vera Korzun, “Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law And Governance,” *U. Pa. J. Int’l L.*, Vol. 40(1), pp. 189-254, at p.198 (internal citations omitted). (**CL-0257-ENG**).

²⁰⁵⁴ Vera Korzun, “Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law And Governance,” *U. Pa. J. Int’l L.*, Vol. 40(1), pp. 189-254, at p.189. (**CL-0257-ENG**).

²⁰⁵⁵ *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s preliminary objections, ¶56 (March 13, 2020). (**CL-0258-ENG**).

company also reflects on shareholders, for instance, by decreasing the value of their shares or diminishing dividend payout.²⁰⁵⁶

- 2115) International investment law allows shareholders to bring claims for reflective loss, regardless of the claims by the corporation.²⁰⁵⁷
- 2116) In *Kappes*, Guatemala contended that any claims for harm derived from a local enterprise's losses *must* be brought through or by the controlling shareholders presenting a claim under Article 10.16.1(b) on behalf of the local enterprise itself. Guatemala also claimed that a claimant who owns or controls an enterprise could not bring claim on its own behalf for its enterprise's alleged losses.²⁰⁵⁸ The tribunal disagreed. The *Kappes* Tribunal held that the plain meaning of the terms of 10.16(a) DR-CAFTA do not bar a claimant from pursuing, on its own behalf, a claim for losses it incurred, just because those losses may have been incurred indirectly rather than directly.²⁰⁵⁹ The *Kappes* Tribunal reasoned as follows:

126. Claimants have invoked Article 10.16.1(a), Which states in relevant part that “[i]n the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, ...; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach...” (emphasis added). Several phrases in this provision, italicized above, are relevant to its construction.

127. First, the phrase “investment dispute” must be understood in the context of Article 10.1(1), which states that Chapter Ten on Investment applies to “measures adopted or maintained by a Party relating to ... covered investments.” The notion of a “covered investment” in turn hearkens back to the definition of investment in Article 10.28, which states that an investment may take the form, inter alia, of an “enterprise” or “shares, stock, and other forms of equity participation in an enterprise.” There appears to be no dispute in this case that Claimants hold a covered investment, by virtue of their collective ownership (directly and indirectly) of the shares of a local enterprise (Exmingua). Contrary to Claimants’ suggestion, however, this does not appreciably assist the jurisdictional

²⁰⁵⁶Vera Korzun, “Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law And Governance,” U. Pa. J. Int’l L., Vol. 40(1), pp. 189-254, at p.199 (internal citations omitted). (CL-0257-ENG).

²⁰⁵⁷Vera Korzun, “Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law And Governance,” U. Pa. J. Int’l L., Vol. 40(1), pp. 189-254, at p.189 (internal citations omitted) (CL-0257-ENG).

²⁰⁵⁸*Kappes*, Respondent’s preliminary objections under article 10.20.5 of CAFTA-DR, (August 16, 2019), ¶40 (CL-0259-ENG).

²⁰⁵⁹*Kappes* at ¶ 157 (CL-0259-ENG).

analysis, because the fact that shares are protected does not necessarily imply that shareholders may seek damages for loss of share value, as opposed to deprivation of share ownership or interference with shareholder rights. For that proposition, one must examine the additional words of Article 10.16.1(a), authorizing “the claimant, on its own behalf,” to submit a claim that “the claimant has incurred loss or damage by reason of, or arising out of,” an alleged breach of a Treaty obligation.

128. The phrase “on its own behalf” plainly refers to the entity whose interests are being pursued. To act on behalf on someone means to act for their benefit or to represent their interests. When a claimant proceeds under DR-CAFTA Article 10.16.1(a), it does not purport to be acting for anyone’s benefit or interest other than its own – a point to which the Tribunal returns when assessing the contrasting language in Article 10.16.1(b). The clear text of Article 10.16.1(a) allows a claimant to proceed for its sole benefit for any claims that it has “incurred loss or damage” (i.e., an alleged result), “by reason of, or arising out of” a challenged State action (i.e., an alleged causal link).

