INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RIVERSIDE COFFEE, LLC

Claimant

v.

REPUBLIC OF NICARAGUA

Respondent

(ICSID Case No. ARB/21/16)

THE REPUBLIC OF NICARAGUA'S REPLY IN FURTHER SUPPORT OF ITS APPLICATION FOR SECURITY FOR COSTS

November 17, 2023

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I. INTRODUCTION

1. The Republic of Nicaragua ("**Nicaragua**" or the "**Respondent**") hereby reiterates its request that the Tribunal order Riverside Coffee, LLC ("**Riverside**" or "**Claimant**") to provide security for costs (the "**Application**").

2. Riverside's Response to Respondent's Application (the "**Response**") exemplifies the abusive and erratic approach of Riverside and its counsel, which is one of the many reasons Nicaragua seeks security for costs. It is contrary to principles of efficiency for a party to plead extensively the merits of its case in opposing an application for security for costs. Yet, that is precisely what Riverside has done in its 80-page filing, much of it internally repetitive or unresponsive to Nicaragua's Application. Nicaragua will respond to Riverside's pervasive merits-based arguments in its forthcoming Rejoinder on the Merits.[1]

3. As will be detailed herein, Nicaragua's Application meets the exceptional circumstances test. Riverside ***does not and never has*** maintained significant liquid assets and is judgment proof.[2] Riverside and its counsel have also unnecessarily escalated Nicaragua's costs through bad faith argumentation as well as procedural misconduct.[3] Riverside is operating on a contingency fee arrangement with its counsel, and Riverside's counsel has a history of bringing frivolous investor-State cases.[4] These circumstances have given rise to the urgency and necessity of Nicaragua's Application.

[1] To the extent that Nicaragua does not respond precisely to each argument raised by Riverside, Nicaragua expressly reserves its right to respond in its forthcoming Rejoinder. In any event, Nicaragua stands by the content and characterization in its Application of Claimant's procedural bad faith, which has caused an abusive escalation in costs.

[2] *See* Section III, *infra*; Nicaragua's Application, ¶¶ 47-55.

[3] *See* Sections II and IV, *infra*; Nicaragua's Application, ¶¶ 24-46.

[4] *See* Section II.C., *infra*; Nicaragua's Application, ¶¶ 51, 54.

4. Riverside's Response is notable, in particular, for what it does not say. At no point has Riverside refuted—in its 80-page filing—the evidence Nicaragua submitted with its Application that demonstrates its utter lack of funds.

5. Furthermore, while Riverside's procedural bad faith was detailed at length in Nicaragua's Application dated October 4, 2023,[5] Claimant's conduct has not improved since that time. Nicaragua has instead continued to incur additional and unnecessary costs as a result of Riverside's abusive and excessive approach to arbitration, even over the last several weeks:

6. ***First***, on October 5, 2023, the Tribunal requested that Riverside file ***nothing more*** than a proposed "procedural timetable for the briefing of the Respondent's Application by Monday, October 9, 2023."[6] Riverside's only task was to propose briefing deadlines, but rather surprisingly, Riverside insisted upon an extension for its simple administrative task. Riverside's subsequent pleading-via-email puts in plain view the bad faith intent for seeking that extension. Indeed, on October 10, 2023, Riverside again unilaterally arrogated to itself an additional opportunity for pleading by filing additional and unsolicited substantive comments to Nicaragua's Application, to which Nicaragua was required to respond.[7] This kind of irregular conduct is abnormal and inappropriate in investor-State arbitration practice. Nicaragua's Application details many more examples of the same pattern of conduct, which, while not new here, persistently and unreasonably escalates Nicaragua's costs.

7. ***Second***, Riverside has instigated prolonged motion practice concerning the hearing format. While Nicaragua will be filing its observations on the hearing format on November 20, 2023, Riverside's position is relevant to Nicaragua's Application. One of the main reasons

[5] *See* Nicaragua's Application, ¶¶ 24-46.

[6] Email from the Tribunal to the Parties of October 5, 2023.

[7] *See* Email from Claimant (Mr. Appleton) to the Tribunal of October 10, 2023 (**R-0133**).

Riverside seeks an entirely virtual hearing are alleged travel difficulties for certain Nicaraguan nationals.[8] However, those Nicaraguan nationals that Claimant references ***are not witnesses in this case and will not be***. It is outrageous for Riverside to demand a fully remote two-week hearing based on speculations as to the difficulties non-witnesses might have traveling to a hearing they will not be attending.[9] Yet, Nicaragua will be forced to respond to such absurd arguments in its forthcoming observations and absorb increased costs due to Claimant's blatant deception.

8. In addition, the fact that Riverside simultaneously demands hundreds of millions of dollars in damages while insisting on a remote hearing—despite the serious allegations in its pleadings—suggests a fundamental lack of confidence or seriousness about its case. For context, the damages claimed in Claimant's Memorial amount to a staggering ***four percent of Nicaragua's annual gross domestic product***.[10] A proportionate claim against the United States would be one for ***one trillion U.S. dollars***. Yet, Riverside or its counsel object to appearing in person when Nicaragua stands ready to do so. Riverside, which is and has been impecunious since as early as 2013, has treated ICSID arbitration as a fly-by-night process, which ought not and cannot be tolerated.

