INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**RIVERSIDE COFFEE, LLC**

Riverside

**v.**

**REPUBLIC OF NICARAGUA**

Respondent

(ICSID Case No. ARB/21/16)

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# NICARAGUA'S REJOINDER ON JURISDICTION AND THE MERITS

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BakerHostetler

**Analía González**
**Nahila A. Cortés**
**James J. East, Jr.**
**Fabian Zetina**
**Diego Zúñiga**
1050 Connecticut Avenue NW
Suite 1100
Washington, DC 20036

**Marco Molina**
**Carlos Ramos-Mrosovsky**
45 Rockefeller Plaza
Suite 1400
New York, NY 10111

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## DEFINED TERMS AND ABBREVIATIONS

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| **ANA** | Nicaraguan National Water Authority (Autoridad Nacional del Agua) |
| **APHIS** | Animal and Plant Health Inspection Service |
| **Castro I** | Witness Statement of Marvin Antonio Castro Orozco **(RWS-02)** |
| **Castro II** | Second Witness Statement of Marvin Antonio Castro Orozco **(RWS-11)** |
| **CETREX** | Nicaraguan Export Procedures Center (Centro de Trámites de las Exportaciones) |
| **Claimant** | Riverside Coffee, LLC |
| **Counter Memorial** | Respondent's Counter Memorial on Jurisdiction and the Merits of March 3, 2023 |
| **Credibility I** | Credibility International Damages Expert Report (**RER-02**) |
| **Credibility II** | Credibility International Damages Second Expert Report (**RER-04**) |
| **DCF** | Discount Cash Flow |
| **Duarte I** | Expert Report of Dr. Odilo Duarte (**RER-01**) |
| **Duarte II** | Second Expert Report of Dr. Odilo Duarte (**RER-03**) |
| **Enríquez I** | Witness Statement of Favio Darío Enríquez Gómez (**RWS-21**) |
| **Ferrufino I** | Witness Statement of Domingo Germán Ferrufino (**CWS-12**) |
| **FET** | Fair and Equitable Treatment |
| **FMV** | Fair Market Value |
| **FPS** | Full Protection and Security |
| **García I** | Witness Statement of Ramón García Guatemala (**RWS-20**) |
| **Government** | Government of the Republic of Nicaragua |
| **Gutierrez I** | Witness Statement of Luis Gutiérrez (**CWS-02**) |
| **Gutierrez II** | Second Witness Statement of Luis Gutiérrez (**CWS-10**) |

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| **Gutiérrez-Rizo I** | Witness Statement of Diana Yuslibis Gutiérrez Rizo **(RWS-01)** |
| **Gutiérrez-Rizo II** | Second Witness Statement of Diana Yuslibis Gutiérrez Rizo **(RWS-010)** |
| **Hacienda Santa Fé** | Hacienda Santa Fé – El Pavón |
| **Henrriquez I** | Witness Statement Jaime Henrriquez Cruz (**CWS-06**) |
| **Herrera I** | Witness Statement of William Ramón Herrera González **(RWS-03)** |
| **Herrera II** | Second Witness Statement of William Ramón Herrera González **(RWS-12)** |
| **HSF** | Hacienda Santa Fé |
| **Huerta I** | Witness Statement of Vidal de Jesús Huerta Gómez (**RWS-19**) |
| **ILC** | International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts |
| **INAFOR** | National Forestry Institute (Instituto Nacional Forestal) |
| **Inagrosa** | Inversiones Agropecuarias, S.A. |
| **IPSA** | Institute of Agricultural Protection and Health (Instituto de Protección y Sanidad Agropecuaria) |
| **Kotecha I** | Expert Valuation Statement of Vimal Kotecha (**CES-01**) |
| **Kotecha II** | Second Expert Valuation Statement of Vimal Kotecha (**CES-04**) |
| **González I** | Witness Statement of Norma del Socorro González Argüello (MARENA) **(RWS-09)** |
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| **Lacayo I** | Witness Statement of Rodolfo José Lacayo Ubau (ANA) **(RWS-07)** |
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| **López I** | Witness Statement of José Valentin López Blandón **(RWS-04)** |
| **López II** | Second Witness Statement of José Valentin López Blandón **(RWS-13)** |

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| **MAG** | Nicaraguan Ministry of Agriculture (Ministerio de Agricultura de Nicaragua) |
| **MAGFOR** | Ministry of Agriculture and Forestry of Nicaragua (Ministerio Agropecuario y Forestal de Nicaragua) |
| **MARENA** | Ministry of the Environment and Natural Resources of Nicaragua (Ministerio del Ambiente y Recursos Naturales de Nicaragua) |
| **Melvin Winger I** | Witness Statement of Melvin Winger I (**CWS-04**) |
| **Memorial** | Claimant's Memorial of October 21, 2022 |
| **Mena I** | Witness Statement of Xiomara Mena Rosales I (CETREX) **(RWS-06)** |
| **Méndez I** | Witness Statement of Álvaro Méndez Valdivia (INAFOR) **(RWS-08)** |
| **Méndez II** | Second Witness Statement of Álvaro Méndez Valdivia (INAFOR) **(RWS-17)** |
| **MFN** | Most-Favored Nation |
| **Miller I** | Witness Statement of Tom Miller I (**CWS-07**) |
| **Mona Winger I** | Witness Statement of Mona Winger I (**CWS-05**) |
| **Moncada I** | Witness Statement of Alcides René Moncada Casco (IPSA) **(RWS-005)** |
| **Moncada II** | Second Witness Statement of Alcides René Moncada Casco (IPSA) **(RWS-14)** |
| **Nicaragua** | Republic of Nicaragua |
| **NT** | National Treatment |
| **Pfister I** | Expert Statement of Carlos Pfister (**CES-03**) |
| **PGR** | Attorney General's Office of Nicaragua (Procuraduría General de la República de Nicaragua) |
| **Police** | National Police of Nicaragua |
| **Renaldy Gutiérrez I** | Expert Statement of Renaldy J. Gutiérrez, Esq. (**CES-06**) |

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| **Reply** | Claimant's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction of November 3, 2023 |
| **Respondent** | Republic of Nicaragua |
| **Riverside** | Riverside Coffee, LLC |
| **Rondón I** | Witness Statement of Carlos Rondón (**CWS-01**) |
| **Rondón II** | Second Witness Statement of Carlos Rondón (**CWS-09**) |
| **Rosales I** | Witness Statement of Martín Agenor Rosales Mondragón (IPSA) (**RWS-18**) |
| **Sequeira I** | Legal Expert Report of Dr. Byron I. Sequeira Pérez (**RER-05**) |
| **Treaty / DR-CAFTA** | Dominican Republic-Central America Free Trade Agreement |
| **USDA** | U.S. Department of Agriculture |
| **Welty I** | Witness Statement of Russ Welty (**CWS-11**) |
| **Winger de Rondón I** | Witness Statement of Melva Jo Winger de Rondón I (**CWS-03**) |
| **Winger de Rondón II** | Second Witness Statement of Melva Jo Winger de Rondón I (**CWS-08**) |
| **Wolfe I** | Expert Statement of Prof. Justin Wolfe (**CES-02**) |
| **Wolfe II** | Second Expert Statement of Prof. Justin Wolfe (**CES-05**) |
| **NIO or C$** | Nicaraguan Córdobas |

## I. INTRODUCTION

1. Riverside Coffee, LLC ("**Riverside**" or "**Claimant**") has failed to meet its burden of proof as to any of its claims against the Republic of Nicaragua ("**Nicaragua**" or "**Respondent**") under the Dominican Republic-Central America Free Trade Agreement ("**DR-CAFTA**" or the "**Treaty**"). These claims stem from an alleged invasion to Hacienda Santa Fé—a 1,142.5-hectare property located in the rural Municipality of San Rafael del Norte in the Department of Jinotega. Riverside alleges that the invasion, which was carried out by non-state actors, resulted in the total destruction of Riverside's investments in avocado and forestry businesses allegedly run by the Hacienda's 100-percent owner, Inversiones Agropecuarias, S.A. ("**Inagrosa**").

2. Riverside's case is a house of cards that has already collapsed. Riverside alleged in its Memorial that its investments in Inagrosa were wiped out when Nicaragua deployed an armed paramilitary unit to seize the Hacienda by brute force, destroying the avocado crops and premium forest trees in the process. But like a Hollywood action movie, this story was fiction. Nicaragua proved in its Counter-Memorial, citing to contemporaneous documents and first-hand accounts, that the invaders were not government mercenaries.

3. Instead, the invaders were members of a local farming cooperative with its origins in the resettlement and demobilization of members of the Nicaraguan Resistance (often referred to as the "*Contras*") at the end of Nicaragua's civil war. Thus, while many of the invaders were heavily armed veterans who warned the government of their willingness to "fight" for control of the Hacienda, many others were elderly family members, women, and children. The purpose of their invasion was not a land-grab ordered by government officials during a smoke-filled meeting. Rather, it was to settle and raise families and work the land, albeit on land that was not theirs.

4. The invasions that Riverside characterize as a government expropriation were the latest iterations of a multi-decade, high-profile property dispute between the farming cooperative

known as *Cooperativa El Pavón* and the Rondón family (which has always run Inagrosa) regarding Hacienda Santa Fé.

5. After Riverside's salacious "paramilitary" theory collapsed, Riverside changed its strategy. Now Riverside endeavors to revise the narrative to address the shortcomings highlighted by Nicaragua in its Counter Memorial. Despite these efforts, the attempt falls short due to familiar issues: a dearth of evidence, dependence on hearsay, witness statements lacking contemporaneous documentation, and the sudden appearance of key documents after being declared non-existent or destroyed, casting doubt on their authenticity.

6. Although Claimant tries halfheartedly to preserve its original theory and to impute the invaders' actions to the State on the basis of hearsay evidence and the alleged sympathy of an individual member of the National Assembly, Riverside now mainly argues that Nicaragua's law enforcement response to the invasion was insufficient under the DR-CAFTA, while trying to recast the Protective Order put in place to protect its rights as a foreign investor into a sinister "judicial expropriation."

7. Nevertheless, Riverside's change in approach reflects an essential, if not quite openly acknowledged, concession that ***Riverside's original theory was not true***. But Riverside's new case is no more believable.

8. The invasion and occupation of Hacienda Santa Fé created a serious challenge for Nicaragua that implicated its essential security interests. It cannot be overlooked that the invasion was led by heavily armed former resistance fighters who claimed and believed that they had been promised the land in exchange for demobilization at the end of Nicaragua's civil war. The timing of this invasion, amid widespread political unrest and limited police resources, further exacerbated the challenge faced by the Nicaraguan state.

9. The unique challenge posed by the invasion means that Riverside's claims do not fall within the DR-CAFTA's scope. Crucially, and as set out below and in Nicaragua's Counter-Memorial, the invasion of Hacienda Santa Fé by heavily armed former resistance fighters claiming to have been promised the land in exchange for demobilization at the end of Nicaragua's civil war and to be ready to "fight" for the territory—at a time of nationwide political unrest—implicated Nicaragua's most essential security interest: preserving its post-civil war settlement and preventing an escalation of violence.

10. Article 21.2(b) of DR-CAFTA places measures that a State "considers necessary" to its essential security outside the coverage of the treaty and no liability can attach to them. As Professor William Burke-White explains in his supporting expert report, ***Article 21.2(b) is self-judging as a matter of treaty design and precludes any liability*** under the DR-CAFTA.

11. Even if it did not, Nicaragua's response to the invasion would be entirely consistent with DR-CAFTA's standards. Nicaragua's measured response to the illegal but heavily armed invasion by demobilized resistance fighters seeking to settle on the Hacienda appropriately struck a delicate balance. It carefully considered safeguarding Riverside's rights as a foreign investor while acknowledging the nationwide turmoil gripping Nicaragua. This reasonable response also took into account the rural area's remote nature, limited police resources, and the potential for the situation to spiral into violence.

12. It is undisputed that Nicaragua cleared the property, resettled the illegal occupiers and their families, and restored Riverside's investment—all without violence.

13. Despite this successful and peaceful response, Riverside suggests in its Reply that Nicaragua breached its obligations under the DR-CAFTA because it did not immediately deploy military force against its own population to protect a putative investment in avocados. Riverside's

shocking suggestion underscores the reasonableness of Nicaragua's peaceful approach to defusing the illegal occupation of Hacienda Santa Fé, while echoing the kinds of historical abuses which investor-state arbitration was intended to replace.

14. Indeed, while in the early 2000s it took Nicaragua four (4) years to evict members of the ***same*** local farming cooperative from the ***same*** property (Hacienda Santa Fé) to assist the ***same*** landowner (Inagrosa), it is undisputed that Nicaragua accomplished the same feat in 2018 ***in less than two (2) months***, that is, by August 11, 2018.

15. When Inagrosa failed to secure the property, resulting in the invaders returning a week after Nicaragua had evicted them, Nicaragua succeeded in evicting ***and*** re-settling these invaders in a little less than three (3) years, which, again, is well ahead of the pace Nicaragua set before and for which Claimant didn't complain. Further, Nicaragua accomplished this without any violence despite the inherent volatility of the situation.

16. As for Riverside's insistence that it was "expropriated" by a temporary Protective Order explicitly designed to protect its rights in Hacienda Santa Fé, this extraordinary argument betrays Riverside's preference to pursue an arbitration claim rather than its investments. Indeed, as fully explained in **Section II.E.** and in the accompanying report of Nicaragua's legal expert, Dr. Byron Sequeira, far from stripping Riverside or Inagrosa of their property rights over Hacienda Santa Fé, that order protects them by ensuring that the Hacienda will remain secure for the remainder of this arbitration. This is exactly what the Tribunal already held in its Procedural Order No. 4 more than a year ago. Riverside has not, and cannot, present any evidence or argument that would make this reality any less true. Nicaragua has always recognized Inagrosa owns Hacienda Santa Fé and has repeatedly protected those rights amid challenging circumstances.

17. Riverside's effort to will itself into being expropriated by a protective order that Riverside could have lifted at any time and its recurring refusal to resume possession of its investment should fool no one. But it is also a tacit admission that, much as it may prefer to have been, Riverside ***was not expropriated by the invasion*** of Hacienda Santa Fé, which was carried out fundamentally by private actors. The Tribunal should consider the rest of Riverside's claims in the light of its extraordinary position on this issue.

18. In sum, there has been no expropriation and no breach of DR-CAFTA. Nicaragua has no liability under the DR-CAFTA for a law enforcement response to non-state conduct that peacefully restored Riverside's investment without further inflaming a volatile situation that directly implicated Nicaragua's most essential security interests.

19. But even if there had been some sort of breach, Riverside's story is untrue in another way. Its ***underdeveloped investment was not worth anything close*** to what its avocados-to-riches damages narrative claims.

20. According to Riverside, Inagrosa was worth hundreds of millions of dollars at the time of the 2018 invasion. That story provides that, after its coffee crop was devastated by a fungus in or around 2012, Inagrosa attempted to grow Hass avocados across a 40-hectare plot at Hacienda Santa Fé (despite not having the know-how, technical skills, or experience in growing this finicky crop, which is not endemic to Nicaragua and which no Nicaraguan agrobusiness has as of this date commercialized). As the story goes, this last-ditch effort was so successful that Inagrosa planned to expand the avocado plantation from 40 hectares to 1,000 hectares and to export the avocados to the U.S. and to other places where demand for Hass avocados is high, thereby netting Inagrosa and Riverside hundreds of millions of dollars in projected profits.

21. As Riverside's chief financial officer (Russ Welty) noted after telling this avocado-to-riches story to a prospective investor in 2017, the story, as told by Riverside, "seems a little too good to be true." That is because that story is not true. There is no evidence that Inagrosa's Hass avocado experiment was a success. There are no contemporaneous records, inventories, or pictures that prove that story true. All the numbers and figures Riverside uses to support its allegation come from testimony that is based on the "memories" of Inagrosa's and Riverside's representatives, who have every incentive to overstate Inagrosa's performance.

22. When confronted with the lack of documentary evidence, Riverside advances a "my dog ate my homework" defense. Riverside claims that the missing documents existed at one point but were destroyed, hacked, lost, or misplaced. Riverside also contends that Inagrosa—a business Riverside values at hundreds of millions of dollars—mostly operated orally and, therefore, did not leave behind much of a paper or cloud trail. Put differently, when it comes to the alleged "success" of the avocado plantation—the allegation upon which Riverside's entirely rests its damages case—Riverside is asking the Tribunal to just take Riverside's and Inagrosa's word for it.

23. But unproven allegations are not evidence. And they have no probative value here because all objective evidence in this record refutes those allegations. As fully explained in **Section II.C.**, that evidence demonstrates that Inagrosa's avocado experiment was a dud: the seeds were defective, the saplings were dying of root rot, the climate conditions were suboptimal. That evidence also demonstrates that Inagrosa was broke, owed large debts, and could no longer count on its sole investor, Riverside, given that Riverside made its final investment in Inagrosa in 2014 and failed to obtain additional funding for Inagrosa from outside investors. In fact, the evidence in the record confirms that Inagrosa was so disillusioned by its experiment that it ***gave up on it***. Indeed, Inagrosa did not seek permits to pursue an avocado business and instead sought to have

Hacienda Santa Fé designated as a private wildlife reserve for the stated reason of conserving the Hacienda's natural habitats by, among other things, ***not expanding its business activities***.

24. Assuming, *arguendo*, that Inagrosa would have continued pursuing a Hass avocado business (which, again, is contrary to what Inagrosa stated it would do in written statement during the relevant period), and assuming that Inagrosa would have been able to grow and harvest Hass avocados (which, again, is unlikely given the contemporaneous evidence), Riverside has failed to prove that Inagrosa could have commercialized this crop.

25. As an initial matter, it is undisputed that Inagrosa had no infrastructure, supplies, or personnel to refrigerate, box, and transport the avocados to any destination. Moreover, the testimony from Martín Rosales Mondragón (a senior official at Nicaragua's agency responsible for overseeing phytosanitary matters relating to Nicaragua's fruit exports) and Dr. Odilo Duarte (Nicaragua's Hass avocado expert) confirm ***it would have been impossible*** for Inagrosa to export avocados to the U.S. because of a longstanding U.S. ban on importing avocados from Nicaragua. There is nothing in this record that in any way suggests this ban would have been lifted. Similarly, Nicaragua's witnesses and experts as well as the documentary evidence in this record, confirms there was little chance Inagrosa would have been able to export its avocados to any other country, given the litany of documented phytosanitary concerns about the avocados grown at Hacienda Santa Fé.

26. Nor would have Inagrosa been able to commercialize its alleged forestry business. As explained in **Section II.D.**, it would have been illegal for Inagrosa to log the trees in Hacienda Santa Fé's forest because Hacienda Santa Fé was designated as a wildlife reserve. In any event, Inagrosa had none of the forestry permits, know-how, funds, expertise, feasibility studies, labor, supplies, or tools to pursue a forestry business. And nothing in this record proves otherwise.

27. It is for the foregoing reasons, as well as those detailed in **Section V**, *infra*, and in the second report of Nicaragua's quantum expert, Credibility International, that Nicaragua's model for damages should be rejected *in toto*. There is no basis on this record upon which this Tribunal can project the lost profits of Inagrosa's Hass avocado and forestry business ***because there is no evidence that these businesses even existed***, let alone that they would have been profitable.

28. As explained in **Section III** of this Rejoinder, apart from lacking merit, Riverside's claims are also jurisdictionally deficient. Riverside's case on jurisdiction has been as subject to change as the rest of its case. Initially, brought this case under DR-CAFTA Article 10.16.1(a), on its own behalf, seeking the damages that ***Riverside*** allegedly suffered. In its Memorial, Riverside belatedly attempted to expand its claim by seeking to bring a case under Article 10.16.1(b) on behalf of Inagrosa, seeking the alleged damages that ***Inagrosa*** suffered. After Nicaragua pointed out the fatal jurisdictional defects of this unsuccessful attempt to file a claim on behalf of, Riverside withdrew its Article 10.16.1(b) claims on behalf of its local subsidiary. That decision left Riverside only with its original claim under DR-CAFTA Article 10.16.1(a), under which Riverside is ***only*** entitled to seek redress of the damages that ***Riverside*** sustained.

29. Nicaragua agrees with Riverside's observation in its Reply that there is no remaining cognizable jurisdictional issue now that Riverside has voluntarily withdrawn claims brought on behalf of Inagrosa. However, Riverside's decision to limit its case to Article 10.16.1(a) is not without important consequences for its damages claims.

30. ***First***, Riverside's claim for damages under DR-CAFTA Article 10.16.1(a) should be inadmissible as an improper attempt to bring a claim for damages suffered by the local company, Inagrosa, instead of a claim for direct damages suffered be Riverside.

31. ***Second***, under DR-CAFTA Article 10.16.1(a), Riverside can only seek damages for the direct losses and damages Riverside sustained, and not for the damages caused to Inagrosa. Riverside has been unable to show or prove what damages Riverside suffered.

32. ***Third***, DR-CAFTA Article 10.16.1(a) does not allow Riverside to seek "reflective loss" or "indirect damages", those damages can only be brought under DR-CAFTA Article 10.16.1(b).

33. ***Fourth***, even if reflective loss damages claims were admissible under DR-CAFTA Article 10.16.1(a), Riverside's attempt to recover losses beyond its *pro rata* shareholding is improper. Any amount of damages potentially granted by the Tribunal shall be reduced by 74.5%, as Riverside shall only recover 25.5% of any damages awarded, which corresponds with the percentage of its shareholding at the time of the alleged breaches.

34. This Rejoinder is structured as follows:

a. **Section II** discusses the relevant proven and uncontroverted facts related to the invasion of the Hacienda Santa Fé, refuting Riverside's allegations of Nicaraguan government involving in the invasions of Hacienda Santa Fé, demonstrating instead that the invasions were part of a private property dispute and detailing the government's response to the situation amidst broader national challenges. It also shows that that Riverside's portrayal of Inagrosa's avocado business as a lucrative venture poised for international success is unfounded. It presents evidence to suggest that Inagrosa's operations were financially unsustainable, legally questionable, environmentally irresponsible, and practically incapable of achieving the claimed export potentials. This section also addresses the purpose and implications of the protective order related to Hacienda Santa Fé, countering Riverside's criticisms and emphasizing Nicaragua's ongoing offer for Inagrosa to take back the property. It addresses concerns and procedural arguments raised by Riverside as unfounded and reassures that the protective order was in Inagrosa's interest, not an act of expropriation.

b. **Section III** outlines the jurisdictional deficiencies in Riverside's case, emphasizing the limitations imposed on its damages claims by its decision to bring a claim under Article 10.16.1(a) of DR-CAFTA. This limitation narrows the scope of admissible damages to direct losses suffered by Riverside, excluding those related to its subsidiary, Inagrosa, and limits potential recovery to Riverside's shareholding percentage.

**c.** **Section IV** discusses the reasons why Riverside's claims against Nicaragua under DR-CAFTA fail on the merits, due to the absence of government involvement in the Hacienda Santa Fé invasion, the protective legal framework provided by DR-CAFTA, and the failure to demonstrate Nicaragua's breach of treaty obligations.

d. **Section V** explains that Riverside is not entitled to compensation and addresses its inappropriate use of the Discounted Cash Flow (DCF) valuation for Inagrosa, citing lack of financial history, unreliable future cash flow projections, uncertain avocado prices, financing issues, and regulatory pressures as reasons for its unsuitability. It suggests less speculative valuation methods based on historic costs or change in value and proposes reducing any awarded damages due to Inagrosa's contributions to damages, failure to mitigate, and outstanding debts.

e. **Section VI** contains Nicaragua's Prayer for Relief**.**

35. With this Rejoinder, Nicaragua submits the following:

a. The Second Witness Statement of **Diana Yuslibis Gutiérrez** (**RWS-10**), describing relevant historical context regarding Hacienda Santa Fé, the invasions of that property, and the process carried out by the government to vacate the property.

b. The Second Witness Statement of **Commissioner Marvin Castro** (**RWS-11**), describing steps Nicaragua took to evict invaders in Hacienda Santa Fé.

c. The Second Witness Statement of **Deputy Commissioner William Herrera** (**RWS-12**), describing the steps Nicaragua took to evict all invaders in Hacienda Santa Fé.

d. The Second Witness Statement of **José Valentín Lopez** (**RWS-13),** narrating the formation of Cooperativa El Pavón and the history of invasions in Hacienda Santa Fé that started in 1990 and continued through 2018.

e. The Second Witness Statement of **Alcides Moncada** (**RWS-14**), discussing the phytosanitary permits required for an avocado business and Inagrosa's lack of phytosanitary compliance to export Hass avocado.

f. The Second Witness Statement of **Norma del Socorro González** (**RWS-15**), discussing the environmental permits for an avocado and forestry business and Inagrosa's lack of compliance with the environmental regulatory framework.

g. The Second Witness Statement of **Rodolfo Jose Lacayo** (**RWS-16**), discussing the regulatory framework to grant a water concession and Inagrosa's lack of water permits to maintain his avocado plantation in Nicaragua.

h. The Second Witness Statement of **Alvaro Méndez** (**RWS-17**), discussing the permits related to the exploitation of the forest and Inagrosa's lack of permits to have a forestry business.

i. The Witness Statement of **Martín Agenor Rosales** (**RWS-18**) discussing the phytosanitary condition of plant and plant products to access international markets.

j. The Witness Statement of **Vidal de Jesus Huerta** (**RWS-19**), as a town councilor of Jinotega, confirmed that he was not and has never been involved in the takings of Hacienda Santa Fé. He also confirmed that he does not know Mr. Carlos Rondón or Mr. Luis Gutiérrez. Finally, he declared that the Jinotega Mayor, Mr. Leónidas Centeno, has been vocal about not tolerating illegal occupations of private properties.

k. The Witness Statement **Ramón García Guatemala** (**RWS-20**), as a worker in the Municipality of Jinotega, confirmed that he was not and has never been involved in the takings of Hacienda Santa Fé. He also confirmed that he never participated in any meetings with the invaders. Finally, he declared that the has never visited or been in Hacienda Santa Fé.

l. The Witness Statement of **Favio Darío Enríquez** (**RWS-21**), an employee of the Ministry of Agriculture, who allegedly told Mr. Luis Gutierrez the State of Nicaragua was behind the invasion of hacienda Santa Fe as retaliation.

m. The Second Expert Report of **Dr. Odilo Duarte** (**RER-03**), analyzing and refuting Claimant's allegations, projections and estimates pertaining to their alleged avocado export business and expansion.

n. The Second Expert Report of **Credibility International (RER-04),** showing that the Kotecha Report submitted by Claimant to calculate its alleged damages is erroneous on several grounds and that the DCF approach used in the Kotecha Report is based on assumptions of future income and cash flow for Inagrosa's avocado experiment and hypothetical forestry business that are entirely speculative and inappropriate.

o. The Expert Report of **Dr. Byron Israel Sequeira** (**RER-05**) analyzing Nicaraguan law in relation to judicial protective orders, the validity of administrative acts, and analysis of private wildlife reserve.

p. The First Expert Report of **Professor William W. Burke-White (RER-06)**, demonstrating that Nicaragua's interpretation of the essential security clause in Article 21.2(b) of DR-CAFTA is correct, that the clause is self-judging and properly applicable to the facts of this case, and that Article 21.2(b) relieves Nicaragua of any liability under DR-CAFTA.

## II. STATEMENT OF FACTS

### A. The Invasion of Hacienda Santa Fé

36. Hacienda Santa Fé spans 1,142 hectares and is located in the municipality of San Rafael del Norte, in the Department of Jinotega, in the country's northwestern region.[1] Hacienda Santa Fé is wholly owned by Inagrosa, which, in turn, is partially owned by Riverside, as well as by other individuals not named as parties.[2] In this case, the parties agree that Hacienda Santa Fé was invaded. But the parties completely disagree as to who caused this invasion and the manner in which Nicaragua should have reacted to the invasion.

37. In its Memorial, Riverside alleged that this invasion began on June 16, 2018 and that it was executed by 200-to-300 armed "paramilitaries" in violent and militaristic fashion.[3] Per Riverside, these "paramilitaries" proclaimed early and often that the invasion had been executed on behalf of Nicaragua's ruling party, Sandinista National Liberation Front (*Frente Sandinista de Liberación Nacional*), as an act of political retaliation and for the purpose of profiting from the assets located in that property.[4] Riverside further alleged that the local police refused to take any action to stop or end the invasion and that certain policemen and local government officials aided and abetted the invaders.[5] Riverside also alleged that the invaders destroyed all valuable assets at Hacienda Santa Fé by, *inter alia*, deforesting the entire lush forest, eradicating a 40-hectare Hass avocado plantation, and taking all physical and electronic records that would have proven that, as

[1] Counter Memorial, ¶ 473; Gutiérrez-Rizo I, ¶ 20 (**CWS-02**).

[2] Memorial, ¶ 101; Related Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry, June 30,2022 (**C-0060**).

[3] Memorial, ¶¶ 57-58.

[4] Memorial, ¶¶ 57-58.

[5] Memorial, ¶¶ 59-60.

of the time of the invasion, Inagrosa had an avocado and forestry business worth hundreds of millions of dollars.[6]

38. In its Counter-Memorial, Nicaragua refuted Riverside's narrative. Nicaragua, for example, proved the invaders of Hacienda Santa Fé were neither paramilitaries nor government agents; they were members of a farming cooperative that is headed by demobilized leaders of the *Resistencia Nicaragüense*, an anti-Sandinista group (also known as *Contras*) that fought against the Sandinistas from 1979 to 1990.[7] As Nicaragua proved with contemporaneous records and first-hand accounts, these demobilized members invaded Hacienda Santa Fé because they (mistakenly) believed that they were entitled to live on the upper part of Hacienda Santa Fé, known as "*El Pavón*," where they or their families lived from 1990 to 2004.[8] As the contemporaneous evidence unambiguously shows, those families moved to the *El Pavón* portion of Hacienda Santa Fé in 1990 because the Nicaraguan government at the time was in the process of resettling these individuals and had identified this property (among others) as a potential place to resettle some of the demobilized *Resistencia* members because the Hacienda was in a state of abandonment.[9]

39. Ultimately, the government never agreed to resettle these families at the Hacienda because its private landowners (the Rondón family and, later, Inagrosa) refused to cede its title.[10] But because this property remained in a state of abandonment throughout the 1990s, the squatters kept living in the upper part of the property, formed a farming cooperative titled *Cooperativa El*

[6] Memorial, ¶¶ 195-197.

[7] Counter-Memorial, ¶¶ 5-16.

[8] Counter-Memorial, ¶¶ 5-16; Lopez I, ¶¶ 4-13 (**RWS-04**); Gutiérrez-Rizo I, ¶¶ 13-16 (**RWS-01**); Agreement of the Regional Agrarian Commission of the Sixth Region, November 22, 1990 (**R-0052**).

[9] Counter-Memorial, ¶¶ 5-16; Lopez I, ¶¶ 4-13 (**RWS-04**).

[10] Counter-Memorial, ¶¶ 5-16; Scorched earth in El Pavón, *El Nuevo Diario*, November 22, 2003 (**R-0036**). *See also* Luis Alemán Saballos, Denuncia abuso policial, *La PrensaNi*, 8 de noviembre de 2003 (**R-0093**).

*Pavón*, and tried for years to convince the local government to grant this cooperative title to the property.[11] The government, however, refused to grant this title because Hacienda Santa Fé was (and remains) privately held property.[12] And in the early 2000s, when the landowners for the first time requested government assistance to evict these squatters, the government went through the formal and legal processes and succeeded, in 2004, to evict them from the property.[13]

40. As Nicaragua proved, many of the evicted squatters resettled nearby the Hacienda and waited for an opportune time to re-take it.[14] Some took their chance in mid-2017, when the Hacienda was in a state of abandonment because, years earlier, a blight destroyed the property's coffee plantation (its main source of income).[15] Others took their chance in June 2018, when the country was wrought with civil strife and unrest for issues unrelated to this arbitration.[16] Because Inagrosa had all but abandoned their property (save for a handful of security guards located at the central house in the property, which is located south of the *El Pavón* portion), the invaders were able to take complete control of the property and restarted their suspended campaign to be given legal title to this land.[17]

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[11] Lopez I, ¶¶ 6-13 (**RWS-04**).

[12] Counter-Memorial, ¶ 13 ("Because Inagrosa had legal title to that land, the Police proceeded to evict most of the illegal occupants and to destroy the structures that had been erected on the property"); Scorched earth in El Pavón, *El Nuevo Diario*, November 22, 2003 (**R-0036**). *See also* Luis Alemán Saballos, Denuncia abuso policial, *La PrensaNi*, 8 de noviembre de 2003 (**R-0093**).

[13] Counter Memorial, ¶ 13 ("Because Inagrosa had legal title to that land, the Police proceeded to evict most of the illegal occupants and to destroy the structures that had been erected on the property"); Scorched earth in El Pavón, *El Nuevo Diario*, November 22, 2003 (**R-0036**). *See also* Luis Alemán Saballos, Denuncia abuso policial, *La PrensaNi*, 8 de noviembre de 2003 (**R-0093**).

[14] Lopez I, ¶¶ 19-22 (**RWS-04**).

[15] Counter-Memorial, ¶¶ 17-19; Lopez I, ¶¶ 20-21 (**RWS-04**).

[16] Counter-Memorial, ¶¶ 17-24.

[17] Letter from Cooperative El Pavón to the Attorney General's Office for Jinotega, June 5, 2018 (**R-0064**); Letter from Cooperative El Pavón to the Attorney General's Office for Jinotega, June 26 2018 (**R-0196**); Letter from Cooperative El Pavón to Nicaragua's Attorney General, September 5, 2018 (**R-0065**).

41. In sum, far from being a government-led paramilitaristic operation, as is alleged by Claimant, Nicaragua proved the invasion was an unfortunate and illegal extension of a long-standing property dispute between Inagrosa and the Rondón family on one side, and the members of *Cooperativa El Pavón* on the other side. Nicaragua, however, is not responsible for this ordeal.

42. In its Counter-Memorial, Nicaragua also disproved Claimant's story that the police and other government officials refused to help Inagrosa and instead assisted the invaders. Quite to the contrary, even Claimant admits that government officials evicted all of the invaders (more than 300) in a peaceful manner by August 11, 2018, *i.e.*, ***less than two (2) months*** after Nicaragua had notice of the invasion.[18] Contemporaneous documents and first-hand accounts confirm Nicaragua accomplished this impressive feat while simultaneously dealing with violent protests and other major distractions.[19] But after Nicaragua returned Hacienda Santa Fé to Inagrosa, free of invaders, Inagrosa failed to secure its property and, a week later, that property was re-invaded by the same individuals.[20] At that point Inagrosa's representatives left the country and Nicaragua government was left to (yet again) manage this ordeal.[21] Because it had become obvious that any further eviction would be meaningless without first resettling these invaders (because they would have likely just kept re-invading the now-abandoned property), Nicaragua worked diligently over the

[18] Counter-Memorial, ¶¶ 34-37; Gutiérrez-Rizo I, ¶ 66; 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 dated August 9, 2019 (**R-0049**).

[19] Herrera I, ¶ 12 (**RWS-03**) ("[…] the context of the events taking place from April 2018 in Nicaragua proves to be utterly relevant and shows that the Police were trying to cope with a number of riots across the country; while trying to afford security to the individual requirements of the population."); Carlos Fernández Álvarez, Article: This is how the coup in Nicaragua was experienced and defeated, El 19 Digital (**R-0037**); National Report issued for the Universal Periodic Report of the United Nations Human Rights Council, 28 January 2019, ¶ 4 (**R-0019**).

[20] Counter-Memorial, ¶ 37; Castro I, ¶ 38 (RWS-02) ("At the meeting of August 11, most of the families agreed to vacate the property. However, the owners or representatives of Hacienda Santa Fe did not show up to take possession. The property was free of illegal occupants for a few days, and when the invaders noted the owners were not there, they returned.").

[21] Rondón II, ¶ 11 (**CWS-09**) ("I was not in Nicaragua since the occupation […]").

ensuing years to resettle these individuals. In August 2021, Nicaragua succeeded in doing so and invited Inagrosa and Riverside to take their land back, but, to date, they have refused.[22]

43. Because of the evidence offered by Nicaragua that refutes Riverside's account of the invasion, in its Reply ***Riverside has now changed its story***. Riverside no longer contends that the invaders were armed, government-ordered paramilitaries.[23] Riverside instead now concedes the invaders were members of a farming cooperative principally led by demobilized members of the *Resistencia Nicaragüense*.[24] But Riverside maintains these invaders were sent by Nicaragua.[25]

44. To try to prove Nicaragua's alleged links with the invaders, Riverside principally relies on: (i) hearsay statements (often triple hearsay) from Carlos J. Rondón, Luis Gutiérrez, and Domingo Ferrufino;[26] (ii) an expert report of Prof. Justin Wolfe ("**Wolfe Second Report**")[27]; (iii) a letter from some of the invaders to the Attorney General, dated 5 September 2018;[28] (iv) a report from Marvin Castro (Commissioner of the National Police Department in Jinotega) to Francisco Diaz (Deputy Chief of the National Police) regarding the Invasion of Hacienda Santa Fé, dated 31 July 2018;[29] and e) correspondence sent by Mr. Gutiérrez to Mr. Rondón during the invasions.[30]

[22] Gutiérrez-Rizo, ¶ 77 (**RWS-01**); Letter from P. Reichler (Foley Hoag) to Barry Appleton (Appleton & Associates) dated September 9, 2021 (**C-0116**).

[23] Memorial, ¶ 11. In the Memorial, the term "paramilitaries" or "paramilitary" is mentioned at least 300 times.

[24] Reply, ¶ 97-103.

[25] Reply, ¶ 97-103.

[26] Rondón II (**CWS-09**); Gutiérrez II (**CWS-10**); Ferrufino I (**CWS-12**).

[27] Wolfe II (**CES-05**).

[28] Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua of September 5, 2018, (**R-0065**).

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

[30] Emails exchanged between Luis Gutierrez and Carlos Rondón between June 17, 2018 and (*See* **C-0296** – **C-0303**, **C-0340** – **C0350**).

45. As detailed in this section, Riverside's new story, like its prior one, is still fiction. Riverside has not provided any evidence linking the invaders to some supposed government plan to take Hacienda Santa Fé. Nor does Riverside's story square with the evidence in this record verifying that, far from being a government-led land grab, the 2017-2018 invasion of Hacienda Santa Fé is the latest chapter of a thirty-year-old property dispute between a farming cooperative and Inagrosa and the Rondón family. And Riverside's accusations about how Nicaragua reacted to the invasion continue to be unsupported and cannot do away with the undisputed fact that, in August 2018, Nicaragua succeeded in evicting all of the invaders and offered the property back to Inagrosa.

### 1. Riverside Improperly Tries to Attribute the Invasions to Nicaragua on Unreliable Hearsay Testimony

46. As noted above, Nicaragua does not dispute that Hacienda Santa Fé was invaded. Nicaragua's position in this case is that the invasion did not involve the government—it was the result of a property dispute among private parties, as proven by the significant evidence included with Nicaragua's Counter-Memorial.[31]

47. In its Reply, however, Claimant continues to advance its theory that the invasion was government-ordered, relying entirely on testimony from three of its witnesses—Messrs. Rondón, Gutiérrez, and Ferrufino—who claim that the invasion was ordered by the government because the invaders said so during the invasion.[32]

48. This testimony is unreliable for many reasons. As an initial matter, their testimony attempting to attribute the invasion to Nicaragua—*i.e.*, the ***key*** issue in the arbitration—is almost exclusively based on hearsay accounts of what ***other*** people (who are ***not*** witnesses) think they

[31] Counter-Memorial, ¶¶ 5-16; Gutierrez-Rizo II, ¶¶ 12-15 (**RWS-10**); López II, ¶¶ 7-22 (**RWS-13**).