129. With respect to the critical phrase “incurred loss or damage,” it is important to note both what it says and what it does not. First, as to what it says, the requirement is that the claimant itself must have “incurred” harm; it would not be sufficient for a claimant to demonstrate only that a local enterprise in which it has an interest has incurred harm. The burden is on the claimant to allege (and eventually to prove) its own injury. Second, the claimant bears the burden of proving causation, i.e., that its own injury was suffered “by reason of or arising out of” the challenged State conduct. The more tenuous the connection between the challenged conduct and the alleged injury to a claimant, the heavier this burden may be.

130. But notably, nothing in the plain text of Article 10.16.1(a) forbids a claimant from trying to make such showings of injury and causation based on a multi-step analysis, such as the one that would be necessary for any claimant arguing that it incurred harm through a chain of events starting with State conduct towards a company in which it holds shares. There is no qualification in the provision that limits the mechanisms through which loss must be incurred. Thus, although Respondent cites various secondary sources opining that Article 10.16.1(a) is limited to pursuit of “direct” loss or damage, the words “direct” or “indirect” appear nowhere in the provision itself. Nor is a limitation to direct harm a necessary implication of the causation requirement, namely that injury be incurred “by reason of, or arising out of” the challenged conduct. The causation requirement points to a “but for” analysis, but it does not restrict that analysis to a single step of “but for” postulation, nor indicate that there is a threshold requirement of immediate or proximate causation, such that

injuries based on more attenuated causation would automatically fall outside the scope of consent. It would have been possible, of course, for the DR-CAFTA Parties to include a reference to direct injury or direct causation in the Treaty provision, but they did not do so. Thus, if the interpretative lens were restricted to Article 10.16.1(a) alone, the text of this provision would not support a conclusion that an investor is barred even from trying to establish, through a chain of causation, that it suffered injury in consequence of State conduct that immediately impacted at a downstream entity in which it holds shares.²⁰⁶⁰

2117) Therefore, shareholders can bring a claim for losses under Article 10.16.1(a),²⁰⁶¹ but the burden is on the shareholder to demonstrate that the loss flows to it due to its control, rather than only the investment directly:

it would not be sufficient for a claimant to demonstrate only that a local enterprise in which it has an interest has incurred harm. The burden is on the claimant to allege (and eventually to prove) its own injury. Second, the claimant bears the burden of proving causation, i.e., that its own injury was suffered “by reason of or arising out of” the challenged State conduct. The more tenuous the connection between the challenged conduct and the alleged injury to a claimant, the heavier this burden may be.²⁰⁶²

2118) Here, Riverside has suffered a total economic loss of its investment in INAGROSA. The economic drivers of the company were destroyed due to the destruction of the Hass avocado plantations and the deforestation of rare hardwood species of trees.²⁰⁶³ As a long-cycle fruit tree business, it would take many years to be able to recondition the soil, propagate the seedlings and replant the facility to be able to regain productive capacity.²⁰⁶⁴ Riverside’s only investment is in INAGROSA. It has loans of more than 15.5 million outstanding²⁰⁶⁵ as well as its equity interest, which currently comprises 95% of the shares of INAGROSA. Riverside controlled INAGROSA at the time of the invasion and occupation in 2018. Damage caused to INAGROSA would be directly suffered by Riverside in these

²⁰⁶⁰ *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s preliminary objections, ¶¶126-130 (March 13, 2020) (emphasis added) (internal citations omitted). (**CL-0258-ENG**).

²⁰⁶¹ *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s preliminary objections, ¶133 (March 13, 2020) (internal citations omitted). (**CL-0258-ENG**).

²⁰⁶² *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s preliminary objections, ¶129 (March 13, 2020) (internal citations omitted). (**CL-0258-ENG**).

²⁰⁶³ Witness Statement of Luis Gutierrez –Reply – SPA at ¶ 144 (**CWS-10**).

²⁰⁶⁴ Richter Reply Damages Report at ¶ 6.7 (**CES-04**).

²⁰⁶⁵ Richter Reply Damages Report at Chart 4 – Investment Balance Calculations (**CES-04**).

circumstances. As the controlling investor in INAGROSA, Riverside's loss as an investor in INAGROSA is total.