9. ***Third***, Riverside recently also burdened the Tribunal and Nicaragua with unnecessary administrative correspondence. Most notably, Claimant approached Respondent's counsel on October 20, 2023 about ten recently "discovered" documents it alleged were not

[8] *See* Email from Claimant (Mr. Appleton) to the Tribunal of October 13, 2023 (**R-0134**).

[9] *See* Email from Claimant (Mr. Appleton) to the Tribunal of October 13, 2023 (**R-0134**). The "sanctioned" individuals Claimant mentions are: Leonidas Centeno, Edwin Castro, and Francisco Diaz. Respondent's witnesses in this case, to date, are: Diana Gutiérrez, Marvin Castro, William Herrera, José V. López, Alcides R. Moncada, Xiomara Mena, Rodolfo J. Lacayo, Alvaro Méndez, and Norma González. There is no overlap. Claimant's use of the word "referenced" in its October 13, 2023 communication to the Tribunal is deliberately misleading.

[10] Claimant has voluntarily reduced its claimed damages amount by over fifty percent in its recent Reply.

produced during the document production phase.[11] But, as Respondent's counsel later indicated—after expending legal resources conducting a review—these documents had already been produced.[12] The slightest modicum of care in reviewing its own document production would have confirmed that Claimant need not approach Respondent. In addition, since filing its Reply Memorial, Riverside has submitted faulty exhibits,[13] voluminous errata,[14] and unilaterally proposed modifications to the correspondence protocol established under Procedural Order No. 1.[15] Each of these episodes has a cost and results in further expenditure of resources. Whatever their effect in isolation, the cumulative effect is costly—and unnecessarily so.

10. Sufficient time has transpired in this case to call Claimant's conduct as it is: guerilla tactics. While Claimant attempts to characterize its conduct as "ordinary,"[16] even a cursory review of Riverside's correspondence and pleadings in this arbitration demonstrates the contrary.

II. NICARAGUA HAS SATISFIED THE STANDARD FOR AN AWARD OF SECURITY FOR COSTS

11. The Parties agree that the Tribunal has the authority to order security for costs as a provisional measure pursuant to Article 47 of the ICSID Convention and Rule 39 of the applicable 2006 ICSID Arbitration Rules.[17] The Parties also agree that, in order for this Tribunal to grant Nicaragua's Application for security for costs, Nicaragua must prove the existence of exceptional circumstances, urgency, and necessity. All these circumstances are present in this case.

[11] *See* Email from Claimant (Mr. Appleton) to Respondent (Ms. Gonzalez) of October 20, 2023 (**R-0135**).

[12] *See* Email from Respondent (Ms. Gonzalez) to Claimant (Mr. Appleton) of October 23, 2023 (**R-0136**).

[13] Email from Claimant (Mr. Appleton) to the Tribunal Secretary of November 10, 2023 (**R-0138**).

[14] Email from Claimant (Mr. Appleton) to the Tribunal Secretary of November 10, 2023 (**R-0137**).

[15] Email from Claimant (Mr. Appleton) to the Tribunal Secretary of November 7, 2023 (**R-0139**).

[16] Riverside's Response, ¶ 182.

[17] *See* Nicaragua's Application, ¶¶ 5-6; Riverside's Response, ¶¶ 142-144.

A. Exceptional Circumstances Are Present and Justify Security for Costs

12. Nicaragua does not dispute that an order for security for costs requires exceptional circumstances.[18] However, Nicaragua disagrees with Riverside's characterization of how the requirement of "exceptional circumstances" should and has been interpreted in past cases. Relying on *Orlandini* and *Tennant*, Riverside argues that Nicaragua must meet what Riverside calls the "exceptional circumstances criteria" which it summarizes as: a) proving claimant's track record of non-payment of costs awards in prior proceedings; b) a claimant's improper behavior in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; c) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or d) other evidence of a claimant's bad faith or improper behavior.[19]

13. Riverside seems to suggest that "all" the above circumstances must be met in order for Nicaragua to succeed in a security for costs application. However, as the tribunal in *Tennant v. Canada* explains, these are non-cumulative ***examples*** of circumstances that would individually establish the necessary exceptional circumstances.[20] In its Application, Nicaragua showed that tribunals have repeatedly found that abusive tactics or serious misconduct represent sufficiently "exceptional" circumstances.[21] *Orlandini* and *Tennant* likewise confirm that a claimant's improper

[18] *See* Nicaragua's Application, ¶ 21 ("While security for costs is granted only in exceptional circumstances […]").

[19] *See* Riverside's Response, ¶ 168.