[32] Rondón II, ¶ 58 (**CWS-09**); Gutiérrez II, ¶ 47 (**CWS-10**); Ferrufino I, ¶ 52 (**CWS-02**).

heard the invaders say as the invasion occurred. To be sure, this testimony is not accompanied by any firsthand documentary evidence of what actually happened. Compounding this deficiency is the fact that all the contemporaneous evidence in this record refutes the hearsay testimony upon which Claimant bases its case. And the proverbial elephant in the room is that Claimant's "star" witnesses are affiliated with Inagrosa and/or Riverside and, thus, ***have every incentive to blame Nicaragua for the invasion***.

49. Beyond that, their testimony does not help Claimant because it contradicts one of the key tenets of Claimant's case: that Nicaragua took Hacienda Santa Fé for political retribution and to profit from the Hacienda's assets.[33] Mr. Rondón refuted the first alleged motivation, given his testimony that Inagrosa and its principals were not politically active.[34] And Messrs. Ferrufino and Gutiérrez refuted the second alleged motivation, given that they have testified that, far from profiting from the Hacienda's assets, the invaders destroyed all of its valuables.[35] In its Reply, Claimant has absolutely no response to this glaring inconsistency in its case.

a. *Mr. Rondón Does Not Have Direct Knowledge of the Invasions in Hacienda Santa Fé*

50. To underscore the fragility of Claimant's case the main witness for Riverside, as it pertains to the invasions is Mr. Rondón, someone who admittedly was ***not at Hacienda Santa Fé*** **–** or even in Nicaragua – when the invasions occurred.[36] Unsurprisingly, his testimony is limited to discussing what others told him about what the invaders supposedly said.

51. For example, in his second witness statement, Mr. Rondón testifies that he knows the invasion was ordered by Nicaragua because "Luis Gutiérrez reported that the invaders said

[33] Memorial, ¶¶ 11, 257.

[34] Rondón I, ¶ 6 (**CWS-01)** ("Our company was not engaged in political debate or affairs in Nicaragua.").

[35] Gutiérrez II, ¶ 137 (**CWS-10**); Ferrufino I, ¶¶ 84-85 (**CWS-02**).

[36] Rondón I, ¶¶ 74-93 (**CWS-01**).

during the invasion that they were sent under the instructions of the Sandinista government of Nicaragua."[37]

52. As asserted in the Counter-Memorial, this type of testimony is unreliable because it is "hearsay," *i.e.*, testimony about what someone else said without that witness having personal knowledge as to the truth (or lack thereof) of the proffered statement.[38] Mr. Rondón's testimony is even more unreliable because it is often ***double*** hearsay (because he is merely repeating what someone else heard the invaders say) or even ***triple*** hearsay (because he is merely repeating what someone else heard from someone else about what the invaders supposedly said).

53. Mr. Rondón's testimony is also belied by the fact that he has a financial interest in Riverside and, thus, has every incentive to pin this invasion on Nicaragua, particularly given that Riverside seeks hundreds of millions of dollars from Nicaragua for damages supposedly caused by this invasion.

54. Mr. Rondón's bias has already been outed in this arbitration. In his first statement, he tried to downplay the historical occupation of Hacienda Santa Fé as an isolated event "in the early 1990s" concerning "some prowlers who came into Hacienda Santa Fé" and were evicted "immediately."[39] Mr. Rondón offers this testimony to attempt to make it seem as if the 2017-18 invasions were completely unrelated to the Hacienda Santa Fé invasions from the 1990s and the early 2000s. But the historical record—which includes correspondences that were written by Mr. Rondón, himself—confirms, however, that: (i) the Hacienda's prior invasion was not an isolated event but, rather, a continuous occupation from 1990-2004; (ii) the invaders were not "prowlers" but, rather, a farming cooperative containing men, women, children, and elderly members who

[37] Rondón II ¶ 58 (**CWS-09**).

[38] Counter-Memorial, ¶ 73.

[39] Rondón I, ¶ 75 (**CWS-01**).

(mistakenly) believed that Hacienda Santa Fé belonged to them; and (iii) when Mr. Rondón first sought government intervention to evict those individuals, in 2000, they were not "immediately" evicted, as Mr. Rondón declares.[40] Rather, the eviction process took ***almost four (4) years***, due to complexities involved in evicting hundreds of individuals.[41] The comprehensive record regarding this long-standing property dispute (which led to the 2017-18 invasions) is summarized in full in Section II.B, *infra*. But Nicaragua alludes to it here to demonstrate that Mr. Rondón's testimony, particularly when it concerns the motives and circumstances that led to the invasion of Hacienda Santa Fé, is completely unreliable.

b. *Mr. Gutiérrez's Testimony about What the Invaders Said Is Also Unreliable Hearsay*

55. Riverside also relies heavily on Mr. Gutiérrez's testimony for the proposition that the invaders acted under directives from Nicaragua when they invaded Hacienda Santa Fé.[42] But, as Nicaragua explained in its Counter-Memorial, Mr. Gutiérrez's testimony is unreliable because he was not at the Hacienda during the time of the invasion and, hence, his account as to what the invaders said amounts to double, or even triple, hearsay.[43]

56. In its Reply, Claimant did not try to cure its evidentiary defect by providing non-hearsay evidence as to what was said. Rather, it attached a second declaration from Mr. Gutiérrez that parrots his hearsay testimony from before. Below is a non-exhaustive list of double or triple hearsay statements made by Mr. Gutiérrez on this topic in his second witness statement.

a. "That day, on June 16, 2018 . . . Efrain ('Payin') Chavarria and Francisco ('Chepon') Chavarria . . . told Mr. Ferrufino that the invaders told them that they were sent by the Nicaraguan Government […] to take Hacienda Santa

[40] Rondón I, ¶ 75 (**CWS-01**).

[41] Ferrufino I, ¶ 60 (**CWS-02**).

[42] Reply, ¶ 81.a).

[43] Counter-Memorial, ¶ 73.

Fé."[44] ***This is an example of triple hearsay and neither Efrain Chavarria nor Francisco Chavarria are witnesses in this arbitration***.

b. "Chief Security Palacios informed me that the leaders of the invasion were […] [t]hese individuals claimed that they were operating under the directive of the Nicaraguan Government to seize Hacienda Santa Fé."[45] ***This is an example of double hearsay and Mr. Palacios is not a witness in this arbitration***.

c. "I was alerted by Raymundo Palacios about the invader's claims: a) That they were sent by the Government of Reconciliation and National Unity (as they referred to the Government of the Republic of Nicaragua under President Daniel Ortega) […]"[46] ***This is an example of double hearsay and Mr. Palacios is not a witness in this arbitration***.

d. "The invaders claimed affiliation with the Nicaragua government"[47] referring to what Mr. Security Chief Palacios had told him. ***This is an example of double hearsay and Mr. Palacios is not a witness in this arbitration***.

57. In his second witness statement. Mr. Gutiérrez even claims he personally heard an invader—Efren Zeledón Orozco, who is known as *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."[48] Of course, that statement is still unreliable hearsay because Mr. Gutiérrez has no knowledge as to whether what he supposedly heard is actually true. If hearing something were enough to prove its veracity, then anything that is ever said in front of others would be deemed to be true. That is not a reliable barometer for truth, yet it is the linchpin of Claimant's case against Nicaragua.

58. Mr. Gutiérrez's testimony is also unreliable because it does not square with his contemporaneous written account of the invasion. On August 14, 2018, Mr. Gutiérrez signed and

[44] Gutiérrez II, ¶ 47 (**CWS-10**).

[45] Gutiérrez II, ¶ 49 (**CWS-10**).

[46] Gutiérrez II, ¶ 51 (**CWS-10**).

[47] Gutiérrez II, ¶ 54 (**CWS-10**).

[48] Gutiérrez II, ¶ 108 (**CWS-10**).

verified a written statement that he gave to a notary concerning the state of the Hacienda after the invaders were initially evicted by Nicaragua on August 11, 2018.[49] In that account, he did ***not*** mention his suspicion that Nicaragua ordered the Hacienda Santa Fé invasion, a suspicion that features prominently in his testimony in this case. Rather, the lone reference to the government in his contemporaneous account was to acknowledge that Nicaragua evicted the invaders.[50] In sum, his contemporaneous account of the story simply does not help Claimant's case and undermines the testimony Mr. Gutiérrez provides in this arbitration.

59. Lastly, Mr. Gutiérrez's testimony is also contradicted by the testimony of Mr. Favio Darío Enríquez presented by Nicaragua with this Rejoinder. Mr. Gutiérrez states that Mr. Enríquez allegedly told him during a traffic stop that Nicaragua was taking Hacienda Santa Fe's lands for redistribution.[51] Mr. Enríquez gives direct testimony that he never told Mr. Gutiérrez that Hacienda Santa Fé was being expropriated or that Nicaragua was targeting companies with foreign capital.[52] In fact, Mr. Gutiérrez's testimony about Mr. Enríquez is so wrong that Mr. Gutiérrez does not even get Mr. Enríquez's name right, mistakenly referring to him as "Enrique Fabio Dario."[53] For these reasons, Mr. Gutiérrez's testimony attempting to attribute the invasion to Nicaragua is unavailing.

c. *Mr. Ferrufino's Testimony that Nicaragua Was Behind the Invasion Is Contrary to His Written Contemporaneous Account*

60. Mr. Ferrufino's testimony suffers from many of the same deficiencies as the other witnesses offered by Claimant. In its Reply, Claimant introduced Mr. Ferrufino's testimony for

[49] Notarized document with Inventory of damages at Hacienda Santa Fe dated August 14, 2018 (**C-0058**).

[50] Notarized document with Inventory of damages at Hacienda Santa Fe dated August 14, 2018 (**C-0058**).

[51] Gutiérrez II, ¶ 108 (**CWS-10**).

[52] Enríquez, ¶ 14 (**RWS-21**) ("it is false that I made any kind of comment to him about the invasions of the Hacienda Santa Fe. I never went to Hacienda Santa Fe nor was I aware of the circumstances under which the Hacienda was invaded in 2018").

[53] Gutiérrez II, ¶ 108 (**CWS-10**).

the first time in this case, mainly to support its theory that Nicaragua ordered the Hacienda Santa Fé invasion. Mr. Ferrufino, one of the security guards who worked at Hacienda Santa Fé during the invasion, testifies that the other security guards told him that the invaders said they were sent by the government to take the Hacienda.[54] He also states that certain of the invaders told him that Nicaragua sent them to invade the property, just before they supposedly beat him for refusing to give up his weapons.[55]

61. As an initial matter, this testimony is hearsay. Mr. Ferrufino does not know if the statements he supposedly heard are true. Nor does he know if statements others heard are true. This testimony, therefore, cannot "prove" that Nicaragua is responsible for the invasion.

*62.* But the main defect with Mr. Ferrufino's account is that it is ***inconsistent*** with the written, notarized account of the invasion that he gave on August 19, 2018 to the Jinotega police. On that day, Mr. Ferrufino gave a detailed statement to the police in front of a notary, which was then memorialized in writing by the notary and signed by Mr. Ferrufino, after he was given an opportunity to review the written account for inconsistencies or omissions.[56] Notably, Claimant submitted that written account as an exhibit in this arbitration.

*63.* Mr. Ferrufino's August 19, 2018 account begins with a declaration that he "began working" at Hacienda Santa Fé in July 2016.[57] That testimony is completely irreconcilable with Mr. Ferrufino's testimony in this case, which provides that he began working at the Hacienda in 2000 and returned to the property in 2013 to help Inagrosa in its alleged transition from a coffee

[54] Ferrufino I, ¶¶ 51-68 (**CWS-02**).

[55] Ferrufino I, ¶¶ 51-68 (**CWS-02**).

[56] Public Instrument No. 131, Affidavit of Domingo German Ferrufino dated August 19, 2019 (**C-0211**).

[57] Public Instrument No. 131, Affidavit of Domingo German Ferrufino dated August 19, 2019 (**C-0211**).

business to an avocado business.[58] This disparity is not trivial given that Claimant is offering Mr. Ferrufino's testimony in this arbitration, in part, to support its version of what transpired at the Hacienda in the early 2000s and during Inagrosa's alleged transition to an avocado business.[59]

*64.* Mr. Ferrufino's contemporaneous written account then provides a detailed version of events that occurred during the invasion. In that version, he provides many of the same details that he provides in his witness statement in this case, such as that he was beaten by the invaders and that they tried to seize the weapons located in the Hacienda.[60] Notably, however, the August 2018 testimony provided by Mr. Ferrufino ***never states that the invaders said that they had been sent by the Nicaraguan government***.

*65.* This omission exposes the unreliability of Mr. Ferrufino's testimony. If he really heard the invaders tell him that they were sent by the government, he would have mentioned this rather scandalous rumor when he gave his contemporaneous written account of the invasion. It is simply unfathomable that this fact, which is the linchpin of his testimony in this arbitration, would have slipped his mind in August 2018, in the immediate wake of the invasion.

2. Riverside's Alleged Contemporaneous Evidence Is Also Unreliable

66. Riverside also claims there is "tangible" written evidence that "proves" that the invasion was ordered by Nicaragua and that the invaders were instructed by government officials to sustain their occupation.[61] As explained below, none of this "tangible" evidence holds up.

67. First, Claimant's reliance on government correspondences misses the mark, given that those correspondences refute Claimant's version of events. Specifically, Riverside relies on:

[58] Ferrufino I, ¶¶ 9-11 (**CWS-02**).

[59] Ferrufino, ¶¶ 51-83, 95-100 (**CWS-02**).

[60] *Compare* Public Instrument No. 131, Affidavit of Domingo German Ferrufino dated August 19, 2019 (**C-0211**) *with* Ferrufino I, ¶¶ 51-68 (**CWS-02**).

[61] Ferrufino, ¶ 60 (**CWS-02**).

(i) a letter sent by certain of the invaders to the Attorney General on September 5, 2018;[62] and (ii) a report from Commissioner Marvin Castro to Francisco Diaz, the Deputy Chief of the National Police regarding invasion of Hacienda Santa Fé on July 31, 2018.[63]

68. Riverside argues the letter submitted by certain of the Hacienda Santa Fé invaders to the Attorney General confirms the occupiers acted "directly under the leadership" of President Daniel Ortega and the Nicaraguan government.[64] Riverside mischaracterizes the content of the correspondence, which Riverside cherry-picks in its Reply but which is provided in full below: [65]

> All of the affiliated members were members of the Former Nicaraguan Resistance, and 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) 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.

69. From the text, it can only be concluded that the authors of this letter stated that, though they formerly served in the *Resistencia Nicaragüense*, they now identify politically with the "Alianza Unidad Nicaragua Triunfa," which is led by the Sandinista National Liberation Front and President Ortega. At no point does the letter indicate that the invasion was carried out on behalf of President Ortega or the Sandinista political party. Nor do the invaders proclaim in this letter that

[62] Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua of September 5, 2018, (**R-0065**).

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

[64] Reply, ¶ 74, a).

[65] Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua of September 5, 2018, p.2 (**R-0065**).

they invaded the Hacienda to appease President Ortega or his party. Claimant just made that up out of whole cloth.

70. Rather than help Claimant, the September 2018 letter is devastating for its case in chief because it confirms that the invasion was an extension of the property dispute that began in the 1990s. Specifically, the invaders identify themselves as the "owners" of Hacienda Santa Fé, citing to a certificate, issued in 1990 by the Regional Agrarian Commission of the Sixth Region (*La Comisión Agraria Regional de la Sexta Región*).[66] In its Counter-Memorial, Nicaragua has explained that this commission identified Hacienda Santa Fé as a property where demobilized leaders of the *Resistencia Nicaragüense* and their families could live, given that the property was in a state of abandonment.[67] Upon reading that certificate, many of the demobilized members and their families moved to the Hacienda, settled in the *El Pavón* region, formed *Cooperativa El Pavón*, and tried several times to acquire formal title over the property.[68]

71. In other words, the September 2018 confirms the Hacienda Santa Fé invaders ***are Cooperativa El Pavón members who previously lived in Hacienda Santa Fé in the 1990s*** and

[66] Letter from Cooperative El Pavón to Nicaragua's Attorney General, September 5, 2018 (**R-0065**) ("The Santa Fe Parcel is a property that was granted to us, the members of the former Nicaraguan Resistance, as evidenced by the certificate of November 22, 1990, which was issued by Mr. Nardo Sequiera Báez, the then Vice-president of the Nicaraguan Institute for Agrarian Reform. Below, we state the details of such grant.")

[67] Counter-Memorial, ¶¶ 8-9.

[68] Gutiérrez-Rizo II, ¶ 15 (**RWS-10**); Letter from members of the former Nicaraguan Resistance (Jose Valentín López Blandón) to Dr. Virgilio Gurdian, Minister Director of INRA in Jinotega of November 1997 (**R-0058**); Letter from the El Pavón Cooperative to Dr. Arturo Eli Tablada Tijerino, Intendant of Property, Ministry of Finance and Public Credit, dated February 20, 2004 (**R-0170 Tab 44**); Letter from Valentín López to Dr. Arturo Eli Tablada Tijerino, Intendant of Property, Ministry of Finance and Public Credit, dated February 23, 2004 (**R-0170 Tab 45**); Letter from FUNDEX to Dr. Arturo Eli Tablada Tijerino, Intendant of Property, Ministry of Finance and Public Credit, dated March 23, 2004 (**R-0170 Tab 46**); Letter from the El Pavón Cooperative to the Honorable Authorities of the Inter-institutional Commission involved in the HSF problem of March 16, 2004 **(R-0170 Tab 48);** Letter from FUNDEX to the Honorable Authorities of the Inter-institutional Commission involved in the HSF problem of March 19, 2004 **(R-0170 Tab 49)**; Letter from the El Pavón Cooperative and FUNDEX to Dr. Alfonso Sandino Camacho, Vice-Minister of the Interior, dated March 23, 2004 **(R-0170 Tab 50);** Letter from the El Pavón Cooperative and FUNDEX to Engineer Luis Alberto Tellería Ramírez, Director General of the Rural Titling Office OTR dated May 10, 2004 **(R-0170 Tab 51);** Letter from Mr. López Blandón, Cooperativa El Pavón, to Engineer Andrés Altamirano Tinoco, Delegate of the Department of the Municipality of Jinotega, dated December 12, 2005 (**R-0035**).

that the purpose of their letter was ***to try to acquire title over the property***, as they had tried to do before when they lived in Hacienda Santa Fé during the 1990s and early 2000s.[69] This letter confirms Nicaragua's account that this invasion was the most recent iteration of a decades-long property dispute and undermines Claimant's theory that the invasion of Hacienda Santa Fé was some sort of government-led operation.

72. Claimant also mischaracterizes the report from Commissioner Castro to Deputy Chief of the National Police from July 2018.[70] Riverside argues this report shows there had been communications "at very senior levels" between the government and the occupiers of Hacienda Santa Fé[71] and that senior government officials (such as Congressman Edwin Castro) provided instructions to the invaders that they were to remain in occupation of Hacienda Santa Fé.[72] Based on this interpretation, Claimant argues that this letter proves that Nicaragua ordered the invasion of Hacienda Santa Fé. This interpretation is baseless.

73. As an initial matter, nothing in the letter states that Nicaragua led the invasion. To the contrary, the letter confirms that the invasion was led by the same members of *Cooperativa El Pavón*, an independent cooperative that did not operate under the orders of any government, who previously lived at the Hacienda, as depicted in the below excerpt. That account is consistent with Nicaragua's position. Perhaps for that reason, Claimant omits this portion of the letter in its Reply.

[69] Letter from Cooperative El Pavón to Nicaragua's Attorney General, September 5, 2018 (**R-0065**)

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

[71] Reply, ¶ 321.b).

[72] Reply, ¶ 321.c).

> Previously in 1990 the El Pavón Cooperative was taken over by approximately 50 citizens, belonging to the Nicaraguan resistance and former members of the E.P.S, under the protection of the agrarian reform in the Government of President Violeta Barrios de Chamorro, where **they formed a directive composed** of the following citizens.
>
> Adrian Wendell Mairena (president)
> José Dolores Zelaya (vice president)
> Jorge Francisco Rostran (secretary)
> Juan José Pineda (treasurer)
> Jorge Alberto Sequeira (surveillance)
> Gerardo Marcos Tapia (legal advisor)
>
> Currently, **on June 18, 2018, at about 09:30 am**, the same leadership in addition to some **400 men** belonging to former members of the resistance and former members of the army, took this property again carrying **shotgun-type firearms, 22 M caliber rifles, pistols and knives**. Stating that they will fight until the right of possession that was taken from them without any judicial order is restored to them again.

74. The part of the letter that concerns Congressman Edwin Castro does not turn this private property dispute into a government-led expropriation, as Riverside suggests. In that part, Commissioner Castro merely reports that during a "conversation" he had with some of the invaders he heard them state that Congressman Edwin Castro had ordered them to stay, as depicted in the below excerpt.[73]

> At the moment none of the parties have presented judgments, resolutions or judicial offices that accredit them as owners. 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.

75. That description does not prove that Nicaragua ordered the invasoin. All it depicts is that there was an unproven claim that a congressman told the invaders to ***stay*** at the Hacienda. There is no indication in that excerpt that this congressman told them to invade it in the first place.

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

And even if the claim about Congressman Edwin Castro in the letter were true, it does not change the fact that the invasion arose from a longstanding property dispute between private parties.[74]

76. In any event, as Commissioner Castro confirms in his second witness statement, there is no evidence that substantiates the unproven claim that Congressman Edwin Castro talked with the invaders, much less that he told them to stay.[75]

77. In his second witness statement, José Valentín López Blandon, a witness offered by Nicaragua in this arbitration, provides some context that helps explain why the invaders would mention Congressman Edwin Castro in their conversation with Commissioner Castro. Mr. López is the former President of *Cooperativa El Pavón* who lived in Hacienda Santa Fé with hundreds of farmers between 1990 through 2004. He explains when the cooperative tried (unsuccessfully) to acquire title over Hacienda Santa Fé he worked with non-governmental organizations, *e.g.* the Foundation of Ex-Combatants of War (*Fundación Ex Combatientes de Guerra*) ("**FUNDEX**"), that were working with various government agencies to resettle the demobilized members of the *Resistencia Nicaragüense*.[76] Congressman Edwin Castro was working with FUNDEX at that time, thus explaining why some of the *Cooperativa El Pavón* members who invaded Hacienda Santa Fé in 2017-18 would refer to this congressman as being sympathetic to their cause.[77]

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

[75] Castro II, ¶ 27 (**RWS-011**) ([…] the report of July 31, 2018 sent by me to Commissioner General Francisco Díaz Madrid is neither proof that the Government of Nicaragua sent the invaders to take over the HSF. I simply reported what the occupiers indicated at the time they left and documented it, and this does not mean that these declarations link the government or Congressman Edwin Castro and do not validate the veracity of that statement.").

[76] Lopez II, ¶ 39 (**RWS-13**) ([…] we went to Congressman Leonidas Centeno to liaise with the National Assembly. Finally, we were able to have meetings with congressmen such as Mr. Edwin Castro, who had a lot of political influence in the FSLN at the time. Despite the meetings we had with these deputies, our efforts were not satisfactory, and we were evicted […]").

[77] Lopez II, ¶ 39 (**RWS-13**) ([…] we went to Congressman Leonidas Centeno to liaise with the National Assembly. Finally, we were able to have meetings with congressmen such as Mr. Edwin Castro, who had a lot of political influence in the FSLN at the time. Despite the meetings we had with these deputies, our efforts were not satisfactory, and we were evicted […]").

78. Next, Riverside contends that e-mails from Luis Gutiérrez to Carlos Rondón from June 2018 to August 2018 confirm that the invasion was government-led. As an initial matter, Nicaragua has doubts about the authenticity of these emails. In its Memorial, Riverside alleged that the "paramilitaries" had looted Inagrosa's computers, records, and books of Hacienda Santa Fé.[78] During the document disclosure phase, when Nicaragua requested all the communications contemporaneous to the invasions, Riverside refused to produce documents claiming that these documents were no longer available due to the destruction of corporate offices on account of the invasion and looting of hacienda Santa Fé.[79]

79. Now, in its Reply, Riverside alleges that it reached out to third parties for emails and this request resulted in additional emails not previously produced or included as exhibits in the arbitration.[80] That explanation, however, does not explain why correspondences between Messrs. Gutiérrez and Rondón (that were supposedly lost) have now reappeared, given that Mr. Gutiérrez has been a witness in this case from the start and worked for Inagrosa for years.

80. Further, Mr. Gutiérrez never mentioned in his First Witness Statement that he had sent emails to Mr. Rondón informing him about what happened during the invasions. Yet, in his second witness statement Mr. Gutiérrez attaches at least eighteen emails allegedly sent between June 2018 and August 2018 that concern the invasion.

[78] Memorial, ¶ 301.

[79] Nicaragua's Document Requests, Objections to Document Request No. 4, Procedural Order No. 6, Annex B, p. 18 ("Responsive documents that might have been in 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 directly on account of the invasion and looting of Hacienda Santa Fé after the invasions in the summer of 2018. As a result, the Investor refuses production under Article 9(2)(d) of the IBA Rules to the extent that the documents were lost or destroyed.").

[80] Reply, ¶ 1867.

81. Even if these emails are legitimate, they do not prove that Nicaragua was behind the invasions. Just as with Mr. Gutiérrez's testimony in this arbitration, his emails offer nothing but hearsay accounts, from unidentified sources, about what Mr. Gutiérrez was allegedly hearing about who was behind the invasion.[81] They offer nothing to change the well-documented reality that the invasion was the latest iteration of a land dispute between private parties that originated in 1990.

82. It should be noted that Mr. Gutiérrez's e-mails, if real, did not even convince Mr. Rondón that the government was behind the invasion. Indeed, contrary to Claimant's suggestion, Mr. Rondón's testimony in this arbitration is that ***he solicited the police's help*** in stopping the invasion.[82] In fact, on August 10, 2018 he authored a letter to then-Captain William Herrera—the ***same policeman*** identified in Mr. Gutiérrez's e-mails as supposedly being sympathetic to the invasion—to demand his assistance, which would have been completely illogical if he believed that Mr. Herrera or any other policeman was behind the invasion.[83]

83. In any event, this Tribunal can ignore Claimant's theory about a government-led invasion because it is undisputed that the government ***evicted*** the invaders on August 11, 2018.[84] When the invaders returned (due to Inagrosa's failure to secure its property), the government ***evicted*** the invaders yet again in 2021.[85] These undisputed facts are fatal to Claimant's theory. If Nicaragua went to great efforts to instruct invaders to invade the Hacienda (as Claimant alleges),

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[81] Emails exchanged between Luis Gutiérrez and Carlos Rondón between June 17, 2018 and (*See* **C-0296** – **C-0303**, **C-0340** – **C0350**).

[82] Rondón II, ¶ 59 (**CWS-09**) ("I also called Police Captain Herrera on June 16, 2018.").

[83] Letter from Carlos Rondón to Police Captain William Herrera dated August 10, 2018 (**C-0012**).

[84] Castro II, ¶ 20, b) (**RWS-11**); Gutiérrez-Rizo, II ¶ 41(**RWS-10**); Gutiérrez II ¶ 120 (**CWS-10**) ("On August 11, 2018, Jaime Vivas informed me that the invaders had evacuated Hacienda Santa Fé on the directive of Toño Loco (Luis Antonio Rizo). This directive purportedly originated from Mayor Leónidas Centeno and Police Commissioner Marvin Castro.")

[85] Castro II, ¶ 20, e) (**RWS-11**); Gutiérrez-Rizo, II ¶ 43 (**RWS-10**).

then it would have been illogical for that government to expend significant efforts and resources to evict those invaders. Much like the well-known adage, Riverside must not want the truth to get in the way of a good story.

### 3. Prof. Wolfe's Reports and Riverside's Claims of Human Right Violations Are Irrelevant to this Arbitration

84. Because Riverside has no reliable and direct evidence that the invasion was led by Nicaragua (because it never happened), Riverside relies heavily on a U.S. academic, Prof. Justin Wolfe, to try to smooth over its evidentiary chasms.

85. But in the Counter-Memorial, Nicaragua exposed Prof. Wolfe's first expert report as being contradictory to Riverside's theory of government involvement. Indeed, Prof. Wolfe's description of government-led "paramilitaries" was irreconcilable with how Riverside described the invaders.[86] Prof. Wolfe testified these "paramilitaries" wore masks, yet Riverside does not allege the invaders had masks. Prof. Wolfe testified these "paramilitaries" are comprised mainly of "youths," yet Riverside alleges that the invaders were mostly middle-aged to senior men. Prof. Wolfe testified that "paramilitaries" are instructed by the National Police, yet Riverside does not allege the invaders were sent by the National Police. Prof. Wolfe testified these "paramilitaries" would have confiscated valuables to send to the government for its benefit, yet Riverside alleges the invaders destroyed the valuables and simply wanted to farm and live off the land.

86. In other words, Riverside's references to Prof. Wolfe's testimony is like trying to fit a square peg in a round hole. It does not work. In fact, in its Reply, Riverside wholly abandons its original theory that the invaders were members of a paramilitary unit and instead adopts the

[86] Counter-Memorial, ¶¶ 57-69.

Nicaragua's account that the invaders are members of a farming cooperative led by demobilized members of the *Resistencia Nicaragüense*.

87. In its Reply, however, Riverside attaches a second expert report from Prof. Wolfe to suggest that former members of the *Resistencia Nicaragüense* are now sympathetic to political causes led by the ruling Sandinista government. Based on this suggestion, Riverside argues that it must be thus assumed that the Hacienda Santa Fé invaders—who were indisputably mostly led by demobilized members of the *Resistencia Nicaragüense*—invaded that property at the behest of the sitting government.[87]

88. That assertion is nonsense. As asserted below, none of the conclusions in Wolfe's Second Report is tied to the facts of this case. That Report offers no assistance to the Tribunal's determination of the claims and defenses in this arbitration.

89. First, and foremost, Prof. Wolfe's opinion that the *Resistencia Nicaragüense* is now allied with the Sandinista government[88] is irrelevant to this dispute. As Nicaragua already proved in its Counter-Memorial, the invaders are ***former*** members of the *Resistencia* who had demobilized and who were no longer active in political movements.[89] Indeed, the record verifies that these individuals are self-described farmers whose sole interest appears to be settling down in a property

[87] Reply, ¶¶ 10, a) ("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. 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.") and 21.

[88] Wolfe II, ¶¶ 52-53 (**CES-05**).

[89] Counter-Memorial, ¶ 24; López I, ¶ 27 (**RWS-04**) ("I understand that Claimant argues that the people who invaded Hacienda Santa Fé in June 2017 and 2018 are "paramilitaries," who were allegedly acting under instructions from the government and in order to intimidate the business sector in Nicaragua. However, 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 Nicaraguan Resistance. 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.")

where they can re-establish the farming community they previously enjoyed at the Hacienda.[90] There is simply no evidence that they are involved in any collective way in political causes. If anything, the Nicaraguan police's records (provided with the Counter-Memorial) show that these individuals appear to have varying political ideologies.[91]

90. Prof. Wolfe's second report also contains opinions about supposed human rights violations that, again, are completely irrelevant to this case.[92] Prof. Wolfe does not explain, and cannot explain, the relevancy of these allegations to the invasions of Hacienda Santa Fé. Rather, it appears that Prof. Wolfe includes those opinions merely because Claimant instructed him to do so, in a desperate attempt to try to demean Nicaragua. In any case, Nicaragua rejects any and all human rights allegations presented by both Riverside and Prof. Wolfe and submits that this is not the forum to discuss any unproven and salacious allegations of human rights violations.

91. Finally, Prof. Wolfe's second report also includes Prof. Wolfe's opinion that the Hacienda Santa Fé invaders were affiliated with Nicaragua, based on the same hearsay testimony that Nicaragua refuted earlier in this section.[93] There is no indication whatsoever that Prof. Wolfe independently verified the unproven allegations in that testimony (or even tried to verify them). Despite identifying himself as an independent expert, he appears to just take whatever Claimant alleges at face value, without considering the well-documented record that confirms the invaders

[90] Counter-Memorial, ¶ 24; López I, ¶ 27 (**RWS-04**) ("I understand that Claimant argues that the people who invaded Hacienda Santa Fé in June 2017 and 2018 are "paramilitaries," who were allegedly acting under instructions from the government and in order to intimidate the business sector in Nicaragua. However, 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 Nicaraguan Resistance. 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.")

[91] Counter-Memorial, ¶ 67.

[92] Wolfe II, ¶¶ 9-18 (**CES-05**).

[93] Wolfe II, ¶¶ 113-135 (**CES-05**).

were private farmers who used to live in Hacienda Santa Fé and invaded the property in 2017-18 in an ill-guided attempt to reestablish their farming cooperative on that property.

92. Based on the foregoing, Riverside has not met its heavy burden of demonstrating that Nicaragua is in any way responsible for the invasion of Hacienda Santa Fé.

### B. What the Evidence Really Proves About the Hacienda Santa Fé Invasion

93. In its Counter-Memorial, Nicaragua presented extensive evidence that proves that it did not send or aid the Hacienda Santa Fé invaders.[94] Nicaragua has also presented extensive evidence that, contrary to what Riverside claims, Nicaragua took all reasonable steps during an episode of civil strife and political instability to protect the lives of the employees of Inagrosa and to recover the property from all illegal occupants.[95]

#### 1. The Invasions at Issue Here Are Part of a Longstanding Property Dispute that Did Not Directly Involve Nicaragua

94. As detailed above, the evidence that Nicaragua presented in its Counter-Memorial demonstrates that the invaders were not government agents but, rather, private farmers who lived in Hacienda Santa Fé from 1990 to 2004, were evicted by the government, and who were since waiting for the opportunity to take back the property they incorrectly believed to be theirs.

95. With this Rejoinder, Nicaragua includes as exhibits even more contemporaneous evidence that proves its version of this story and further refutes Claimant's conspiracy theories of government-led invasions. The complete record detailing this important backstory is summarized in full below and all supporting documents are now part of this arbitral record.

96. **1990:** The updated record proves that Hacienda Santa Fé was identified as a potential property where members of the *Resistencia Nicaragüense* could settle because it was in

[94] Counter-Memorial, ¶ 67.

[95] Counter-Memorial, ¶ 67.

a state of abandonment.[96] The dispositive document on this point, depicted below, makes clear, however, that for Hacienda Santa Fé to be settled the private landowners of that property (at that time, the Rondón family) had to agree to the resettlement.

> The REGIONAL AGRARIAN COMMISSION FOR THE SIXTH REGION hereby authorizes the Governing Board of the Nicaraguan Resistance of San Rafael del Norte, presided over by Wendel Blandón (WAMA), to claim the following abandoned land: El Cacao (240 *manzanas*) in the Jinotega Municipality, La Sotana and the remaining abandoned land in the Santa Fe property (1,800 *manzanas*) – these last two located in the San Rafael del Norte Municipality– for such land to be occupied by the Resistance in accordance with the agreements signed with the National Government. These lands shall be compensated to or negotiated with their owners, except for the first one, which belongs to the Area Owned by the People (APP). The group led by Wendel Blandón also has a claim

97. **1990-2000**. Because Hacienda Santa Fé was in a state of abandonment, however, some ex-members of the *Resistencia Nicaragüense* settled the upper part of the Hacienda, known as *El Pavón*, without first receiving permission from the property's landowners and without title to that land.[97] As confirmed in Nicaragua's Counter-Memorial, the Hacienda continued to be in a state of abandonment throughout the 1990s, which allowed these settlers to establish a sprawling community.[98] This community built dwellings, schools, and even had its own baseball team.[99]

98. The community of squatters at Hacienda Santa Fé became so large that it became formally recognized as *Cooperativa El Pavón* in 1997 by the Nicaraguan Institute of Agrarian Reform, as shown in the excerpt below.[100]

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[96] Agreement of the Regional Agrarian Commission of the Sixth Region of November 22, 1990 (**R-0052**).

[97] Lopez I, ¶ 9 (**RWS-04**) ("The El Pavón area was delivered on November 22, 1990, and approximately 50 families of demobilized members of the Nicaraguan Resistance benefitted from the grant. At the time, the property consisted virtually in unoccupied lands full of weeds and brushwood.")

[98] Counter-Memorial, ¶¶ 5-12.

[99] Counter-Memorial, ¶ 11.

[100] Certificate issued by Nardo Sequeira Baez of the Nicaraguan Institute of Agrarian Reform, 1997 (**R-0053**).

The Nicaraguan Institute of Agrarian Reform (INRA) **HEREBY CERTIFIES** that it recognizes **COOPERATIVE EL PAVON's** possession of a property referred to as **SANTA FE**, located in the Rio Grande District, Municipality of San Rafael, Jinotega Department, with a registered area of **ONE THOUSAND, EIGHT HUNDRED AND SIXTY-NINE BLOCKS AND A FRACTION (1,869 *manzanas* and a fraction)**.

99. **2000**. In or around 2000, Mr. Rondón and his family for the first time requested government assistance to evict the squatters. By that time, the Rondón family had created Inagrosa to pursue a coffee business. Thus, on August 11, 2000, Mr. Rondón and Mrs. Melva Jo Winger de Rondón, on behalf of Inagrosa, sent a letter to the government agency that oversees land titles (*Oficina de Titulación Rural*) requesting its immediate assistance in evicting the squatters from the property, which, according to the letter, had been living on that property ***since 1990***, as seen in the below excerpt.[101]

INAGROSA
INVERSIONES AGROPECUARIAS, S.A.
LOMAS DE GUADALUPE No 15
MANAGUA, NICARAGUA
277.3041

Managua 11 de Agosto del 2000

Sr.
Marco Centeno Caffaena
Director General de la OTR
Oficina de Titulacion Rural
Managua
Su Despacho

Estimado Sr. Centeno:

Le estamos escribiendo para solicitar su atención y la resolución inmediata a un serio problema causado por el gobierno de Nicaragua.

En 1990, como ciudadanos estadounidenses fuimos invitados a venir a Nicaragua para invertir y así poder colaborar en la reconstrucción del país destruido por los sandinistas. Después de una cuidadosa investigación, en mayo de 1990 compramos la finca Santa Fe, ubicada en el Departamento de Jinotega, al Sr. Cayetano Castellón Rivera, quien como parte de la Sociedad Castellón Rivera, fueron dueños de Santa Fe, desde 1965.

[101] Letter from Carlos José Rondón Molina y Melva Jo Winger de Rondón to Marco Centeno Caffaena, General Director of OTR dated August 11, 2000 (**R-0177 Tab 8**); Letter from Carlos José Rondón Molina and Melva Jo Winger de Rondón to Marco Centeno Caffaena, Director General of the OTR, dated September 8, 2000 (**R-0177 Tab 9**); Letter from Mr. Carlos Rondón Molina, Inagrosa, to Mr. Francisco Chavarrría Jr., OTR Delegate of Jinotega, dated September 18, 2001 (**R-0177 Tab 10**).

100. On September 6, 2000, Mr. Rondón met with the agency to discuss this matter. In that discussion, the parties discussed the reality that the hundreds of people living in the property could not merely be evicted, as Inagrosa had initially requested. Rather, Inagrosa had to first seek an eviction order from the local court, which, once obtained, would allow the local authorities to evict the squatters, as seen in the below excerpt from the letter Mr. Rondón wrote memorializing his meeting with the title agency. [102] Because of the high number of squatters at Hacienda Santa Fé, Inagrosa agreed to give the government (including the office of the Presidency) time to find another property where it could resettle these squatters.