2119) In addition, Riverside has suffered direct damage arising from Nicaragua's Judicial Order. The Judicial order, and the application seeking the Judicial Order directly named Riverside as a party. The effect of the Judicial Order was to deprive INAGROSA of its exclusive property rights over HSF. As a result, Riverside has suffered direct losses, in addition to its indirect losses.

2120) As a result, Riverside is entitled to seek damages for its indirect loss under CAFTA-DR Article 10.16.1(a).

1. No cognizable remaining jurisdictional issue

2121) The discussion of the remaining jurisdictional issues necessitates a review of the long history of Riverside's interest in INAGROSA.

2122) Riverside made its first investment in INAGROSA in 1997 and it made its last formal financial commitment to INAGROSA in March 2018 for US\$16 million.

2123) Riverside is an American limited liability company incorporated in Kansas. Riverside owned shares and debt in INAGROSA at the time of the expropriation in 2018.²⁰⁶⁶

2124) To obtain treaty protection by the CAFTA, an investor must be an investor of another party or have a covered investment under the treaty. The CAFTA defines an investor of a party as follows:

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.²⁰⁶⁷

2125) Riverside's interest in INAGROSA was known to Nicaragua at least as of the filing of the Riverside's shares certificates in INAGROSA filed with the Notice of Arbitration.²⁰⁶⁸ At Counter-Memorial paragraph 243, Nicaragua freely admits that Riverside owns at least 25.5% of the equity of INAGROSA. Nicaragua admits:

²⁰⁶⁶Articles of Incorporation- Riverside Coffee, LLC, June 18, 1999 (**C-0040-ENG**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022, at ¶ 3 (**C-0055**).

²⁰⁶⁷CAFTA, Article 10.28: Definitions.

²⁰⁶⁸INAGROSA Share Certificate No. 12, August 31, 2004 (**C-0043-SPA**); INAGROSA Share Certificate No. 13, August 31, 2004 (**C-0044-SPA**); INAGROSA Share Certificate No. 14, August 31, 2004 (**C-0045-SPA**); INAGROSA Share Certificate No. 15, August 31, 2004 (**C-0046-SPA**).

243. What we do know from the evidence submitted by Claimant and shown in the above chart, is that from at least January 30, 2013, until August 27, 2020, **Riverside only owned 25.5 percent of the shareholding in Inagrosa. That is undisputed. In fact, Claimant admits it.**²⁰⁶⁹

- 2126) Riverside has owned shares in INAGROSA since September 2003. Riverside's pleading of ownership of shares in INAGROSA;²⁰⁷⁰ As an owner of shares in the equity of INAGROSA, Riverside is entitled to bring a claim under the CAFTA.
- 2127) Riverside has been the controlling shareholder of INAGROSA for many years before the June 2018 invasion.²⁰⁷¹ Riverside controlled INAGROSA at the time of the Invasion. As the controlling shareholder, in 2018.²⁰⁷² Riverside can bring a claim arising from its control of INAGROSA.²⁰⁷³
- 2128) In addition to the investment in equity shares, there are additional basis that qualify Riverside as an Investor with an investment in INAGROSA. These include Riverside's long-term debt.²⁰⁷⁴ CAFTA Article 10.28 defines Investment. Paragraph (c) of this definition in Article 10.28 expressly includes "bonds, debentures, other debt instruments, and loans" within the definition. In Part VII of the Reply Memorial above, the long-term loans made by Riverside to INAGROSA were reviewed in detail. These debt instruments, some spanning back more than twenty years, all independently qualify as an investment owned by Riverside in INAGROSA for the purposes of jurisdiction.
- 2129) There is no legal or factual basis to Nicaragua's remaining jurisdictional objection. In paragraph 238 of the Counter-Memorial, Nicaragua claims:
- ... Riverside has failed to meet its burden of establishing the Tribunal's jurisdiction over such claims because it has not shown that it controlled Inagrosa at the time of the alleged breaches.²⁰⁷⁵

²⁰⁶⁹Counter-Memorial at ¶243 (footnotes removed).