[20] *Tennant Energy v. Canada*, Procedural Order No. 4, ¶ 174 (**CL-0301-ENG**). ("The Tribunal agrees with the tribunal in *Orlandini v. Bolivia* that such exceptional circumstances would include, ***for instance*** (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behaviour.") (emphasis added). Claimant's insistence that each of these examples should be treated as a necessary condition for an order of security for costs would make an order of security for costs functionally impossible: repeat claimants in investor-state disputes are rare and those few that exist tend to be multinational corporations whose ability to satisfy a costs award would rarely be in doubt.

[21] *See* Nicaragua's Application, ¶¶ 21, 22 citing *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, Decision on the Parties' Request for Provisional Measures, June 23, 2015, ¶ 121 (**RL-0127**) ("As regularly held by ICSID arbitral tribunals, security for costs may only be granted in exceptional circumstances, for example, where abuse or serious misconduct has been evidenced); *Commerce Group*

behavior in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings, is proof of exceptional circumstances.[22]

14. In its Application, Nicaragua detailed how Riverside's conduct has unreasonably multiplied Nicaragua's legal costs.[23] Since the beginning of this arbitration, Riverside has displayed a pattern of conduct that has increased Nicaragua's costs by submitting unnecessary, unsubstantiated, and curiously long submissions, supported by relatively few documentary exhibits.[24] Riverside's eccentric conduct has resulted in an unnecessary escalation of Nicaragua's legal costs. Specifically, Nicaragua explained in detail that Riverside has inflicted unreasonable and unforeseeable costs on Nicaragua by:[25]

a) Repeatedly making substantive requests and motions to the Tribunal outside of the agreed procedural calendar, all of which have been summarily rejected;

b) Filing extraordinarily long Memorials and document requests, even for investor-state arbitration, despite repeatedly acknowledging its own lack of documentary evidence;[26]

Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs (Annulment Proceeding), September 20, 2012, ¶ 45 (**RL-0128**) ("However, the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced.") *See also* Joseph R Profaizer, Igor V. Timofeyev and Adam J. Weiss, Costs, *Global Arbitration Review*, December 19, 2022, pp. 4-5 (**RL-0129**).

[22] *Orlandini. v. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation, and Security for Costs, July 9, 2019, ¶¶ 143-146 (**CL-0293-ENG**).

[23] *See* Nicaragua's Application, ¶¶ 24-46.

[24] *See* Nicaragua's Application, ¶¶ 24-46.

[25] *See* Nicaragua's Application, ¶¶ 24-46.

[26] *See, e.g.*, Procedural Order No. 6, Annex B, p. 38 (Claimant repeatedly objected to Nicaragua's document requests on the basis that "Responsive documents that might have been in the possession of INAGROSA are no longer available due to the loss and destruction of corporate offices and records located in INAGROSA's offices at Hacienda Santa Fé[.]"); Riverside's Response, ¶ 87.

c) Repeatedly making requests and proposals to Respondent's counsel only to later withdraw such requests or proposals; and

d) Ignoring the authority of the Tribunal by requesting the arbitrators to revisit issues that they have already decided, such as Procedural Order No. 4 where the Tribunal decided that the Protective Order "was specifically for 'the purpose of appointing a judicial depositary' and 'in order to avoid damage to the property belonging to the [Claimant].'"[27] This improper conduct has and will unnecessarily increase Nicaragua's legal costs.

15. Riverside's behavior has not changed since Nicaragua submitted its application for security for costs. Riverside's conduct keeps unreasonably multiplying Nicaragua's costs. This behavior will not stop unless Riverside faces concrete consequences.

16. ***First***, on October 20, 2023, Riverside's counsel submitted an alleged supplemental production.[28] Respondent's legal team was required to review the documents at some length and ultimately realized that these documents had already been produced. On October 23, 2023, Nicaragua's counsel asked Riverside's counsel to confirm if the correct documents were submitted as it appeared that these had already been produced.[29] On October 25, 2023, Riverside's counsel informed that "[they had] done a comprehensive review of [their] production files" and confirmed that the documents had already been produced on June 9, 2023.[30] This "comprehensive review" should have been done before submitting the "supplemental production." The costs of such a

[27] Procedural Order No. 4, ¶ 31.

[28] Email from Riverside (Mr. Appleton) to Nicaragua of October 20, 2023 (**R-0135**).

[29] Email from Nicaragua (Ms. Gonzalez) to Riverside of October 23, 2023 (**R-0136**).

[30] Email from Riverside (Mr. Appleton) to Nicaragua of October 25, 2023 (**R-0140**).

review were appropriately incurred by the party under an obligation to produce documents, rather than subsidized by Nicaragua.