> **De otra forma, tal a como se lo expresamos en la reunión, nosotros deberemos cumplir con el espíritu y la letra de las leyes de Nicaragua que mandan al desalojo de los invasores ilegales. Los veredictos en los diferentes tribunales judiciales han dejado a los invasores sin recurso legal.**

101. **2001-2002**: The government embarked on a comprehensive process, coordinated by the title agency, and involving the office of the Presidency, several Ministries (including the *Ministerio de Hacienda y Credito Publico*, *Ministerio de Relaciones Exteriores*, and *Ministerio de Educacion*), as well as the U.S. Embassy in Managua.[103] This task included conducting on-site

[102] Letter from Carlos José Rondón Molina and Melva Jo Winger de Rondón to Marco Centeno Caffaena, Director General of the OTR, dated September 8, 2000 (**R-0177 Tab 9**).

[103] *See e.g.,* Letter from Mr. Marco Centeno Caffaena, Director General of the OTR to Mr. José David Castillo, Secretary of the Presidency, dated January 5, 2001 (**R-0177 Tab 12**); Letter from Anthony J. Interlandi, Economic Counselor of the U.S. Embassy in Nicaragua to Mr. Marco Centeno Caffaena, Director General of the OTR, dated February 2, 2001 (**R-0177 Tab 13**); Memorandum from Mr. Francisco Rivera, Delegate of the Presidency for Agrarian Affairs of the Nicaraguan Resistance, to Mr. Marco Centeno Caffaena, Director General of the OTR, dated February 5, 2001 (**R-0177 Tab 14**); Letter from Mrs. Carmen Zelaya, Director General for North America of the Ministry of Foreign Affairs, to Dr. Marco Centeno Cafarena, Director of the Rural Titling Office, dated February 19, 2001 **(R-0177 Tab 16);** Letter from Dr. Marco Centeno Cafarena, Director of the Rural Titling Office, to Engineer David Castillo, Secretary of the Presidency, February 21, 2001 **(R-0177 Tab 17);** Letter from Dr. Marco Centeno Cafarena, Director of the Office of Rural Titling, to Carmen Zelaya, Director General for North America of the Ministry of Foreign Affairs, dated February 21, 2001 **(R-0177, Tab 18).** Gutiérrez-Rizo, II ¶ 14(**RWS-10**).

inspections to understand the identities of the squatters so Nicaragua could re-settle them as soon as practicable.[104]

102. In the meantime, the Rondón family, on behalf of Inagrosa, formally sought and obtained a court order confirming that the squatters were unlawfully occupying the Hacienda and allowing the local authorities to evict the squatters.[105]

103. Meanwhile, members of *Cooperativa El Pavón*, including its then-president, Mr. López, sent letters to the government pleading their case as to why they should be allowed to live in Hacienda Santa Fé.[106]

104. Also around this time, FUNDEX, the Regional Agrarian Commission, and human rights organizations became involved and began coordinating with the government to ensure that the squatters would be resettled in another property (rather than just evicted onto the street).[107]

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[104] Letter from Dr. Marco Centeno Cafarena, Director of the Rural Titling Office to Engineer David Castillo, Secretary of the Presidency, dated February 21, 2001**(R-0170 Tab 17)**.

[105] Letter from Carlos José Rondón Molina and Melva Jo Winger de Rondón to Marco Centeno Caffaena, Director General of the OTR, dated August 11, 2000 (**R-0170 Tab 8**).

[106] Letter from the El Pavón Cooperative to Dr. Arturo Eli Tablada Tijerino, Intendant of Property, Ministry of Finance and Public Credit, dated February 17, 2004 **(R-0177 Tab 43);** Letter from the El Pavón Cooperative to Dr. Arturo Eli Tablada Tijerino, Intendant of Property, Ministry of Finance and Public Credit, dated February 23, 2004 **(R-0177 Tab 44);** Letter from Valentín López to Dr. Arturo Eli Tablada Tijerino, Intendant of Property, Ministry of Finance and Public Credit, dated February 23, 2004 **(R-0177 Tab 45);** Letter from FUNDEX to Dr. Arturo Eli Tablada Tijerino, Intendant of Property, Ministry of Finance and Public Credit, dated February 23, 2004 (**R-0170 Tab 46**); Letter from the El Pavón Cooperative to the Honorable Authorities of the Inter-Institutional Commission dated March 16, 2004 **(R-0177 Tab 48);** Letter from FUNDEX to the Honorable Authorities of the Inter-Institutional Commission dated March 19, 2004 **(R-0177 Tab 49);** Letter from the El Pavón Cooperative and FUNDEX to Dr. Alfonso Sandino Camacho, Vice-Minister of the Interior, dated March 23, 2004 **(R-0177 Tab 50);** Letter from the El Pavón Cooperative and FUNDEX to Engineer Luis Alberto Tellería Ramírez, Director General of the Rural Titling Office OTR dated May 10, 2004 **(R-0177 Tab 51);** Letter from Mr. López Blandón, Cooperativa El Pavón, to Engineer Andrés Altamirano Tinoco, Delegate of the Department of the Municipality of Jinotega, dated December 12, 2005 (**R-0035**).

[107] Letter from FUNDEX to Dr. Arturo Eli Tablada Tijerino, Intendant of Property, Ministry of Finance and Public Credit, dated February 23, 2004 (**R-0177 Tab 46**); Letter from FUNDEX to the Honorable Authorities of the Inter-Institutional Commission dated March 19, 2004 **(R-0177 Tab 49);** Letter from the El Pavón Cooperative and FUNDEX to Dr. Alfonso Sandino Camacho, Vice-Minister of the Interior, dated May 10, 2004 **(R-0170 Tab 50)**.Letter from the El Pavón Cooperative and FUNDEX to Engineer Luis Alberto Tellería Ramírez, Director General of the Rural Titling Office OTR dated May 10, 2004 **(R-0177 Tab 51).**

105. As an aside, the president of the Regional Agrarian Commission at this time was Leónidas Centeno, the current mayor of Jinotega.[108] This fact is relevant because it explains why some of the individuals who participated in the 2017-18 Hacienda Santa Fé invasions may have mentioned that they had been "sent" by Mr. Centeno, as Claimant alleges in this arbitration. Mr. Centeno was probably viewed favorably by the Hacienda Santa Fé squatters in the early 2000s as someone who was ensuring that they were given a place to resettle. Importantly, in his letters to the relevant government agencies in the early 2000s about this matter, Mr. Centeno made clear that the Regional Agrarian Commission would not approve of the squatters remaining inside the Hacienda if the private landowners wanted them out.[109] This documented fact further debunks Claimant's theory that Mr. Centeno was behind the Hacienda Santa Fé invasions.

106. **2003-2004:** In 2003, the National Police evicted almost all the squatters located in *El Pavón*.[110] Given that there were hundreds of squatters, some of them armed, Nicaragua had to rely on its National Police force based in Managua (rather than use its much more modest police force based in San Rafael del Norte, where the Hacienda is located). This eviction attempt was reported in the local newspaper, as seen in the below excerpt.[111]

[108] Minutes of the Commission for Agrarian Reform and Agricultural Affairs, November 26, 2003 (**R-0062**).

[109] Minutes of the Commission for Agrarian Reform and Agricultural Affairs, November 26, 2003 (**R-0062**).

[110] Lopez I, ¶¶ 14-19 (**CWS-04**).

[111] Lopez I, ¶ 15 (**RWS-04**); Scorched land in El Pavón, Nuevo Diario, November 22, 2003 (**R-0036**); Letter from José Valentín López Blandón to Eng. Andres Altamirano Tinoco of December 12, 2005, p. 2 (**R-0035**).

DEPARTAMENTALES

EL NUEVO DIARIO 118

campesinos, niños y ancianos, lanzados a la muerte

Tierra arrasada en El Pavón

107. In 2004, all occupiers were finally evicted, but not all of them were relocated. Based on Mr. López's testimony, only about 20% of the squatters were relocated to other State-owned properties, with the balance moving to the vicinities or to other nearby provinces.[112]

108. As is further confirmed by Mr. López, many of the evicted squatters were angry that their farming cooperative had been disbanded and upset that Inagrosa and the Rondón family refused to let them stay on the property after that community had lived there ***for nearly fourteen (14) years***.[113]

109. **2017:** As Mr. López also testified in his first witness statement, certain of these evicted and embittered squatters, led by Adrián Wendel Mairena Arauz, also known as "Wama," took their opportunity to re-take the *El Pavón* portion of Hacienda Santa Fé in June 2017 due to

[112] Lopez II, ¶ 30 (**RWS-13**) ("Only 20% of the families living in El Pavón were relocated. The rest of the people went to live on relatives' properties, which are located near the Santa Fé farm or in other departments, because there was no response to the request for relocation by the government at the time. Several of the families who were not located were left with the resentment that their request for relocation was never responded to").

[113] Lopez II, ¶ 30 (**RWS-13**) ("Only 20% of the families living in El Pavón were relocated. The rest of the people went to live on relatives' properties, which are located near the Santa Fé farm or in other departments, because there was no response to the request for relocation by the government at the time. Several of the families who were not located were left with the resentment that their request for relocation was never responded to").

the fact that this part of the property had been abandoned by Inagrosa.[114] That month, Wama and 170 other individuals belonging to *Cooperativa El Pavón* invaded the *El Pavón* sector and settled in that property for nearly a year.[115]

110. In its Reply, Claimant alleges that the 2017 invasion never happened because the Inagrosa security guards never reported it to management.[116] But, as Mr. López explains in his second witness statement, those guards would not have seen these invaders because the *El Pavón* portion of the property was abandoned and the guards were stationed at the Hacienda house, on the lower part of the Hacienda.[117]

111. Claimant also contends that the Hacienda was not in a state of abandonment as of June 2017 and that, instead, the Hacienda was teeming with workers who were working to clean the soil for the alleged expansion of the Hass avocado plantation.[118] Claimant, however, does not provide any evidence that supports this assertion. As explained in the Counter-Memorial, all the reliable evidence corroborates Mr. López's account that the property had all but been abandoned as of June 2017, such as the documented facts that: (i) Inagrosa stopped paying labor benefits for its workers in 2013, suggesting it had no labor force in 2017; (ii) Inagrosa had low cash balances during this supposed expansion (between USD $400 and $1,000) and had not received any investment from Riverside since 2014, demonstrating that it was not engaged in any significant

[114] Lopez I, ¶¶ 21-22 (**RWS-04**).

[115] Lopez I, ¶¶ 21-22 (**RWS-04**).

[116] Rondón II, ¶ 50 (**CWS-09**).

[117] Lopez II, ¶ 33 (**RWS-13**) ("The "El Pavón" sector, that is, the northern area, was in apparent abandonment.")

[118] Rondón II, ¶ 49 (**CWS-09**).

activities during this time; and (iii) Inagrosa had outstanding debts during this time that it was not paying, such as past-due property tax liabilities and loan payments.[119]

112. **2018:** It is undisputed that in June 2018 Nicaragua was dealing with major civil strife around the country, including in Jinotega, arising from student-led groups who were trying to effect a change in government. This strife resulted in the imposition of *tranques* and resulted in violence.[120] As a result of these chaotic events, different episode of invasions took place around the country. Nicaragua produced during document production documents that demonstrate that invasions were taking place in other parts of this country, which were presented as exhibits by Riverside.[121] This further demonstrates that the invasion of Hacienda Santa Fé was not a targeted, isolated invasion, but rather, an issue affecting Nicaragua nationwide that is based on the history of land distribution that occurred in the 90s.

113. It is further undisputed that, during this chaotic time, hundreds of invaders saw an opportunity to invade properties, *e.g.*, Hacienda Santa Fé, including the lower part of the property that housed the security guards. This was not particular to San Rafael del Norte, which Riverside acknowledges.[122]

114. In sum, the longstanding property dispute between Inagrosa and members of the *Cooperativa El Pavón* is well-documented and undeniable. It is telling that Riverside and Mr. Rondón continue to deny the circumstances behind the historical invasions of Hacienda Santa Fé, even more when he and his family have personal knowledge of the Hacienda Santa Fé invasions

[119] Gutiérrez-Rizo, II ¶¶ 52-54 (**RWS-10**). *See also* Payment Agreement between Inagrosa and the Municipal Government of San Rafael del Norte dated December 18, 2014 (**R-0056**); Report of the Municipal Cadastre Section of the San Rafael del Norte Mayor's Office dated December 12, 2022 (**R-0055**); Report of the Municipal Cadastre Section of the San Rafael del Norte Mayor's Office dated February 21, 2024 (**R-0230**)

[120] Castro II, ¶ 13 (**RWS-11**); Herrera II, ¶ 8 (**RWS-12**).

[121] Reply, ¶ 1330.

[122] Reply, ¶ 1330.

in the 1990s.[123] The only conclusion is that they deny this backdrop because it belies Riverside's theory that the recent invasions of Hacienda Santa Fé were ordered by Nicaragua.

2. Nicaragua Diligently Took Steps to Evict All Illegal Occupiers

115. In addition to proving the Hacienda Santa Fé invasion was not government-led, the evidence also demonstrates that Riverside's contention that Nicaragua did not act diligently, because it did not immediately send its local police forces to evict the hundreds of invaders when notified of the invasion in or around June 2018,[124] is bogus.

116. If anything can be learned from the 2003-04 evictions it is that evicting hundreds of squatters from a vast, remote property like Hacienda Santa Fé takes time. The property owners have to first seek an eviction order from a court. The government then has to rely on its national police forces (as opposed to just its local police forces) and work with numerous ministries, and even the office of the Presidency, to ensure that the squatters are resettled in government land.

117. As further detailed below, despite these challenges, as well as new challenges that were caused by the 2018 civil strife and violent unrest, Nicaragua succeeded in evicting all of the squatters from Hacienda Santa Fé in ***less than two months***. And when Inagrosa failed to secure its property, causing the Hacienda to be re-invaded by hundreds of squatters, Nicaragua was able to evict ***and*** relocate each of the squatters in less than three years, which is faster than the time it took Nicaragua to evict the same squatters in the same property in 2004.

a. *Ongoing Civil Strife and Violent Unrest Across Nicaragua Impeded the National Police to Take Immediate Action to Evict Illegal Occupants in Hacienda Santa Fé*

[123] Letter from Carlos José Rondón Molina y Melva Jo Winger de Rondón to Marco Centeno Caffaena, General Director of OTR dated August 11, 2000 (**R-0177 Tab 8**); Letter from Carlos José Rondón Molina and Melva Jo Winger de Rondón to Marco Centeno Caffaena, Director General of the OTR, dated September 8, 2000 (**R-0177 Tab 9**); Letter from Mr. Carlos Rondón Molina, Inagrosa, to Mr. Francisco Chavarrría Jr., OTR Delegate of Jinotega, dated September 18, 2001 (**R-0177 Tab 10**).

[124] Reply, ¶ 1380.

118. Riverside does not dispute that in April 2018 a violent civil strife and widespread unrest erupted across Nicaragua in response to changes announced by President Ortega to the pension system.[125]

119. In the city of San Rafael del Norte, where Hacienda Santa Fé is located, the civil strife became increasingly more violent in or around May 2018.[126] Armed protesters constructed barricades (*tranques*) blocking all the exits and entrances to the city.[127] Commissioner Castro and Deputy Commissioner Herrera prepared maps with all the places where barricades were located in Jinotega and San Rafael del Norte:

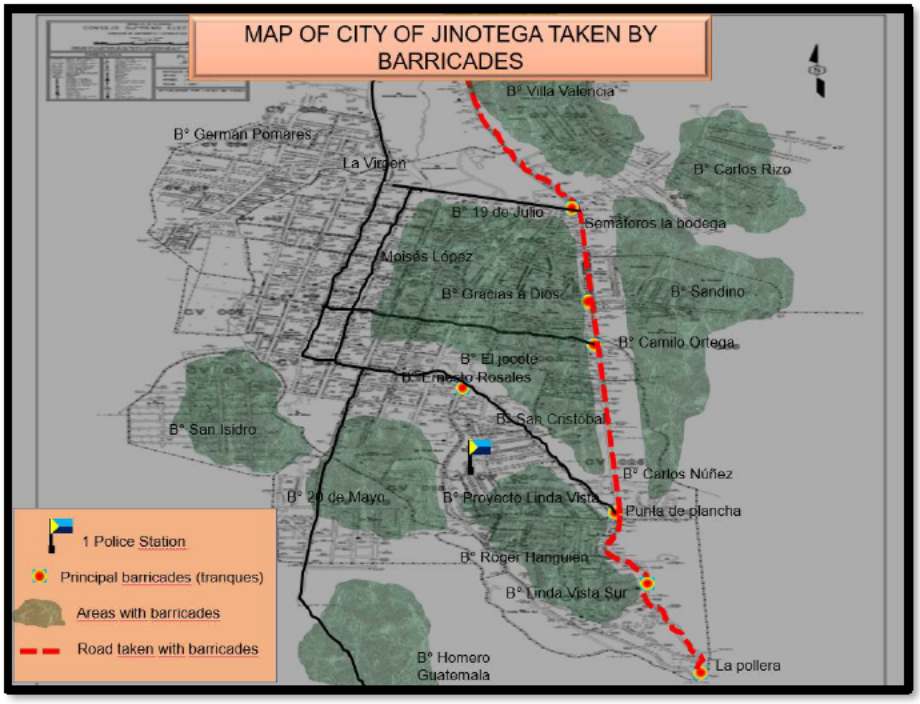
**Map 1**


[125] Herrera I, ¶ 8 (**RWS-03**); National Report issued for the Universal Periodic Report of the United Nations Human Rights Council, January 28, 2019, ¶¶ 3-4 (**R-0019**); Carlos Férnandez Alvarez, Article: This is how the coup in Nicaragua was experienced and defeated, El 19 Digital (**R-0037**).

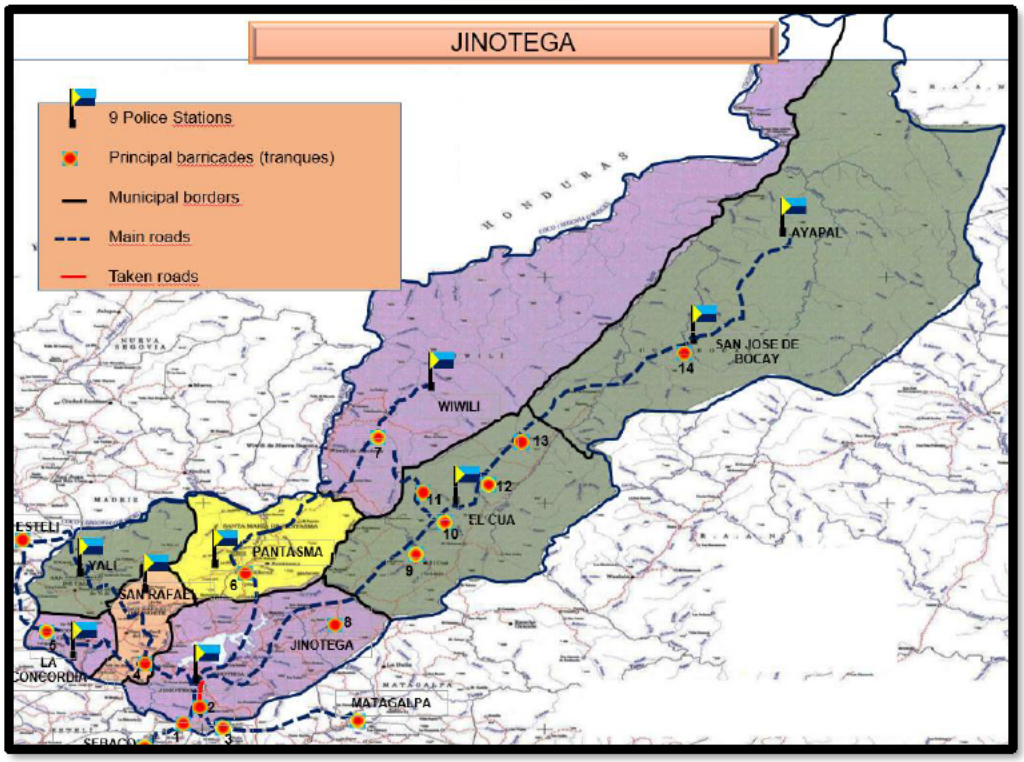
[126] Herrera I, ¶ 9 (**RWS-03**); Herrera II (**RWS-12**).

[127] Herrera I, ¶ 9 (**RWS-03**); Herrera II (**RWS-12**).

**Map 2**


MAP OF CITY OF JINOTEGA TAKEN BY BARRICADES
B° Villa Valencia
B° German Pomares
La Virgen
B° Carlos Rizo
B° 19 de Julio
Semáforos la bodega
Moisés López
B° Gracias a Dios
B° Sandino
B° Camilo Ortega
B° El jocote
B° Ernesto Rosales
B° San Cristóbal
B° San Isidro
B° Carlos Núñez
B° 20 de Mayo
B° Proyecto Linda Vista
Punta de plancha
B° Roger Hanguiera
B° Linda Vista Sur
B° Homero Guatemala
La pollera
1 Police Station
Principal barricades (tranques)
Areas with barricades
Road taken with barricades

**Map 3**


JINOTEGA
9 Police Stations
Principal barricades (tranques)
Municipal borders
Main roads
Taken roads
HONDURAS
AYAPAL
SAN JOSE DE BOCAY
WIWILI
EL CUA
PANTASMA
SAN RAFAEL
JINOTEGA
LA CONCORDIA
MATAGALPA
ESTELI
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120. At the time of these disturbances, the National Police only had eight officers who were assigned to patrol San Rafael del Norte.[128] These officers were assigned to patrol an area with approximately 23,000 individuals, which is the population of San Rafael del Norte.[129] In addition to being understaffed, the San Rafael del Norte police station is located in a rural area and does not have the same technological and sophistication of police equipment that would be found in stations in urban areas, like for example, Managua.[130] They also only had one police car and one motorcycle in poor condition.[131] Deputy Commissioner Herrera attaches to his second statement a video that shows the limited conditions of San Rafael del Norte station.[132]

121. Riverside argues the Police could have requested help from neighboring police stations.[133] But that position completely ignores the gravity and scope of the civil unrest that was affecting the country at the time. Other police stations in neighboring communities, *e.g.*, in the cities of Jinotega and La Concordia, were also overwhelmed and dealing with their own violent events.[134] Even if they had the capacity to deploy additional officers, the roads connecting these communities were blocked, as depicted in the maps above.[135] In addition to being blocked, these roads are not high-speed highways. A video submitted by Deputy Commissioner Herrera shows

[128] Herrera I, ¶ 9 (**RWS-03**) ("It should be mentioned that there were only 8 agents deployed in the San Rafael del Norte Municipality, myself included.").

[129] Herrera II, ¶ 10 (**RWS-12**).

[130] Video of Hacienda Santa Fé and San Rafael del Norte recorded on March 7, 2024 (**R-0231**); Images of Hacienda Santa Fé and San Rafael del Norte taken on March 7, 2024 (**R-0232**).

[131] Herrera II, ¶ 11 (**RWS-12**).

[132] Herrera II, ¶ 11 (**RWS-12**); Video Police Station of San Rafael del Norte today (**R-0195**).

[133] Gutiérrez II, ¶¶ 152-156; Ferrufino I, ¶¶ 93-94.

[134] Castro II, ¶ 16 (**RWS-11**); Herrera II, ¶ 16 (**RWS-12**).

[135] Castro II, ¶ 16 (**RWS-11**); Herrera II, ¶ 16 (**RWS-12**).

that the road that connects San Rafael del Norte municipality and Hacienda Santa Fé is difficult to transit as it is a one-way narrow dirt road.[136]

122. Riverside also argues that the protests did not generally affect rural areas such as the area where Hacienda Santa Fé is located.[137] Riverside's contention is not only discredited by the evidence[138] but is contradicted by its own witnesses. Indeed, Mr. Gutiérrez declares that, on July 16, 2018, after the property was occupied, he encountered *tranques* close to the Hacienda.[139] That account confirms that the civil unrest that plagued Nicaragua also made its way to the town where the Hacienda is located.

123. The evidence also shows that, by late May 2018, during a period of a negotiation between government officials and civic groups seeking to bring the violent civil strife to an end, President Ortega ordered National Police officers to shelter in their barracks so that peace talks could continue without the police being accused of any escalation of violence.[140] This order was given during a televised interview and remained in place until sometime in late July 2018, when the nationwide unrest finally decreased.[141]

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[136] Herrera II, ¶ 14 (**RWS-12**); Video "Entrance road to the Municipality of San Rafael del Norte" (**R-0186**).

[137] Ferrufino I, ¶ 90.

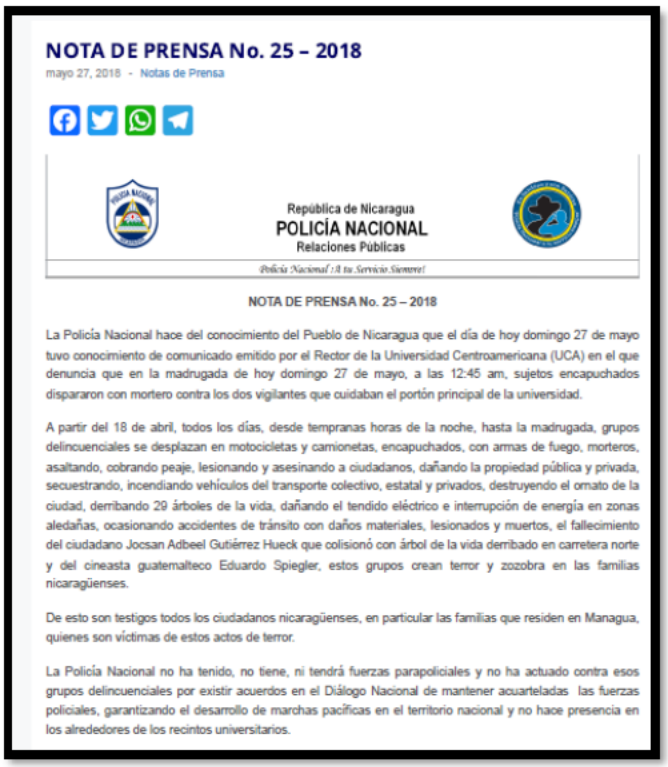
[138] Carlos Fernández Álvarez, This is how we faced the coup d'état in Nicaragua and how it was defeated, in El 19 Digital, December 30, 2018, p. 5 (**R-0037**).

[139] Gutiérrez I, ¶ 82 (**CWS-02**).

[140] Castro II, ¶ 10 (**RWS-11**); Herrera II, ¶ 18 (**RWS-12**) ("Due to the high level of violence, President Daniel Ortega, in May 2018 and as a result of a negotiation between the government and civil society, ordered in dialogue with opponents of the government that all national police should shelter in their barracks ("Shelter Order"). In a police press release dated May 28, 2018, the police, through their website, reported [...]"). *See also* Press Release No. 25 – 2018 of the National Police, May 27, 2018 (**R-0180**); Press Release No. 26 – 2018 of the National Police, May 28, 2018 (**R-0181**). *See also* News, Citizen Security, a concern for all, National Police, May 28, 2018 **(R-0192**) ("the National Police has not acted against criminal groups because there are agreements in the National Dialogue, to keep the police forces barracked, guaranteeing the development of peaceful protests in the national territory and not having a presence in the surroundings of university campuses").

[141] Herrera II, ¶ 19 (**RWS-12**) ("[…] This order was given live by President Daniel Ortega and was personally given to me by Commissioner Marvin Castro, who is the Chief of Police of the Department of Jinotega, who told us that we should guard and protect the Police Units to also prevent the demonstrators from acquiring more weapons, and thus avoid more violence. The order specifically ordered us to take shelter in the police units, to make sure that they were

124. Riverside argues Nicaragua has produced no evidence supporting the existence of the shelter order. But the opposite is true. There is ample evidence that confirms the existence of the shelter order: a) video of Opening of the National Dialogue where President Daniel Ortega communicates the shelter order;[142] b) press releases issued by the National Police that are posted on the website of the National Police;[143] c) witness statements of Commissioner Castro and Sub Commissioner Herrera;[144] and d) news articles describing the existence of the shelter order, such as the article depicted below.[145]



**NOTA DE PRENSA No. 25 – 2018**

mayo 27, 2018 - Notas de Prensa

República de Nicaragua
POLICÍA NACIONAL
Relaciones Públicas

*Policía Nacional ¡A tu Servicio Siempre!*

NOTA DE PRENSA No. 25 – 2018

La Policía Nacional hace del conocimiento del Pueblo de Nicaragua que el día de hoy domingo 27 de mayo tuvo conocimiento de comunicado emitido por el Rector de la Universidad Centroamericana (UCA) en el que denuncia que en la madrugada de hoy domingo 27 de mayo, a las 12:45 am, sujetos encapuchados dispararon con mortero contra los dos vigilantes que cuidaban el portón principal de la universidad.

A partir del 18 de abril, todos los días, desde tempranas horas de la noche, hasta la madrugada, grupos delincuenciales se desplazan en motocicletas y camionetas, encapuchados, con armas de fuego, morteros, asaltando, cobrando peaje, lesionando y asesinando a ciudadanos, dañando la propiedad pública y privada, secuestrando, incendiando vehículos del transporte colectivo, estatal y privados, destruyendo el ornato de la ciudad, derribando 29 árboles de la vida, dañando el tendido eléctrico e interrupción de energía en zonas aledañas, ocasionando accidentes de tránsito con daños materiales, lesionados y muertos, el fallecimiento del ciudadano Jocsan Adbeel Gutiérrez Hueck que colisionó con árbol de la vida derribado en carretera norte y del cineasta guatemalteco Eduardo Spiegler, estos grupos crean terror y zozobra en las familias nicaragüenses.

De esto son testigos todos los ciudadanos nicaragüenses, en particular las familias que residen en Managua, quienes son víctimas de estos actos de terror.

La Policía Nacional no ha tenido, no tiene, ni tendrá fuerzas parapoliciales y no ha actuado contra esos grupos delincuenciales por existir acuerdos en el Diálogo Nacional de mantener acuarteladas las fuerzas policiales, garantizando el desarrollo de marchas pacíficas en el territorio nacional y no hace presencia en los alrededores de los recintos universitarios.

not burned or destroyed, to keep an eye on the prisoners who were in the police units, and in general, not to escalate the violence.").

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

[143] Press Release No. 25 – 2018 of the National Police, May 27, 2018 (**R-0180**); Press Release No. 26 – 2018 of the National Police, May 28, 2018 (**R-0181**).

[144] Castro II, ¶ 10 (**RWS-11**); Herrera II, ¶ 18 (**RWS-12**).

[145] News Citizen Security, a concern for all, National Police, May 28, 2018 (**R-0192**) ("the National Police has not acted against criminal groups because there are agreements based on the National Dialogue to keep the police forces in barracks, to guarantee the development of peaceful protests in the national territory and not to have a presence in the vicinity of university campuses"); Carlos Férnández Álvarez, This is how the coup d'état in Nicaragua was experienced and defeated, El 19 Digital, December 30, 2018, p. 5 (**R-0037**).

125. All this context is crucial to understand the extraordinary circumstances that were present in San Rafael del Norte when Inagrosa first requested assistance from the National Police in or around June 16, 2018.

b. *Nicaragua Assisted Inagrosa and Evicted the Illegal Occupants from Hacienda Santa Fé on August 11, 2018*

126. It is undisputed that, in or around June 16, 2018, Inagrosa requested the National Police to assist in the eviction of the invaders at Hacienda Santa Fé. But the parties disagree as to whether the Police and government officials took diligent actions to protect Hacienda Santa Fé and its employees. As explained in detail below, Nicaragua's position is that even if the Police could not take immediate action (because its resources were allocated at that time to handling the civil strife), the Police took diligent and reasonable actions to protect the physical integrity of the employees of Inagrosa and to protect the property.

127. ***First***, Nicaragua did not have police intelligence of the invasions in Hacienda Santa Fé in 2018. Riverside argues Nicaragua had "police intelligence" about the invasions in Hacienda Santa Fé in June 2018.[146] This is incorrect. Deputy Commissioner Herrera confirms that the Police took notice of this potential incident on June 16, 2018 when Mr. Gutiérrez told the Police about it during his visit to the local Police Station.[147] This was the only source that the Police had as of that time.[148] In that conversation, Deputy Commissioner Herrera informed Mr. Gutiérrez that there was

[146] Reply, ¶ 130.

[147] Herrera II, ¶ 24, a) (**RWS-12**) ("[…] As I clarified above, the police intelligence I referred to was Mr. Gutiérrez's visit to the police station on June 16, 2018 [...] I clarify that prior to that conversation in which Mr. Gutiérrez himself told us what was happening at the Hacienda, no one in the police was aware that the invaders intended to go down to the lower part of the HSF and I hereby declare that we had no "police intelligence" on a possible invasion of the HSF.")

[148] Herrera II, ¶ 24, a) (**RWS-12**).

a shelter order in place, that the police was overwhelmed, and that while the Police could not take immediate action it committed to monitor the situation.[149]

128. On or around the same day, someone identified as Carlos Rondón called Deputy Commissioner Herrera to request help with the invasion.[150] Deputy Commissioner Herrera told Mr. Rondón what he had already told Mr. Gutiérrez, *i.e.*, that there was a shelter order in place, the Police was overwhelmed, and that the Police would monitor the situation .[151]

129. ***Second,*** despite the civil strife and violent unrest, the Police took diligent actions to protect Inagrosa, its employees, and its property. Deputy Commissioner Herrera immediately called Commissioner Castro to report the invasions.[152] Commissioner Castro instructed Deputy Commissioner Herrera to visit the property.[153] The day after the call from Inagrosa, the Police sent an officer to Hacienda Santa Fé to assess the situation.[154] Based on the conversation with the employees at Hacienda Santa Fe that hundreds of individuals, some of whom were armed, were going to take the Hacienda house, the Police told Inagrosa's employees to evacuate the premises to ensure their personal safety.[78] The Police explained to them that it was simply not possible at that time for the Police to evict or arrest the illegal occupants in light of the widespread unrest and violent civil strife across the country.[155]

[149] Herrera II, ¶ 24, a) (**RWS-12**) ("Even though Mr. Gutiérrez denies that we informed him about the Shelter Order, in that conversation, I told him that at that time we could not provide immediate assistance because of the situation of the roadblocks and because of the Shelter Order, but regardless, we were going to monitor the situation.")

[150] Herrera II, ¶ 24, b) (**RWS-12**).

[151] Herrera II, ¶ 24, b) (**RWS-12**).

[152] Herrera II, ¶ 24, c) (**RWS-12**).

[153] Herrera II, ¶ 24, c) (**RWS-12**).

[154] Herrera II, ¶ 24, c) (**RWS-12**).

[155] Herrera II, ¶ 24, c) (**RWS-12**).

130. As an additional safety measure, the Police confiscated the guns from Inagrosa's guards.[156] This measure was not undertaken to assist the invaders, as Riverside claims.[157] Rather, the purpose of this measure was to mitigate against the risk of deadly violence. Indeed, had the guards kept and used their weapons on the illegal occupants, a massacre might had followed.[158] The only reasonable action at that time was to avoid inflaming the situation, for the weapons to be confiscated and for the guards to go home.[159]

131. Riverside lists measures that it contends the Police could have taken to control the situation, *e.g.*: (i) having police officers stationed at Hacienda Santa Fé; (ii) having patrol cars with lights outside the Hacienda to dissuade invaders; and (iii) installing cameras and recording devices at the Hacienda to gather evidence.[160]

132. But none of this was possible. The National Police in San Rafael del Norte was overwhelmed,[161] it had very few resources to control the situation,[162] it had difficulties to move around because of the *tranques*,[163] it did not have sophisticated equipment (*e.g.* they only had one police car and one motorcycle in bad condition),[164] and there was a shelter order in place that prevented the Police from allocating the full extent of its resources.[165]

[156] Herrera II, ¶ 24, c) (**RWS-12**).

[157] Reply, ¶ 1533.

[158] Herrera II, ¶ 24, c) (**RWS-12**).

[159] Herrera II, ¶ 24, c) (**RWS-12**).

[160] Gutiérrez II, ¶ 63 (**CWS-10**).

[161] Herrera II, ¶ 10 (**RWS-12**).

[162] Herrera II, ¶¶ 10-11 (**RWS-12**).

[163] Herrera II, ¶ 13 (**RWS-12**).

[164] Herrera II, ¶ 11 (**RWS-12**).

[165] Herrera II, ¶ 18 (**RWS-12**).

133. ***Third***, there is no reliable evidence that during the invasions, Nicaragua or any of its government officials directed or helped the invaders to take Hacienda Santa Fé. Nicaragua has submitted declarations of seven (7) witness statements who have attested, with contemporaneous evidence, that Nicaragua has never been involved in the taking of Hacienda Santa Fé; that the Nicaragua's stance has always been to prosecute illegal occupations; and that the National Police and government officials acted diligently to evict all illegal occupiers in Hacienda Santa Fé. A summary of these testimonies and evidence is described below.

134. **Ms. Diana Gutiérrez**, in her capacity as the Attorney General delegate in Jinotega, declared the government did not participate in the taking of Hacienda Santa Fé. She accompanies contemporaneous evidence that shows the Attorney General had instructed that all illegal invasions must be prosecuted, and that the Attorney General's Office must assist the owners to evict illegal occupiers.[166] She was part of the commission that started a process to evict all illegal occupiers in Hacienda Santa Fé and negotiated with the communities to relocate them to other lands owned by the Government.[167] She confirmed that by August 2021, all illegal occupiers had been evicted.[168]

135. **Commissioner Castro**, in his capacity as Police Chief of Jinotega, confirmed that the government did not participate in the taking of Hacienda Santa Fé.[169] Especially, he confirmed that the report he sent to the Chief of the Police in July 2018, was not a validation that Congressman

[166] Gutiérrez -Rizo II, ¶¶ 46-50 (**RWS-10**); E-mail from the Office of the Attorney General to delegations of the Office of the Attorney General dated June 26, 2018 (**R-0226);** E-mail from the Office of the Attorney General to delegations of the Office of the Attorney General dated July 13, 2018 (**R-0225);** E-mail from the Office of the Attorney General to delegations of the Office of the Attorney General dated August 14, 2018 (**R-0223).**

[167] Gutiérrez -Rizo II, ¶¶ 22-34 (**RWS-10**).

[168] Gutiérrez -Rizo II, ¶ 30 (**RWS-10**).

[169] Castro II, ¶¶ 29 (**RWS-11**) ("I declare again that in my role as Chief Police of the Department of Jinotega, the invaders were never supported or given orders to take over the HSF and on the contrary, and in accordance with the guidelines of not tolerating illegal invasions, [Inagrosa was] given the necessary support until the property was effectively evicted and left free of invaders").

Edwin Castro had instructed the occupiers to remain in Hacienda Santa Fé.[170] He also confirmed that the Police acted diligently after taking notice of the invasion in Hacienda Santa Fé and instructed the Police to visit the property and safeguard the life of the employees that were in the property.[171] On August, 12, 2018, he and Jinotega Mayor Leonidas Centeno ordered the occupiers to leave the property.[172] He also was part of the commission that started a process to evict all illegal occupiers in Hacienda Santa Fé and negotiated with the communities to relocate them to other lands owned by the Government.[173] Finally, he also confirmed that by August 2021, all illegal occupiers had been evicted.[174]

136. **Deputy Commissioner Herrera**, in his capacity as the Chief of the Police in San Rafael del Norte, confirmed that the government did not participate in the taking of Hacienda Santa Fé. He never met with invaders or encouraged them to stay in the property or to help them stay.[175] After receiving information from Mr. Gutiérrez and Mr. Rondón that some individuals would take Hacienda Santa Fé, he sent police officers to check in and ensure that the physical integrity of the workers at Hacienda Santa Fé was safeguarded.[176] However, the employees decided to remain in the property, which lead to unnecessary violence.[177] After Jinotega Mayor Leonidas Centeno and Commissioner Castro ordered the invaders to abandon the property on August 11, 2018, Deputy

[170] Castro II, ¶¶ 27 (**RWS-11**).