²⁰⁷⁰Riverside Memorial on the Merits, October 21, 2022, at ¶¶ 41,83-85,87, 89,91, 102, and 468 (hereinafter "Riverside Memorial").

²⁰⁷¹Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (**CWS-03**).

²⁰⁷²Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 37 (**CWS-03**). Witness Statement of Melvin Winger – Memorial – ENG at ¶ 30 (**CWS-04**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 212, 220 (**CWS-01**).

²⁰⁷³Witness Statement of Melvin Winger – Memorial – ENG at ¶ 32 (**CWS-04**); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 46 (**CWS-03**).

²⁰⁷⁴Expert Renaldy J. Gutierrez confirmed that Riverside's promissory note was a valid debt instrument under the law of Nicaragua. Expert Witness Statement of Renaldy J. Gutierrez in Question 4 at ¶195 (**CES-06**).

²⁰⁷⁵Counter-Memorial at ¶ 238.

- 2130) In paragraphs 198, 208 and 238 of its Counter-Memorial, Nicaragua claims that the issue of the Investor's control is a matter going to the jurisdiction of the Tribunal. This displays a lack of close reading of the terms of the Treaty and a fundamental misunderstanding of the jurisdictional issues.
- 2131) The requirement for ownership or control is alternative. Nicaragua erroneously reads them as cumulative. There is no requirement for a Claimant to demonstrate controls over an investment when, as here, that Claimant has demonstrated that it owns any share equity in the investment.
- 2132) Riverside owns shares in INAGROSA directly.²⁰⁷⁶
- 2133) Riverside's equity investment in the shares of INAGROSA was recorded in the INAGROSA Share Registry Book.²⁰⁷⁷ The information in the Mercantile Registry is presumptively valid.²⁰⁷⁸ Riverside filed the INAGROSA share certificates No. 12,13,14,15,16 and 17 with its Notice of Arbitration.²⁰⁷⁹ These INAGROSA share certificates clearly state that these share certificates is recorded in the INAGROSA Share Registry Book.²⁰⁸⁰ There is no reasonable way that Nicaragua could have been unaware of Riverside's ownership of shares in INAGROSA.
- 2134) At the time of the invasion, Riverside had 25.5% of the shares of INAGROSA registered in its name.²⁰⁸¹ At earlier times, Riverside had 50% of the shares of INAGROSA registered in its name.²⁰⁸²
- 2135) Riverside's interest in INAGROSA was known to Nicaragua at least as of the filing of the Riverside's shares certificates in INAGROSA filed with the Notice of Arbitration.²⁰⁸³ At paragraph 243, Nicaragua admits that Riverside owns at least 25.5% of the equity of INAGROSA. Nicaragua admits:

243. What we do know from the evidence submitted by Claimant and shown in the above chart, is that from at least January 30, 2013, until

²⁰⁷⁶Inagrosa Share Certificate No. 12, August 31, 2004 issued to Riverside Coffee, LLC. **(C-0043-SPA)**; Inagrosa Share Certificate No. 15, August 31, 2004 issued to Riverside Coffee, LLC. **(C-0046-SPA)**.

²⁰⁷⁷INAGROSA Share Registry Book-Riverside shareholder entry page, undated **(C-0312-SPA)**.

²⁰⁷⁸Expert Witness Statement of Renaldy J. Gutierrez in Question 5 – at ¶196 **(CES-06-ENG) (CES-06)**.

²⁰⁷⁹INAGROSA Share Certificate No. 12, August 31, 2004 **(C-0043-SPA)**; INAGROSA Share Certificate No. 13, August 31, 2004 **(C-0044-SPA)**; INAGROSA Share Certificate No. 14, August 31, 2004 **(C-0045-SPA)**; INAGROSA Share Certificate No. 15, August 31, 2004 **(C-0046-SPA)**.

²⁰⁸⁰INAGROSA Share Certificate No. 12, August 31, 2004 **(C-0043-SPA)**; INAGROSA Share Certificate No. 13, August 31, 2004 **(C-0044-SPA)**; INAGROSA Share Certificate No. 14, August 31, 2004 **(C-0045-SPA)**; INAGROSA Share Certificate No. 15, August 31, 2004 **(C-0046-SPA)**.