17. ***Second,*** on November 3, 2023, Riverside submitted its Reply Memorial on the Merits and Counter-Memorial on Jurisdiction. Riverside's brief consists of 497 pages, including a fifty-page "brief summary" and "executive summary." The Reply in this case is supposed only to "reply" to Nicaragua's arguments in its Counter-Memorial, not to rewrite Riverside's entire case. Riverside's Reply is longer than its Memorial by more than one third.[31]

18. ***Third,*** on November 10, 2023, Riverside submitted its Response to Nicaragua's application for security for costs. Riverside's Response comprises eighty pages, and purports to respond to Nicaragua's Application of only twenty-six pages.[32] Riverside submitted a response four times longer than Nicaragua's Application.

19. Riverside's behavior speaks for itself.[33] This conduct highlighted above and in Section I, *supra*, alone constitute exceptional circumstances. Riverside's own legal authorities confirm that "improper behavior in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings" rise to the level of exceptional circumstances warranting an award of security for costs.[34]

[31] *See generally* Riverside's Memorial (302 pages).

[32] *See generally* Riverside's Reply (497 pages).

[33] On November 17, 2023, Riverside transmitted an additional legal authority erratum to the Tribunal Secretary. Nicaragua takes no exception to the correction but notes that Riverside sent an eight-paragraph email to advise that it had cited the wrong edition of Prof. Schreuer's treatise, followed by an additional four-paragraph email to advise that CL-0175 was uploaded twice in two different versions. *See* Emails from Claimant (Mr. Appleton) to the Tribunal Secretary of November 17, 2023 (**R-0143**). The cumulative effect of such undisciplined communications has imposed significant costs Nicaragua and impairs the efficient conduct of this arbitration.

[34] Riverside's Response, ¶¶ 167-168 citing to *Orlandini. v. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation, and Security for Costs, July 9, 2019, ¶¶ 143-146 (**CL-0293-ENG**).

B. Nicaragua's Application Is Urgent

20. Nicaragua's Application is urgent. Riverside argues that "Nicaragua [has] refrained from acting promptly" and that "[this] delay supports a denial of the motion."[35] That is not correct.

21. As Nicaragua explained in its Application, the tribunal in *Kazmin v. Latvia* recognized that the extraordinary conduct justifying an order of security for costs can "become known gradually overtime and acquire[] … overall significance only when . . . considered in its totality."[36] That is precisely what has happened here, as a result of Claimant's abusive and wasteful pattern of conduct over the course of the case.

22. Nicaragua did not have any reason to make its Application at the beginning of these proceedings. Rather, Nicaragua gradually over time acquired the knowledge and suffered the unreasonable mounting costs that justify its Application. Riverside's continuing pattern of conduct—combined with its impecuniosity, as confirmed by its productions during the document production phase—establish the urgency of Nicaragua's Application in the manner anticipated by the tribunal in *Kazmin*.[37]

23. Nicaragua's Application is urgent because Claimant's erratic conduct has compounded its costs throughout these proceedings—so far resulting in approximately $2.2 million in fees—and shows no sign of stopping.[38] Such excessive costs borne by Claimant's

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[35] Riverside's Response, ¶ 226.

[36] *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6, Decision on the Respondent's Application for Security for Costs, April 13, 2020, ¶ 28 (**RL-0120**) ("The Tribunal finds, as did the *RSM v. Saint Lucia* tribunal, that '[a]lso future or conditional rights such as the potential claim for cost reimbursement qualify as 'rights to be preserved' by provisional measures.'").

[37] *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6, Decision on the Respondent's Application for Security for Costs, April 13, 2020, ¶ 29 (**RL-0120**) ("The Tribunal acknowledges that information on the "extraordinary circumstances" became known gradually over time and acquired its overall significance only when it could be considered in its totality'").

[38] *See* Nicaragua's Application, ¶ 17. According to the BIICL study, average State fees and costs for defending an ICSID arbitration where the Claimant has sought between US$ 250 million and US$ 1 billion is US$ 5.4 million, excluding the tribunal's costs. Currently, Nicaragua is at median respondent's typical cost already, a year ahead of the

conduct is likely to result in manifest irreparable harm without the Tribunal's intervention at this juncture.

24. Riverside suggests that Nicaragua's "inactivity even after obtaining relevant documents in May and June, raises genuine concerns about its intentions."[39] But Riverside omits to mention that Nicaragua advised Riverside of its intention to file an application for security for costs on August 17, 2023, roughly a month a half after document production had concluded.[40] Nicaragua must also note that Riverside produced documents as late as June 26, 2023—over two weeks after the deadline to produce documents. Nicaragua then deferred making its application to the Tribunal solely as a good faith accommodation to the Winger family and Mr. Appleton's circumstances.[41] Nicaragua's good faith should by no means be taken as a delay in submitting its Application for security for costs.

C. Nicaragua's Application Is Necessary

25. Nicaragua's Application is also necessary under the circumstances presented in this case. Riverside argues that "Nicaragua simply asserts that this application is necessary"[42] and that "Nicaragua completely misunderstands the necessity test."[43] The opposite is true.

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hearing. Unless Claimant stops its erratic behavior, Nicaragua's costs will continue to increase. *See* M. Hodgson, Y. Kryvoi, D. Hrcka, *British Institute of International and Comparative Law, 2021 Empirical Study: Damages and Duration in Investor-State Arbitration*, Figure 39 (**RL-0136**).