[171] Castro II, ¶¶ 20 (**RWS-11**).

[172] Castro I, ¶¶ 37-38 (**RWS-11**).

[173] Castro II, ¶¶ 20 (**RWS-11**).

[174] Castro II, ¶¶ 20 (**RWS-11**).

[175] Herrera II, ¶¶ 27 (**RWS-12**) ("Finally, I declare that the Police in San Rafael del Norte at no time supported the invaders, on the contrary, to the best of our ability, during a time of conflict and high violence, the Police tried to protect the lives of the HSF workers and protect the property. The multiple attempts by both the police and the Attorney General's Office to evict the invaders show that the Plaintiff's account makes no sense.").

[176] Herrera II, ¶ 24, c) (**RWS-12**).

[177] Herrera II, ¶¶ 24, c) (**RWS-12**).

Commissioner Herrera, at Inagrosa's request, visited the property with Inagrosa's notary to verify some of the damages.[178]

137. **José Valentín López**, as a member and former president of *Cooperativa El Pavón*, confirmed the existence of a longstanding property dispute of Hacienda Santa Fé.[179] He also confirmed that the government has never controlled *Cooperativa El Pavón* or the occupiers in Hacienda Santa Fé and that none of the government officials accused by Riverside of having led the invasions have ever supported the occupiers.[180]

138. **Favio Dario Enriquez Gomez**, a worker in Nicaragua's Ministry of Agriculture and Livestock in Jinotega, testifies that he never told Mr. Gutiérrez that Hacienda Santa Fé was being expropriated by the government or that the government was targeting companies with foreign capital, thus refuting Claimant's allegations about him.[181]

139. **Vidal de Jesus Huerta Gomez**, as a town councilor of Jinotega, confirmed that he was not and has never been involved in the takings of Hacienda Santa Fé.[182] He also confirmed that he does not know Mr. Carlos Rondón or Mr. Luis Gutiérrez.[183] Finally, he declared that the

[178] Herrera II, ¶¶ 24, i) (**RWS-12**).

[179] López I, ¶¶ 7-22 (**RWS-04**).

[180] López I, ¶ 41 (**RWS-04**) ("I conclude this statement by reaffirming that I have never heard that the government sent the people who took the HSF in 2018. My understanding is that the 2018 invasions are linked to a long-standing dispute and were motivated by land claims that date to the 1990s, when the government handed over a portion of the HSF to members of the Former Nicaraguan Resistance. In addition, I am aware that during the invasions, state institutions, including the Attorney General's Office, Mayors' Office and the National Police, convened meetings with the leaders of the occupiers to ask them to voluntarily vacate the property.").

[181] Enríquez, ¶ 14 (**RWS-21**) ("it is false that I made any kind of comment to him about the invasions of the Hacienda Santa Fe. I never went to Hacienda Santa Fe nor was I aware of the circumstances under which the Hacienda was invaded in 2018").

[182] Huerta ¶ 13 (**RWS-19**) ("I declare before this arbitral tribunal that I have never participated in land seizures or invasions of private property in Jinotega or any other locality in Nicaragua. I also declare that it is absolutely false that I organized or recruited invaders to take over the HSF").

[183] Huerta, ¶ 8-9 (**RWS-19**) ("First of all, I emphatically affirm that I do not know Mr. Luis Adolfo Gutiérrez Cruz and that I have never had any kind of relationship (neither professional nor social) with him [...] Nor do I know Mr. Carlos Rondón Molina, who I understand would be one of the owners of the HSF, nor the company Inversiones Agropecuarias, S.A. ("Inagrosa")").

Jinotega Mayor, Mr. Centeno, has been vocal about not tolerating illegal occupations of private properties.[184]

140. **Ramón García Guatemala**, as a worker in the Municipality of Jinotega, confirmed that he was not and has never been involved in the takings of Hacienda Santa Fé.[185] He also confirmed that he never participated in any meetings with the invaders. Finally, he declared that the has never visited or been in Hacienda Santa Fé.[186]

c. *Nicaragua Diligently Moved to Evict all Illegal Occupants*

141. Riverside's allegations that Nicaragua, and especially the National Police, refused to help when its assistance was requested, are contradicted by evidence in the record.

142. The evidence demonstrates that Nicaragua worked tirelessly for years to evict the illegal occupants from the Hacienda. [187] As was the case in 2003-2004, the process of evicting dozens of families from such a remote property is a complex task. These families include elderly people and children. They could not just be thrown onto the street, as Claimant is suggesting. For these reasons, after the Rondón family requested government assistance to evict several hundred squatters from Hacienda Santa Fé in 2000, ***it took four (4) years to complete the evictions***.[188] It should be noted that the Rondón family never complained, as those evictions were carried out, that

[184] Huerta, ¶ 15 (**RWS-19**) ("I am struck by the fact that the plaintiff indicates that this seizure was ordered by government officials, given that our mayor of Jinotega, Mr. Leonidas Centeno, has always stated that the illegal seizure of property would not be tolerated.").

[185] García, ¶ 7 (**RWS-20**) ("In this regard, I categorically reject Mr. Gutierrez's assertions. I was not part of the group of peasants who occupied the HSF in 2018 or at any other time. I have never participated in the seizure of land, neither in Jinotega nor in any other department of Nicaragua.").

[186] García, ¶ 10 (**RWS-20**) ("I have never been to the HSF nor have I visited it. If Mr. Gutiérrez had corroborated what was said by the so-called "Pocoyo," he would have realized that what was said by that individual is not true.").

[187] Gutiérrez-Rizo I, ¶ 65 (**RWS-01**).

[188] Gutiérrez-Rizo II, ¶ 15 (**RWS-10**) (showing that Inagrosa and Mr. Rondón initiated judicial proceedings to evict the illegal occupiers on or around 2000 and they were effectively evicted until 2004).

Nicaragua waited too long or that it acted unreasonably because it did not evict those people any sooner.

143. It is therefore surprising that the Rondón family, which controls Claimant, is now alleging that Nicaragua should have evicted the hundreds of squatters at Hacienda Santa Fé that invaded the property between 2017-18 in a matter of days. Or that Nicaragua could have evicted the invaders through brute police force when, back in the early 2000s, the Rondón family agreed to let the humanitarian and legal process play out to ensure that the squatters would be resettled in another property before they were evicted.[189]

144. If anything, Claimant should be lauding Nicaragua's reaction to the 2018 invasion given that it led to the eviction of all squatters ***in less than two (2) months*** (as opposed to almost four (4) years back in the early 2000s) even though the country was embroiled in civil strife (the country had no such civil strife present in the early 2000s). And when the squatters reinvaded the property in or around August 18, 2018 (because Inagrosa failed to secure the property after it had been returned to Inagrosa free of invaders), Nicaragua succeeded in re-settling ***all the invaders*** in less than three (3) years, *i.e.*, one year faster than the time it took Nicaragua in the early 2000s, in a peaceful fashion.[190]

145. Below is the uncontested evidence demonstrating Nicaragua's major eviction and resettlement efforts in response to the recent Hacienda Santa Fé invasion:

a. **August 11, 2018**. Mayor Centeno and Commissioner Castro personally travel to Hacienda Santa Fé and order the illegal occupants to leave immediately.[191]

[189] Letter from Carlos José Rondón Molina and Melva Jo Winger de Rondón to Marco Centeno Caffaena, Director General of the OTR, dated September 8, 2000 (**R-0177 Tab 9**).

[190] Gutiérrez-Rizo II, ¶ 30 (**RWS-10**).

[191] Castro I, ¶ 37 (**RWS-02**).

The illegal occupants leave the property but return about a week later on August 17, 2018, due to Inagrosa's and Riverside's failure to secure the Hacienda.[192]

b. **August 2018 – January 2019.** Nicaragua establishes a dialogue with leaders of the illegal occupants and, in that dialogue, confirms that the Hacienda is privately owned by Inagrosa, and its unauthorized occupation is illegal.[193]

c. **January 2019**. Mayor Centeno and the Attorney General of Jinotega met with the leaders of the illegal occupants and ordered them to leave without violence. Some of the illegal occupants voluntarily left the Hacienda immediately after this meeting.[194]

d. **January 24, 2019**. Continuing with the process to evict the invaders, a "Commission for the purpose of evicting Finca Santa Fé" was formed. This commission comprised of Commissioner Castro, Mayor Centeno, and Attorney General Betanco. That same day, the commission and certain of the leaders of the illegal occupants executed a resolution providing that: (i) the Hacienda is privately owned; (ii) its occupation by Cooperativa El Pavón is illegal; (iii) the illegal occupants would leave the premises in two phases; and (iv) Nicaragua would relocate these individuals elsewhere.[195]

e. **January 2019 – April 2021.** Many of the illegal occupants exit Hacienda Santa Fé. The commission continues to identify lands to relocate the illegal occupants that remain on the property.[196]

f. **April 28, 2021.** The Government summoned the leaders of the families that still occupied Hacienda Santa Fé to meet with them and discuss the relocation situation.[197] Two days later, a meeting between the parties takes place at the Attorney General's office in Managua that concerned the eviction of the illegal occupants that remained on the property.[198]

g. **May 4, 2021.** The Government meets with remaining illegal occupants at the Hacienda, presents relocation options, and orders them to leave immediately.[199]

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[192] Castro, ¶ 37 (**RWS-02**) ("The meeting was chaired by me, along with the Jinotega Delegate from Nicaragua's Attorney General's Office and the Jinotega Mayor, and the settlers were ordered to leave the estate because it was private property and did not belong to them. This has been admitted by Claimant […]"); ¶ 39.

[193] Gutiérrez-Rizo I, ¶ 68 (**RWS-01**).

[194] Gutiérrez-Rizo I, ¶ 68 (**RWS-01**).

[195] Castro I, ¶ 39 (**RWS-02**); Minutes of the Meeting of the Commission in charge of the eviction of the unlawful occupants of January 24, 2019 (**R-0050**).

[196] Gutiérrez-Rizo I, ¶¶ 70-72 (**RWS-01**); Castro I, ¶ 40 (**RWS-02**).

[197] Gutiérrez-Rizo I, ¶ 71 (**RWS-01**); Summons sent by the Jinotega Departmental Attorney's Office to occupants of Hacienda Santa Fé dated April 28, 2021 (**R-0066**).

[198] Gutiérrez Rizo I, ¶ 71 (**RWS-01**).

[199] Gutiérrez Rizo I, ¶ 72 (**RWS-01**).

Almost all of the remaining illegal occupants leave immediately and only about 112 illegal occupants remain on the property.[200]

h. **August 13, 2021**. The Government convenes another meeting at the Hacienda, wherein these officials gave remaining illegal occupants a firm deadline to leave the property.[201]

i. **August 18, 2021**. The Government successfully evicted all illegal occupants from Hacienda Santa Fé.[202]

j. **September 9, 2021**. The Government invites Inagrosa to reclaim the Hacienda, but Inagrosa inexplicably decided not to take possession of the property.[203]

k. **September 29, 2021.** The Government hires security team to provide around-the-clock surveillance of Hacienda Santa Fé.[204]

l. **November 30, 2021**. Due to Inagrosa's unwillingness to take back the Hacienda the Government is forced to seek a protective order from a court that allows the Government to place around-the-clock surveillance around the perimeter of the property to prevent against future invasions.[205] The court issues this order on December 15, 2021.[206]

m. **December 2021 – Present**. Nicaragua has spent NIO 3,567,813.12, plus taxes, in its ongoing efforts to secure Hacienda Santa Fé.[207] Inagrosa still has not taken back its property, despite repeated invitations to do so.

146. These uncontroverted facts speak for themselves. They demonstrate that Nicaragua at all times undertook to protect Hacienda Santa Fé and in no way assisted or facilitated those who illegally invaded it. And they confirm that Nicaragua achieved the impressive feat of ridding the property of these invaders in peaceful and orderly fashion.

[200] Gutiérrez-Rizo I, ¶ 72 (**RWS-01**).

[201] Gutiérrez Rizo I, ¶ 74 (**RWS-01**).

[202] Gutiérrez Rizo I, ¶ 74 (**RWS-01**).

[203] Gutiérrez Rizo, ¶ 77 (**RWS-01**); Letter from P. Reichler (Foley Hoag) to Barry Appleton (Appleton & Associates) dated September 9, 2021 (**C-116**).

[204] Gutiérrez-Rizo I, ¶ 79 (**RWS-01**); Security Services Agreement dated September 29, 2021 (**R-0009**).

[205] Nicaragua's Attorney General request for Protective Orders dated November 30, 2021 (**C-0253**).

[206] Protective Order issued on December 15, 2021 (**C-0251**).

[207] Security Services Agreement dated September 29, 2021 (**R-0009**).

147. Accordingly, Riverside's theory that Nicaragua aided and abetted the invasion and otherwise failed to protect Inagrosa from the invaders is baseless.

### C. Claimant Has Not Proven Avocado-To-Riches Story

148. In addition to its failure to prove that the Hacienda Santa Fé invasion was caused or bolstered by Nicaragua, Riverside has not proven the other key issue in this case, *i.e.*, whether Inagrosa had a valuable Hass avocado business.

149. In its Memorial, Nicaragua alleged that, when the 2018 invasion began, Inagrosa had a Hass avocado business with a fair market value of ***more than six hundred million dollars***. According to Riverside, Inagrosa lucked into this business around 2013, after Inagrosa's coffee plantation (its primary source of income) was decimated by the Roya fungus.[208] Lacking any sort of experience with growing avocados of any kind, Inagrosa attempted as a last-ditch experiment to obtain Hass avocado seeds from a Costa Rican farmer and plant them in a 40-hectacre plot and hope for the best.[209] Riverside alleges that, in 2017, this plot produced a harvest so "successful" that Inagrosa began expanding its plot by 200 hectares and that, by June 2018, Inagrosa planned to add another 760 hectares to the plantation (1,000 in total) over the coming year and export the crop all the way to the U.S. to tap into the lucrative consumer market for Hass avocados in that region[210] As Riverside tells it, Inagrosa effectively won the lottery.

150. If a story sounds too good to be true, it usually is. And in the Counter-Memorial, Nicaragua confirmed that Riverside's story about a failed coffee business that overnight became a wildly successful avocado producer is, in fact, ***not*** true.

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[208] Rondón I, ¶¶ 43, 66 (**CWS-01**).

[209] Memorial, ¶¶ 51, 329; Rondón I, ¶¶ 33, 68-69, 120, 129 (**CWS-01**).

[210] Memorial, ¶¶ 49, 52.

151. Specifically, Nicaragua demonstrated that Claimant did not present any evidence to support any of the key components of its avocado-to-riches story. While Nicaragua does not dispute that Inagrosa may have tried to plant some avocado trees in its failed plantation, there is no evidence that Inagrosa had the resources, know-how, or experience to grow Hass avocados—a fruit that is notoriously finicky and difficult to grow, particularly in Nicaragua, a country not known for producing or exporting avocados,[211] where ***no other company has successfully commercialized Hass avocados***.[212] In fact, Nicaragua's Hass avocado expert—Dr. Odilo Duarte—explained in his first expert report that the methodology Inagrosa employed to cultivate its Hass avocados is deficient in myriad ways and would have guaranteed failure rather than success.[213]

152. Nor is there proof that Inagrosa had the financial or labor resources to transition its coffee plantation into a Hass avocado business.[214] Inagrosa had no debt financing and its sole investor—Riverside—stopped loaning money to Inagrosa in 2014.[215] Since 2015, Inagrosa was destitute, with only a few hundred dollars on hand to handle menial day-to-day activities.[216] And its lack of access to funding forced it to lay off almost all its workforce in 2013 and to incur tax debts and other liabilities that it had no manner of paying off.[217]

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[211] *See*, FAO's statistics pertaining to top 10 commodities produced by Nicaragua between 2014 and 2022 (**R-0156**), top 10 avocado producing countries between 2014 and 2022 (**R-0155**), and top 10 avocado exporting countries between 2015 and 2022 (**R-0154**).

[212] Counter-Memorial, ¶¶ 84-86.

[213] *See generally*, Duarte I (**RER-01**).

[214] Counter-Memorial, ¶¶ 86, 100-102.

[215] Counter-Memorial, ¶ 100; Mona Winger I, ¶¶ 20, 24 (**CWS-05**).

[216] Counter-Memorial, ¶ 101; Inagrosa Annual Declaration of Income Tax (**C-0062**); Inagrosa Annual Declaration of Income Tax (**C-0063**); Inagrosa Annual Declaration of Income Tax (**C-0064)**.

[217] Counter-Memorial, ¶ 102; Letter from Dr. Roberto López (Executive President of the Nicaraguan Institute of Social Security - INSS) to Ms. Wendy Morales (Attorney General of Nicaragua) (**R-0085**).

153. Nor is there proof that the 40-hectare plot of avocado trees at Hacienda Santa Fé bore Hass avocado fruit (as opposed to some other less desirable avocado fruit). To the contrary, the few contemporaneous documents in Riverside's Memorial about this Hass avocado business demonstrate that many trees in that plot were never grafted with Hass avocado saplings.[218] Nor is there evidence that the 2017 harvest was "successful" by any metric, which is a glaring omission given how much importance Riverside attributes to this event.[219] Similarly, there is no evidence that a 200-hectare expansion was "underway" (as Riverside claims) or that a 1,000-hectare Hass avocado plantation was even possible. Indeed, Riverside has presented no independent, objective evidence that this avocado-to-riches plan was even possible (*e.g.*, feasibility reports).[220]

154. Nicaragua also exposed the head-scratching fact that Inagrosa, an entity Riverside alleges to have been running a multi-hundred-million-dollar avocado business, had not acquired any of the many permits it needed to have to run that business.[221] It had no permits to use the soil to grow avocado trees. It had no permits to use water from the nearby river to irrigate the trees. It had no permits to import seeds from Costa Rica. It had no permits to make saplings using those seeds or to store the saplings. It had none of the phytosanitary permits that are required to ensure the crop they were growing was not infected or vulnerable to infection. It had none of the permits needed to export the avocado fruits to any country. And Inagrosa's supposed plan to export Hass avocados to the U.S. was effectively dead on arrival because, as a matter of longstanding policy,

[218] English translation of Mr. Rodrigo Jiménez's Avocado Cultivation Recommendations submitted by Claimant as exhibit C-0086-SPA, p. 789 (**R-0108**); Counter Memorial, ¶ 90.

[219] Counter-Memorial, ¶ 91; Rondón I, ¶ 130 (**CWS-01**); Gutiérrez, ¶150 (**CWS-02**); Duarte II, ¶ 9.2 (**RER-03**).

[220] Counter-Memorial, ¶¶ 91-93; Memorial, ¶ 49; Rondón I, ¶¶ 200-201; Riverside Management Representation Letter dated September 12, 2022, ¶ 28 (**C-0055**); Duarte II, ¶ 9.4 (**RER-03**).

[221] Counter-Memorial, ¶ 98, Section II.C.2.

the U.S. does not accept avocado imports from Nicaragua and there is no evidence that the policy is subject to change anytime soon.[222]

155. Last, but not least, in its Counter-Memorial, Nicaragua exposed the fact that, as of the date of the invasion, ***only*** government filing Inagrosa sought was a request to have Hacienda Santa Fé designated as a private wildlife reserve.[223] As Nicaragua explained this fact proves there was never any intention of expanding the 40-hectare plot in the manner Riverside alleges as doing so would have required the cutting down of approximately 500 hectares of standing forest—something that would have been ***impossible*** if Hacienda Santa Fé were classified as a private wildlife reserve.[224] In other words, Riverside's tale about Inagrosa's avocado plantation is a complete work of fiction.

156. In its Reply, Riverside ignores these glaring holes in its story or just shrugs them off as obstacles Inagrosa would have overcome. For example, Riverside admits Inagrosa had no permits to run the alleged avocado business, but Riverside declares (without objective evidence) that its subsidiary would have obtained these permits before the 2018 harvest occurred.[225] As for Inagrosa's lack of funding, Riverside asserts (again without objective evidence) that it was ready to loan Inagrosa millions of dollars.[226] In response to technical defects identified by Dr. Duarte, Riverside ignores most of them and tries to address the others by relying on testimony from Mr. Gutiérrez—who admittedly has ***no*** prior experience growing avocados—instead of submitting

[222] Counter-Memorial, ¶¶ 160-167.

[223] Counter-Memorial, ¶ 99; Rondón I, ¶ 48 (**CWS-01**); Inagrosa Ministry of Environment and Natural Resources (MARENA) Form application for designation of Private Wildlife Reserve (**C-0083**); Inagrosa application form for a Private Wildlife Reserve (**R-0032**); Ministerial Resolution No. 021.2018, Government of the Republic of Nicaragua, Ministry of the Environment and Natural Resources (**R-0012**).

[224] Counter-Memorial, ¶ 99; González I, ¶¶54-57, 75.

[225] Reply, ¶¶ 714, 715, 763, 771, 774, 801. 824, 851, 876.

[226] Reply, ¶¶ 689, 691.

independent testimony from a real avocado expert to respond to Dr. Duarte's technical testimony (because no such expert would support Riverside's assertions about the alleged avocado farm).[227] And in response to the issues about the wildlife reserve, Riverside suggests that Inagrosa would have found some way to cut down every tree from the forest (to clear the way for the expansion of the Hass avocado farm) while ***at the same time*** ensuring that the same forest is preserved in accordance with the specifications of a wildlife reserve.[228] It is all nonsense.

157. As to the complete dearth of evidence supporting Riverside's assertions about the performance of the alleged Hass avocado plantation and its supposed expansion, Riverside uses its version of the "my dog ate my homework" defense. Indeed, Riverside alleges that the records that support its allegations were stored in paper form in the Hacienda house and were destroyed during the invasion.[229] Riverside then alleges that the computers that stored the electronic version of those records were saved in computers that were also destroyed during the invasion.[230] Then Riverside also alleges that the business records that were sent to third parties, also were destroyed by those third parties.[231] As for emails, Riverside alleges that Inagrosa's email account was hacked in 2021 (just before this case started) and that, as a result, Inagrosa lost access to emails.[232] Finally, Riverside states that none of Inagrosa's records were kept by Riverside in Kansas because the executives of Riverside could not maintain copies of documents of foreign language.[233] In other

[227] Reply, ¶¶ 911-988.

[228] Counter-Memorial, ¶¶ 742-752.

[229] Counter-Memorial, ¶ 1860.

[230] Counter-Memorial, ¶ 1861.

[231] Counter-Memorial, ¶ 1862.

[232] Counter-Memorial, ¶ 1865.

[233] Counter-Memorial, ¶ 1864.

words, when it comes to Riverside's allegations about the performance of Inagrosa's Hass avocado business, ***Riverside's stance is that this Tribunal should just take its word on it***.

158. Riverside's self-serving descriptions of Inagrosa's avocado business, however, are insufficient to overcome Riverside's evidentiary burden to prove that Inagrosa went from a failed coffee business to an avocado producer worth hundreds of millions of dollars. Especially, where, as is the case here, the objective evidence in this record confirms that Riverside's tale is, in fact, too good to be true. Below is a summary of this evidence.

1. Inagrosa Was Broke, Owed Large Debts, Lacked Resources, and Had No Experience or Technical Proficiency

159. In its Counter-Memorial, Nicaragua proved that Inagrosa—an entity that Claimant values at hundreds of millions of dollars—was broke, owed large debts, and lacked resources to do much of anything (let alone operate an avocado business) when the 2018 invasion began.[234]

160. Indeed, Inagrosa's financial statements from 2015-2017 show that Inagrosa's cash reserves fluctuated between USD $418 to USD $1,066.[235] Put differently, in the years Claimant alleges that Inagrosa was transitioning to an avocado business, Inagrosa had almost no cash.

161. Nor was there any cash on the way. Inagrosa's only investor—Riverside—made its final investment in October 2014.[236] The invested funds were not stored or invested. Rather, that money was used to pay off an approximately USD $1 million debt that Inagrosa had with the Latin American Agrobusiness Development Corporation since 2013.[237]

162. Inagrosa had other debts that it never paid. As an initial matter, as of the date of the 2018 invasion, Inagrosa owed more than USD $1.35 million, plus interest, to Riverside under loans

[234] Counter-Memorial, ¶¶ 100-101.

[235] Counter-Memorial, ¶ 101.

[236] Counter-Memorial, ¶ 100.

[237] Counter-Memorial, ¶ 100.

that dated back to 2004.[238] Also at that time, Inagrosa owed tens of thousands of dollars in property taxes, which it stopped paying altogether sometime in 2015.[239]

163. Without cash or investments Inagrosa lacked resources to run a business. Indeed, Inagrosa had no farmhands to work a plantation because it could not pay them. Government records confirm that Inagrosa stopped requesting social security benefits on behalf of its workers in 2013, thus demonstrating that it laid off all its farmhands around that time. This timeline rings true since the coffee plantation Inagrosa had run for decades was destroyed in or around 2012 by a Roya fungus.[240]

164. In its Reply, Claimant largely ignores these facts or comes up with unsupported allegations to try to make them go away. Riverside, for example, ignores that Inagrosa operated with almost no cash from 2015-2017.[241] Riverside then suggests Inagrosa was not in financial straits because Riverside pledged up to USD $16 million, in 2016, to finance its businesses.[242]

165. But that is not what the record shows. Per Riverside's own exhibits, from 2016 to 2018 Riverside's Chief Financial Officer, Russ Welty, tried desperately to get some investments to fund Inagrosa's business, making ***no fewer than fifteen pitches***.[243] All prospective investors declined to invest any money, probably because they (correctly) saw that what was being pitched was too good to be true.

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[238] Counter-Memorial, ¶ 101.

[239] Counter-Memorial, ¶ 101.

[240] Counter-Memorial, ¶ 102.

[241] Inagrosa Annual Declaration of Income Tax (2015) (**C-0062**); Inagrosa Annual Declaration of Income Tax (2016) (**C-0063**); Inagrosa Annual Declaration of Income Tax (2017) (**C-0064**).

[242] Reply, ¶¶ 902-906.

[243] Welty I, ¶ 44 (**CWS-11**); Reply, ¶ 1964.

166. Despite its litigation position, Riverside also thought that Inagrosa's avocado-to-riches story was too good to be true. Those were the words Mr. Welty used when he analyzed the product he was trying to sell investors: "In fact, at times ***it seems a little too good to be true***."[244] And Riverside's members must have agreed because the record shows that Riverside ***never made any investments in Inagrosa*** between 2016 and 2018, *i.e.*, ***after*** making its supposed "pledge" to Inagrosa.

167. Next, Claimant contends Inagrosa had no outstanding tax payments as of the date of the invasion, citing to a 2019 document from Nicaragua's Ministry of Finance and Public Credit (*Ministerio de Hacienda y Crédito Público*).[245] But that document does not state that Inagrosa owed no property taxes. Rather, it merely states that the Ministry considered Inagrosa to be in good standing at that specific time with the national tax authority. However, taxes in Nicaragua are owed not only at the national level, but also at the municipality level. Inagrosa had an outstanding debt with San Rafael del Norte's municipal government, which has affirmed that, as of February 21, 2024, Inagrosa owes NIO 6,361,975.72 in property taxes, *i.e.*, ***about USD 173,447.88***.[246] So Claimant's allegations about Inagrosa's tax debts are incomplete and wrong.

168. As to the issue of Inagrosa's lack of farmhands, Claimant does not dispute that Inagrosa stopped paying social security payments for its workers in 2013. Instead, Claimant alleges, for the first time in this arbitration, that starting in 2013 a company called Santa Fé Estate Coffee Company S.A. compensated the Hacienda's workforce. In support of this allegation, Claimant cites to Luis Gutiérrez 's second witness statement, which, in turn, cites to absolutely no

[244] Email from Russ Welty re: RVHA Business Plan (**C-0647**).

[245] Email from Russ Welty re: RVHA Business Plan (**C-0468**).

[246] Certificate from the Head of Cadastre of the Municipality of San Rafael del Norte dated February 21, 2024 (**R-0230**).

documentary evidence supporting this claim.[247] Once again, Claimant's position appears to be that everyone should just take its witnesses at their word, notwithstanding that there should be copious documents related to these payments to the extent they ever happened.

169. Even if Inagrosa could find farmhands, that would not cure the fact that Inagrosa had no experience or technical proficiency in growing and cultivating Hass avocados. This fact is not in dispute; Riverside freely admits that neither Mr. Rondón nor Mr. Gutiérrez (nor anyone at Inagrosa) had prior experience growing or cultivating Hass avocados.[248] They relied on a consultant—Rodrigo Jimenez—who lived in Costa Rica and only visited the Hacienda a handful of times.[249]

170. Riverside suggests on several occasions that there is a transferability of skills and knowledge between coffee cultivation and avocado cultivation.[250] But this self-serving allegation is wrong.[251] ***First***, implying that growing coffee and avocado is the same because both items are "agricultural products," is like saying that caring for a dog and a snake is similar because both are animals. ***Second***, Nicaragua's avocado expert, Dr. Odilo Duarte, explains that managing a coffee plantation is not the same as handling an avocado plantation because, among other things: (i) coffee is a bush while the avocado is a tree; (ii) a coffee plantation is composed of thousands of plants per hectare while an avocado plantation only includes a few hundred trees, depending on the conditions in the field; (iii) they require very specific and distinct pruning; (iv) they are affected by different phytosanitary problems; (v) they require a totally different post-harvest management

[247] Reply, ¶ 906; Gutiérrez II, ¶¶ 290-91 (**CWS-10**).

[248] Rondón I, ¶ 69 (**CWS-01**); Gutiérrez I, ¶ 17 (**CWS-02**).

[249] Rondón I, ¶ 99 (**CWS-01**).

[250] Reply, ¶¶ 962, 965, 966; Rondón I, ¶¶ 114-189 (**CWS-01**); Gutiérrez II, ¶ 247 (**CWS-10**).

[251] Duarte II, ¶ 9.4.3.1 (**RER-03**).

strategy; and (vi) although both crops require adequate planning in their initial stages, coffee requires much less supervision. The avocado, on the other hand, requires constant attention to prevent and/or correct situations that could affect the production or integrity of the tree.[252]

171. As Dr. Duarte also explains, having technical experience is even more necessary where, as is the undisputed case here, the Hass avocado fruit is not endemic to Nicaragua.[253] In fact, there is no known exporter of Hass avocados in Nicaragua.[254] In its Reply, Riverside attempts to confuse this record by suggesting that there is a "variety" of Hass avocado supposedly native to the region.[255] However, as explained by Dr. Duarte in his Second Expert Report, "Hass" is a product of a cross between the so-called Guatemalan race of avocado and the Mexican race of avocado.[256] There is no Nicaraguan component in that mix.

172. Dr. Duarte's analysis is consistent with reliable studies of Hass avocados. Indeed, in 2019, a team of scientists made up of professionals from the National Laboratory of Genomics for Biodiversity (LANGEBIO) of Mexico, Texas Tech University, and the University at Buffalo published a study revealing that Hass avocado inherited around 61% of its DNA from Mexican varieties and around 39% from Guatemalan varieties.[257] Riverside's allusions to a "Nicaraguan" variety of Hass avocado is, at best, an unfounded urban legend and, at worst, a lie.

### 2. The Record Does Not Support Riverside's Description of Inagrosa's Hass Avocado Plantation

[252] Duarte II, ¶ 9.4.3.1 (**RER-03**).

[253] Duarte II, ¶ 7.1-7.2 (**RER-03**).

[254] Rondón I, ¶ 69 (**CWS-01**); Memorial, ¶ 48.

[255] Email from Carlos Rondón to Rob Brokaw dated April 19, 2018 (**R-0150**).

[256] Duarte II, ¶ 7.1 (**RER-03**).

[257] Duarte II, ¶ 7.2 (**RER-03**).

173. Notwithstanding all of the aforementioned limitations Riverside avers in its Reply that it has demonstrated the existence of a successful avocado business.[258] But that is simply not true. Other than the self-serving witness statements of Inagrosa's and Riverside's executives and employees, Claimant has not put before this Tribunal objective, contemporaneous, or verifiable evidence to support its allegations. In fact, all the objective, contemporaneous, or verifiable proof in this record demonstrates that Inagrosa's Hass avocado business was more like a Hass avocado experiment that did not end well.

a. *The size of the alleged Hass avocado commercial plantation.*

174. In its Memorial, Claimant alleged Inagrosa planted 16,000 avocado trees in January 2014 and that these trees matured at the same pace and enjoyed their first harvest in 2017.[259] These assertions, which are based on testimony from Inagrosa's representatives and literally nothing else, are used by Riverside to claim that the 40-hectare plantation had matured sufficiently to provide reliable harvests every year (allowing Riverside to offer lofty projections in its quantum analysis).

175. However, a report prepared in 2016 by Inagrosa's own Hass avocado consultant, Mr. Rodrigo Jiménez, made reference to (i) trees needing to be replanted, (ii) plots where non-grafted trees had been planted that needed to be grafted in the field, (iii) wind as a limiting factor damaging the avocado trees, and (iv) areas in progress, full of ferns that needed to be cleared and properly prepared.[260] As stated by Nicaragua in its Counter-Memorial, Riverside failed to prove its claim regarding the size of the alleged Hass avocado plantation since it did not submit any

[258] Reply, ¶¶ 85, 86, 235, 1014, 1724, 1831(b), 1835(b).

[259] Memorial, ¶¶ 51, 816; Rondón I, ¶ 55 (**CWS-01**); Gutiérrez I, ¶ 150 (**CWS-02**).

[260] Avocado Cultivation Recommendations by Mr. Rodrigo Jiménez (**C-0086**), pp. 787-788, Duarte I, ¶7.6 (**RER-01**).

credible evidence supporting its contention that Inagrosa succeeded in growing, grafting, and planting 16,000 Hass avocado trees by 2018.[261]

176. Rather than submitting any documentation substantiating its unproven allegations pertaining to the existence of a 40-hectare 16,000 Hass avocado tree plantation, in its Reply Riverside decided to up the ante stating that the plantation had 44.75 hectares, not 40 hectares as originally stated.[262] Yet again, this allegation is neither based on contemporaneous evidence nor objective sources. Riverside just wants the Tribunal to take Mr. Gutiérrez at his word while at the same time ignoring the satellite images produced by Nicaragua whose coordinates confirm that the avocado plantation was approximately 40 hectares in surface area (not 44.75).[263]

b. *Inagrosa's unrealistic and unfounded yield expectations*

177. Riverside also grossly overstates yield expectations for Inagrosa's Hass avocado plantation. In the Counter-Memorial, Nicaragua's expert, Dr. Duarte, exposed this deficiency in detail, using comparative data from avocado plantations in Peru, Mexico, Guatemala, California, and Chile.[264]

178. Riverside argues in its Reply that comparative data from avocado in the countries that were considered by Dr. Duarte "lacks context as it omits comparative figures specific to Nicaragua",[265] adding "Dr. Duarte offers general anecdotal evidence from dissimilar conditions in other countries."[266]

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[261] Counter Memorial, ¶87.

[262] Reply, ¶¶ 722, 786, 890, 1823(b); Rondón II, ¶ 23(b) (**CWS-09**); Gutiérrez II, ¶ 215, Table A (**CWS-10**).

[263] *See*, Satellite images of the land use at Hacienda Santa Fe of February 2015 (**R-0074**), January 2016 (**R-0081**), February 2017 (**R-0082**), and January 2018 (**R-0083**) prepared by the National Environmental Information System.

[264] Counter Memorial, ¶¶ 172-178.

[265] Reply, ¶ 921.

[266] Reply, ¶ 921.

179. But, as Dr. Duarte explains in his second expert report, Nicaragua is not a country recognized for producing or exporting avocados (of any variety), so Riverside's contention about a lack of "context" misses the mark.[267] To support this statement, Dr. Duarte includes statistics from the Food and Agriculture Organization of the United Nations (FAO) demonstrating that (i) avocados are not within the top 10 commodities produced by Nicaragua between 2014 and 2022, (ii) Nicaragua is not ranked among the top 10 world producers of avocado between 2014 and 2022, and (iii) Nicaragua was not a major exporter of avocados between 2013 and 2022.[268] Therefore, "comparative figures" or data "specific to Nicaragua" is really scarce or just does not exist. It is worth noting that despite its criticisms, Claimant itself did not produce any data that is specific about Nicaraguan Hass avocados (because that data does not exist).

180. Despite characterizing Dr. Duarte's comparative data as "anecdotal," and despite criticizing that data as being too detached from Nicaragua, Riverside anecdotally states that the Cerro Prieto plantation, located in Peru, is the most analogous to Hacienda Santa Fe[269] to attempt to validate its unrealistic and unproven expectations pertaining to planting density and yields. As Dr. Duarte notes, Claimant is trying to take advantage of the dearth of information on planting densities or yields of avocado plantations in Nicaragua to try to assert that conditions in Cerro Prieto are similar to those in Hacienda Santa Fé.[270] However, Riverside's comparison of Cerro Prieto with Hacienda Santa Fe does not afford proper consideration to the characteristics of the Peruvian avocado plantation and is misleading for the following reasons.

[267] Duarte II, ¶ 8.2 (**RER-03**).

[268] Duarte II, ¶ 8.2 (**RER-03**); FAO's Statistics regarding Top 10 Commodities Produced by Nicaragua (2014-2022) (**R-0156**), Top 10 Avocado Producers (2014-2022) (**R-0155**), and Top 10 Avocado Exporters (2013-2022) (**R-0154**).

[269] Reply, ¶ 924.

[270] Duarte II, ¶ 9.6.4 (**RER-03**); Reply ¶ 920.

181. ***First***, it should be noted that the area where the avocado industry is developed in Peru is in the coastal strip, mainly desertic, located between the Pacific Ocean and the Andes, an area that, despite being in a tropical zone, has much colder temperatures than expected for this region where rain is scarce.[271] As Simon Newett's report indicates,[272] Cerro Prieto is located in the dry coastal area of Peru, where rain is a fairly rare occurrence, and the soil is 95% sand.[273]

182. In contrast, the region in Nicaragua where Hacienda Santa Fé is located has heavy rains that last for six (6) months and does not enjoy the cool temperatures enjoyed by the area in which Cerro Prieto is located. Moreover, the soil at Hacienda Santa Fé is not sandy; it contains mostly volcanic rock.[274]

183. ***Second***, because the climate conditions differ so much between the Cerro Prieto farm and Hacienda Santa Fé, the Cerro Prieto farm produces (in addition to avocados) grapes, blueberries, and asparagus,[275] its nursery produces a small tree from seed to planting in the field in six months,[276] and they do not use Hass avocado seeds for its rootstock.[277]

184. In contrast, the only crop that is proven to grow at Hacienda Santa Fé is coffee and, per Riverside's allegations, the avocado trees took longer to mature[278] and Inagrosa decided to use

[271] Simon Newett's report dated September 2015, p. 10393 (**C-0577**).

[272] Simon Newett's report dated September 2015, p. 10403 (**C-0577**).

[273] Simon Newett's report dated September 2015, p. 10403 (**C-0577**).

[274] Memorial, ¶ 320; Rondón I, ¶¶ 116, 140 (**CWS-01**).

[275] Simon Newett's report dated September 2015, p. 10403 (**C-0577**).

[276] Simon Newett's report dated September 2015, p. 10403 (**C-0577**).

[277] Simon Newett's report dated September 2015, p. 10403 (**C-0577**).