²⁰⁸¹INAGROSA Share Registry Book-Riverside shareholder entry page, undated **(C-0312-SPA)**.

²⁰⁸²INAGROSA Share Registry Book-Riverside shareholder entry page, undated **(C-0312-SPA)**.

²⁰⁸³INAGROSA Share Certificate No. 12, August 31, 2004 **(C-0043-SPA)**; INAGROSA Share Certificate No. 13, August 31, 2004 **(C-0044-SPA)**; INAGROSA Share Certificate No. 14, August 31, 2004 **(C-0045-SPA)**; INAGROSA Share Certificate No. 15, August 31, 2004 **(C-0046-SPA)**.

August 27, 2020, **Riverside only owned 25.5 percent of the shareholding in Inagrosa. That is undisputed. In fact, Claimant admits it.**²⁰⁸⁴

- 2136) The issue of control is addressed below. While Riverside can prove that it controlled INAGROSA, this issue is both irrelevant and immaterial to jurisdiction because Riverside owns registered equity shares in INAGROSA.
- 2137) Nicaragua admitted the fact of the ownership in its Counter Memorial saying, “Riverside only owned 25.5 percent of the shareholding in Inagrosa. That is undisputed.”
- 2138) This share ownership conclusively grants jurisdiction to this Tribunal due to the definition of “investment” under the Treaty in the relevant CAFTA definition in CAFTA Article 10.28.
- 2139) The matter of control of an investment is not legally relevant to the jurisdiction of this Tribunal. The absence of legal merit to the defense is “clear and obvious” without requiring extensive analysis by the Tribunal. Nicaragua has no legal basis for the defense as Riverside constitutes an Investor with an Investment as defined in the relevant definition under CAFTA Article 10.28.
- 2140) Nicaragua has confused the existence of an investment with the matter of control. While control may be a relevant question in relation to damages issues, it is not a matter relevant to the jurisdictional competency of this Tribunal.
- 2141) Further, Nicaragua has subsequently made an additional admission that Riverside own shares in INAGROSA. Nicaragua’s Document Request No. 10 was regarding documents evidencing Riverside’s control of INAGROSA. In Part B of the Document Request, Nicaragua again admitted that Riverside had 25.5% of the registered equity shares of INAGROSA at the time of the invasion. In justifying the relevance of its request, Nicaragua admits

“Claimant has been unable to demonstrate that it controlled Inagrosa before August 27, 2020, when it acquired 95 per cent of Inagrosa’s shares. (See C-0052, C-0053) or when the alleged breaches occurred, **a time where it only owned 25.5 percent of Inagrosa’s shareholding.**”²⁰⁸⁵

- 2142) There can be no jurisdictional issue considering Nicaragua’s express admission that there is no dispute between the parties that Riverside is the

²⁰⁸⁴Counter-Memorial at ¶243 (footnotes removed).

²⁰⁸⁵Annex B to Procedural Order No. 6 – page 43.

owner of equity in INAGROSA in Nicaragua's response to Document Request No. 10, paragraph 243 of the Counter-Memorial and the fact that the shares in INAGROSA are registered and public record in a public government registry.

- 2143) Further, as pleaded in the Memorial, Riverside's investments in shares, and loans to INAGROSA, meet the requirements of an investment including those with respect to the contribution of money, duration of the investment, risk, and its contribution to the economic development of Nicaragua.²⁰⁸⁶ Riverside made millions of dollars of investments in Nicaragua since 1998. These promissory notes are evidenced before this Tribunal. These investments meet all the requirements for an investment under Article 25 of the ICSID Convention.
- 2144) This Tribunal has jurisdiction. Without doubt, Riverside is an American juridical national that owns equity (shares) in a Nicaraguan enterprise. Such an investment meets the express terms of the definition of investment in CAFTA Article 10.14 and under Article 25 of the ICSID Convention.
- 2145) There is no jurisdictional defense available to Nicaragua as a matter of law over the issue of control.
- 2146) The remainder of Nicaragua's arguments in paragraphs 239 and 241 to 253 are not rationally connected to the issue of jurisdiction.