[39] Riverside's Response, ¶ 227.

[40] Email from Nicaragua (Ms. Gonzalez) to Riverside (Mr. Appleton) of August 17, 2023 (**R-0141**).

[41] Email from Nicaragua (Ms. Gonzalez) to the Tribunal of August 25, 2023 (**R-0142**) ("[…] Respondent's Application was set to be filed within days of receiving an email from Claimant on August 15, 2023, which described the circumstances in Mr. Appleton's below email to the Tribunal. In good faith and for the sake of procedural economy, Respondent disclosed the imminence of its Application to Mr. Appleton to accommodate the Winger family and Mr. Appleton's circumstances. In particular, Nicaragua offered Claimant the opportunity to set a procedural calendar that grants more flexibility for Claimant's response to Nicaragua's Application, but Claimant declined. Accordingly, Nicaragua reserves the right to file its Application at a time of its discretion and to object to any further adjustments to the procedural calendar after filing its Application.")

[42] Riverside's Response, ¶ 237.

[43] Riverside's Response, ¶ 239.

26. As explained in Nicaragua's Application and further detailed below, Nicaragua's application for security for costs is necessary because (1) Riverside is impecunious and has not demonstrated the contrary; (2) Claimant's counsel has a history of bringing meritless claims against States; and (3) Claimant has never been serious about its quantum case.

27. ***First***, Riverside is impecunious.[44] Despite submitting eighty pages in response to Nicaragua's Application, Riverside did not submit a single document to demonstrate that it has the means to comply with a potential adverse award on costs. Riverside's omission speaks for itself.

28. ***Second***, Claimant's counsel has a history of bringing meritless claims against States. On April 12, 2013, the tribunal in *St. Marys VCNA, LLC v. Canada* issued a consent award. In that case, as here, the claimant was represented by Appleton & Associates, International Lawyers.[45] As demonstrated in the extract below, the claimant, to obtain a release from liability for the respondent's costs, expressly acknowledged that it had ***"always lacked standing to bring a claim under NAFTA Chapter Eleven in respect of the Claims***" (emphasis added).

> 1. SMVCNA hereby irrevocably and permanently withdraws its Notices of Intent in respect of the Claims and Notice of Arbitration in respect of the First Claim served against the Government of Canada.
>
> 2. The Votorantim Group on their own behalf and on behalf of their successors and assigns hereby releases and forever discharges the Government of Canada from the Claims.
>
> 3. The Votorantim Group hereby acknowledges that SMVCNA lacks and has always lacked standing to bring a claim under NAFTA Chapter Eleven in respect of the Claims.

> 7. As consideration for the above-cited final settlement and waiver of any and all legal action by the Votorantim Group against the Government of Canada in respect of the Claims and related acknowledgements, the Government of Canada agrees not to pursue any claim against the Votorantim Group for its costs incurred to date in respect of the Claims.

[44] *See* Section III, *infra*; Nicaragua's Application, ¶¶ 47-55.

[45] *St. Marys VCNA, LLC v. The Government of Canada*, PCA Case No. 2012-19, Consent Award, March 29, 2013 (**RL-0139**).

29. In that same case, a Tribunal-appointed expert, Hon. James Spigelman AC KC, was tasked with deciding whether certain documents inadvertently disclosed by investor's counsel, Appleton & Associates, would remain subject to attorney-client privilege. Judge Spigelman decided that the interests of justice fair outweighed certain documents' alleged privilege because they evidenced a deliberate scheme to manufacture NAFTA jurisdiction in bad faith:[46]

> In the proceedings before me the Claimant has chosen not to contest the evidence put forward by Canada as at the times Canada asserts, and I have found for present purposes, to be relevant. I have formed the view, on the basis of the unchallenged evidence put before me, that Canada has a strong case that the Claimant is the vehicle for a scheme to obtain the right under NAFTA to institute and pursue proceedings, being a right to which neither it nor its controllers were entitled. The case is sufficiently strong to overcome the attorney client privilege for documents which came into existence as part of that scheme or which otherwise evidence the scheme.

30. ***Third,*** Claimant was never serious about its quantum case. Inagrosa has not been able to demonstrate with contemporaneous documentary evidence that it ever sold a single avocado, but Claimant initially claimed over $600 million.[47] Riverside has since ***voluntarily reduced*** its damages claim by over 50%.[48] So dramatic a downward revision suggests that Claimant never took its own quantum case seriously, as it cannot because all evidence suggests that Inagrosa was not a going concern during the alleged measures. Claimant's volatile position

[46] *St. Marys VCNA, LLC v. The Government of Canada*, PCA Case No. 2012-19, James Spigelman Report on Inadvertent Disclosure, December 27, 2012, p. 12 (**RL-0140)**.