[278] Rondón I, ¶ 71 (**CWS-01**)

Hass avocado seeds to support its expansion plans putting at risk the health and viability of its avocado trees and the integrity of its plantation.[279]

185. ***Third***, the Cerro Prieto farm has a USD $12 million packing plant[280] and is run by a company that has 800 full-time workers and up to 1,500 seasonal workers.[281]

186. Conversely, in its heyday, Inagrosa had 30 employees (full-time and part-time). And Hacienda Santa Fé has never had a packing plant, much less any of the infrastructure that is typically seen at an actual avocado business.

187. In sum, Riverside's allegations about the projected avocado yields at the Hacienda are unfounded and Riverside's attempt to liken Hacienda Santa Fé to Cerro Prieto is borders on the frivolous.

c. *The tale of the "successful" 2017 crop*

188. In its Memorial, Claimant states, without a shred of contemporaneous evidence to support such allegation, that it had a successful 2017 harvest.[282] In its Reply, Riverside continues to push this narrative, adding that Inagrosa had presented evidence corroborating the validity of its claims regarding the 2017 harvest.[283] However, this alleged evidence, which consists of a few pictures showing what appears to be workers in a farm with a few boxes of avocado,[284] a 3-second video in which the only thing visible is a small dark glass bottle,[285] and the analysis results from a

[279] As explained by Dr. Duarte, the use of Hass avocado seeds makes evident Inagrosa's lack of experience and technical knowledge in the cultivation of Hass avocado, since it not being a variety resistant to root rot puts the entire plantation at risk (Duarte II, ¶¶ 9.4.3.5, 9.4.3.6 (**RER-03**)).

[280] Simon Newett's report dated September 2015, p. 10409 (**C-0577**).

[281] Simon Newett's report dated September 2015, p. 10412 (**C-0577**).

[282] Memorial, ¶ 51.

[283] Reply, ¶ 918.

[284] Email from Luis Gutiérrez to Carlos Rondón attaching pictures dated October 27, 2017 (**C-0457**).

[285] Email from Carlos Coronel to Carlos Rondón attaching video dated November 7, 2017(**C-0458**).

laboratory about the dry matter composition of some unknown sample of fruit,[286] does not provide any proof about the size of the harvest or the yield per tree. Therefore, there is no evidence that Inagrosa reached a commercial level of production, much less that Inagrosa's 2017 Hass avocado harvest was "successful."

189. It is possible that in 2017 a small harvest was obtained from the trees planted in 2014 that were already 3 years old. However, there is no way to verify that the entirety of that harvest was Hass avocado because the reports from Rodrigo Jiménez and Edwin Gutiérrez point to (i) the planting of ungrafted rootstocks in the field which would not produce Hass avocados, (ii) root rot, and (iii) the death of some trees in the plantation.[287] The 2016 Inagrosa Hass avocado planting schedule confirms those reports, demonstrating that there were 3,348 ungrafted rootstocks and 383 "failed" trees, planted in the fields.[288] This amounts to approximately 35% of the total number of trees in the plantation.

190. In order to shed some light on this issue, Dr. Duarte reviewed the information set forth in the 2017-2018 Inagrosa Hass avocado harvest report,[289] and the 2014-2018 Hacienda Santa Fé avocado planting program included the testimony from Inagrosa's representatives.[290] After analyzing the numbers included therein, Dr. Duarte concluded that in 2017 the avocado trees planted in the first 14.87 hectares (planted in 2014) were the only ones ready to produce its first fruits. If, as the report indicates, those 14.87 hectares produced 60,000 fruits averaging 250 grams

[286] Laquisa's 2017 avocado crop test analysis results (**C-0054**).

[287] *See*, Avocado Cultivation Recommendations by Mr. Rodrigo Jiménez (**C-0086**); conclusions included in the First Report of a Statistical Base of Growth and Development of Hass Avocado in the First 2.5 Years, prepared by Mr. Edwin Gutiérrez (**C-0434**).

[288] 2016 Inagrosa Hass avocado planting schedule (**C-0662**).

[289] Inagrosa Hass Avocado Harvest 2017-2018 dated September 19, 2023 (**C-0635**).

[290] Gutiérrez II, Table A at p.42 (**CWS-10**).

each, that would mean that the 2017 harvest came to a grand total of 15,000 kilograms, or around 1,000 kilograms per hectare and 2.5 kilograms per tree (assuming 400 trees per hectare). As Dr. Duarte concludes, this is a fairly low yield for a 3-year-old plant, and drastically lower than the 50 kilograms per tree projected by Inagrosa.[291]

191. In regard to the lack of documentary evidence submitted by Riverside to support this allegation, Dr. Duarte mentions in his Second Expert Report that a successful harvest leaves a paper trail.[292] Even if we take Riverside's allegations about the destruction of its corporate records at face value, which Nicaragua does not, there would still be a paper trail to chase, since copies of some of the documents generated by a harvest would be in possession of third parties and not only Inagrosa. Crop or harvest records, showing quantity of fruits, weights, number of boxes filled, information on diseases or defects, anomalies in production or yields detailing areas of high or low production, reports, bills of lading and/or shipping documents, delivery confirmations or receipts (from the laboratory that performed the analysis of the dry matter, for example), would be some examples of documents shared with, or in possession of, third parties whom Claimant could have contacted in order to substantiate its allegations.

192. Therefore, Inagrosa's 2017 avocado harvest could not be regarded, by any metric, as successful. Quite to the contrary, as Dr. Duarte states in his Second Expert Report, the meager yields from their 3-year-old avocado trees should have been a sign of concern and warranted a severe adjustment of Inagrosa's expectations and projections as set forth in their business plans and financial documents.[293]

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[291] In his First Witness Statement, Mr. Gutiérrez, the person in charge of the plantation, expected a yield of 20 Kgs. per tree in the second year and more than ***50 Kgs. per tree in the third year*** and beyond. (Gutiérrez I, ¶ 150 (**CWS-02**)).

[292] Duarte II, ¶¶ 9.2.1, 9.2.2 (**RER-03**).

[293] Duarte II, ¶¶ 5.11, 9.2.4 (**RER-03**).

d. *The Misstatements about the 2018 Harvest*

193. In its Reply, Riverside maintains that every tree in Inagrosa's Hass avocado farm would have borne fruit during the harvest.[294] According to Riverside, this harvest was supposed to be even more prolific than the 2017 harvest.

194. This account is misleading, however, because (as proven in the preceding section) the contemporaneous reports from Messrs. Edwin Gutiérrez and Rodrigo Jimenez evidence that Inagrosa's plantation was planted in tranches across different years, thereby making it impossible for ***every*** tree in the plantation to bear fruit.

195. As Dr. Duarte indicates in his Second Expert Report, the contradictions between Riverside's account and the objective evidence are, frankly, glaring. The 2017-2018 Inagrosa avocado harvest report, which was drafted in 2023 (well ***after*** this arbitration began) estimated a 75,000 kg harvest from 14.87 hectares.[295] However, if we take the numbers reported by Mr. Gutiérrez in the Hacienda Santa Fé 2014-2018 Hass avocado planting program, we arrive at the conclusion that in 2018 there should have been 18.38 hectares in production.[296]

196. And if we combine this information, we can conclude that the estimated yield per tree in 2018 would have been around 10 kilograms.[297] This number, although higher than the 2.5

[294] Gutiérrez II, ¶ 9(g) (**CWS-10**).

[295] Inagrosa Hass Avocado Harvest 2017-2018 dated September 19, 2023 (**C-0635**).

[296] Hacienda Santa Fé Hass avocado planting program 2014-2018 included as Table A in Luis Gutiérrez's Second Expert Report, page 42 (**CWS-10**).

[297] The calculations are as follows: 18.38 hectares x 400 trees per hectare (alleged planting density according to Inagrosa) = 7,352 trees in 18.38 hectares. Estimated 2018 harvest of 75,000 Kgs. divided by 7,352 trees = 10.20 Kgs. per tree.

kilograms per tree supposedly achieved in 2017, is still substantially lower than the 50 kilograms per tree estimate by Inagrosa.[298]

e. *Riverside Has Not Proven Inagrosa's Alleged Expansion of the Hass Avocado Plantation*

197. According to Claimant, "the expansion of the operations at HSF was underway in 2018."[299] Adding that "[i]n the spring of 2018, the Hacienda Santa Fé workers staked and started preparation on the next 200 hectare"[300] Riverside also claims that 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.[301] However, Riverside contradicts itself stating in its Reply that Inagrosa had begun working on the 200 hectares ***but the actual clearing had not yet commenced***.[302]

198. This is one of many holes in Riverside's story about Inagrosa's alleged expansion of the Hass avocado plantation. Below are some more instances where Riverside's story is outed for what it is: a work of fiction.

(1) Inagrosa did not have enough nurseries to meet their expansion goals.

199. In its Reply, Riverside states that there were three nurseries at Hacienda Santa Fé capable of housing 23,000 avocado seedlings.[303] However, at the time of the invasion, in June of

[298] Gutiérrez I, ¶ 150 (**CWS-02**).

[299] Memorial, ¶ 79; Reply ¶¶ 723, 786, 890.

[300] Memorial, ¶ 317.

[301] Reply, ¶ 893.

[302] Reply, ¶ 796.

[303] According to the Claimant, 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, and the third nursery was established in 2016 and had capacity for 10,000. (Reply, ¶ 907).

2018, Inagrosa only had 7,000 grafted Hass avocado saplings and 3,000 ungrafted avocado trees in its principal in-house nursery,[304] which was the only one active at that time.[305]

200. It is hard to understand why Inagrosa was only using one of its three nurseries if it considered the plant nursery "a key driver of the expansion for the avocado plantation",[306] and the nursery saplings "the cornerstone of the plantation's expansion plans"[307] if it was, allegedly, already embarked in the expansion, planning to plant 240,000 saplings in the following 12 months.[308] Claimant's own admission that the expansion plan only contemplated the use of the large secondary nursery for an additional 10,000 Hass avocado saplings commencing in 2018[309] makes even less sense.

201. Dr. Duarte notes that even if Inagrosa (i) used all the nurseries that it claimed to have in 2018, (ii) had a 100% grafting success rate and 0% deaths or diseases in the nurseries, (iii) had access to good quality seeds, rootstocks and buds for grafting, (iv) had a sufficient amount of clean water and the equipment necessary to water all the seedlings, and (v) hired trained grafters and experienced field staff to care for the seedlings and its transfer to the field, planting 240,000 trees in 12 months was unrealistic; concluding that Inagrosa was not in a position to begin the expansion in June 2018.[310]

(2) The plan to use their own avocado seeds from the 2017 and 2018 crops was doomed.

[304] Reply, ¶ 892.

[305] Reply, ¶ 927.

[306] Memorial, ¶ 819.

[307] Memorial, ¶ 255.

[308] Reply, ¶ 893.

[309] Memorial, ¶ 316.

[310] Duarte II, ¶ 9.4.1.3 (**RER-03**).

202. Riverside alleges that Inagrosa undertook to plant 60,000 avocado seedlings per quarter and that having the ability to access its own avocado seeds provided Inagrosa with clarity on its Hass avocado expansion plans.[311]

203. Despite noting in its Memorial the importance of using adequate rootstock in an avocado plantation to prevent root rot disease,[312] in its Reply, Riverside reveals its plan to use seeds from its own production stating that "in 2018, Inagrosa would have the harvested seeds from its harvest for use in the Hass avocado expansion",[313] adding that the company had sufficient internal capacity to generate avocado seeds and graft sticks from its own production to satisfy its own needs.[314]

204. Regarding this new strategy, Dr. Duarte mentions that it evidences Inagrosa's lack of experience and technical capability in setting and handling of an avocado plantation,[315] adding that this new plan entailed a couple of problems. ***First***, Inagrosa would have to sacrifice part of the first years' harvest, in which there is little fruit, to get the seeds or take the fruit to an oil or guacamole factory, lowering the potential profit. ***Second***, using Hass seeds could have been very dangerous since it is not a variety resistant to *Phytophthora* (root rot) and there is no certainty of its absence in the Hacienda, especially since there was seed rot, death of grafts, and poor plant development, which could be attributed to the presence of *Phytophthora* in the soils.[316]

[311] Gutiérrez II, ¶ 288 (**CWS-10**).

[312] Claimant said in its Memorial that it was considering using Clonal Dusa rootstocks from Brokaw Nurseries in its nursery in the spring of 2018, since the Dusa rootstock was the most tolerant rootstock to avocado root rot disease (Memorial, ¶ 330).

[313] Reply, ¶ 986.

[314] Reply, ¶ 930.

[315] Duarte II, ¶ 9.4.3.5 (**RER-03**).

[316] Duarte II, ¶ 9.4.3.5 (**RER-03**).

205. Dr. Duarte concludes that by using avocado seeds from its own production to implement the expansion, Inagrosa puts at risk the health and viability of its avocado trees and the integrity of its plantation.[317]

(3) Hacienda Santa Fé lacked adequate water resources to support the expansion.

206. After reviewing the Hydrology and Irrigation Report submitted by Claimant,[318] Dr. Duarte concluded in his first expert report that (i) there were not enough water resources at Hacienda Santa Fé to irrigate the expanded plantation,[319] and (ii) during the dry season (the months featuring the lowest rainfall levels), the irrigation of an avocado plantation of the size projected by Claimant, would consume the water available from the water sources identified by Claimant's hydrology, which could cause severe problems in the area.[320]

207. In response, Riverside offers nothing more than anecdotal evidence, stating that Inagrosa's management always envisioned implementing a drip irrigation system at the avocado plantation at Hacienda Santa Fé.[321] In response to Dr. Duarte's finding pertaining to the severe impact that depleting all the water from the existing resources could have on neighboring farms if they depended on those same resources, Mr. Luis Gutiérrez asserted that the neighboring farms were not large-scale producers; therefore, "they were not likely to require large quantities of water."[322]

[317] Duarte II, ¶ 5.8 (**RER-03**).

[318] Duarte I, ¶ 8.5 (**RER-01**).

[319] Duarte I, ¶ 8.5.2 (**RER-01**).

[320] Duarte I, ¶ 8.5.4 (**RER-01**).

[321] Gutiérrez II, ¶ 260 (**CWS-10**).

[322] Gutiérrez II, ¶ 263 (**CWS-10**).

208. But a report produced by Riverside (from Mr. Edwin Gutiérrez) confirms Dr. Duarte's concerns about the lack of sufficient water to irrigate Inagrosa's avocado plantation. In that report, Mr. Edwin Gutiérrez states that the poor growth of the plantation is due to the lack of adequate irrigation in the first months of 2016 and the presence of *Phytophthora*.[323]

209. Because Mr. Edwin Gutiérrez's contemporaneous reports in many respects refute Riverside's description of Inagrosa's Hass avocado plantation—and despite those reports being exhibits ***submitted by Riverside*** in this arbitration—Riverside spends considerable space in its Reply and accompanying documents attacking Mr. Edwin Gutiérrez as someone who should not be trusted because he is not an agronomist without experience in growing avocados.[324]

210. But the fact that Mr. Edwin Gutiérrez is not an agronomist does not disqualify his contemporaneous observations, particularly when there are no other contemporaneous opinions on the topic in this record. In any event, his observations certainly carry more evidentiary weight than the *ex post facto* and biased observations of Riverside's witnesses.

### 3. By the Time of the Invasion, Hacienda Santa Fé was Declared as a Private Wildlife Reserve – a Protective Area

211. As alluded to above, another glaring hole in Riverside's story is its allegation that Inagrosa planned to expand its avocado plantation to 240 hectares and, later, 1,000 hectares.[325] This portion of Riverside's story is irreconcilable with the contemporaneous record, which shows that Inagrosa sought for, and obtained, a declaration that its Hacienda would be classified as a

[323] Conclusion No. 3 included in the First Report of a Statistical Base of Growth and Development of Hass Avocado in the First 2.5 Years, prepared by Mr. Edwin Gutiérrez (**C-0434**).

[324] Reply, ¶¶ 722, 800, 890, 893.

[325] Memorial, ¶ 49; Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶¶ 28, 32 (**C-0055-ENG).**

private wildlife reserve.[326] That fact demonstrates that Inagrosa had no plans to grow its avocado plantation because it is illegal under Nicaraguan law to exploit the land of a wildlife reserve.

212. In the Memorial, Riverside admitted that Hacienda Santa Fé had been designated as a private wildlife reserve.[327] According to Riverside's witnesses and exhibits, Inagrosa applied in 2015 and refiled in 2016 for a classification from the Ministry of the Environment and Natural Resources (*Ministerio del Ambiente y los Recursos Naturales*) ("**MARENA**") to have Hacienda Santa Fé designated as a private wildlife reserve.[328]

213. As Inagrosa's application states, Inagrosa asked MARENA to designate the entire Hacienda Santa Fé as a private wildlife reserve to "***conserve the forest area, protect water sources, to provide habitat for wildlife***" and justified its request by saying that "we are a company with an interest in ***protecting, not only Santa Fé from the clearing, but also the destruction of the forest***, hunting of wild animals, protecting their natural habitat, protecting water sources and we currently have hawksbill turtles to breed them."[329] On February 27, 2018, MARENA declared all 1,142.50 hectares in Hacienda Santa Fé as a private wildlife reserve.[330]

214. In the Counter-Memorial, Nicaragua confirmed that MARENA's classification of Hacienda Santa Fé as a private wildlife reserve meant that Inagrosa would have been prohibited from expanding its avocado plantation in the manner Riverside alleges[331] and from pursuing a

[326] Resolución Ministerial No. 021/2018 de fecha 27 de febrero de 2018 (**R-0012**).

[327] Memorial, ¶ 376, Rondón I, ¶¶ 10, 47, 56 (**CWS-01**).

[328] Rondón I, ¶ 48 (**CWS-01**); MARENA Form application for designation of Private Wildlife Reserve filed by INAGROSA (**C-0083**); Inagrosa's Private Wildlife Reserve application to the Ministry of Natural Resources (MARENA) (**R-0032**).

[329] MARENA Form application for designation of Private Wildlife Reserve filed by INAGROSA (**C-0083**).

[330] Resolución Ministerial No. 021/2018 de fecha 27 de febrero de 2018 (**R-0012**); Rondón I, ¶ 56 (**CWS-01**).

[331] Counter Memorial, ¶ 99, González I, ¶¶ 54-57, 68 (**RWS-09**).

forestry business.[332] In an accompanying witness statement, MARENA's Director, Dr. Norma González, explained that the purpose of a wildlife reserve is to ***conserve*** natural resources in a property to not disturb the natural habitats of the *flora* and *fauna* located in that property.[333] Dr. Gonzalez explained that(i) the areas designated as private wildlife reserve are intended to the conservation, restoration and reproduction of flora and fauna,[334] (ii) the forest cannot be extracted or exploited,[335] and (iii) and any economic activity that is performed therein is subject to MARENA's approval and should be subject to conservation criteria and cannot dismantle the ecosystem.[336] Therefore, Inagrosa's alleged expansion of its Hass avocado business, which would have required disturbing the natural habitat, deforesting standing forests, and exploiting the waterways, was antithetical to that purpose.[337]

215. In its Reply, Claimant attempts to "have its cake and eat it, too," by arguing that Inagrosa could ***simultaneously*** expand its avocado business while complying with the wildlife reserve requirements. Claimant's position is frivolous for the reasons below.

216. ***First***, Nicaraguan law prohibits any party to exploit the land of a wildlife reserve as alleged by Riverside. The purpose of a Private Wildlife Reserve is to conserve the area, protect its *flora* and *fauna*, prohibit the exploitation of the forest, and prohibit any substitution of the forest soil for an agricultural venture.

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[332] Counter-Memorial, ¶ 187; González I, ¶¶ 65-68, 75, 77; Law No. 217, Art. 116 (**RL-0017**); Decree No. 1/2007, Arts. 3.28, 98.8 (**RL-0007**); Méndez I, ¶ 20 (**RWS-008**); Law for the Conservation, Promotion and Sustainable Development of the Forestry Sector, Law No. 462, June 26, 2003 ("Law No. 462"), Art. 26 (**RL-0021**); See Decree No. 73/2003, Regulation of Law No. 462, Law for the Conservation, Promotion and Sustainable Development of the Forestry Sector, November 3, 2003 ("Decree No. 73/2003"), Arts. 60-63 (**RL-0015**).

[333] González I, ¶ 65 (**RWS-09**).

[334] González I, ¶ 57 (**RWS-09**).

[335] González I, ¶¶ 75, 77 (**RWS-09**).

[336] González I, ¶¶ 57, 68 (**RWS-09**).

[337] Counter-Memorial, ¶ 99; González I, ¶ 57 (**RWS-09**).

217. This principle is incompatible with the expansion of the avocado plantation to 1000 hectares that was intended to be done in Hacienda Santa Fe. This expansion would have completely changed the forestry landscape and altered the ecosystem. As Mr. Gutiérrez and Mr. Rondón explained, to plant avocado trees it was necessary to "prepare the land" which required to clear the land, create a stable surface, and disinfect the area.[338] This is what Riverside did in 2014 and 2018 as part of its agriculture plan.[339] The expansion of the plantation to 1000 hectares would have required to exact same activity: the forest should have been cleared in order to stabilize the entire land. Therefore, a ***Private Wildlife Reserve could not co-exist with this expansion project***. Full stop. There is no gray area.

218. As Dr. González explains in her second witness statement:

> It is forbidden to carry out extensive agricultural or extractive use activities in the entirety of a protected area, simply because it is diametrically opposed to conserving the place. Protected areas constitute a fundamental strategy for the long-term conservation of biological and cultural diversity, providing essential ecosystem goods and services for society and life in general.[340]

219. Dr. González similarly confirms that the activities that would have been necessary to expand the avocado plantation to 1,000 hectares, such as the deforestation of standing forests and disturbing the natural habitats at the Hacienda is irreconcilable with the purpose of a private wildlife reserve. In her words:

> As I said, two opposing projects cannot coexist. In the case of Inagrosa, it was the entity itself that made the decision to convert its farm into a protected area, submitted supporting documentation of its plan and obtained the corresponding declaration. That is why it is manifestly inconsistent for the Plaintiff to now maintain that there really was a Hass avocado production project on the Santa Fé farm

[338] Rondón I, ¶¶ 135, 138 (**CWS-01**); Gutiérrez I, ¶ 155, 158 (**CWS-02**).

[339] Counter-Memorial, ¶ 138; González I, ¶¶ 25, 31, 32, 34, 36 (**RWS-09**).

[340] González II, ¶ 16 (**RWS-15**).

> and that this project would extend to 1000 hectares, of its 1,142.5 hectares of the farm.[341]

220. Dr. González's interpretation of relevant laws and regulations is supported by Nicaragua's legal expert, Dr. Byron Sequeira. Dr. Sequeira states that Executive Decree No. 01-2007 provides that the purpose of a private wildlife reserve is to conserve the biodiversity and ecosystem of the designated area.[342] This Decree provides that a reserve is conserved when it is kept in its "***original condition*** . . . [by] reducing the intervention of" humans, tools, or machinery.[343] For these reasons, Dr. Sequeira coincides with Dr. González's conclusion that it is irreconcilable to expand the plantation to 1000 hectares when the area is declared as a Private Wildlife Reserve.[344]

221. Riverside's position that Inagrosa could have exploited a wildlife reserve ***is completely unfounded*** and demonstrates that Riverside's allegations about Inagrosa's supposed expansion of its avocado business are not based in reality.

222. ***Second***, Riverside's assertion that Inagrosa always intended to have its Hacienda be a wildlife reserve ***and*** a 1,000 hectare avocado farm is not supported by the contemporaneous records that Inagrosa sent to MARENA about the wildlife reserve classification. Indeed, none of the documents that Inagrosa presented to the MARENA, including its rapid ecological study and wildlife reserve management plan, made any mention of this supposed expansion. In fact, these documents do not mention the avocado farm at all, except for one minor reference to an existing plot of land containing coffee trees and avocado trees.[345] At no point did Inagrosa tell MARENA

[341] González II, ¶ 24 (**RWS-15**).

[342] Sequeira I, ¶ 37.3 (**RER-05**).

[343] Sequeira I, ¶ 37.3 (**RER-05**).

[344] Sequerira I, ¶¶ 38.1- 38.2 (**RER-05**); González II, ¶ 16 (**RWS-15**).

[345] Ecological Study prepared by Dania Hernandez (**C-0081**); González II, ¶¶ 20-22 (**RWS-15**).

that its plan was to exploit the wildlife reserve by expanding its plot of avocado trees to 1000 hectares.

223. As Dr. Sequeira concludes, if Riverside's story about Inagrosa's avocado business expansion is true, that would mean that Inagrosa acted in bad faith and defrauded MARENA to issue the wildlife reserve classification.[346] That type of behavior would subject Inagrosa and even Mr. Rondón (who authored and signed Inagrosa's applications to MARENA) to civil, criminal, and administrative liability.

224. To be sure, Nicaragua's position in this arbitration is that Riverside's story about Inagrosa's expansion of its avocado plantation is ***not*** true because there is no evidence to support it. Riverside just invents this expansion to inflate, in exponential fashion, its damages calculation and to try to make Inagrosa look like a serious avocado business when, in reality, it was anything but that, as confirmed in how it described its small avocado plantation to MARENA and by the fact that it would not have sought the wildlife reserve classification if it believed it was sitting on a green gold mine.

225. Presumably because Riverside knows it was impossible for Inagrosa to expand its avocado business on a wildlife reserve, Riverside also argues that MARENA's wildlife reserve classification never went into effect because it was never published in the official gazette and, therefore, Inagrosa's alleged avocado business expansion was viable.[347] But this misses the mark for the following reasons.

[346] Sequeira I, ¶ 41 (**RER-05**) .

[347] Reply, ¶¶ 744, 752; Renaldy Gutiérrez I, ¶ 32 (**CES-06**).

226. ***First***, Riverside's contention that MARENA's classification never entered into validity is wrong. Dr. Sequeira, confirms that, under Nicaraguan law, an administrative act—*e.g.*, a ministerial resolution designating a property as a wildlife reserve—is presumed to be valid.[348]

> In this sense, the administrative act is presumed legitimate, as the doctrine expresses when explaining the principle of the presumption of legitimacy of administrative acts, which determines as a rule that they are considered valid and produce their natural legal effectiveness, as long as an interested party does not prove their invalidity before the competent jurisdiction or body.
>
> MARENA's ministerial resolution 021.2018 is completely valid and therefore constitutes obligations and benefits in the name of whom the declaration and recognition of Private Wildlife Reserve has been extended.

227. In other words, Riverside has it exactly backwards. A resolution is not presumed to be invalid until it is published on the official gazette (as Riverside claims). Rather, a resolution is always presumed to be valid unless and until it is withdrawn, annulled, or otherwise found to be invalid.

228. Dr. González, a MARENA director who has extensive experience with ministerial resolutions like the one here also confirms that the classification resolution was valid the moment it was issued and that its validity was never preconditioned on it being published in the official gazette.[349] In her words:

> [T]he publication of the resolution is an act of the administration that depends on MARENA.[350] The entry into force becomes an event in the background and has no impact on the analysis of whether or not there is incompatibility of regimes. The validity of the RSP declaration does not depend on publication and is an administrative act that is presumed to be legitimate. In addition, it should be noted that Inagrosa never renounced the RSP process, did not retract or oppose during the entire procedure, nor after the

[348] Sequeira I, ¶¶ 43.1-43.2 (**RER-05**).

[349] González II, ¶ 27 (**RWS-15**).

[350] Ministerial Resolution No. 021/2018 dated February 27, 2018, art. 6 (**R-0012**).

> declaration of the farm as RSP, to this happening. Inagrosa's intention has always been to continue with the RSP process and to abide by the conservation paradigm.[351]

229. ***Second***, the question is not if the MARENA classification was valid but, rather, ***what Inagrosa's intentions were when it applied for this classification*** in 2015 and when it pursued its approval through 2018.[352] The answer to that question will confirm if Inagrosa actually had plans to expand its Hass avocado plantation from 40 hectares to 1000 hectares (almost the entire Hacienda), as Riverside is alleging in this arbitration.

230. As noted above the answer to this question is laid out in Inagrosa's application for the classification, authored by Mr. Rondón, which unambiguously provides that Inagrosa sought this classification to ***conserve*** the *flora* and *fauna* in the Hacienda.[353] Inagrosa repeated these same intentions when it re filed the application to MARENA.[354]

231. Inagrosa's unambiguous intentions to conserve Hacienda Santa Fé (as opposed to converting it to a 1,000-hectare avocado plantation) are also detailed in a rapid ecological study conducted for Inagrosa on August 20, 2015[355] and a management plan that Inagrosa developed as part of its efforts to convince MARENA to issue the private wildlife classification.[356] Each of those documents confirm Inagrosa wanted to conserve the Hacienda ***in its actual state*** in order to protect the standing forest and other *flora* and *fauna* native to the Hacienda.

232. For these reasons, Riverside's allegation that Inagrosa was looking to expand its Hass avocado plantation by tilling the soil, cutting down trees, and disturbing the natural habitats

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[351] González II, ¶ 27 (**RWS-15**); Certificate issued by MARENA No. 6 (**R-0165**).

[352] González II, ¶¶ 18-23 (**RWS-15**).

[353] MARENA Form application for designation of Private Wildlife Reserve filed by INAGROSA (**C-0083**); Rondón I, ¶ 48 (CWS-01); Rondón II, ¶ 120-121 (**CWS-09**).

[354] Inagrosa's Private Wildlife Reserve application to the Ministry of Natural Resources (MARENA) (**R-0032**).

[355] González II, ¶¶ 20-21 (**RWS-15**); Ecological Study prepared by Dania Hernandez, p. 10 (**C-0081**).

[356] González II, ¶¶ 22-23 (**RWS-15**); Ecological Study prepared by Dania Hernandez, p. 56-61 (**C-0081**).

in the Hacienda is ***completely irreconcilable*** with what Inagrosa actually intended to do with the Hacienda.

233. ***Third***, it must be noted that Inagrosa never withdrew its application or indicated to MARENA that it had second thoughts about moving forward with the classification because its investor wanted Inagrosa to focus on exploiting the Hacienda to grow the avocado business. To the contrary, the record confirms that Inagrosa diligently tried to obtain the classification since as early as 2015, by submitting applications, preparing management plans, and inviting MARENA to conduct *in situ* visits of Hacienda Santa Fé.[357]

234. For these reasons, Riverside's assertions about the validity of the resolution issued by MARENA are wrong and, ultimately, meaningless. The uncontroverted record confirms that Inagrosa ***intended*** to convert its Hacienda into a private wildlife reserve from 2015 through the date of the invasions in 2018. For this reason alone, Riverside's allegations about an "expansion" of the avocado business has been refuted on this basis alone.

4. Inagrosa's Plantation and Its Alleged Expansion of the Plantation Are Illegal

235. Riverside's avocado-to-riches story is also flawed for two reasons: (i) the avocado plantation Inagrosa planted in 2014 is in a "prohibited area," *i.e.*, an area where Nicaraguan law prohibits any agricultural activity; and (ii) Inagrosa's alleged expansion of its avocado plantation to 1,000 hectares would have been impossible because the 1,142.5-hectare Hacienda consists of ***more than 587 hectares of land located in a prohibited area.***

[357] González II, ¶ 23 (**RWS-15**); Certificate issued by MARENA No. 5 (**R-0164**).

236. As demonstrated below, these facts mean that, far from being a lucrative business worth hundreds of millions of dollars, Inagrosa's alleged avocado business was an illegal, black market operation was subject to closure and other criminal, civil, and administrative penalties.

**a.** *Inagrosa's 40-hectare Hass Avocado Plantation Was Located in a Prohibited Area*

237. It is undisputed in this arbitration that Nicaraguan environmental laws (i) prohibit to clear land where a private forest is located[358] and (ii) to clear land located within 200 meters from riverbank and/or lake or lagoons.[359] In other words, a business or person cannot clear land where a forest is located and cannot use tools to clear or cut any brush or trees located in that area for the purpose of clearing land for agricultural use. The purpose behind this restriction is self-evident: to protect and conserve the forest and the integrity of the waterways.

238. In its Memorial, Riverside alleged that Inagrosa planted 16,000 avocado trees over 40 hectares.[360] To "prepare the ground" for this plantation, Riverside alleges Inagrosa cleared the area by using different tools, such as shovels and axes, to cut down the brush, crush the weeds, and remove the trees.[361]

239. In its Counter-Memorial, Nicaragua presented satellite images that demonstrated that Inagrosa's 40-hectare plantation was partially located in a prohibited area. Specifically, this map confirmed that parts of the plantation were within the 200 meters of the *Diamante* river that

[358] González I, ¶ 30 (**RWS-09**); Law No. 217, Art. 108 (**RL-0017**) .

[359] González I, ¶ 30 (**RWS-09**); General National Water Law, Law No. 620, Art. 96, amended by Law No. 1046, November 12, 2020 ("Law No. 1046") (**RL-0028**).

[360] Memorial, ¶ 51, Rondón I, ¶ 130 (**CWS-01**), Gutiérrez I, ¶ 150 (**CWS-02**).

[361] Rondón I, ¶ 135 (**CWS-01**), Gutiérrez I, ¶¶ 150, 155 (**CWS-02**).

cuts across the Hacienda.[362] Based on that fact, Nicaragua concluded that Inagrosa's 40-hectare plantation was illegal.[363]

240. In its Reply, Claimant denied the application of all these environmental provisions on the basis that (i) Inagrosa's plantation had been strategically located outside the limits of the prohibited areas,[364] and (ii) Nicaragua's maps lacked coordinates and were therefore incapable of proving the alleged noncompliance.[365]

241. As to its first argument, Riverside cites to the testimony of Luis Gutiérrez, who claims that in preparing his second witness statement he remembered that the avocado plantation was "several kilometers away" from the *Diamante* river and, thus, outside of the 200-meter area where agricultural activities are prohibited.[366] To be sure, Mr. Gutiérrez offers no documents or any other evidence to support this account. He is relying entirely on his "memory," many years after-the-fact.

242. But Mr. Gutiérrez memory about the distance between the plantation and the river is wrong. Dr. González from MARENA provides in her second witness statement a map—taken from satellite images and containing coordinates—that confirms Nicaragua's positions.[367] This map is included here:

[362] Counter Memorial, ¶ 144.

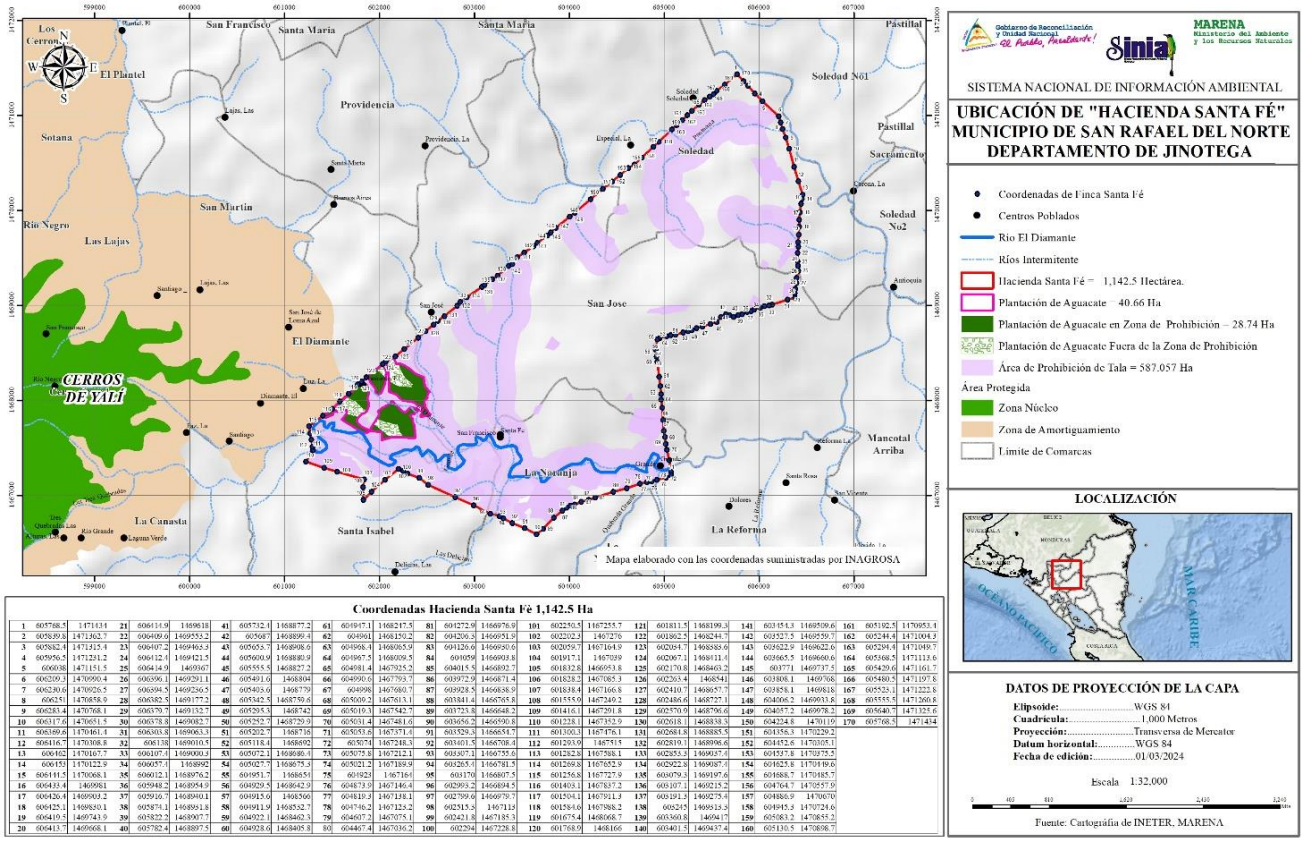
[363] Counter Memorial, ¶ 145.

[364] Reply, ¶¶ 804, 806-808, 810, 815, 816, Gutiérrez II ¶¶ 185-188, 196-200 (**CWS-10**); Renaldy Gutiérrez I, ¶ 150 (**CES-06**).

[365] Reply, ¶¶ 809-810, Gutiérrez II, ¶¶ 196-200 (**CWS-10**).

[366] Gutiérrez II, ¶¶ 198-200 (**CWS-10**).

[367] González II, ¶ 65 (**RWS-15**); Map prepared by the National Environmental Information System (**R-0166**).




243. This map was created using soil information of the year 2010 and by comparing satellite images taken before Inagrosa had its plantation to satellite images taken after this plantation existed.

244. As Dr. González confirms, and in accordance with the map coordinates, Inagrosa planted its avocado plantation across a 40.66-hectare plot of land.[368] And about 28.74 hectares of that plot—*i.e.*, ***more than 70 percent***—highlighted in a dark green, are located within a prohibited area (denoted in the legend as *zona de prohibición*).[369] As explained by Ms. González, the area is

[368] González II, ¶ 66.b (**RWS-15**).

[369] González II, ¶ 66.b (**RWS-15**).

prohibited because (i) there is a forest and forest land use and/or (ii) the area is inside 200 meters of a riverbank.[370]

245. As Dr. González explains, the consequences of working the land inside prohibited areas can be significant. These sanctions range from a warning from the competent authority, to a fine, to a partial or temporary suspension or cancellation of permits, authorizations, licenses, concessions and/or any other right to carry out the activity; and to the temporary or permanent closure of the business.[371] And those are just the administrative penalties. Inagrosa would also be subject to civil and criminal sanctions.[372]

b. *It Would Have Been Impossible for Inagrosa to Have Expanded Its Avocado Plantation to 1,000 Hectares*

246. Similarly, if Inagrosa would have tried to expand its avocado plantation to 1,000 hectares—as Riverside alleges in this arbitration—this expansion would have also been illegal, given that ***more than half*** of the 1,142.5-hectare Hacienda is situated in a prohibited area.