2. Evidence of Control is not necessary to resolve this issue.

- 2147) While the control issue is not legally relevant to the question of jurisdiction, in any event, Riverside *has filed* evidence from Members and Officers of Riverside confirming that in fact Riverside controlled INAGROSA during the invasion of HSF.
- 2148) Reference is made to Party VII of the Reply Memorial, wherein the concept of "control" is exhaustively examined. The relevant discussions and findings therein are incorporated herein by reference.
- 2149) To encapsulate, establishing control may be derived from demonstrable practical control. In the context of Riverside's relationship with INAGROSA, such control was manifested in various ways. Riverside exerted actual control over INAGROSA through shared high-ranking officials, comprehensive financial oversight, significant influence over INAGROSA's debt structure, and a direct shareholding that was consistently exercised in concert, forming a cohesive controlling bloc. While any single one of these

²⁰⁸⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 - Decision on Jurisdiction, at ¶ 52 (CL-0085-ENG).

factors could suffice to establish control independently, their collective presence provides incontrovertible evidence of Riverside's dominant influence over INAGROSA.

2150) Part VII of this Reply Memorial detailed Riverside's control of INAGROSA. In summary, Part IV shows that Riverside dominated INAGROSA, establishing its effective control through the following:

- a) Riverside's most senior officer was concurrently the President of INAGROSA.²⁰⁸⁷
- b) Riverside was the principal financial investor in INAGROSA. Riverside's financial investment at the time of the invasion was over \$9.5 million.²⁰⁸⁸
- c) Nicaragua notes that INAGROSA's financial position worsened during INAGROSA's transition to Hass avocado production. At this time, INAGROSA had to incur investment costs and operating costs while having limited to no contribution of revenues from its established coffee operations.²⁰⁸⁹ Continued access to Riverside financial support was critical during INAGROSA's transition from coffee production to Hass avocado production. Riverside approved the transition from coffee to Hass avocados in a members' resolution in 2016,²⁰⁹⁰ which committed Riverside to providing a key financial lifeline to INAGROSA during this period when coffee revenues had essentially ended but costs for the development of the Hass avocado operation were underway.
- d) Riverside gave a binding financial commitment of up to \$16 million in March 2018.²⁰⁹¹ There also was a further deferral of the payment of interest with interest forgiveness on the Riverside debt worth an additional \$1.5 million.
- e) This investment, in addition to the existing \$9.5 million invested by Riverside, was essential for INAGROSA's continuation.
- f) Riverside had voting control of the shares of INAGROSA. For years, Riverside held 50% of the shares, with other Riverside officers holding

²⁰⁸⁷Ward Nairn served concurrently as President of INAGROSA and as Operating Manager of Riverside (Riverside's most senior corporate officer). He was succeeded in 2013 in the dual roles by Melvin Winger, who served concurrently as President of INAGROSA and as Operating Manager of Riverside at the time of the invasion and the occupation.

²⁰⁸⁸Chart 4 of the Reply Expert Damages Report (**CES-04**) details the value of Riverside's loans to INAGROSA as of June 2018.

²⁰⁸⁹Credibility International Report at ¶51-52. (**RER-02**).

²⁰⁹⁰Riverside Members Resolution- Financial Support for INAGROSA Expansion Plan, June 10, 2016 (**C-0286-ENG**).

²⁰⁹¹Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (**C-0287-ENG**)

additional shares to guarantee voting control. At the time of the invasion and occupation in 2018, Melvin Winger (the Operating Manager of Riverside at the time and the President of INAGROSA) held 24.5% of the shares along with Riverside's 25.5% direct interest. This totaled 51% of the shares of INAGROSA. Riverside's former Operating Manager Ward Nairn (also a former President of INAGROSA) held another 24.% of INAGROSA shares,²⁰⁹² which were consistently voted en bloc with Riverside, resulting in an influential 74% control bloc for Riverside in votes.²⁰⁹³

- g) Riverside confirmed its voting control over INAGROSA in tax filings in 2015, 2016, 2017 and 2018.²⁰⁹⁴

2151) Riverside has been the controlling shareholder of INAGROSA for many years before the June 2018 invasion.²⁰⁹⁵ Riverside controlled INAGROSA at the time of the Invasion.