[47] Riverside's Memorial, ¶ 946(b) ("Alternatively, or in combination, an award for Economic Loss Damages to the Investment for its claims under Article 10.16(1)(b) in the amount not less than **US$ 644,098,011** plus interest from the date of the award at a rate set by the Tribunal") (emphasis added).

[48] Riverside's Reply, ¶ 2158(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$ 240,995,14** plus interest from the date of the award at a rate set by the Tribunal.") (emphasis added).

on its own damages case has and will significantly increase Nicaragua's legal and damages expert fees and costs, as Nicaragua is now forced to address a fundamentally new calculation of damages.

31. For the reasons described above, Nicaragua's Application not only meets the "exceptional circumstances" standard but is also urgent and necessary in the specific circumstances of this case. Nicaragua is faced with the fatal combination of an impecunious Claimant whose *modus operandi* is bombarding the Tribunal and Nicaragua with unsubstantiated claims in lengthy, repetitive, and inefficient pleadings.

D. The Considerations Favoring Nicaragua's Application Outweigh Any Burden on Riverside

32. Under the circumstances present here, the considerations supporting Nicaragua's Application significantly outweigh what Claimant asserts would be "an undue detrimental burden."[49] This is not correct, and Riverside has not submitted any evidence to the contrary.

33. To divert the Tribunal's attention and fill its lack of evidence, Riverside inappropriately asks the Tribunal to pre-judge the merits of this case by claiming to have "filed a Reply Memorial filled with the admissions of Nicaraguan government officials confirming their awareness that [Inagrosa] lawfully owned the full possessory rights at the HSF before the arbitration arose."[50] But Nicaragua's Application does not seek an order on the merits. To the contrary, the Application seeks only to preserve Nicaragua's rights in the event that it should prevail on the merits. Nicaragua has demonstrated that it has a plausible case, and it remains a real possibility that Nicaragua might receive an award of costs with no possibility of recovery.

34. It bears emphasis that Nicaragua is not asking the Tribunal to order Riverside to deposit funds into escrow equal to the totality of its anticipated costs. Nicaragua seeks reasonable

[49] Riverside's Response, ¶ 305.

[50] Riverside's Response, ¶ 306.

security in the form of a bank guarantee,[51] which Riverside appears not to understand. As explained in Nicaragua's Application, irrevocable bank guarantees, such as that set forth in Annex 1 of the Application, have been considered by tribunals as the least burdensome form of security for a claimant to provide.[52] An irrevocable bank guarantee is, by its terms, not an "upfront payment" as Claimant suggests.[53]

35. Riverside argues that Nicaragua's reliance on the decision issued in *Dirk Herzig* is misplaced, as the tribunal rescinded the decision after the Claimant submitted that it was unable to comply with such decision.[54] But Riverside has been unable to demonstrate that it cannot or will not be able to comply with a security for costs order. On the contrary, Claimant on numerous occasions has highlighted its prior history of complying with its financial obligations in this case.[55] Given Riverside's impecuniosity, this factor only reinforces Nicaragua's concerns about a future costs awards because it suggests that the funds are originating from somewhere else and that Riverside is being maintained as a judgment proof shell by design.[56] Riverside cannot use this argument as a sword and a shield. It either has sufficient assets to comply with a potential adverse award on costs, and alternatively, to provide security for costs, or it does not. But neither has been demonstrated by Riverside.

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[51] Nicaragua seeks security only for the foreseeable costs of the median investor-state arbitration of comparable value. *See* Nicaragua's Application, ¶¶ 14-19.

[52] *See* Nicaragua's Application, ¶ 19 citing *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6, Decision on the Respondent's Application for Security for Costs, April 13, 2020, ¶ 66 (**RL-0120**) ("The Tribunal considers that the least burdensome form which the security may take is an irrevocable guarantee from a first-class international. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020, ¶ 65 (**RL-0122**).

[53] *See* Riverside's Response, ¶ 307.

[54] *See* Riverside's Response, ¶ 246.

[55] Riverside's Response, ¶ 326.

[56] *See* Nicaragua's Application, ¶¶ 48-49.

36. Finally, Riverside argues that "Nicaragua's bank guarantee is flawed," that "the guarantee is not suitable for its purpose,"[57] and that "if awarded this guarantee, Nicaragua could call upon the guarantee at any time in its exclusive judgement over any matter."[58] Nicaragua's proposed bank guarantee is standard. Nicaragua has no intention to execute a guarantee unless it is the result of Riverside's failure to pay an adverse award on costs. In any event and as Nicaragua submitted in its Application, Nicaragua respectfully requests that the Tribunal order a security for costs in favor of Nicaragua in the form and terms that the Tribunal deems appropriate.

37. Strictly in the alternative, Nicaragua would also be willing to accept a formal written guarantee enforceable under Colorado law from Riverside's ultimate beneficial owners—Ms. Winger de Rondón and Mr. Rondón—to the effect they jointly and personally accept liability for satisfying any future adverse costs award against Riverside up to the amount of US$ 4 million.