247. In its Memorial, Riverside states that Inagrosa was in the process of expanding its avocado plantation from about 40 hectares to 1,000 hectares.[373] This is a consequential allegation because Riverside uses it to exponentially increase its damages calculations.

248. In the Counter-Memorial, Nicaragua proved this expansion was impossible under Nicaraguan environmental regulation because more than 50 percent of the Hacienda's land sits on top of a prohibited area.[374] This prohibited area includes the lands that are within 200 meters of

[370] González II, ¶ 66.a (**RWS-15**); Law No. 217, art. 108 (**RL-0017**); Law No. 620, art. 96, amended by Law No. 1046 (**RL-0028**).

[371] González I, ¶ 22 (**RWS-09**).

[372] González I, ¶ 23 (**RWS-09**); Law No. 217, arts. 159-161 (**RL-0017**). See also Decree No. 9/96, Regulations of the General Law on the Environment and Natural Resources, dated July 25, 1996 ("Decree No. 9/96"), arts. 101 to 110 (**RL-0008**).

[373] Memorial, ¶¶ 49, 835, 836; Rondón I, ¶¶ 137, 196 (**CWS-01**).

[374] Counter-Memorial, ¶ 148; González I, ¶¶ 36-37 (**RWS-09**).

waterways in the Hacienda (such as the 28.74-hectare portion of the plantation described in the section immediately above) and the land containing the forests located inside the Hacienda, given that, in Nicaragua, it is illegal to deforest[375]

249. In her first witness statement, Dr. González summed it up in the following terms:

> To achieve this expansion to 1000 hectares, as Engineer Luis Gutiérrez argues, the area would have to be cleaned. To this end, not only would an Environmental Authorization for the Use, Management of Soils and Terrestrial Ecosystems have been needed to expand the plantation in available areas, ***but the expansion to 1000 hectares would not have been feasible*** since the expansion of the agricultural area would have violated, at least, the following legal provisions: (i) the prohibition of change of land use that applies to forest or vocation areas; (ii) the prohibition of felling of trees that are 200 meters from the banks of rivers and lake shores; (iii) the prohibition of exploiting a conservation area, such as a forested area located in a private wildlife reserve with logging or logging activities; (iii) the prohibition of cutting, extracting or destroying trees of those protected and endangered species that are registered in national lists and international agreements and that are in protected areas.[376]

250. In the Reply, Riverside reaffirms that the management of Inagrosa contemplated expanding its plantation to 1000 hectares[377] and it does not question the existence and validity of the environmental regulations that govern the prohibition areas. Instead, Riverside states that the areas affected by the expansion were not located in areas where the environmental prohibitions, identified by Dr. González, were in force.[378] In support, Riversides cites only to Mr. Rondón's testimony, which provides that Inagrosa had historically used 750 hectares of Hacienda Santa Fé to plant coffee[379] and therefore there were 250 additional hectares located outside of the prohibited

[375] Counter-Memorial, ¶¶ 143, 148.

[376] González I, ¶ 36 (emphasis added) (**RWS-09**).

[377] Reply, ¶ 800; Rondón II, ¶ 99 (**CWS-09**); Gutiérrez II, ¶ 187 (**CWS-10**).

[378] González I, ¶ 143 (**RWS-09**).

[379] Reply, ¶ 799, Rondón II, ¶ 99 (**CWS-09**); Renaldy Gutiérrez I, ¶ 146 (**CES-06**).

areas that could be cleared for the avocado plantation.[380] For the following reasons, however, Riverside's allegations are baseless.

251. ***First***, Riverside failed to provide any objective evidence to support its claim that there were 1,000 hectares of land at Hacienda Santa Fé where the avocado plantation could have been expanded. Despite having the burden of proof in this case, Riverside does not produce any maps, drawings, charts, or business records that support its claims. Instead, Riverside relies only on its biased witnesses to give ballpark, back-of-the-napkin guesses based on their "memory."

252. ***Second***, the map of Hacienda Santa Fé included in the section immediately above refutes Riverside's unsupported claims. That map confirms that there are roughly ***587 hectares*** (about 51 percent of Hacienda Santa Fe's surface area) that sit in prohibited areas.[381] These areas include areas that are within 200 meters of the waterways and areas where there are forests.[382] As noted above, this map was not assembled using ballpark figures or anyone's memory but, rather, using satellite images of the Hacienda.

253. ***Third***, Inagrosa's rapid ecological study, which Inagrosa created in August 2015 as part of its efforts to obtain a private wildlife reserve classification from MARENA, confirms there are roughly 795.43 *manzanas*, *i.e.*, 556.50 hectares containing forest lands and other types of prohibited areas, which is consistent with the map described above.[383] Further, Inagrosa's rapid ecological study confirms that Inagrosa had cultivated its coffee plantation across 781 *manzanas*,

[380] Reply, ¶ 801; Gutiérrez II, ¶¶ 188-189 (**CWS-10**).

[381] González II, ¶ 65 (**RWS-15**); Map prepared by the National Environmental Information System (**R-0166**).

[382] González II, ¶ 66 (**RWS-15**).

[383] Ecological Study prepared by Dania Hernandez, p. 15 (**C-0081**); González II, ¶ 68 (**RWS-15**).

*i.e.*, 550.14 hectares, thereby refuting Mr. Gutiérrez unsupported claims that Inagrosa had farmed its coffee plantation across 750 hectares.[384]

254. For these reasons, it would have been objectively impossible for Inagrosa to have expanded its 40-hectare avocado plantation to 1,000 hectares, as Riverside alleges in this case. If Inagrosa tried to do such an expansion, it would have been subjected to the severe criminal, civil, and administrative penalties outlined in the section immediately above.[385]

5. Because Inagrosa Never Secured any Permits, Its Avocado Business Was Subject to Closure

255. The other fatal flaw in Riverside's story about Inagrosa's multi-hundred-million-dollar Hass avocado business is that this so-called "business" had absolutely no permits. Not one. In fact, Inagrosa had not even applied for the many permits and authorizations it needed in order to have an avocado business.

256. In its Counter-Memorial, Nicaragua confirmed many of the alleged activities that Inagrosa supposedly did between 2013 to 2018 to transition its property into a Hass avocado business required permits, such as: (i) the use of the soil to plant a 40-hectare avocado plantation; (ii) the importation of avocado seeds from Costa Rica; (iii) the creation of a nursery of avocado saplings; (iv) the use of water sources to irrigate the avocado plantation; and (v) the clearing and plowing of 200 additional hectares as part of the alleged expansion of the avocado farm.[386] Thus, to the extent Inagrosa actually carried out these activities, its business would not have been worth hundreds of millions of dollars; it would have been completely illegal and subject to sanctions.

[384] Ecological Study prepared by Dania Hernandez, p. 15 (**C-0081**).

[385] González II, ¶ 59 (**RWS-15**); Law No. 217, arts. 159-161 (**RL-0017**). See also Decree No. 9/96, Regulations of the General Law on the Environment and Natural Resources, dated July 25, 1996 ("Decree No. 9/96"), arts. 101 to 110 (**RL-0008**).

[386] Counter-Memorial, ¶ 105.

257. Nicaragua also confirmed that all of the activities that Inagrosa allegedly planned to do (according to Riverside) also required permits. Inagrosa, for example, had to secure permits to: (i) finish the 200-hectare expansion that was supposedly underway[387]; (ii) start and finish the 1,000 hectare expansion;[388] (iii) export any of the avocado fruits that it would have harvested;[389] and (iv) secure a water concession for the expansion.[390]

258. On the exportation point, Nicaragua proved that Inagrosa's alleged plan to export Hass avocados to the U.S. is a non-starter because the U.S. prohibits importation of avocados from Nicaragua.[391]

259. In its Reply, Riverside ***admits*** that Inagrosa never applied for a permit for its Hass avocado business, much less obtained one.[392] Riverside, however, argues that nothing Inagrosa did up to the invasions required a permit.[393] And though Riverside admits that Inagrosa needed to secure many permits before it could sell or export Hass avocados—as Inagrosa allegedly planned to do in the Fall of 2018—Riverside argues these permits were formalities that Inagrosa could have obtained at any time.[394]

260. As demonstrated below, however, both of Riverside's responses to the permitting issue are self-serving, unfounded, and wrong.

a. *Inagrosa's Alleged Pre-Invasion Activities Required Permits*

[387] Counter-Memorial, ¶¶ 137-138.

[388] Counter-Memorial, ¶¶ 148-149.

[389] Counter-Memorial, ¶¶ 122, 127, 133, 135.

[390] Counter-Memorial, ¶ 154.

[391] Counter-Memorial, ¶¶ 160-161.

[392] Reply, ¶¶ 710-715; 758, 762, 769, 773, 774, 783, 796, 798, 804, 807, 816, 822, 828, 837, 838, 839, 844, 846, 851, 853, 860, 862, 865, 866, 875.

[393] Counter-Memorial, ¶ 715.

[394] Counter-Memorial, ¶¶ 714-715.

261. As an initial matter, Riverside is wrong when it asserts that nothing Inagrosa did with respect to its alleged Hass avocado business required any permits. These alleged activities, if true, would have required Inagrosa to have phytosanitary, environmental, and water permits in hand.

262. As demonstrated below, if Inagrosa really conducted the activities Riverside says it conducted, then Inagrosa's avocado business was an illegal black market operation that would have no commercial value and instead would be subject to criminal, civil, and/or administrative sanctions.

(1) Inagrosa failed to comply with phytosanitary regulations for the production and processing of avocado seeds and nurseries

263. Nicaragua has already proven that compliance with phytosanitary requirements is mandatory for producers and processors of avocado seeds and avocado nurseries in Nicaragua. The Law Regarding the Production and Commerce of Seeds, also known as "**Law No. 280**,"[395] requires these producers and processors to register with the Institute of Agricultural Protection and Health (*Instituto de Protección y Sanidad Agropecuaria*) ("**IPSA**").[396] It is undisputed that, if a person qualifies as producer or processor of seeds or nurseries under Law No. 280, and that person fails to register with IPSA, said person would be subject to major administrative, civil, and/or criminal penalties because the unregulated production and processing of avocado seeds and nurseries could lead to significant health concerns for the population.[397]

264. In its Reply, Riverside argues that Inagrosa was not required to register with IPSA because Inagrosa is not a producer of avocado seeds or nursery plants under the meaning of Law

[395] Counter-Memorial, ¶ 108; Seed Production and Trade Law, Law No. 280 (**RL-0019**).

[396] Counter-Memorial, ¶ 108.

[397] Counter-Memorial, ¶ 114; Moncada I, ¶¶ 30, 33 (**RWS-05**); Law No. 280, Arts. 20-23 (**RL-0019**).

No. 280 because, according to Riverside, that law only applies to businesses that are in the process of commercializing those seeds or nursery plants.[398] Riverside also avers that if importing avocado seeds is enough to trigger the registration requirements under Law No. 280 then Inagrosa still did not have to register with IPSA because it never imported any avocado seeds.[399] These arguments fail for the following reasons.

265. ***First***, contrary to its arguments in the Reply, Riverside ***has*** alleged that Inagrosa imported avocado seeds as part of its avocado business. Messrs. Rondón and Gutiérrez testified that Inagrosa imported avocado seeds from Costa Rica[400], and used those seeds in Nicaragua to create Hass avocado saplings.[401] At least, from November 2015 to May 2016, Inagrosa imported more than 65,000 seeds to Nicaragua from Costa Rica.[402]

266. In its Reply, Riverside tries to deflect blame from Inagrosa by contending that, in reality, the importer of those seeds was not Inagrosa but rather Rodrigo Jimenez.[403] But that tack does not work because Riverside has elsewhere confirmed that Mr. Jimenez worked for Inagrosa as a consultant, thus confirming that these activities were done on Inagrosa's behalf.[404]

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[398] Reply, ¶¶ 764, 766, 767, 769; Gutiérrez II, ¶¶ 177, 179, 180, 181 (**RWS-10**); Renaldy Gutiérrez, ¶ 127, 128 (**CES-06**); Moncada II, ¶ 31 (**RWS-05**).

[399] Monacada II, ¶ 18 (**RWS-05**); Replica ¶¶ 758-760, Renaldy Gutiérrez, ¶¶ 122-124 (**CES-06**).

[400] Gutiérrez I, ¶ 149 (**CWS-02**); Rondón I, ¶¶ 122, 129 (**CWS-01**).

[401] Rondón I, ¶ 119 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., ¶ 12 (**C-0055**); Gutiérrez I, ¶ 150 (**CWS-02**).

[402] Invoice No. 047 dated November 14, 2015 (**R-0161**); Invoice No. 049 dated November 14, 2015 (**R-0162**); Invoice No. 0462 dated May 24, 2016 (**R-0163**); Check receipt No. 10003598 dated May 30, 2016 (**R-0158**).

[403] Reply, ¶ 758-760, Renaldy Gutiérrez I, ¶¶ 122-124 (**CES-06**).

[404] Memorial, ¶ 329; Rondón I, ¶¶ 121, 129, 137 (**CWS-01**); Gutiérrez I, ¶¶ 17, 49, 157 (**CWS-02**); Gutiérrez II, ¶ 248 (**CWS-10**).

267. The fact that Inagrosa was importing avocado seeds from Costa Rica is dipositive here because Law No. 280 requires any person who is importing seeds from another country to register with IPSA. [405]

268. ***Second***, the registration requirement under Law No. 280 applies to other persons beyond those who are seed importers. Specifically, this requirement applies to any business that (i) investigates, (ii) produces, (iii) benefits, (iv) stores, (v) imports, (vi) exports, (vii) distributes or (viii) commercializes seeds or nursery plants.[406]

269. In other words, contrary to Riverside's arguments, the registration requirement in Law No. 280 is not limited to businesses that are importing or commercializing avocado seeds and plant nurseries. Rather, any business that investigates, produces, benefits, stores, imports, exports, or distributes avocado seeds and nurseries would have to register with IPSA.

270. This conclusion is dispositive because it is clear that Inagrosa produced, stored, and processed seeds[407] to produce Hass avocado grafts, which were then processed and stored.[408] Inagrosa received approximately 15,830 avocado seeds in 2015 and more than 40,000 avocado seeds in 2016, and according to Mr. Moncada, IPSA Director, Inagrosa either stored those seeds[409] or used them to create saplings that it later grafted onto planted avocado trees.[410] Accordingly, Inagrosa was subject to the registration requirements under Law No. 280.

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[405] Counter Memorial, ¶ 108; Seed Production and Trade Law, Law No. 280, art. 16 (**RL-0019**).

[406] Moncada II, ¶¶ 12, 14 (**RWS-14**); Ley No. 280, art. 16 (**RL-0019**).

[407] Moncada II, ¶ 21, 23 (**RWS-14**).

[408] Moncada II, ¶ 23 (**RWS-14**); Reply, ¶ 892; Avocado cultivation recommendations from Rodrigo Jimenez, p. 1, 2 (**C-0086**); Email exchange between Javier González and Rodrigo Jimenez regarding purchase of avocado seeds (**C-0433**); Gutiérrez I, ¶ 96 (**CWS-02**); Gutiérrez II, ¶¶ 177, 215, 230, 231, 233, 286 (**CWS-10**); Rondón I, ¶ 71 (**CWS-01**); Rondón II, ¶ 23(m) (**CWS-09**); Management representation letter from Riverside Coffee LLC to Richter Inc. ¶ 32 (**C-0055**).

[409] Moncada II, ¶ 23 (**RWS-14**).

[410] Moncada II, ¶ 34 (**RWS-14**).

271. Similarly, Inagrosa was a processor and producer of avocado nurseries and, thus, had to register with IPSA. Riverside states that Inagrosa maintained nurseries at Hacienda Santa Fé containing 7,000 grafted avocado seedlings and 3,000 non-grafted seedlings and that it was in the process of preparing 240,000 avocado seedlings in its nursery.[411] These facts are undisputed.

272. As noted above, if Riverside's allegations about Inagrosa are true, then Inagrosa's failure to register with IPSA has consequences. As an initial matter, Inagrosa would be subject to extensive criminal, civil, or administrative penalties because it was running a black-market Hass avocado operation that could have subjected the population and the environment to significant health risks.[412] But in this arbitration, the consequences are that Inagrosa's business would have no fair market value because it would be illegal.

(2) Inagrosa did not obtain land use permits for the activities it carried out in 2014 and 2018

273. Inagrosa also failed to obtain land use permits from MARENA when it planted its 40-hectare avocado plantation.

274. In its Memorial, Riverside alleged that Inagrosa modified the soil at the Hacienda on two occasions. The first occasion was in 2014 when Inagrosa cleared 40 hectares to create a plot for its avocado plantation[413] and the second occasion was in 2018, when Inagrosa cleared 200 hectares to supposedly plant new avocado trees.[414]

[411] Memorial ¶¶ 49, 316; Rondón I ¶71 (**CWS-01**); Gutiérrez I, ¶¶ 96, 167 (**CWS-02**); Gutiérrez II, ¶ 233 (**CWS-10**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., ¶32 (**C-0055**), Moncada II, ¶ 33(f) (**RWS-14**).

[412] Moncada I, ¶ 30 (**RWS-05**); Law No. 280, arts. 20-25 (**RL-0019**); Law No. 291, arts. 58-63 (**RL-0020**).

[413] González I, ¶ 25 **(RWS-09)**; Gutiérrez I, ¶ 155 (**CWS-02**), Rondón I, ¶ 138 (**CWS-01**)**.**

[414] González I, ¶ 32 **(RWS-09)**; Memorial, ¶¶ 316, 317; Gutiérrez I, ¶ 155 (**CWS-02**), Rondón I, ¶ 135 (**CWS-01**).

275. In the Counter-Memorial, Nicaragua explained that modifying the soil in this way required obtention of a "Change of Use" permit, as required by Article 97 of Decree 20/2017 and its precedents.[415]

276. In its Reply, Riverside contended that a Change of Use permit only applies when uncultivated land is converted to agricultural land,[416] and that this permit does not apply where, as here, the soil that is being modified for agricultural purposes was previously used for similar agricultural purposes.[417] Under this logic Riverside argues that the alleged activities that Inagrosa carried out from 2014 to 2018 with respect to its avocado business did not require permits, given that the land that was being modified for the planting of avocados was previously used to plant coffee.[418] But this argument fails for the following reasons.

277. ***First***, Riverside does not present any evidence to show that the areas that Inagrosa modified from 2014 to 2018 had historically been cultivated with coffee. Riverside relies solely on the witness statements of Messrs. Rondón and Gutiérrez, who, in turn, do not present any kind of documentary or photographic evidence to support their statement.[419]

278. ***Second***, even if Riverside had provided such evidence it would be of no moment because the alleged activities from 2014 to 2018 amount to "agricultural reactivation" and, thus, ***were covered*** activities under Decree No. 20/2017 and its predecessors.[420]

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[415] Counter Memorial, ¶¶ 137-138.

[416] Reply ¶ 788, Renaldy Gutiérrez I, ¶ 133, 137-139 (**CES-06**); González II, ¶ 45 (**RWS-15**).

[417] Reply ¶¶ 789-791; Renaldy Gutiérrez I, ¶¶ 134, 138, 143 (**CES-06)**; González II, ¶ 45 (**RWS-15**).

[418] Reply, ¶¶ 789, 791, 793, 795; Rondón II, ¶ 23(e) (**CWS-09**), Gutiérrez II, ¶185-188 (**CWS-10**); González II, ¶ 45 (**RWS-15**).

[419] González II, ¶ 50 (**RWS-15**); Rondón II, ¶ 23E (**CWS-09**), Gutiérrez II, ¶185-188 (**CWS-10**).

[420] González II, ¶¶ 52-57 (**RWS-15**).

279. As Dr. González confirms, Riverside's contention—that the environmental regulation do not apply because the soil that is being modified for agricultural purposes was previously used for similar agricultural purposes—is wrong.[421] Riverside and its expert—who has absolutely no experience interpreting this law or its regulations—appear to have made up this exception out of whole cloth.

280. Rather, Dr. González, who is intimately familiar with this Decree No. 20/2017 and its predecessors, and the way that it is applied in Nicaragua, explains that any time there is soil that is reactivated for agricultural purposes, *i.e.*, "agricultural reactivation," a Change of Use permit is required under Decree No. 20/2017 and its predecessors. In her words:

> [B]etween 2014 and 2018, there were three regulations on the Change of Use Permit. All these regulations, including the current Decree No. 20/2017, require the permit when there is ***agricultural reactivation and change of activities***, regardless of whether the area in question has historically been destined for agricultural exploitation.[422]

281. The newly submitted testimony from Messrs. Rondón and Gutiérrez removes any doubt that Inagrosa engaged in agricultural reactivation of the soil at Hacienda Santa Fé. They testify that the soil that was used to plant the avocado plantation had been previously used as soil for coffee crops that died years earlier when the Roya fungus decimated coffee crops all over the country.[423] According to Dr. González, this activity amounts to "agricultural reactivation" and, therefore, Inagrosa would have required a Change of Use permit to carry out this activity.[424]

[421] Reply, ¶ 788, Renaldy Gutiérrez I, ¶ 133, 137-139 (**CES-06**); González II, ¶¶ 52-53 (**RWS-15**).

[422] González II, ¶ 52 (**RWS-15**).

[423] González II, ¶ 57 (**RWS-15**); Rondón I, ¶ 43 (**CWS-01**).

[424] González II, ¶ 58 (**RWS-15**).

282. This violation is subject to administrative penalties, such as closure, cancellation, and fines, as well as criminal and civil liability.[425] For this arbitration, the fact that Inagrosa is alleged to have modified 40 to 240 hectares of soil at Hacienda Santa Fé without a permit means that Inagrosa's alleged avocado business is illegal and, thus, without a fair market value.

(3) Inagrosa did not obtain any water concessions

283. Inagrosa was also subject to significant penalties because, according to Riverside, Inagrosa used the local waterways to irrigate its avocado plantation without ever getting a water concession from the National Water Authority (*Autoridad Nacional del Agua*) ("**ANA**").

284. Indeed, in its Memorial, Riverside alleges that from 2014 to 2018 Inagrosa used existing water resources at Hacienda Santa Fé to irrigate its 40-hectare avocado plantation[426] and further alleges that Inagrosa planned to use those same resources to expand its plantation to 1000 hectares.[427]

285. In the Counter Memorial, Nicaragua explained that its General Law on National Waters, also known as "**Law No. 620**," requires any person or business to get a water concession from ANA before using or affecting the water in any of the country's waterways.[428] Nicaragua also presented the testimony of Dr. Rodolfo Lacayo, a Director at ANA, who confirmed there are no records indicating that Inagrosa ever applied for, much less obtained, a concession to use any of the waterways at Hacienda Santa Fé for its alleged avocado business.[429] Dr. Lacayo explained

[425] González II, ¶ 59 (**RWS-15**); Law No. 217, arts. 159-161 (**RL-0017**); Decree No. 9/96, Regulation of the General Law on the Environment and Natural Resources No. 217, July 25, 1996 (**RL-0008**).

[426] Memorial, ¶ 336; Rondón I, ¶ 131 (**CWS-01**).

[427] Memorial, ¶¶ 337,338; Rondón I, ¶¶ 131, 132 (**CWS-01**); Gutiérrez I, ¶ 154 (**CWS-02**); Hydrology Study at Hacienda Santa Fé prepared by Engineer Federico Sanabria (**C-0087**). Mr. Rondón stated that Hacienda Santa Fé had enough water to directly irrigate 600 hectares and water storage capacity that would permit the irrigation of another 450 hectares, for a total of 1,050 hectares. See Rondón I, ¶132 (**CWS-01**).

[428] Reply, ¶¶ 151-152.

[429] Lacayo I, ¶ 35 (**RWS-07**); Certificate issued by the National Water Authority No. 1 (**R-0027**).

that if Riverside's allegations about Inagrosa are true, then Inagrosa would have been subject to significant penalties for unregulated use of the country's waters.[430]

286. In the Reply, Riverside presented two defenses. ***First***, Riverside argued Inagrosa was exempt from the water concession requirement under Law No. 620 because Inagrosa (i) already was using these waterways for its coffee plantation before this Law came into force; and (ii) Law No. 620 only covers persons or businesses that have investment in water infrastructures, such as dams or wells.[431] ***Second***, Riverside argues that this was, at worst, a small infraction and that Inagrosa would have been "favored" to obtain a water concession at any time.[432] None of this is true.

287. For its first defense, Riverside relies on Article 137 of Law No. 620, which states, in relevant part, that:

> Natural or legal persons who have investments in water infrastructure 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.
>
> Exceptions to the above-mentioned provision apply to National Higher Education Centers, assets recognized by the National Council of Universities (CNU) and that have in their study program subjects related to agriculture, livestock and forestry. This exception does not exempt from the obligations set forth in this Law.[433]

288. Riverside interprets this Article as exempting persons or businesses who (i) did not have investment in water infrastructure and (ii) who had been using and exploiting the natural waterways before Law No. 260 went into effect.[434] But that is not what that Article states. Rather,

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[430] Lacayo I, ¶ 31(**RWS-07**); Law No. 620, arts. 123-125, as amended by Law No. 1046 (**RL-0028**).

[431] Reply, ¶¶ 821-822; Renaldy Gutiérrez I, ¶¶ 154-156 **(CES-06).**

[432] Reply, ¶ 823; Renaldy Gutiérrez I, ¶¶ 157 **(CES-06).**

[433] Reply, ¶ 822.

[434] Reply, ¶ 822; Renaldy Gutiérrez I, ¶¶ 155-158 **(CES-06).**

a plain reading of the text confirms that this Article is ***requiring***, not exempting, businesses who were already using the waterways "to legalize their situation and adjust to the conditions and terms established" by Law No. 620.[435]

289. The ***only*** exception provided by Article 137 of Law No. 260 is the one expressly provided for in the article corresponding to "National Higher Education Centers, active activities recognized by the National Council of Universities (CNU) and that have in their study program subjects related to agriculture, livestock and forestry."[436] It is undisputed that this exception is inapplicable here.

290. Moreover, Riverside interprets that "investments in water infrastructure" is a pond or a reserve, therefore, persons with a rustic infrastructure are exempted from complying with the law.[437] This is baseless. As confirmed by Dr. Lacayo, who is the Director of ANA, a trained Nicaraguan lawyer and intimately familiar with the laws and regulations surrounding this topic, a water infrastructure "is part of a "system" that allows the supply of water and whose purpose is to pump, divert, transport, store, treat and distribute water for its different uses and/or developments, it can be of rustic or sophisticated, and it does not have to be a reservoir or dam."[438] Therefore, the Law No. 620 does not limit its application in the manner that Riverside suggests. Rather the Law covers any activity that could impact the waterways, even if unsophisticated or rustic.[439]

291. This interpretation is confirmed by the plain text of Article 145 of Law No. 620, which states that "natural and legal persons who maintain ***their own water extraction systems,***

[435] Ley No. 620, art. 137 (**RL-0022**).

[436] Lacayo II, ¶¶ 24-25 (**RWS-16**).

[437] Lacayo II, ¶ 18 (**RWS-16**); Reply, ¶ 822; Renaldy Gutiérrez I, ¶ 158 **(CES-06).**

[438] Lacayo II, ¶ 16 (**RWS-16**).

[439] Lacayo II, ¶ 18 (**RWS-16**); Reply, ¶ 822; Renaldy Gutiérrez I, ¶ 158 **(CES-06).**

***whether through wells or any other rustic or advanced technology system, for commercial or industrial purposes, are subject to all the provisions of this law*** . . . ."[440] Again, it appears that Riverside has simply made up a self-serving exception out of whole cloth.

292. In any event, Riverside's made-up exception would not apply here even if it did exist (which it does not). After reviewing the relevant record, Dr. Lacayo confirmed "it is evident that Inagrosa, by using existing water resources, should have had *at least* a system of water extraction and precarious water distribution for its plantation, especially during the dry season"[441] which last six months in Nicaragua.[442]

293. Similarly, Riverside's second defense—that it would have easily obtained a water concession—is baseless. Riverside relies on Article 47 of Law No. 620 to argue that it was clear that Inagrosa would have obtained a concession (had it asked for one, which it did not) because water concessions are easily obtained by entities that have water on their property and who have a history of using that water.[443] Similarly, Riverside cites to Article 73 of Law No. 260 for the proposition that water concessions are easily obtained by agricultural businesses.[444]

294. As an initial matter, this "would've, could've, should've" defense does nothing to take away from the fact that Inagrosa ***did not*** obtain a water concession and thus its water-related activities are all illegal.

295. In any event, Riverside's indication that ANA would have rubberstamped a water concession application from Inagrosa is wrong. Dr. Lacayo, from ANA, explains that these types

[440] Lacayo II, ¶¶ 26-27 (**RWS-16**); Law No. 620, art. 145, as amended by Law No. 1046 (**RL-0028**).

[441] Lacayo II, ¶ 22 (**RWS-16**).

[442] Lacayo II, ¶ 21 (**RWS-16**).

[443] Lacayo II, ¶ 31 (**RWS-16**); Reply, ¶ 823; Renaldy Gutiérrez I, ¶¶ 157 **(CES-06).**

[444] Lacayo II, ¶ 31 (**RWS-16**); Reply, ¶ 823; Renaldy Gutiérrez I, ¶¶ 157 **(CES-06).**

of applications are not automatic and there is no "favoring" businesses at all, much less in the manner described by Riverside, for the reasons set forth below.[445]

296. ***First***, the granting of the concession is not automatic. To apply for a concession, the applicant must, in advance, collect all the studies and information required by the regulatory framework to submit the application[446] and, in particular, must submit a study of the availability of the water resource,[447] a hydrological or hydrogeological study[448] and an environmental impact study for the construction of any infrastructure that would deviate or alter the hydraulic regimen. These studies are essential to quantify hydrological supply and demand,[449] and to achieve better resource management.[450]

297. Subsequently, the competent authority evaluates the requirement and several directorates intervene to evaluate the technical and legal component of each file in accordance with the nature of the procedure and issue technical-legal opinions that recommend granting or denying the corresponding concession, permit or license.[451] Therefore, ANA is not obliged to grant a concession, but the granting is optional and depends on the presentation made by the applicant and that it complies with the legal requirements.[452]

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[445] Lacayo II, ¶ 33 (**RWS-16**).

[446] Lacayo II, ¶¶ 35; 38-39 (**RWS-16**).

[447] Lacayo II, ¶ 40 (**RWS-16**).

[448] Lacayo II, ¶ 41 (**RWS-16**); Law No. 620, art. 45.h (**RL-022**); Decree No. 44/2010, arts.52 y 87 **(RL-0013**); Terms of Reference for the preparation of a hydrological study to request a concession title for the use of surface water (**RL-0155**); Terms of Reference for the preparation of a hydrogeological study to request a concession title for the use of groundwater (**RL-0154**).

[449] Lacayo II, ¶ 43 (**RWS-16**); Lacayo I, ¶¶ 17-18 (**RWS-07**); Law No. 217, art. 27 (**RL-0017**); Decree No. 44/2010, art. 64 (**RL-0013**).

[450] Lacayo II, ¶¶ 39,44 (**RWS-16**).

[451] Lacayo II, ¶ 46-48 (**RWS-16**); Flowchart and procedure for the water use concession application (**R-0169**).

[452] Lacayo II, ¶ 49 (**RWS-16**); Lacayo I, ¶¶ 13-20 **(RWS-07**).

298. As for Inagrosa, there is no evidence in this arbitration to show that Inagrosa had the basic water studies required by law to require a concession for the plantation and the expansion, nor studies to show that the flows that Inagrosa would have requested for the expansion could have been granted. Hence, it is not possible in this record to assume that Inagrosa would have received a water concession.[453]

299. The only hydrology study that Inagrosa requested for Hacienda Santa Fé is a study prepared by Mr. Sanabria. The purpose of this study was to determine whether the existing water resources located in Hacienda Santa Fe were sufficient to irrigate additional hectares for the expansion, but it did not evaluate the minimum information that is needed to evaluate a concession. [454] Without technical support, this study concludes that there is sufficient water to irrigate more than 1,000 hectares[455] and Riverside uses this study to justify the expansion.[456]

300. However, as Mr. Lacayo stated, this study is technically deficient to request a water concession and it does not determine how much water flow Inagrosa could have eventually requested to the Water Authority.[457] In any case, according to Mr. Lacayo it could not have been possible for the Water Authority to grant a concession that uses 100% of the available water resources in Hacienda Santa Fe without knowing which was the water supply and demand. In addition, any water concession should at least, preserve a minimum ecological flow of water, consider the ecosystem balance, and the prior granted concessions.[458] In the words of Dr. Lacayo,

[453] Lacayo II, ¶¶ 59-61 (**RWS-16**).

[454] Hydrology Study at Hacienda Santa Fe prepared by Engineer Federico Sanabria (**C-0087**); Lacayo II, ¶¶ 39-43, 57.

[455] Hydrology Study at Hacienda Santa Fe prepared by Engineer Federico Sanabria (**C-0087**).

[456] Memorial, ¶ 48; Rondón I, ¶ 132 (**CWS-01)**.

[457] Lacayo II, ¶¶ 58-60 (**RWS-16**).

[458] Lacayo II, ¶ 60 (**RWS-16**).

"the expansion of the Hass avocado plantation to more than 1,000 hectares is not supported from a technical and legal point of view. technical and legal point of view."[459]

301. ***Second***, Inagrosa was not "favored" to obtain a water concession merely because it was an agricultural company. A concession for agricultural use is not a priority use and it is in third place in order of priority, behind the use for "natural human consumption" and "drinking water services."[460] This implies that if there is a request for human consumption and another for agricultural use, priority use prevails and ANA evaluates whether it is possible to grant the concession for agricultural use in the requested flows so as not to affect the concessions granted and the water resource.[461]

302. In fact, in the Municipality of Jinotega and San Rafael, there are several water concessions granted for human consumption.[462] Therefore, as Dr. Lacayo stated, any application for water concession would have been subject to analysis of the water authority and conditioned to the volumes and pumping regimes previously granted.[463]

303. ***Third***, Articles 47 and 73 of Law No. 620 are not elements that "favor" the granting of a concession but are "conditions" for the enforcement authority to consider and grant a concession for agricultural use.[464] As a result, Inagrosa was not in a better position to obtain a water use concession.

304. As a result and as confirmed by Dr. Lacayo, because Inagrosa illegally used water without a concession it is subject to penalties ranging from fines to a temporary or ***permanent***

[459] Lacayo II, ¶ 60 (**RWS-16**).

[460] Lacayo II, ¶¶ 51-52 (**RWS-16**); Ley No. 620, art. 46 (**RL-022**).

[461] Lacayo II, ¶ 52 (**RWS-16**).

[462] Lacayo II, ¶ 61 (**RWS-16**); Certificate issues by the National Water Authority No. 3 (**R-0168**).

[463] Lacayo II, ¶ 61 (**RWS-16**).

[464] Lacayo II, ¶¶ 53-54 (**RWS-16**).

suspension of uses of water in the property.[465] Moreover, there is no evidence, to show that the flows that Inagrosa would have requested for its plantation and for the expansion could have been granted.[466]

305. This fact, alone, confirms that Inagrosa's avocado business was anything but valuable. If anything, it was a significant liability to Inagrosa (and, by extension, Riverside) given that it exploited Hacienda Santa Fé's waterways without ever getting a water concession from ANA.

### 6. Inagrosa Could Not Export to the United States, Canada, Costa Rica, or Anywhere Else

306. The climax of Riverside's avocados-to-riches story is that, starting in Fall 2018, Inagrosa would have started boxing up its avocados and shipping them around the world. In its Memorial, Riverside alleged that Inagrosa's plan was to ship these avocados to Costa Rica and then to the U.S.[467] Then in its Reply, Riverside belatedly added that Inagrosa also planned to ship its Hass avocados to Canada, the European Union, and even Japan.[468] As Riverside tells it, there were no barriers standing in Inagrosa's ability to cash in on its magical Hass avocado plantation, all but assuring that, as of June 2018, Inagrosa was already worth hundreds of millions of dollars even before selling one avocado.

307. But there were barriers to Inagrosa's selling its avocados to other countries. They were more like mountains. As an initial matter, there is the inconvenient and undisputed fact that Inagrosa had no plant to box the avocados, no way to keep them cold so they did not go bad, and no ability to ship them any significant distance, much less to another country. But the even more

[465] Lacayo I, ¶ 31 (**RWS-07**); Law No. 620, arts. 123-125, as amended by Law No. 1046 (**RL-0028**).

[466] Lacayo II, ¶ 62 (**RWS-16**).

[467] Memorial, ¶¶ 360, 361; Rondón I, ¶¶ 183, 192 (**CWS-01**).

[468] Reply, ¶¶ 987, 1980; Welty I, ¶¶ 88-93 (**CWS-11**).

insurmountable barrier in this part of Riverside's story is the fact that Inagrosa ***had no permit to export*** the avocados outside of Nicaragua and, even if it could get that permit, Inagrosa ***was very unlikely to be able to ship its avocados to its desired destinations***.

a. *Inagrosa Did Not Have the Permit Needed to Export and It Is Not Likely that It Would Have Ever Received It*

308. It is undisputed that Inagrosa could not have exported its avocados to any country unless and until it received a permit from Nicaragua's agency that oversees all issues related to exportation, the *Centro de Trámites de las Exportaciones* ("**CETREX**").[469]

309. In its Counter-Memorial, Nicaragua presented testimony from Ms. Xiomara Mena Rosales, a Director at CETREX, who confirmed that the process for obtaining a permit to be able to export agricultural goods, *e.g.*, avocados, largely depends on the obtention of a phytosanitary permit from IPSA.[470]

310. Also in the Counter-Memorial, Nicaragua proved that to obtain this permit, Inagrosa would have to: (i) register with IPSA as exporter of agricultural products; (ii) pass the phytosanitary inspections conducted by IPSA and obtain a phytosanitary certificate; and (iii) acknowledge in writing to IPSA about the existence of any plagues or diseases that could be associated with the crop it wishes to export.[471]

311. In its Reply, Riverside does not dispute the foregoing. Instead, Riverside argues that Inagrosa would have gone through this phytosanitary process quickly because it was already familiar with it from when it exported coffee to the United States.[472] As Riverside tells it, this process would have taken days, maybe weeks, and would not have halted Inagrosa's ability to

[469] Counter Memorial, ¶ 132; Mena I, ¶ 14 (**RWS-06**).

[470] Counter Memorial, ¶ 133; Mena I, ¶ 14 (**RWS-06**).

[471] Counter Memorial, ¶¶ 123-126; Moncada I, ¶ 25-27 (**RWS-005**).

[472] Reply, ¶ 774; Rondón II ¶¶ 93-96 (**CWS-09**); Renaldy Gutiérrez I, ¶ 130 (**CES-06**).

obtain its exportation permit from IPSA and CETREX before the harvest of 2018 (which, according to Riverside, would have started approximately two (2) weeks after the June 16, 2018 invasion and ended in November 2018.[473] So, for Riverside to be correct, Inagrosa needed to go through this entire process by the end of June 2018 in order to start exporting its avocados and certainly no later than November 2018 (five months from the invasion).

312. To be sure, Riverside does not present any evidence that would demonstrate that Inagrosa would have achieved this feat in the timelines given. Again, Riverside is just asking for the Tribunal to just take Riverside at its word.