2152) As the controlling shareholder, in 2018.²⁰⁹⁶ Riverside can bring a claim arising from its control of INAGROSA.²⁰⁹⁷

3. Even if there was no control, Nicaragua's challenge fails

2153) However, even taking Nicaragua's contention that Riverside does not control INAGROSA to be correct on a *prima facie* basis (which this Tribunal should not do), such a matter does not give rise to a defect of jurisdiction considering the other express basis for jurisdiction admitted by Nicaragua.

2154) There are no genuine issues of admissibility or jurisdiction articulated with respect to the Investor's control of INAGROSA. There is no legally cognizable issue. This objection is manifestly without legal merit.

2155) Nicaragua's own admission of the existence of equity ownership is sufficient to confirm jurisdiction for this claim the jurisdictional claim Nicaragua

²⁰⁹²Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 36 (CWS-03).

²⁰⁹³Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (CWS-03). Melva Jo Winger de Rondón voted the Riverside shares at the INAGROSA meetings as the legal representative of Riverside to INAGROSA.

²⁰⁹⁴2015 Riverside US Federal IRS Tax Return- Form 1065 (C-0320-ENG); 2016 Riverside US Federal IRS Tax Return- Form 1065 (C-0321-ENG); 2017 Riverside US Federal IRS Tax Return- Form 1065 (C-0322-ENG); and 2018 Riverside US Federal IRS Tax Return- Form 1065 (C-0323-ENG).

²⁰⁹⁵Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (CWS-03).

²⁰⁹⁶Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 37 (CWS-03). Witness Statement of Melvin Winger – Memorial – ENG at ¶ 30 (CWS-04); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 212, 220 (CWS-01).

²⁰⁹⁷Witness Statement of Melvin Winger – Memorial – ENG at ¶ 32 (CWS-04); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 46 (CWS-03).

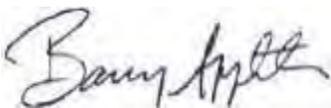
advances has no prospect of success as Nicaragua fails to present a legally cognizable claim.

2156) The Tribunal's jurisdiction to hear this matter is, therefore, indisputable. However, that has not stopped Nicaragua from pursuing erroneous and baseless jurisdictional objections to avoid responsibility for its breaches of CAFTA and unnecessarily add additional time and burden to these proceedings.

XI. RELIEF REQUESTED

- 2157) For the reasons set out in this Counter-Memorial on Jurisdiction, without limitation and reserving Riverside's right to supplement this request for relief under Rule 20 of the ICSID Arbitration Rules, Riverside respectfully requests that the Tribunal dismiss Nicaragua's jurisdictional objections.
- 2158) For the reasons set out in this Reply Memorial, without limitation and reserving Riverside's right to supplement this request for relief under Rule 20 of the ICSID Arbitration Rules, Riverside respectfully requests that the Tribunal grant the following relief for its claims under CAFTA Article 10.16(1):
- a) A Declaration that Nicaragua has acted inconsistent with its Treaty obligations under CAFTA Articles 10.1, 10.2, 10.3, 10.5 and 10.7.
 - b) An award for Economic Loss Damages to the Investor for its claims under Article 10.16 (1)(a) in the amount not less than US\$ **240,995,140** plus interest from the date of the award at a rate set by the Tribunal.
 - c) An award for Moral Damages to the Investor for its claims under Article 10.16 (1)(a) in the amount of US\$ **45 million** plus interest from June 16, 2018, at a rate set by the Tribunal.
 - d) The award is made net of all applicable Nicaraguan taxes.
 - e) An award that Nicaragua may not tax the award rendered.
 - f) An award in favor of the Investor on behalf of itself and/or on behalf of its investment on a full indemnity basis for its costs, disbursements, and all expenses incurred in the arbitration for legal representation and assistance, including financing, plus interest, and for the costs of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Prof. Barry Appleton
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Counsel for Riverside Coffee, LLC.