III. RIVERSIDE'S RESPONSE DOES NOT REBUT THE EVIDENCE THAT IT IS JUDGMENT PROOF

38. Nicaragua demonstrated in its Application that Riverside ***never held significant liquid assets*** from 2013-2018, as evidenced by Riverside's contemporaneous bank account statements and tax returns.[59]

39. Claimant cannot refute its own documents. Claimant instead falsely alleges that "[a]t no time does Nicaragua accuse Riverside of impecuniosity."[60] But that is simply untrue. Nicaragua ***does*** allege that Riverside is impecunious, and Nicaragua did so repeatedly and explicitly in its Application, based on documents produced by Riverside.[61]

[57] Riverside's Response, ¶ 328.

[58] Riverside's Response, ¶ 330.

[59] *See* Nicaragua's Application, ¶¶ 47-48.

[60] Riverside's Response, ¶ 27.

[61] *See* Nicaragua's Application, ¶¶ 47-55.

40. A review of its financial history points to one inescapable conclusion: Riverside has operated as a shell company with no liquid assets capable of covering short-term debt obligations since 2013.[62] Claimant provided no plausible explanation or additional context as to Riverside's lack of assets in its Response. To the contrary, the evidence shows that only Riverside's partners have significant assets.[63] However, Kansas law would shield those funds from Riverside's creditors, including Nicaragua should it be awarded costs at any point in this arbitration.[64]

41. Nicaragua has also shown that Riverside transferred all liquid assets out of its bank accounts as of year-end 2018, leaving a hollow shell company to act as the Claimant here.[65] The order of the *Nord Stream 2* tribunal, which recently awarded security for costs, is instructive in this context. There, the tribunal recognized that, like here, the respondent would be incapable of enforcing a costs award against Nord Stream 2 AG without an order for security by the tribunal because Nord Stream 2 operated as an empty holding company leaving the "Respondent without sufficiently reliable guarantees that it would be able to collect on an award of costs.[66]

42. Claimant offers ***no response*** to the *Nord Stream 2* decision.

43. Furthermore, contrary to Claimant's accusations,[67] Riverside's lack of liquid assets is in no respect attributable to Nicaragua. In reality, Riverside's own bank statements and tax

[62] *See* Nicaragua's Application, ¶¶ 47-50.

[63] Riverside IRS Form 1065, 2018, p. 5 (**R-0111**); Riverside IRS Form 1065, 2017 (**R-0118**).

[64] *See* Nicaragua's Application, ¶ 47; Kansas Statutes, Ch. 17, Art. 76, § 88 (2021) (RL-0138) ("[T]he debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manage of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.")

[65] *See* Nicaragua's Application, ¶ 48; Riverside IRS Form 1065, 2018, p. 5 (**R-0111**).

[66] *See Nord Stream 2 AG v. The European Union*, UNCITRAL, Procedural Order No. 11, July 14, 2023, ¶ 94 (**RL-0124**).

[67] *See, e.g.*, Riverside's Response, ¶ 258.

returns demonstrate that it has operated as a mere holding company with no meaningful capital reserves or assets since at least 2013, many years prior to the measures alleged.[68]

IV. RIVERSIDE'S SUBMISSIONS RAISE QUESTIONS ABOUT THE TRUTHFULNESS OF ITS PAST REPRESENTATIONS TO THE TRIBUNAL

44. Unable to refute its own documents, Riverside tries to change the subject by suggesting that Nicaragua's Protective Order somehow converted Hacienda Santa Fé into an illiquid asset.[69] No citation is needed to support the common knowledge fact that real estate is an illiquid asset by its very nature.

45. In so arguing, Riverside raises a serious question about whether it may have misled the Tribunal. Riverside's witness Melva Jo Winger de Rondón testifies that "Nicaragua froze our title in Hacienda Santa Fé" and that "[t]he freeze effectively prevented us from raising funds on that collateral to fund our arbitration."[70] Ms. Winger de Rondón's testimony here references Nicaragua's Protective Order, which, as the Tribunal conclusively established, preserves Riverside's title to Hacienda Santa Fé. In its Response and previously in its so-called "emergency application" of November 13, 2022, Claimant asserted that it had not received proper notice and had been completely unaware of Nicaraguan judicial proceedings that placed a protective trust over the Hacienda Santa Fé.[71] Yet, Ms. Winger de Rondón's testimony at least supports an inference that the Wingers in fact knew about the Protective Order proceedings prior to filing their

[68] *See* Riverside Bank Account Statement, December 31, 2013 (balance of $435.31) (**R-0112**); Riverside Bank Account Statement, September 30, 2014 (balance of $1,377.81) (**R-0113**); Riverside Bank Account Statement, December 31, 2015 (balance of $53,711.81) (**R-0114**); Riverside Bank Account Statement, December 31, 2016 (balance of $53,261.81) (**R-0115**); Riverside Bank Account Statement, December 31, 2017 (balance of $52,831.81) (**R-0116**); Riverside Bank Account Statement, December 31, 2018 (balance of $13,713.31) (R-0117); Riverside IRS Form 1065, 2018, p. 5 (**R-0111**); Riverside IRS Form 1065, 2017 (**R-0118**).