313. This arbitral record, however, is replete with evidence that suggests that Inagrosa would not have obtained the exportation permit from IPSA and CETREX because it would not have passed the phytosanitary inspections by IPSA. A non-exhaustive list of this evidence is included below.

a. Inagrosa was not registered before IPSA as an exporter of Hass avocado.[474]

b. There is no evidence that Inagrosa kept carried out phytosanitary work.[475]

c. There is no evidence that Inagrosa met minimum requirements for the production and packaging of its products.[476]

[473] Reply, ¶ 1719, 1723; Rondón I, ¶ 171 (**CWS-01**); Rondón II ¶ 23.g (**CWS-09**); Gutiérrez II, ¶¶ 287-288 (**CWS-10**); Report on 2018 Hass avocado harvest and future planning plan, August 28, 2020 (**C-0460**).

[474] Moncada II, ¶ 43.a (**RWS-14**); Technical standard for the phytosanitary certification of fresh and processed agricultural products for export. Reg No. 6228 -M- 0333816 (2001), August 29, 2001, art 4.1.2. (**RL-0026**); Certificate issued by IPSA No. 3 (**R-0067**); Certificate issued by IPSA No. 7 (**R-0160**).

[475] Moncada II, ¶ 43.b (**RWS-14**); Certificate issued by IPSA No. 7 (**R-0160**); Technical standard for the phytosanitary certification of fresh and processed agricultural products for export. Reg No. 6228 -M- 0333816 (2001), August 29, 2001, art 4.1.2.1 (**RL-0026**).

[476] Moncada II, ¶ 43.c (**RWS-14**); Certificate issued by IPSA No. 7 (**R-0160**); Technical standard for the phytosanitary certification of fresh and processed agricultural products for export. Reg No. 6228 -M- 0333816 (2001), August 29, 2001, art 4.1.2.10 (**RL-0026**).

d. There is no evidence that Inagrosa has been in compliance and has been applying the pest prevention and control measures recommended by the Department of Phytosanitary Certification to guarantee phytosanitary quality.[477]

e. There is uncertainty about the origin of the avocado seeds used by Inagrosa.[478]

f. There is no evidence that Inagrosa was in incompliance with the phytosanitary requirements to export to Costa Rica that requires that the fruit is free of *Conotrachelus aguacatae*[479]

g. There is evidence that many of the seeds were rotting.[480]

h. There were sudden deaths of the grafts in the nurseries.[481]

i. Inagrosa did not comply with the phytosanitary provisions of Law No. 280 for the management of seeds and nursery plants.[482]

314. Mr. Alcides Moncada, Director at IPSA, analyzed this evidence and concluded it was sufficient to conclude Inagrosa would ***not*** have cleared IPSA's phytosanitary inspections. In

[477] Moncada II, ¶ 43.d (**RWS-14**); Certificate issued by IPSA No. 7 (**R-0160**); Technical standard for the phytosanitary certification of fresh and processed agricultural products for export. Reg No. 6228 -M- 0333816 (2001), August 29, 2001, art 4.1.2.6 (**RL-0026**).

[478] Moncada II, ¶ 43.e (**RWS-14**); Certificate issued by IPSA No. 1 de (**R-0015**); Certificate issued by IPSA No. 4 (**R-0068**).

[479] Moncada II, ¶ 43.f (**RWS-14**); Certificate issued by IPSA No. 7 (**R-0160**).

[480] Moncada II, ¶ 43.g (**RWS-14**); Email exchange between Javier González and Rodrigo Jimenez regarding purchase of avocado seeds, June 16, 2016 (**C-0433**); First Report of a statistical base of growth and development of the Hass avocado in the first 2.5 years prepared by Edwin Gutiérrez and addressed to Mr. Carlos Rondón, dated October 25, 2016 ("Report of Edwin Gutiérrez") (**C-0434**), conclusion item 9.

[481] Moncada II, ¶ 43.g (**RWS-14**); First Report of a statistical base of growth and development of the Hass avocado in the first 2.5 years prepared by Edwin Gutiérrez and addressed to Mr. Carlos Rondón, dated October 25, 2016 ("Report of Edwin Gutiérrez") (**C-0434**), conclusion item 9.

[482] Moncada II, ¶ 43.e (**RWS-14**); Certificate issued by IPSA No. 1 de (**R-0015**); Certificate issued by IPSA No. 4 (**R-0068**).

his words: "The existence of these conditions proves that Inagrosa did not meet the phytosanitary conditions to process a phytosanitary certificate and obtain IPSA approval."[483]

315. Even if Inagrosa could somehow "cure" these phytosanitary defects and improve its chances of clearing the IPSA and CETREX hurdles, that would have taken time. And, when it comes to avocados, time is an exporter's worst enemy. As noted above, to take advantage of the full 2018 harvest, Inagrosa would have needed to have its permitting ready in two weeks[484] and to not miss out on the 2018 harvest alone Inagrosa had to have its permits ready by November of that year.[485]

316. Also it should be noted that Hass avocados last only days after being picked from the tree and only up to 30-40 days if kept in refrigeration, as confirmed by Dr. Duarte.[486] Even if Claimant's number of 90 days[487] were correct (it is not) this distinction is without a difference since there is no evidence that Inagrosa had the means tools to refrigerate its crop. If anything the July 2018 e-mails from Mr. Luis Gutiérrez to Mr. Rondón confirm is that Inagrosa could not sell Inagrosa's avocados, not even in the local market,[488] and had to give the away.[489]

317. Hence, even in the but-for world where there is no invasion that would interrupt the anticipated 2018 harvest, there is simply nothing in this record to suggest that Inagrosa would have

[483] Moncada II, ¶ 44 (**RWS-14**).

[484] Moncada II, ¶ 42 (**RWS-14**).

[485] Reply, ¶ 1719, 1723; Rondón I, ¶ 171 (**CWS-01**); Rondón II ¶ 23.g (**CWS-09**); Gutiérrez II, ¶¶ 287-288 (**CWS-10**); Report on 2018 Hass avocado harvest and future planning plan, August 28, 2020 (**C-0460**).

[486] Duarte II, ¶ 9.7.6 (**RER-03**).

[487] Rondón I, ¶ 178 (**CWS-01**).

[488] Email exchange between Luis Gutiérrez and Carlos Rondón re 2018 harvest -re contact Rodrigo Jimenez, July 27, 2018 (**C-0432**).

[489] Gutiérrez II, ¶ 289 (**CWS-10**).

obtained the phytosanitary permits from IPSA at all, and definitely not in time to be able to export all of the harvested avocados to another country.

b. *Inagrosa Could Not Export Avocados to the U.S. Because the U.S. Forbids Avocado Imports from Nicaragua*

318. Even if Inagrosa could, at some point, clear the phytosanitary inspections and get an exportation permit, the reality is that Inagrosa would not have been able to export any of its avocados to the U.S., which Riverside identifies as Inagrosa's primary export target.

319. As detailed in the Counter-Memorial, U.S.'s Animal and Plant Health Inspection Service ("**APHIS**") has a longstanding ban against the importation of Nicaraguan Hass avocados into the U.S.[490] The reason for this hardline ban is that Nicaragua is home to plagues that are lister in the U.S. Regulated Plan Pest List.

320. A serious plague that affects Nicaragua is a fruit fly, known as *Ceratitis capitata*, that burrows itself into different fruits, including avocados, lays its eggs, kills the fruit, and can spread diseases and plagues.[491] This fly is pictured below.

[490] Counter Memorial, ¶ 160; USDA Avocado Demand (**C-0146**); Global Hass Avocado Market Report 2022-2027 pertaining to the U.S. market (**C-0155**); USDA import unit value by commodity (**C-0159**).

[491] Rosales I, ¶¶ 24, 37 (**RWS-18**); The Mediterranean Fruit Fly in Central America (**R-0174**).

321. Moreover, the are other plagues present in Nicaragua that affect avocado fruits, such as the *Heilipus lauri Boheman*, *Stenoma catenifer Walsingham* and *Conotrachelus aguacatae* which are also listed in the U.S. Regulated Plan Pest List.[492] Due to the existence of these plagues in Nicaragua, Nicaraguan avocados are banned from entry to the U.S.

322. Despite claiming Inagrosa had everything under control and following all the relevant protocols, Riverside never mentions in its Memorial that Inagrosa was unable to export its avocados to the U.S. (its preferred destination) because of this ban.[493] Instead, Riverside assured

[492] Rosales I, ¶ 37 (**RWS-18**); APHIS, U.S. Regulated Plants List (**R-0193**).

[493] *See*, APHIS, Avocado from Inadmissible Countries into All Ports, December 7, 2022 (**R-0078**) (listing Nicaraguan as a country that cannot export avocados to the United States).

that it had begun the process to obtain approval to export its avocados to the U.S. market by having calls with Mr. Rondón's local Colorado Senator's office to assist with the inspection process.[494]

323. After being confronted with the APHIS ban, Claimant changed its story. Indeed, in its Reply, Riverside now claims that Inagrosa always knew about the APHIS ban and estimated that this ban would be lifted within four years and that in the meantime Inagrosa planned to sell its avocados to Canada, the European Union, or even Japan.[495] But this last-ditch argument fails for the following reasons.

324. ***First***, as detailed below, Inagrosa would not have been able to export its avocados to Canada.

325. ***Second***, Riverside offers no objective or reliable evidence that supports its position that the APHIS ban would be lifted in four years. Riverside relies entirely on biased testimony from Mr. Russ Welty—Riverside's Chief Financial Officer—who came up with this figure out of thin air, citing to no documents, and on the apparent basis that the Colorado senator that was speaking to Mr. Rondón would be able to achieve this feat on behalf of Riverside.[496]

*326.* ***Third***, as IPSA's Martin Rosales explains, lifting the APHIS ban is not something that could be sped up or expedited by Messrs. Rondón or Welty having discussions with a local senator. Rather, to try to lift the APHIS ban, Riverside or Mr. Rondón had to apply to IPSA in Nicaragua and request IPSA to contact APHIS to initiate the proceeding to evaluate whether the

[494] Rondón I, ¶ 193 (**CWS-01**).

[495] Reply, ¶ 987; Welty I, ¶¶ 88, 90, 91 **(CWS-11).**

[496] Welty I, ¶ 86 (**CWS-11**).

ban could be lifted.[497] This proceeding is handled between States, not between an interested exporter and the phytosanitary authority of the country of destination.[498]

*327.* ***Fourth***, if APHIS is interested in pursuing this cause (which, again, is extremely unlikely given their longstanding ban and the fact that the reasons for that ban (the fruit fly) have not been ameliorated), then it would have to work with Nicaragua's phytosanitary regulator, *i.e.*, IPSA, to conduct a Risk Analysis of all the plagues located in Nicaragua that affect the avocado production, conduct myriad inspections and tests to assess whether this ban should be lifted, and both countries, the U.S. and Nicaragua, should subscribe a work plan and agreements on phytosanitary measures to monitor the plague.[499]

328. Even if Inagrosa had requested IPSA to begin the process with APHIS to obtain the necessary permits to export avocado to the U.S. market, its 4-year forecast to conduct the Risk Analysis and get an eventual the approval was unrealistic.[500] As Dr. Duarte mentions in his First Expert Report, the approval process takes several years due to rigorous and time-consuming phytosanitary controls required by APHIS.[501]

329. Mr. Rosales, who oversees these country-to-country processes at IPSA and is very familiar with the timelines involved, testifies that this is a complex process that takes several years and both countries should subscribe phytosanitary agreements.[502] Therefore, in Rosales' words "an

[497] Rosales I, ¶¶ 15-16 (**RWS-18**).

[498] Rosales I, ¶¶ 15-16 (**RWS-18**); Certificate of IPSA No. 8 (**R-0218**).

[499] Rosales I, ¶¶ 9.c; 17-20 (**RWS-18**).

[500] Rosales I, ¶¶ 9.c, 49-52 (**RWS-18**).

[501] Duarte I, ¶ 9.2 (**RER-01**).

[502] Rosales I, ¶ 50 (**RWS-18**).

exportation of avocado Hass to the Unites States in 2022 was impossible from a technical standpoint."[503]

330. Mr. Rosales added he is aware of at least two other Nicaraguan avocado producers who have asked IPSA to initiate the proceeding before APHIS to consider lifting this ban, ***more than six years ago***, and that, to date, the producers were not able to present the information and comply with the requirements APHIS imposed to "initiate" the Risk Analysis.[504]

331. The only other time APHIS has lift this type of ban in a fresh fruit was with a Nicaraguan dragonfruit exporter, ***thirteen years after that exporter requested the ban lift***.[505]

332. ***Fifth***, there is no guarantee that even after conducting the Risk Analysis, the U.S. would have lifted the ban and admit the importation of Nicaraguan avocados. The entire process is subject to a technical analysis and the result could be the denial of the importation because there is a high risk.[506] Which is highly probable considering the presence of the fruit fly. As Mr. Rosales stated "[l]ikewise, even if the steps before IPSA were to be initiated and the Risk Analysis were to proceed, there is no guarantee of success that the United States would approve the access of Nicaraguan avocados. As I mentioned, the process is not only technically complex and would take several years, but the result of the Risk Analysis could be negative due to the existence of a high level of risk."[507]

333. For these reasons, Riverside's belief that Inagrosa would have been able to export avocados to the U.S. by 2022 is completely unfounded and, by all reliable accounts, wrong.

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[503] Rosales I, ¶ 52 (**RWS-18**).

[504] Rosales I, ¶¶ 45-48 (**RWS-18**).

[505] Rosales I, ¶ 51 (**RWS-18**); Work Plan and Cooperation Agreement for the Pitahaya (**R-0178**).

[506] Rosales I, ¶ 19 (**RWS-18**).

[507] Rosales I, ¶ 53 (**RWS-18**).

c. *Inagrosa Would Not Have Been Able to Export to Canada, Either*

334. Even if Inagrosa intended to export its Hass avocado to Canada, it would have been impossible to export to that destination in 2019.

335. Nicaragua never exported any single fresh fruit to Canada, it in unknown whether the Hass avocado would be admitted in the Canadian market, and in any event, a Risk Analysis should have been mandatory conducted by the Canadian authorities in Nicaragua to assess the risk of the importation. This technical assessment takes several years. However, Inagrosa did not even initiate any relevant proceeding to obtain the authorization to export to Canada and there is no evidence that this could have been possible.

336. ***First***, Nicaragua has never exported fruit to Canada. As of today, it is unknown whether any export of fresh fruit form Nicaragua to Canada would be possible, and which are the phytosanitary requirements to export.[508]

*337.* ***Second,*** to determine whether the export was viable, Inagrosa should have applied to IPSA and request IPSA to contact the Canadian phytosanitary authority to initiate the proceeding and evaluate whether avocado from Nicaragua could be admitted. However, Inagrosa did not initiate any proceeding before IPSA in this sense.[509]

*338.* ***Third***, even if Inagrosa would have requested IPSA to initiate the proceeding with Canada, the Canadian authorities should have conducted a Risk Analysis in Nicaragua, both countries should have exchanged technical information, the Canadian authorities should have conducted inspection in Nicaragua, among other things. The whole process takes several years.[510]

[508] Rosales I, ¶¶ 9.b, 34 (**RWS-18**).

[509] Rosales I, ¶¶ 9.b, 34 (**RWS-18**); Certificate of IPSA No. 8 (**R-0218**).

[510] Rosales I, ¶¶ 9.b, 16, 18, 19, 34 (**RWS-18**).

As Mr. Rosales mentioned, in the case of Inagrosa, an "***eventual export of Hass avocados to Canada in 2019 was neither possible nor feasible.***"[511]

*339.* ***Third,*** there is no guarantee that the Risk Analysis would have been favorable to Nicaragua and admit the export of Hass avocado. There is no guarantee of success. [512]

d. *There Is Also No Reason to Assume Inagrosa Could Have Exported Avocados to Costa Rica*

340. Riverside assumed that exporting to Costa Rica was an extremely easy process and it assumed that in just two weeks after the invasion, or even in November of 2018, the export could have been possible.[513] This is another unfounded assumption of Riverside. There is nothing in the arbitration record to support that Inagrosa could have been able to export to Costa Rica.

341. ***First***, there is evidence to conclude that Inagrosa would ***not*** have cleared IPSA's phytosanitary inspections to export its product. As previously stated, the record is replete of evidence that suggests that Inagrosa would not have obtained the exportation permit from IPSA and CETREX because it would not have passed the phytosanitary inspections by IPSA.

342. ***Second***, there is no evidence that Inagrosa's avocados were in compliance with the Costa Rica phytosanitary requirements. Costa Rica requires that any avocado that is exported should be free of *Conotrachelus aguacatae* and free of plant residues, soil, snails, and slugs.[514] However, as Director Rosales stated "[b]ased on the documentation I have reviewed, there is no record or proof that the Hass avocado produced by Inagrosa was free of pests for export to Costa Rica, therefore, the product could not have been exported."[515]

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[511] Rosales I, ¶ 35 (**RWS-18**).

[512] Rosales I, ¶¶ 9.b, 19 (**RWS-18**).

[513] Ut supra

[514] Rosales I, ¶ 31 (**RWS-18**); Importation Requirements to Costa Rica (**R-175**).

[515] Rosales I, ¶ 32 (**RWS-18**).

### D. Inagrosa's Nonexistent Forestry Business

343. Riverside's penchant for making unsupported and fanciful claims about Inagrosa is in full display in Riverside's description of Inagrosa's alleged forestry business. As Riverside tells it, Inagrosa had some undefined and undocumented plan to cut down the more than 35,000 hardwood forest trees scattered across Hacienda Santa Fé, process the timber, and then export it to the U.S.[516]

344. To be sure, this plan is nowhere memorialized in this record. Indeed, there is no business plan, feasibility study, or documented concept of how this forestry business would (or even could) work. Inagrosa had none of the tools needed to cut down the trees, nor the means to process the timber, nor the infrastructure to transport the lumber, nor the experience in this type of business, nor any of the permits needed for this business. Inagrosa had neither the cash nor the investments or loans needed to finance any part of this business.

345. On top of that, Riverside's assertions in this arbitration about Inagrosa's supposed plan to eliminate the forests at Hacienda Santa Fé is contradicted with what Inagrosa reported it would do with those forests in its contemporaneous government filings. As detailed earlier in this Rejoinder, and in the Counter-Memorial,[517] from 2015 to 2018, Inagrosa sought, and obtained, a ministerial resolution from MARENA declaring Hacienda Santa Fé a private wildlife reserve.[518] In obtaining that resolution, Inagrosa submitted detailed filings that noted that Inagrosa sought this classification because it wanted to preserve the property's forests and protect the *flora* and *fauna*

[516] Memorial, ¶¶ 376 -378; Tree Census at Hacienda Santa Fe prepared by Luis Gutiérrez (**C-0084**).

[517] Counter Memorial, ¶¶ 99, 187.

[518] Ministerial Resolution No. 021.2018, Government of the Republic of Nicaragua, Ministry of the Environment and Natural Resources (**R-0012**).

that live in the forests. In other words, Inagrosa's alleged forestry business never existed. Again, Riverside just made it up out of whole cloth.

346. Nicaragua also exposed the silliness of Riverside's argument that the invaders had "totally deforested" Hacienda Santa Fé's standing forest between June 2018 and August 2018.[519] Riverside relies on this allegation for its claim that it should be compensated USD $5.1 million—the value that Riverside ascribes to the total value of the lumber in Hacienda Santa Fé's forest as well as the value of the trees that Inagrosa was supposedly harvesting in on-site nurseries.[520] In the Counter-Memorial, Nicaragua refuted this claim by presenting satellite images depicting that the Hacienda Santa Fé forests—which span more than 500 hectares—are ***still*** there.[521]

347. Nicaragua also explained that Riverside's story of lumberjack invaders is totally unrealistic. Indeed, the invaders are farmers with no known experience in logging and who are not alleged to have brought any heavy machinery and tools required to carry out this extensive logging project. Riverside's story begs the following questions: How did the invaders cut down 35,000 trees in just two months without any of the tools or experience needed to accomplish this impressive feat? What motivated the invaders to go through this labor-intensive (and costly) effort? What happened to the timber from these trees?

348. In its Reply, Riverside never answers these questions. Nor does Riverside respond to most of the arguments Nicaragua presented with its Counter-Memorial concerning Inagrosa's alleged forestry business. Riverside, for example, never addresses, much less cures, the absence of

[519] Memorial, ¶¶ 18, 67, 275, 301(d), 387; Rondón I, ¶ 10 (**CWS-01**).

[520] Memorial, ¶ 842.

[521] Counter Memorial, ¶ 193; Satellite image of the land use of October 2022 of Hacienda Santa Fé prepared by the National Environmental Information System (**R-0077**).

any evidence demonstrating that Inagrosa had the requisite experience, technical know-how, financial means, supplies, labor, or infrastructure to execute run a forestry business.

349. Instead, in its Reply, Riverside changes its story. The Reply states that "Riverside did not argue that the entire forest was deforested-only that the rare woods were logged."[522] But that is false. In its original story, Riverside alleged that "[a]s a result of the invasion, ***the private forest reserve was totally deforested***."[523]

350. Riverside also attempts to shrug off the lack of permitting by arguing that none of the permits were applicable because, as of the June 2018 invasion, Inagrosa's forestry business had not yet begun the process of logging the trees, much less the process of exporting the lumber from these trees.[524] As for the wildlife reserve issue, Riverside contends Inagrosa management "understood" that a reserve could be subject to exploitation even if the Hacienda was designated as a private wildlife reserve.[525]

351. As demonstrated in this section, none of Riverside's contentions about the alleged forestry business is true.

1. Apart from Being Unfounded, Inagrosa's Alleged Forestry Business Is Illegal

352. As noted above, in its Reply, Riverside maintains its position that Inagrosa should be credited for having a forestry business worth millions of dollars, even if Inagrosa did not have any permits related to that business. Specifically, Riverside alleges—similar to what it argued as to the avocado business—that Inagrosa had no obligation to obtain any of the permits unless and until it started logging the trees and exporting the processed lumber (which, according to Mr.

[522] Reply, ¶ 886.

[523] Memorial, ¶ 387.

[524] Reply, ¶¶ 838, 845, 846, 848, 853, 859, 861; Rondón II, ¶ 117 (**CWS-09**); Gutiérrez II, ¶ 201, 202, 300 (**CWS-10**).

[525] Reply, ¶ 732, Rondón II, ¶ 121 (**CWS-09**).

Rondón,[526] would have occurred one year after the 2018 invasion).[527] These contentions do not pass muster for the following reasons.

353. ***First***, it is completely illegal to log trees in a private wildlife reserve. As stated by Ms. González, "[i]n the Private Wildlife Reserve, the forest area is a conservation zone where forest timber cannot be cut or used. Forest use is not possible, since protected areas are intended for the conservation, rational management and restoration of wild flora, fauna and other forms of life, such as biodiversity and the biosphere. Under these conditions, a forest area is only subject to forest sanitation plans and is not subject to resource exploitation and extraction."[528] This is confirmed by Dr. Sequeira who states that there is a total and permanent ban to log trees in a private wildlife reserve[529]

354. In addition, as Álvaro Méndez Valdivia, a delegate from Nicaragua's National Forestry Institute (*Instituto Nacional Forestal*) ("**INAFOR**"), declares, the insurmountable legal obstacle for Inagrosa's supposed plan to cut down its forest is that logging ***is completely illegal*** in private wildlife reserves.[530] As Mr. Méndez explains, this legal maxim is set out in Article 26 of *Ley No. 462 de Conservación, Fomento y Desarrollo Sostenible del Sector Forestal* ("**Law No. 462**").[531] And its application is dispositive here because Inagrosa had asked for, and obtained, a

[526] Rondón II, ¶ 117 (**CWS-09**).

[527] Reply, ¶¶ 838, 845, 846, 848, 853, 859, 861; Rondón II, ¶ 117 (**CWS-09**); Gutiérrez II, ¶ 201, 202, 300 (**CWS-10**).

[528] González I, ¶ 77 (**RWS-09)**; Law No. 217, art. 5 (RL-0017); Decree No. 1/2007, art. 3.2 (**RL-0007**); Decree No. 20/2017, art. 82 (**RL-0009**)

[529] Sequerira I, ¶ 37.10 (**RER-05**).

[530] Méndez II, ¶ 39 (**RWS-08**).

[531] Méndez II, ¶ 39 (**RWS-08**); Law No. 462, art. 26 (**RL-0021**).

MARENA resolution in February 2018 that designated Hacienda Santa Fé as a private wildlife reserve.[532]

355. Riverside contends in its Reply that this resolution was never valid because it was not published in the official gazette.[533] But as fully explained earlier in this Rejoinder, Nicaragua's legal expert, Dr. Sequeira, confirms that ministerial resolutions are administrative acts that, under Nicaraguan law, are presumed to be valid.[534] So Riverside's invalidity argument is unfounded.

356. Riverside also contends Inagrosa believed that it could log the forests in a private wildlife reserve because that is what a neighboring wildlife reserve, called "*El Jaguar*," allegedly told Inagrosa.[535] But there is no contemporaneous evidence of this conversation and in any event the opinions of another private reserve does not, and cannot, alter Nicaraguan law. Further, any suggestion that Inagrosa was under the impression that it could log the forest in a wildlife reserve is contradicted by Inagrosa's filings with MARENA about its wildlife reserve application, which unambiguously state that, rather than log the forest, Inagrosa's intentions were to ***conserve and protect the forests***.[536]

357. ***Second***, Riverside cannot have it both ways. If it maintains Inagrosa had a viable forestry business whose alleged destruction is actionable for damages, then Inagrosa should have obtained the requisite permits from INAFOR.[537] But if Inagrosa did not go through the necessary

[532] Ministerial Resolution No. 021.2018, Government of the Republic of Nicaragua, Ministry of the Environment and Natural Resources (**R-0012**).

[533] Reply, ¶¶ 744, 752.

[534] Sequeira I, ¶¶ 42.3, 43.1, 43.2 (**RER-05**); González II, ¶ 27 (**RWS-15**).

[535] Reply, ¶ 733.

[536] González II, ¶ 18 (**RWS-15**); MARENA Form Application for designation of Private Wildlife Reserve filed by INAGROSA (**C-83**).

[537] Méndez I, ¶ 31 (**RWS-08**).

regulatory vetting,[538] then Riverside's attempts to obtain damages related to that business must be rejected.

358. Riverside's suggestion that the logging permit would have been a mere formality for Inagrosa—and, therefore, the Tribunal should just assume Inagrosa would have obtained this permit sometime in 2019—is unfounded. Riverside never presents any proof that Inagrosa would have obtained this permit, except the unsupported testimony of Mr. Rondón that Inagrosa felt confident about its permitting because it had numerous meetings with INAFOR about its planned activities.[539] But, as Mr. Méndez confirms, ***there is no evidence whatsoever that those alleged meetings took place*** and certainly nothing in INAFOR's records, which would have contained some documentary evidence of these meetings.[540]

359. Mr. Méndez also confirms that logging permits are not mere formalities, contrary to Riverside's allegations. Rather, the permitting process for these permits is extensive and there is no reason to assume, on this record, that Inagrosa would obtain these permits if it ever applied for them.[541]

360. In sum, Riverside's assertions about Inagrosa's forestry business do not withstand scrutiny because any such business would have been illegal, given that Hacienda Santa Fé was designated as a private wildlife reserve. Even if that designation did not exist, there is nothing in this record that would allow this Tribunal to assume that Inagrosa would have secured any of the necessary permits for this business.

2. Riverside Has Not Proven Any Damages Related to This Business

[538] Méndez I, ¶ 32 (**RWS-08**); Certificate issued by INAFOR No. 1 (**R-0017**).

[539] Reply, ¶ 841; Rondón II, ¶ 113 (**CWS-09**).

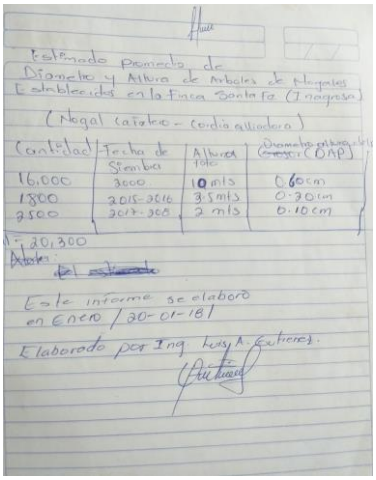
[540] Méndez II, ¶¶ 22-25 (**RWS-17**); Certificate issued by INAFOR No. 2 (**R-0216**).

[541] Méndez, ¶¶ 26-37 (**RWS-17**).

361. The other fatal flaw in Riverside's claims concerning Inagrosa's alleged forestry business is that Riverside has not proven any damages related to it.

362. In its Reply, Riverside maintains that its damages figure related to this business is valid because: (i) it is based on a "census" of the trees containing "rare woods" conducted by Mr. Luis Gutiérrez on January 20, 2018; and (ii) there is contemporaneous evidence confirming that the trees containing these "rare woods" were all cut down by the invaders.[542] Again, these claims are unfounded.

363. ***First***, the "census" cited by Riverside[543] is not reliable and lacks information that is needed to support Riverside's claims. This one-page, handwritten document is depicted below.[544]



Estimado promedio de
Diametro y Altura de Arboles de algunas
Establecidos en la finca Santa Fe (Inagrosa)
(Nogal (cataloe - cordia alliodora)

| Cantidad | Fecha de Siembra | Altura Prom | Diametro (DAP) |
|---|---|---|---|
| 16,000 | 2000 | 10 mts | 0.60 cm |
| 1800 | 2015-2016 | 3.5 mts | 0-30 cm |
| 2500 | 2017-2018 | 2 mts | 0.10 cm |

= 20,300
Arboles

Este informe se elaboro
en ENERO / 30-01-18
Elaborado por Ing. Luis A. Gutierrez.

364. As Mr. Méndez explains, a tree census is a technical document that contains a full inventory of the trees in a particular forest.[545] Apart from registering every tree in the forest, this

[542] Reply, ¶¶ 992, 994.

[543] Tree Census at Hacienda Santa Fé prepared by Luis Gutiérrez, January 20, 2018 **(C-0084)**.

[544] Tree Census at Hacienda Santa Fé prepared by Luis Gutiérrez, January 20, 2018 **(C-0084)**.

[545] Méndez, ¶ 13 (**RWS-17**); Nicaraguan mandatory technical standard (NTON) No. 18 001-12, published in the Official Gazette on August 19, 2013 ("NTON 18 001-12") (**RL-0161**).

inventory must also contain detailed information about each tree and relevant measurements that are obtained using specific tools.[546] In Mr. Méndez's words:

> The forest inventory should present the results at the level of each forest layer, using different sampling intensities. According to the simplified guide for the preparation of general forest management plans and annual operational plans in broadleaf forests, the inventory must contain (1) a classification of forest area, (2) a classification of production forests by type or stratum, (3) a description of the inventory methodology that includes (a) delimitation of the area, (b) type of inventory, (c) sampling intensity, (d) type of plot, (e) size of the plot, (f) strip or inventory line, (g) distribution of the sampling plot, (h) measurement variables, (i) parameters to be evaluated, (j) sampling error, and (4) inventory results.[547]

365. Putting aside that Mr. Gutiérrez's tree "census" is incomplete and unconventional, it is also unreliable. As Mr. Méndez explains, that "census" is riddled with inconsistencies and unreliable conclusions, such as: (i) incorrect names of the types of trees located at the Hacienda; (ii) the reported ages of the trees do not match up with the reported diameters of those trees; (iii) inconsistent numbers when compared to Inagrosa's other reports about how many trees exist in Hacienda Santa Fé; (iii) it is impossible that all of the trees in each category have the exact same diameter and age (as Mr. Gutiérrez's "census" suggests); and (iv) missing information about the other types of trees in the forest.[548]

366. Moreover, Mr. Méndez explains that the information provided in Mr. Gutiérrez's "census" cannot be reconciled with the data Mr. Rondón provided to Riverside's damages expert to arrive at the USD $5.1 million figure.[549]

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[546] Méndez, ¶¶ 13-16 (**RWS-17**).

[547] Méndez, ¶ 14 (**RWS-17**); NTON 18 001–12, art. 5.1.2.1 (**RL-0161**).

[548] Méndez, ¶ 17 (**RWS-17**).

[549] Méndez, ¶¶ 19-21 (**RWS-17**); Rondón I, ¶ 60 (**CWS-01**); Memorial, ¶ 385; Réplica, ¶ 992.

367. ***Second***, there is no contemporaneous evidence supporting Riverside's allegations that the invaders logged all of the "rare" trees at Hacienda Santa Fé. As noted earlier, Riverside initially alleged that these invaders "totally deforested" the more than 35,000 hardwood trees in Inagrosa's forest.[550] In its Reply, Riverside walked this allegation back and now alleges that the invaders logged the 20,300 black walnut trees in the forest.[551]

368. In its Reply, Riverside avers that its claim that the black walnut trees were logged is supported by Mr. Gutiérrez's August 2018 written statement that he gave to the Jinotega police when conducting an inventory of the Hacienda after the invaders were first evicted.[552] But that is wrong. The only allegation in that document about damages to the black walnut trees is that there was some undefined "extraction" of this type of wood.[553] There is ***no*** allegation that all 20,300 black walnut trees were logged (as Riverside suggests). There is not even an allegation that even one such tree was logged.

369. Next, Riverside points to Facebook posts from unidentified users that purport to show photographic evidence that the invaders logged trees at Hacienda Santa Fé.[554] The photo in those posts, however, merely depict ***two tree stumps*** located in the middle of a standing forest.[555] In other words, rather than showing a complete deforestation of 20,300 black walnut trees, those posts merely show that two trees were cut down. Importantly, however, there is nothing in those photos that confirms that the two trees that were logged were black walnut trees. Nor is there any basis to assume that those two trees were cut down by the invaders (as opposed to Inagrosa). In

[550] Memorial, ¶¶ 18, 67, 275, 301(d), 387; Rondón I, ¶ 10 (**CWS-01**).

[551] Reply, ¶ 886.

[552] Reply, ¶ 881; Inventory of damages at Hacienda Santa Fe August 14, 2018 **(C-0058-SPA).**

[553] Inventory of damages at Hacienda Santa Fe August 14, 2018 **(C-0058-SPA).**

[554] Reply, ¶¶ 887-88, NotiPinolero, Tomatierras destroy forest at Hacienda Santa Fe (**C-0061**).

[555] Reply, ¶ 887.

fact, the pictures are not even dated and Riverside does not include the original Spanish-language posts as exhibits to its Reply.

370. In sum, Riverside has not presented any evidence proving that ***any*** of the 20,300 black walnut trees at Hacienda Santa Fé were harmed by the invaders, much less that all of them were logged. Nor has Riverside presented any evidence to support that those trees had a value of USD $5.1 million. Its allegations and claims about the forestry business must, thus, be rejected.

### E. Claimant Mischaracterizes the Protective Order and Nicaragua's Standing Offer to Have Inagrosa Take Back Hacienda Santa Fé

371. This dispute is about the invasion of Hacienda Santa Fé. A property that Claimant alleges to have abundant nutrient-rich volcanic soil, liberal access to sunlight and water, the right amount of elevation above sea level, and distinctive climate conditions that, altogether, allowed Inagrosa to cultivate Nicaragua's first-ever commercial Hass avocado plantation. Claimant also alleges (albeit without any contemporaneous evidence) that this unprecedented plantation was so prolific, and its product so commercially viable, that the plantation's fair market value as of June 2018 would have been in the hundreds of millions of dollars, even when taking into account the undisputed facts that, as of that date, the plantation had no permits, sales, customers, independent financiers, or an objective track record of success. And Claimant alleges that the Hacienda had a lush forest, filled with valuable lumber, that Inagrosa would have processed through its forestry business—which was also bereft of permits, sales, independent financiers, or track record—that was worth millions of dollars as of June 2018. In other words, Claimant's litigation position is that Hacienda Santa Fé was a proverbial cash cow and that the 2018 invasion halted the windfall that Inagrosa (and, by extension, Riverside) would have inevitably reaped from this property.

372. If the above is true, one would assume that Inagrosa and Riverside would be eager to return to Hacienda Santa Fé as soon as the invaders were evicted from the property. But that is

not the case. For nearly three years, Hacienda Santa Fé has been rid of invaders, yet Inagrosa and Riverside have repeatedly refused to retake possession of their supposedly valuable investment.

373. In its Reply, Claimant attempts to patch this glaring hole in its story by advancing the already-debunked myth that a 2021 court order that installed Nicaragua as judicial depositary of Hacienda Santa Fé in order to protect it from future invasions ("**Protective Order**") somehow transferred title over the property to Nicaragua, thus preventing Inagrosa from retaking its asset.[556] This argument is baseless.

374. As an initial matter, and as fully summarized below, the Tribunal already rejected this argument in its Procedural Order No. 4, as demonstrated in this excerpt:[557]

> *On its face, the Court Order is therefore for the appointment, by way of a provisional measure, of a judicial depositary* ***for the purpose of protecting****, and* ***not for the purpose of seizing****, Hacienda Santa Fé. Both the Application and the Court Order specifically acknowledged that the property was registered in favor of Inagrosa, a Nicaraguan company in which the Claimant is a majority stakeholder.* ***Thus the Court Order did not purport to transfer ownership****. The Court Order also is provisional and specifically provides that it "will have a duration of two years."*
>
> . . . .
>
> *Indeed, by its terms,* ***the Court Order does not preclude the Claimant from seeking repossession of the property at any time****.*

375. Claimant argues that the Tribunal's findings on this matter are inaccurate because they were made "in the absence of specialized knowledge concerning Nicaraguan law" that Dr. Gutiérrez supposedly provides in his expert report attached to the Reply.[558] But as demonstrated in this section and in the accompanying expert report of Dr. Sequeira attached to this Rejoinder,

[556] Reply, ¶¶ 625-647.

[557] Procedural Order No. 4, ¶¶ 33-34 (emphasis added).

[558] Reply, ¶ 47.

Dr. Gutiérrez's analysis and conclusions misstate Nicaraguan law, distort or omit relevant facts, and offer nothing on which this Tribunal could overturn its prior finding with regard to the Protective Order.

376. Claimant also argues that Inagrosa and Riverside have not retaken Hacienda Santa Fé in the last three years because Nicaragua never offered it to them.[559] This argument borders on the frivolous, given that this record contains several written standing invitations (dating back to 2021) from Nicaragua to Claimant to have Inagrosa or Riverside retake Hacienda Santa Fé.[560] Claimant acknowledges those invitations but mischaracterizes them to try to make them fit its self-serving narrative that Nicaragua wants to expropriate that property.[561] As demonstrated in this section, the text in those invitations speaks for itself and belies Claimant's narrative. In any event, as the Tribunal held in Procedural Order No. 4 and as was separately confirmed by Dr. Sequeira, Claimant or Inagrosa do ***not*** need an invitation from Nicaragua to repossess Hacienda Santa Fé; Claimant and Inagrosa can "seek[] repossession of the property ***at any time***."[562]

377. As further demonstrated below, Claimant's and Inagrosa's repeated refusal to take back Hacienda Santa Fé undermines Claimant's case-in-chief. As an initial matter, these refusals show that Claimant has not taken reasonable steps to mitigate its alleged damages, as argued in Section V.C, *infra*. But there is more. Claimant's and Inagrosa's repeated refusals to take back the property undermine Claimant's assertions about the fair market value of the avocado and forestry businesses that were allegedly run inside of Hacienda Santa Fé. Indeed, if Hacienda Santa Fé has

[559] Reply, ¶¶ 542-547.

[560] Letter from Foley Hoag to Appleton & Associates regarding offer to return Hacienda Santa Fe (**C-0116**); Nicaragua's Second Response to Claimant's Motion, dated December 12, 2022, p. 3 (**R-0222**); email from A. Gonzalez to B. Appleton regarding handover of Hacienda Santa Fe (**C-0429**); Nicaragua's Letter to Appleton, dated January 19, 2024 (**R-0219**).