[69] *See* Riverside's Response, ¶ 302.

[70] Winger de Rondón II, ¶ 30.

[71] *See* Riverside's Response, ¶ 127.

Memorial, as a consequence of unsuccessful efforts to finance their claims.[72] If so, this would mean that Riverside's emergency application was predicated on a misrepresentation to the Tribunal. Irrespective of the Tribunal's decision on security for costs, Claimant should be required to clarify this issue immediately.

46. For the avoidance of doubt, Nicaragua does not hold title to Hacienda Santa Fé and any suggestion that Nicaragua is adequately secured as a result of its Protective Order is false.[73]

V. RIVERSIDE HAS IMPLIED THAT IT WOULD NOT ABIDE BY AND COMPLY WITH THE TERMS OF THE AWARD

47. Finally, Claimant's suggestion that Respondent could "in any event" enforce an adverse costs award through litigation in the United States, only deepens Nicaragua's concern.[74] Article 53(1) of the ICSID Convention provides that an award "shall be binding on the parties" and that "[e]ach party shall abide by and comply with the terms of the award."[75] This is, of course, Nicaragua's obligation if Riverside prevails but it is equally Riverside's obligation if Nicaragua prevails. Litigation in a United States court could thus arise only if Riverside failed to "abide by and comply with" the terms of an unstayed costs award. That Riverside should raise this possibility in its Response suggest that Riverside expects to be able otherwise to ignore an adverse costs award. In such a situation, Nicaragua would be forced to take its chances as an unsecured creditor

[72] Melva Jo Winger II, ¶ 30 ("Nicaragua froze our title in Hacienda Santa Fé. The freeze effectively prevented us from raising funds on that collateral to fund our arbitration.") Ms. Winger also states that she did not know about the Protective Order when Riverside filed its Memorial. *See* Melva Jo Winger II, ¶ 38. Thus, Riverside either knew about the Protective Order before filing its Memorial or curiously ran out of funds to fund this arbitration—which Claimant's counsel had represented that it was handling on a contingent basis—***after*** filing its Memorial when they allegedly tried to use HSF as a collateral.

[73] *See* Nicaragua's Counter-Memorial, ¶¶ 328, 337(n), 362.

[74] *See* Riverside's Response, ¶ 255 ("Put simply, the potential harm Nicaragua invokes, i.e., the prospect of an unpaid costs award, is hypothetical and, in any event, reparable through the courts of enforcement.").

[75] ICSID Convention, Article 53(1).

litigating in Colorado. This is exactly the kind of predicament that a self-contained mechanism for investor-state *arbitration* is designed to avoid.

VI. PRAYER FOR RELIEF

48. Nicaragua has established an urgent, necessary, and proportional need for adequate security from a judgment proof Claimant with a frivolous claim initiated by counsel with a history of bringing frivolous investor-State cases. The Tribunal has authority to protect Nicaragua's rights and should do so here.

49. Nicaragua respectfully requests the Tribunal to:

a. Order the Claimant to provide, within 14 days of the Tribunal's order, security for Respondent's costs of these proceedings in the amount of US$ 4 million:

   i. in the form and terms indicated in Annex 1 of Respondent's application; or

   ii. alternatively, in form of a guarantee from Mr. Carlos Rondón and Mrs. Melva Winger de Rondon as the ultimate beneficial owners of Riverside and enforceable under the laws of Colorado providing that they will be jointly liable for any award of costs in favor of the Republic of Nicaragua up to the amount of US$ 4 million; or

   iii. alternatively, in any other form and terms the Tribunal deems appropriate.

b. In case of non-compliance by the Claimant, to order the suspension of the proceedings for ninety (90) days, or any time period deemed reasonable by the Tribunal; and

c. Should the Claimant fail to comply within the ordered suspension period, to order the discontinuance of the proceedings with prejudice and award

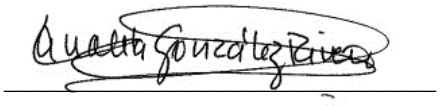
Nicaragua all costs and fees incurred in the defense of this arbitration as of the date of such award, subject to an appropriate rate of interest; and

d. Order Claimant to comply fully with Respondent's Requests Nos. 11, 12, 13, and 15 within 7 days of the Tribunal's order including, in the event no documents are produced in response to such order, to provide a certification signed by Claimant's counsel (i) that diligent efforts have been made to find such documents; (ii) detailing such diligent efforts; and (iii) confirming that such documents either do not exist or cannot be found despite diligent efforts to obtain them; and

e. Order Claimant to bear the costs of this Application.[76]

November 17, 2023

Respectfully submitted,



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[76] Respondent reserves the right to amend its requested relief herein, as well as request any additional relief at the appropriate time.