[561] Reply, ¶¶ 508-534.

[562] Procedural Order No. 4, ¶ 34 (emphasis added).

the right environmental, climatological, biological, and topographical conditions to produce Hass avocados and premium lumber, as Claimant alleges in this arbitration, then there is no reason for Inagrosa to leave it in a state of abandon when it has been rid of invaders for nearly three years. Claimant's story just does not add up.

1. The Protective Order Protects Inagrosa's Interests in Hacienda Santa Fé and Claimant's Arguments to the Contrary Have Been Rejected and Are Unfounded

378. In its Reply, Claimant contends the Protective Order is a "secretive seizure order" that "divested Inagrosa of its possessory rights over" Hacienda Santa Fé, "conferr[ed] them upon Nicaragua," and caused the "*de jure* and *de facto* substantive deprivations of Inagrosa's property rights" over the Hacienda.[563] None of this is true.

379. As identified above, the Tribunal has already ruled on this issue. In late 2022, each party submitted two rounds of pleadings on this issue, following Claimant's motion for an order that, *inter alia*, would have required Nicaragua to disclose documents regarding the Protective Order and given Claimant leave to supplement its Memorial with the information obtained from those disclosures.[564] Along with those submissions, the parties filed thirty-seven (37) fact exhibits and ten (10) legal authorities, including relevant court and registry filings, which confirm that the Protective Order did not divest Inagrosa of its property rights over Hacienda Santa Fé. Based on that record, on December 19, 2022, the Tribunal issued Procedural Order No. 4, which dismissed Claimant's motion in its entirety.[565]

380. In denying Claimant's motion, the Tribunal held that the Protective Order merely permitted "the appointment, by way of a provisional measure, of a judicial depositary for the

[563] Reply, ¶¶ 627-630.

[564] Procedural Order No. 4, ¶¶ 1-6.

[565] Procedural Order No. 4, ¶ 34.

purpose of protecting, and not for the purpose of seizing, Hacienda Santa Fé."[566] Additionally, the Tribunal found that the Protective Order made clear "that the property was registered in favor of Inagrosa" and "did not purport to transfer ownership" of that property to Nicaragua, contrary to Claimant's arguments.[567] The Tribunal also held the Protective Order was "not inappropriate" in light of the fact that neither Claimant nor Inagrosa was in possession of the property when the Order was entered, as well as the fact that nothing in that Order prevents Claimant or Inagrosa "from seeking repossession of the property at any time."[568] And the Tribunal concluded that, in light of the foregoing, the Protective Order "***cannot be characterized*** as a 'seizure' order; it rather constitutes a measure ***that is intended to protect the Claimant's property in Nicaragua***, pending the completion of the present proceedings."[569]

381. In its Reply, Claimant mostly ignores the Tribunal's findings and makes the same arguments the Tribunal already rejected more than two years ago. The only novelty is Claimant's reliance on testimony from Dr. Gutiérrez, who reviews the ***same*** documents that the Tribunal has already reviewed (*e.g.*, court filings and registry information related to the Protective Order) and concludes that they determine the Protective Order has "substantially eroded" and "diminished" Inagrosa's rights over Hacienda Santa Fé.[570] This conclusion is erroneous and unfounded.

382. To be sure, Dr. Gutiérrez's conclusions are not based on the text of the Protective Order, itself, which he largely ignores and does not quote in his report. That text makes clear that the purpose of the Protective Order is to preserve the *status quo* so as to facilitate this arbitration.

[566] Procedural Order No. 4, ¶ 41.

[567] Procedural Order No. 4, ¶ 41.

[568] Procedural Order No. 4, ¶ 34.

[569] Procedural Order No. 4, ¶ 35 (emphasis added).

[570] Reply Memorial, ¶¶ 587-664; Renaldy Gutiérrez I, ¶¶ 34-107 (**CES-06**).

Specifically, as the Tribunal has already found, the Protective Order notes that: (i) this arbitration stems from invasions of Hacienda Santa Fé; (ii) neither Inagrosa (the owner of the Hacienda) nor Riverside (the majority owner of Inagrosa) has repossessed the Hacienda since Nicaragua rid it of the invaders; and (iii) a judicial depositary is necessary to protect the property from further invasions throughout the pendency of the arbitration or until Inagrosa or Riverside retake their property and secure it for themselves.[571]

a. *Claimant's Concerns about an Unlimited Depositary Are Unfounded*

383. Claimant and Dr. Gutiérrez do not present an alternative interpretation of the plain text of the Protective Order. They instead suggest the Protective Order "seems to have created a cloud in INAGROSA's title" because it does not state the limitations of the judicial depositary and because Dr. Gutiérrez opines there is no article in the "Nicaraguan Civil Procedure Code" that would limit Nicaragua's status as depositary, thus potentially allowing Nicaragua "to use, dispose, or hypothecate the property."[572] But this suggestion is unfounded.

384. The Nicaraguan Civil Procedural Code, which indisputably must be used in order to interpret the Protective Order, identifies limitations to a judicial depositary appointed pursuant to a provisional measure, as is the case here. As Nicaragua's legal expert, Dr. Byron Sequeira, explains in his expert report,[573] one set of limitations is contained in Article 356 of that Section, which states as follows:

> ***Article 356 Obligations of the depositary***
>
> *The obligations of the depositary are, among others, the following:*

[571] Court Order issued by the Second Oral Civil District Court of Jinotega, December 15, 2021(**C-0251**).

[572] Renaldy Gutiérrez I, ¶ 70 (**CES-06**).

[573] Sequeira I, ¶ 25.1 (**RER-05**).

> *(1) To keep the property in custody in the same state in which it was received, at the order of the judicial authority and with permanent access for observation by the parties and by the judicial officer designated for that purpose;*
>
> *(2) To report immediately to the judicial authority, under civil and criminal liability, anything that may involve alteration or deterioration of the objects in storage, without prejudice to the specific provisions of other regulations;*
>
> *(3) When the nature of the seized property so requires, taking into account its characteristics and productivity, to safeguard and preserve the property with due diligence, disposing of it in the conditions indicated to it and handing it over to the person designated by the judicial authority; and*
>
> *(4) Where the attachment relates to wages, salaries, remuneration or their equivalent, the depositary shall be obliged to make the attachments in accordance with the attachment order, to make reports and to deliver them to such persons as the judicial authority may designate.*[574]

385. As can be seen from this text, a judicial depositary must conserve the property "in the same state in which it was received" and is subject to "civil and criminal liability" if there is any "alteration or deterioration" of the asset in question and can only dispose of said asset in the manner detailed by the order appointing the depositary.[575]

386. This Article, which Claimant wholly omits from its Reply, and Dr. Gutiérrez wholly omits from his report, is dispositive here because it confirms that Nicaragua cannot "dispose" of Hacienda Santa Fé as is suggested by Claimant and Dr. Gutiérrez.[576]

[574] Nicaraguan Civil Procedural Code, Art. 356 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[575] Nicaraguan Civil Procedural Code, Art. 356 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[576] Renaldy Gutiérrez I, ¶ 70 (**CES-06**).

387. Further, Article 357 of the Nicaraguan Civil Procedural Code, which is also not addressed by Claimant or Dr. Gutiérrez, states that a depositary can only "use" the deposited asset if such use "is not incompatible" with the asset's conservation, as demonstrated below:[577]

> ***Article 357 Special features of a deposit***
>
> *In the case of objects of special value, or that require special care, the deposit will be made in the accredited public or private entity that is appropriate.*
>
> *Where the enforced party is appointed as depositary, he may be authorized to use the seized property provided that it is not incompatible with its retention. It may also be authorized to replace the seized property, if required by the nature of the property or the business activity; but its fruits or rents will be subject to execution, and up to twenty per cent of the net income must be deposited monthly to cover the amount of the claim.*[578]

388. As Dr. Sequeira further explains in his report, Article 385 of the Nicaraguan Civil Procedural Code also provides that a judicial depositaries (like Nicaragua) can only dispose of an asset in deposit if authorized by judicial order and only after a showing of extraordinary reasons, such as when it can be demonstrated that conservation is more burdensome than disposal.[579] An excerpt of this Article is included below. Notably, Dr. Gutiérrez does not consider this Article in his expert report.

> ***Article 385 Practice of provisional measures***
>
> *(....)*
>
> *Depositaries, depositaries, auditors, receivers, administrators or judicial administrators, as well as persons responsible for the assets or rights on which a provisional measure has fallen, may dispose of them only with the prior authorization of the judicial authority,*

[577] Nicaraguan Civil Procedural Code, Art. 357 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[578] Nicaraguan Civil Procedural Code, Art. 357 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[579] Sequeira I, ¶¶ 26.1-26.4 (**RER-05**).

> *when there are exceptional circumstances that make conservation more burdensome than alienation.*[580]

389. Accordingly, Dr. Gutiérrez is wrong when he concludes that the "Nicaragua Civil Procedural Code is silent on whether Nicaragua requires judicial authorization to use, dispose, or hypothecate" Hacienda Santa Fé and, thus, it should be assumed that Nicaragua can undertake to use or dispose of the property in a manner that injures or prejudices Inagrosa and Claimant.[581] ***Dr. Gutiérrez has it exactly backwards***. The Nicaragua Civil Procedural Code guarantees that Nicaragua must act in a manner that safeguards and protects the deposited asset, under penalty of civil and criminal liability, with the ultimate goal of preserving the value of the deposited asset so as to prevent any prejudice to the asset's owner over the duration of the deposit.

390. Beyond the aforementioned articles under the Nicaraguan Civil Procedural Code, there are articles in Nicaragua's Civil Code that further limit and restrain a depositary's ability to use or dispose the asset in deposit, such as Articles 3451, 3461, 3463, 3480, 3486, and 3487.[582] Dr. Sequeira quotes these Articles in his expert report and explains how they limit and constrain a judicial depositary in similar and complementary ways as the Articles quoted and cited in this section from Nicaragua's Civil Procedural Code.[583] Again, Dr. Gutiérrez does not cite this black letter law in his report.

391. Dr. Gutiérrez's conclusions in this regard are further undermined by the fact that Nicaragua has not used, disposed, nor hypothecated Hacienda Santa Fé since being appointed as its depositary. Quite to the contrary, the arbitral record confirms Nicaragua has paid hundreds of

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[580] Nicaraguan Civil Procedural Code, Art. 385 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[581] Renaldy Gutiérrez I, ¶ 70 (**CES-06**).

[582] Nicaraguan Civil Code, Arts. 3451, 3461, 3463, 3480, 3486, 3487 (**RL-0168**).

[583] Sequeira I, ¶¶ 25.2-25.4 and 27.1 (**RER-05**).

thousands of dollars to a private security firm to ***protect*** the Hacienda from invasions after it took significant efforts from 2018 to 2021 to rid the property of its invaders.[584]

392. All the while, and as is summarized later in this section, Nicaragua has repeatedly invited Riverside and Inagrosa to take possession of the Hacienda as soon as possible; a fact that is irreconcilable with Dr. Gutiérrez's suggestion that Nicaragua is trying to convert the property. It is notable that Dr. Gutiérrez does not address, much less analyze, these invitations in his expert report.

b. *Claimant Mischaracterizes and Conflates the Provisional Measures at Issue Here*

393. In its Reply, Claimant distorts and conflates the relevant provisional measures. Relying on Dr. Gutiérrez's testimony, Claimant alleges that the Nicaraguan court issued myriad provisional measures, including a "judicial intervention" (*administracion judicial*), a sequester (*secuestro*), and an attachment (*embargo*).[585] But none of this is true.

394. As confirmed by Dr. Sequeira, under Nicaraguan law, the provisional measures that are available to a court are listed in Articles 343 and 344 of the Nicaraguan Civil Procedural Code.[586] In other words, the court's ability to issue provisional measures is limited by the relief provided by those Articles and the case-specific factual circumstances.

395. Dr. Sequeira explains in his expert report that the Nicaraguan court issued two separate, but interrelated, provisional measures. ***First***, as described in the previous section, the

[584] Invoice No. 10840 issued by Empresa de Servicios de Seguridad Privada (CYB) for security services for the month of April 2023, April 23, 2023 (**C-0705**); Receipt No. 12119 from CYB security company acknowledging receipt of ₡1,486,588.80 for services rendered between September 2023 and January 2024 (**R-0200**); Receipt No. 11615 from CYB security company acknowledging receipt of ₡3,567,5813.12 as annual payment for services rendered (**R-0201**).

[585] Renaldy Gutiérrez I, ¶¶ 63-70 (**CES-06**).

[586] Sequeira I, ¶¶ 11.1-11.5 (**RER-05**); Nicaraguan Civil Procedural Code, Arts. 343 and 344 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

Protective Order appointed Nicaragua as the judicial depositary of Hacienda Santa Fé.[587] As Dr. Sequeira confirms, in issuing the provisional measure, the court relied on Article 344 of the Nicaraguan Civil Procedural Code.[588] That Article allows a Nicaraguan court to fashion "undefined provisional measures" or "*medidas cautelares innominadas*" that it deems "necessary to ensure the effectiveness of the jurisdictional protection sought" by the moving party.[589] The full text of this Article is below.[590]

> **Article 344 General precautionary power**
>
> Without prejudice to the provisions of the preceding article, the adoption of any precautionary measure deemed necessary to ensure the effectiveness of the jurisdictional protection sought, as well as those expressly provided for in the laws or international instruments approved and ratified in Nicaragua for the protection of certain rights, may be requested.

396. As Dr. Sequeira explains, in its Protective Order the Nicaraguan court considered the case-specific circumstances – namely, that Hacienda Santa Fé was vulnerable to invasions in the future given that its owners refused to repossess it – and appointed Nicaragua as depositary of the property to ensure its protection and to maintain the *status quo* in this arbitration.[591] This type of provisional measure is not identified in Article 343 of the Nicaraguan Procedural Code, but is consistent with the provisions and limitations of Article 344 thereunder.[592]

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[587] Sequeira I, ¶ 19 (**RER-05**); Court Order issued by the Second Oral Civil District Court of Jinotega, December 15, 2021(**C-0251**).

[588] Sequeira I, ¶¶ 23.1-23.17 (**RER-05**).

[589] Sequeira, ¶ 11.3 (**RER-05**); Nicaraguan Civil Procedural Code, Art. 344 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[590] Nicaraguan Civil Procedural Code, Art. 344 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[591] Sequeira I, ¶¶ 23.1-23.17 (**RER-05**); Court Order issued by the Second Oral Civil District Court of Jinotega, December 15, 2021(**C-0251**).

[592] Sequeira I, ¶¶ 23.1-23.17 (**RER-05**); Nicaraguan Civil Procedural Code, Arts. 343 and 344 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**)

397. Contrary to Dr. Gutiérrez's testimony,[593] the Protective Order did ***not*** impose any of the following provisional measures: (i) an attachment (*embargo*) under Article 343.1 of the Nicaraguan Procedural Code; (ii) a sequester (*secuestro*) under Article 343.2 of the Nicaraguan Procedural Code or (iii) a judicial intervention or administration (*intervención o administración judicial*) under Article 343.3 of the Nicaraguan Procedural Code.[594] Those measures arise where a claimant seeks to freeze an asset as security for its claims. That situation is not present here, given that Nicaragua brings no claims against Riverside or Inagrosa. The inapplicability of these other types of provisional measures is confirmed by Dr. Sequeira in his expert report.[595]

398. ***Second***, in addition to naming Nicaragua as judicial depositary consistent with the undefined provisional measure provision in Article 344, on January 25, 2022 the Nicaraguan court ordered provisional relief by way of a "preventive filing" or "*anotación preventiva*" as to Hacienda Santa Fé pursuant to Article 343.6 of the Nicaraguan Civil Procedural Code.[596]

399. As Dr. Sequeira explains, this provisional measure resulted in the addition of a note in the public registry file that concerns Hacienda Santa Fé.[597] The purpose of that note is to provide the property's owner (*i.e.*, Inagrosa) with constructive notice of the judicial deposit that was implemented by the Protective Order.

400. Claimant and Dr. Gutiérrez do not mention this measure in their analysis of the judicial file, presumably because it does not square with their (erroneous) conclusions that the

[593] Renaldy Gutiérrez I, ¶¶ 63-70 (**CES-06**).

[594] Nicaraguan Civil Procedural Code, Art. 343 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[595] Sequeira I, ¶¶ 23.1-23.17 (**RER-05**)

[596] Sequeira I, ¶ 20 (**RER-05**); Order from Judge Julio Cesar Blandon Villagra of the Second Oral Civil District Court of Jinotega to the Real Property Registry of Jinotega (**R-0187**).

[597] Sequeira I, ¶¶ 20.5-20.6; 23.15-23.17 (**RER-05**).

Nicaraguan court was trying to facilitate Nicaragua's "secret judicial seizure" of the property,[598] as analyzed further below in this section.

c. *Claimant's Contention that Inagrosa Should Have Been Named as the Judicial Depositary of Hacienda Santa Fé Misses the Mark*

401. Dr. Gutiérrez and Claimant next contend that the Nicaraguan court that issued the Protective Order erred as a matter of Nicaraguan law by naming Nicaragua as judicial depositary of Hacienda Santa Fé. Specifically, in his report, Dr. Gutiérrez cites Article 348 of the Nicaragua Civil Procedural Code for the proposition that "the judge should have appointed as depositary the owner of the property," *i.e.*, Inagrosa.[599] But this conclusion is wrong for the following reasons.

402. ***First***, Article 348 of the Nicaragua Civil Procedural Code is irrelevant here since – as explained in the preceding section – this provision applies only where a claimant seeks an attachment of an immovable asset.[600] Specifically, this Article provides:

> ***Article 348 Attachment of immovable property***
>
> *When an immovable property is seized at the request of the interested party, its entry in the Public Registry of Real Estate and Commercial Property shall be ordered by means of an official letter to be sent on the same day as the seizure is executed.*
>
> *In the case of unregistered immovable property, the debtor shall be notified immediately of the measure.*
>
> *When the allocation is limited to the property itself, to the exclusion of its fruits, the owner, possessor or occupier of the immovable property shall be appointed as depositary without the right to remuneration for the deposit. In the absence of the above, the*

[598] Reply, ¶¶ 587-609.

[599] Renaldy Gutiérrez I, ¶ 67 (**CES-06**).

[600] Nicaraguan Civil Procedural Code, Art. 357 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

> *judicial authority may appoint as depositary the person it deems suitable.*[601]

403. ***Second***, Article 357 of the Nicaragua Civil Procedural Code, which identifies the relevant features and characteristics of judicial depositaries, confirms that a court can appoint as judicial depositary whichever "accredited public or private entity" it deems "suitable," taking into account the nature of the asset and the care it requires.[602] Here, the court correctly held that Nicaragua was a suitable entity to serve as judicial depositary, given that Nicaragua worked from 2018 to 2021 to rid Hacienda Santa Fé of its invaders and has the capacity to secure the property from future invasions, as confirmed by the fact that Nicaragua has kept the property safe and secure since being named its depositary.[603]

404. ***Third***, Dr. Gutiérrez's conclusion that Inagrosa should have been appointed as the judicial depositary of Hacienda Santa Fé in November 2021 is illogical because it is undisputed in this arbitration that Inagrosa stopped possessing the property in August 2018 and did not show any indication that it would return to possess and secure its property when given the opportunity in September 2021.[604] Again, the entire point of the Protective Order was to protect the property from further invasions ***because*** Inagrosa and Claimant refused to secure it. Dr. Gutiérrez's conclusion that Inagrosa should have been appointed as the depositary appears to be based on a fundamental misunderstanding of the relevant facts and procedural posture that led to the entry of the Protective Order.

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[601] Nicaraguan Civil Procedural Code, Art. 348 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[602] Nicaraguan Civil Procedural Code, Art. 357 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[603] Court Order issued by the Second Oral Civil District Court of Jinotega, December 15, 2021(**C-0251**).

[604] Letter from Foley Hoag to Appleton & Associates regarding offer to return Hacienda Santa Fe (**C-0116**).

405. Further, it should be noted that Nicaragua wants nothing more than for Inagrosa to retake Hacienda Santa Fé so that Nicaragua can stop paying a private security company to keep it safe. This fact is confirmed by Nicaragua's several offers to Riverside and Inagrosa to retake the property.[605] Dr. Gutiérrez considers none of these facts in his report.

d. *The Protective Order Did Not Result in the De Jure or De Facto Expropriation of Hacienda Santa Fé*

406. Next, Claimant and Dr. Gutiérrez allege that the Protective Order had the *de jure* effect of taking away Inagrosa's title to Hacienda Santa Fé. In so opining, Dr. Gutiérrez cites to an October 24, 2022 literal certificate of Hacienda Santa Fé for the proposition that the "*de jure* title to Hacienda Santa Fé no longer is exclusively owned by INAGROSA [as a result of the Protective Order]. Now, the title formally includes the Republic of Nicaragua as a full co-owner on title."[606] But this contention is completely unfounded.

407. As a preliminary matter, under Nicaraguan law, a "literal certificate" (*certificado literal*) is a certificate showing specific "entries" (*asientos*) that the interested parties themselves select when procuring the certificate from the registry.[607] A literal certificate is not the same as a "related certificate" (*certificado relacionado*), which shows a snapshot of the general status of a property at a specific point in time, such as: (i) the owner of the property; (ii) adjacent properties; (iii) supporting documentation for transfers of rights in the property; (iv) registration data; (v) filings related to the property; and (vi) general observations.[608]

[605] Letter from Foley Hoag to Appleton & Associates regarding offer to return Hacienda Santa Fe (**C-0116**); Nicaragua's Second Response to Claimant's Motion, dated December 12, 2022, p. 3 (**R-0222**); email from A. Gonzalez to B. Appleton regarding handover of Hacienda Santa Fe (**C-0429**); Nicaragua's Letter to Appleton, dated January 19, 2024 (**R-0219**); Email from A. Gonzalez to B. Appleton dated March 2, 2024 (**R-0234**).

[606] Renaldy Gutiérrez I, ¶ 75 (**CES-06**).

[607] Sequeira I, ¶ 29.6 (**RER-05**).

[608] Sequeira I, ¶ 29.6 (**RER-05**).

408. The literal certificate analyzed by Dr. Gutiérrez focuses on the "filing" (*asiento*) concerning the Protective Order. The relevant section, titled "Facts of the Selected Entry" (*Datos del Asiento Solicitado*), merely notes that the parties who are relevant to that Order are Nicaragua and Riverside, because they are the parties to the international arbitration that gave rise to the provisional measure (*medida cautelar*) as is depicted in the below excerpt.[609]

| DATOS DEL ASIENTO SOLICITADO | | | |
|---|---|---|---|
| PERTENECE A | | ESTADO DE LA REPUBLICA DE NICARAGUA | |
| PERTENECE A | | RIVERSIDE COFFEE L.L.C. | |
| Acto Contrato: | Anotaciones Preventivas/Oficio de Medida Cautelar | | |
| Finca N°: | | 6145 | |
| Número NAP: | BI-9AG0EX7 | Asiento Folio Electrónico: | 2 |
| Estado: | | Activo | |

409. Dr. Gutiérrez misinterprets that section as stating that Nicaragua and Inagrosa are co-owners of Hacienda Santa Fé as a result of the Protective Order.[610] But as an initial matter, his conclusion is illogical because that section identifies Nicaragua and ***Riverside***, not Nicaragua and Inagrosa.[611] Moreover, the first section in the certificate cited by Dr. Gutiérrez and titled "Actual Owner" (*Propietario Actual*) is the section that denotes which entity, according to Nicaragua's official registry, owns Hacienda Santa Fé. That section unambiguously states that ***Inagrosa*** is the "100" percent owner of Hacienda Santa Fé, as depicted in the below excerpt.[612] Dr. Gutiérrez fails to address, much less reference, this section in his report.

[609] Literal Certificate of Hacienda Santa Fe issued by the Property Registry of Jinotega (**C-0268**).

[610] Renaldy Gutiérrez I, ¶ 75 (**CES-06**).

[611] Literal Certificate of Hacienda Santa Fe issued by the Property Registry of Jinotega (**C-0268**).

[612] Literal Certificate of Hacienda Santa Fe issued by the Property Registry of Jinotega (**C-0268**).

C-0268-SPA

REGISTRO PÚBLICO DE LA PROPIEDAD DE JINOTEGA
CERTIFICADO LITERAL FOTOCOPIA

| PROPIETARIO ACTUAL | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| PERTENECE A | | INVERSIONES AGROPECUARIA S.A | | Tipo Derecho: | Propiedad | Porcentaje Derecho: | 100 | | |
| Finca N°: | 6145 | Tomo(s): | 131, 156 | Folio(s): | 108, 163, 164 | Asiento(s): | | 6 | |
| Número NAP: | | BI-9AG0EX7 | | Asiento Folio Electrónico: | | 1 | | | |

410. The inescapable fact that Inagrosa has been, and continues to be, the sole owner of Hacienda Santa Fé is further confirmed by the "related certificate" (*certificado relacionado*) that the parties analyzed in the pleadings that resulted in the Tribunal's entry of Procedural Order No. 4. Just as with the literal certificate cited by Dr. Gutiérrez , that related certificate, which is dated June 30, 2022 (*i.e.*, ***after*** the entry of the Protective Order), demonstrates that Inagrosa is the 100 percent owner of Hacienda Santa Fé, as depicted in the below excerpt.[613] This conclusion is confirmed by Dr. Sequeira, who studied these certificates and concluded that they demonstrate that Inagrosa was, and remains, the 100 percent owner of Hacienda Santa Fé.[614]

R-0005-SPA
C-0060-SPA

REGISTRO PÚBLICO DE LA PROPIEDAD DE JINOTEGA
CERTIFICADO RELACIONADO

| PROPIETARIO ACTUAL | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| PERTENECE A | | INVERSIONES AGROPECUARIA S.A | | Tipo Derecho: | Propiedad | Porcentaje Derecho: | 100 | | |
| Finca N°: | 6145 | Tomo(s): | 131, 156 | Folio(s): | 108, 163, 164 | Asiento(s): | | 6 | |
| Número NAP: | | BI-9AG0EX7 | | Asiento Folio Electrónico: | | 1 | | | |

[613] Related Certificate issued by Jinotega's Land Registry delivered to Riverside on July 13, 2022 (Spanish version submitted by Claimant as exhibit C-0060-SPA (**R-0005**); Related Certificate of Hacienda Santa Fe issued by the Property Registry of Jinotega (**C-0060**).

[614] Sequeira I, ¶¶ 30-31 (RER-05).

411. In summary, the Protective Order did not result in the *de jure* transfer of title over Hacienda Santa Fé, as Claimant and Dr. Gutiérrez claim. The registry records confirm Inagrosa is, and has at all relevant times been, the sole owner of Inagrosa.

412. Nor did the Protective Order constitute the *de facto* transfer of title over Hacienda Santa Fé, as Dr. Gutiérrez concludes.[615] Specifically, Dr. Gutiérrez states, in conclusory fashion, that the "*de facto* effect of the [Protective Order] was to remove INAGROSA's quiet possession, control right to alienation and hypothecation have been removed from INAGROSA for a two-year period."[616] But this conclusion is wrong.

413. To be sure, the Protective Order has not removed Inagrosa's right to possession of Hacienda Santa Fé. Inagrosa can resume possession over the property at any time, as evidenced by the series of correspondences from Nicaragua to Riverside, which invite Inagrosa to repossess the property.[617] This position is affirmed by Dr. Sequeira in his expert report.[618]

414. Further, as noted earlier, the Tribunal has already held in its Procedural Order No. 4 that "by its terms, ***the Court Order does not preclude the Claimant from seeking repossession of the property at any time***."[619] Dr. Gutiérrez does not cite to any text in the Order that is to the contrary because none exists. And Dr. Gutiérrez does not cite to any provision in the Nicaragua Civil Procedural Code, or any other relevant authority, that in any way indicates that Inagrosa is incapable of repossessing Hacienda Santa Fé as a result of the Protective Order.

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[615] Renaldy Gutiérrez I, ¶¶ 80-84 (**CES-06**).

[616] Renaldy Gutiérrez I, ¶ 84 (**CES-06**).

[617] Letter from Foley Hoag to Appleton & Associates regarding offer to return Hacienda Santa Fe (**C-0116**); Nicaragua's Second Response to Claimant's Motion, dated December 12, 2022, p. 3 (**R-0222**); email from A. Gonzalez to B. Appleton regarding handover of Hacienda Santa Fe (**C-0429**); Nicaragua's Letter to Appleton, dated January 19, 2024 (**R-0219**); Email from A. Gonzalez to B. Appleton dated March 2, 2024 (**R-0234**).

[618] Sequeira I, ¶¶ 30-32 (**RER-05**).

[619] Procedural Order No. 4, ¶¶ 33-34 (emphasis added).

415. Dr. Gutiérrez similarly does not cite to the text of the Protective Order or legal authorities for his conclusion that the Protective Order removed Inagrosa's right to alienation and hypothecation with respect to Hacienda Santa Fé.[620]

416. Nor does Claimant present any evidence that supports Dr. Gutiérrez's conclusion that the Protective Order frustrated Inagrosa's right to alienate or hypothecate the property. There is no proof that Inagrosa tried but failed to exercise such property rights because of the Protective Order. All Claimant alleges in its Reply is the blanket and unsupported representation that doing so would have been "impossible."

417. For these reasons, and those included in the accompanying report of Dr. Sequeira, this Tribunal should reject – again – Claimant's contention that the Protective Order has deprived Inagrosa of its property rights over Hacienda Santa Fé. As this Tribunal has already held, and as now confirmed by Dr. Sequeira and the plain text of the Order and registry certificates, the Order in actuality ***protects*** Inagrosa's property rights by preventing further invasions.

### 2. Claimant's Procedural Arguments Regarding the Protective Order Are Wrong and, Ultimately, Red Herrings

418. Because the Protective Order does not fit Claimant's self-serving narrative about Nicaragua in this case, Claimant tries to distract from the substance of that Order by advancing a series of procedural challenges to how the Order was issued. Specifically, in its Reply, Claimant contends that the Protective Order is illegal under Nicaraguan law because Nicaragua: (i) did not provide Claimant or Inagrosa with notice of the judicial proceeding that led to the issuance of the Order; (ii) named Riverside, and not Inagrosa, as a party to that proceeding; and (iii) did not send Claimant or Inagrosa a copy of the Protective Order immediately after its issuance.[621] Each of

[620] Renaldy Gutiérrez I, ¶¶ 83-84 (**CES-06**).

[621] Reply, ¶¶ 587-609.

these arguments has already been considered and rejected by the Tribunal. Regardless, and as set forth below and in Dr. Sequeira's expert report, these arguments are unfounded and, ultimately, irrelevant to the disposition of the claims and defenses in this arbitration.

a. *Nicaragua Had No Obligation to Notify Inagrosa of Its Application*

419. In its Reply, Claimant argues that Nicaragua had an obligation under Nicaraguan law to notify Inagrosa of its application for a provisional measure. Specifically, Claimant relies on Dr. Gutiérrez for the position that "[o]mitting to notify INAGROSA, the actual landowner," of its court application for urgent relief constitutes a breach of foundational fairness and due process."[622] That position is false.

420. As an initial matter, Dr. Gutiérrez does not cite to any Nicaraguan legal authority to support any of his conclusions on this matter. No such authority exists.

421. The application in question that Nicaragua filed was for the issuance of an urgent provisional measure (*medida cautelar urgente*).[623] The procedural rules that apply to these types of applications are listed in Article 380 of the Nicaraguan Civil Procedural Code, which states:

> **Article 380 Processing and hearing of urgent provisional measures**
>
> When the applicant requests that urgent provisional measures be adopted without a hearing of the opposing party, he or she must prove the reasons or allege that the hearing may jeopardize the success of the provisional measure. In this case, the judicial authority will decide on its adoption within three days of the submission of the request, reasoning on whether the requirements of the measure are met and the reasons for granting it without hearing the other party. There is no appeal against the order.
>
> At the time of executing the precautionary measure, the affected person shall be notified of the order, giving him a copy of the

[622] Renaldy Gutiérrez I, ¶¶ 90-91 (**CES-06**).

[623] Application for Urgent Provisional Measure dated November 30, 2021 (**C-0253**).

> application, so that he may exercise his right to oppose if he so wishes.[624]

422. As evident from the above excerpt, a party that brings an application seeking the issuance of an urgent provisional measure ***can bring the application on an ex parte basis –*** that is, without providing notice to any other potentially interested party.

423. This interpretation is confirmed by Dr. Sequeira, who explains that a party filing an urgent provisional measure is under no obligation to provide notice to an affected party.[625] Rather, when an urgent provisional measure application is filed, the court will only consider the arguments and evidence presented by the applicant, without seeking such information from any other potentially affected party.[626]

424. This procedure does not rid potentially affected parties of due process, as alleged by Claimant. Rather, potentially affected parties would still be able to oppose the execution of an urgent provisional measure after-the-fact. As Dr. Sequeira notes, Article 381 of the Nicaraguan Civil Procedural Code allows the asset's owner to challenge a court order imposing the "urgent" provisional measure within three (3) calendar days of obtaining notice of said order.[627] And if the party thinks that notification of the provisional measure order was improperly given, that party may seek to annul the provisional measure order within one (1) day of receiving notice of said order.[628] This post-order relief is fully addressed later in this section.

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[624] Nicaraguan Civil Procedural Code, Art. 380 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[625] Sequeira I, ¶¶ 13.1-13.8 (**RER-05**).

[626] Sequeira I, ¶¶ 13.1-13.8 (**RER-05**).

[627] Sequeira I, ¶¶ 14.1-14.6 (**RER-05**).

[628] Sequeira I, ¶¶ 15.1-15.13 (**RER-05**).

425. The procedure for urgent provisional measure applications differs materially from the procedure for standard (*i.e.*, non-urgent) provisional measure applications. For the latter type of application, the applicant would have to notify all the affected parties about the application.[629] Once notified, those parties and the applicant would participate in a court hearing where they can present evidence and argumentation about the application.[630] And the court would issue its ruling on the application only after considering the arguments and evidence presented by all parties, not just that of the applicant.[631]

426. The standard procedure was not applicable here because the record confirms that Nicaragua's Attorney General's Office filed an application that sought the issuance of an ***urgent*** provisional measure (*medida cautelar urgente*), as seen in the below excerpt.:[632]

> VI.- PRESUPUESTOS PROCESALES DE LA MEDIDA CAUTELAR URGENTE Y FUNDAMENTO LEGAL.

427. This fact is also confirmed in the preamble to the Protective Order, as seen in the below excerpt:[633]

[629] Sequeira I, ¶¶ 12.1-12.3 (**RER-05**).

[630] Sequeira I, ¶¶ 12.1-12.3 (**RER-05**).

[631] Sequeira I, ¶¶ 12.1-12.3 (**RER-05**).

[632] Application for Urgent Provisional Measure dated November 30, 2021 (**C-0253**).

[633] Court Order issued by the Second Oral Civil District Court of Jinotega, December 15, 2021(**C-0251**).

**MANDAMIENTO**

El suscrito doctor Julio César Blandón Villagra, abogado y juez del Juzgado Segundo Distrito Civil Oral del departamento de Jinotega Circunscripción Norte, a cualquier autoridad judicial, a quien el presente le fuera cometido para su cumplimiento:

**Hace Saber y Ordena**

Que para su debido cumplimiento se ha dictado auto de adopción de medida cautelar urgente en la presente causa, auto que integra y literalmente dice: "**Número de Asunto: 001434-ORN2-2021-CO Número de Asunto Principal: 001432-ORN2-2021-CO Número de Asunto Antiguo:**

428. Accordingly, Nicaragua was under no requirement to provide notice to Inagrosa with respect to its application and nothing cited by Claimant or Dr. Gutiérrez is to the contrary.

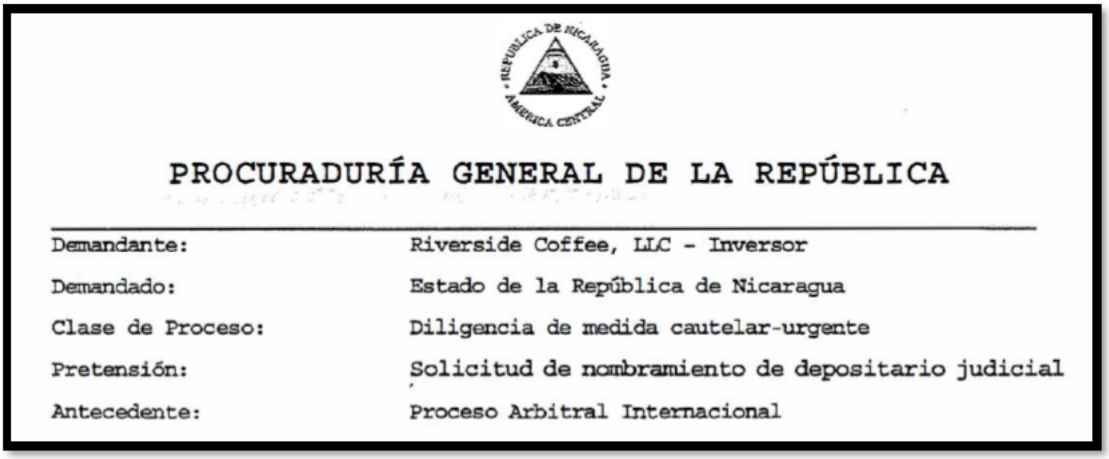
b. *Nicaragua Had No Obligation to Name Inagrosa as a "Party" to the Judicial Proceeding that Resulted in the Protective Order*

429. Claimant argues that the Protective Order is illegal because Inagrosa should have been named as a party in the court proceeding that resulted in said Order. Specifically, Claimant argues that "[a]s a matter of Nicaraguan law, the legal landowner is required to be a named party to this Application," citing exclusively to Dr. Gutiérrez's expert report for this proposition.[634] But that contention is wrong.

430. As an initial matter, it is important to note that the Protective Order arises from an application that Nicaragua filed in Nicaraguan court to obtain provisional relief in relation to ***this*** arbitration. This fact is clear from the preamble to Nicaragua's application, which provides that the urgent provisional measure sought was in relation to a "*Proceso Arbitral Internacional*" or "*International Arbitration Case*" in which the "*Demandante*" or "Claimant" is Riverside and the "*Demandado*" or "Respondent" is Nicaragua, as depicted in the below excerpt.[635]

[634] Reply, ¶ 500; Renaldy Gutiérrez I, ¶¶ 43-45 (**CES-06**).

[635] Application for Urgent Provisional Measure dated November 30, 2021 (**C-0253**).



PROCURADURÍA GENERAL DE LA REPÚBLICA

| | |
|---|---|
| Demandante: | Riverside Coffee, LLC - Inversor |
| Demandado: | Estado de la República de Nicaragua |
| Clase de Proceso: | Diligencia de medida cautelar-urgente |
| Pretensión: | Solicitud de nombramiento de depositario judicial |
| Antecedente: | Proceso Arbitral Internacional |

431. This fact is also confirmed in the text of the application, itself, which explains that the entire purpose of the urgent provisional measure sought was to maintain the *status quo* in this arbitration. Specifically, Nicaragua explained in its application that Riverside had commenced an investment arbitration seeking damages against Nicaragua arising from the invasion of Hacienda Santa Fé.[636] Nicaragua also explained that it had since rid the Hacienda of invaders and invited Riverside to have its investment, Inagrosa, retake the property.[637] Nicaragua further explained that counsel for Riverside, Appleton & Associates, subsequently communicated (in a phone call) that Claimant and Inagrosa refused to return to the Hacienda due to safety concerns.[638] This fact meant the property would be left in a state of abandon, thus increasing the likelihood of future invasions that would aggravate the harm that prior invasions already caused.

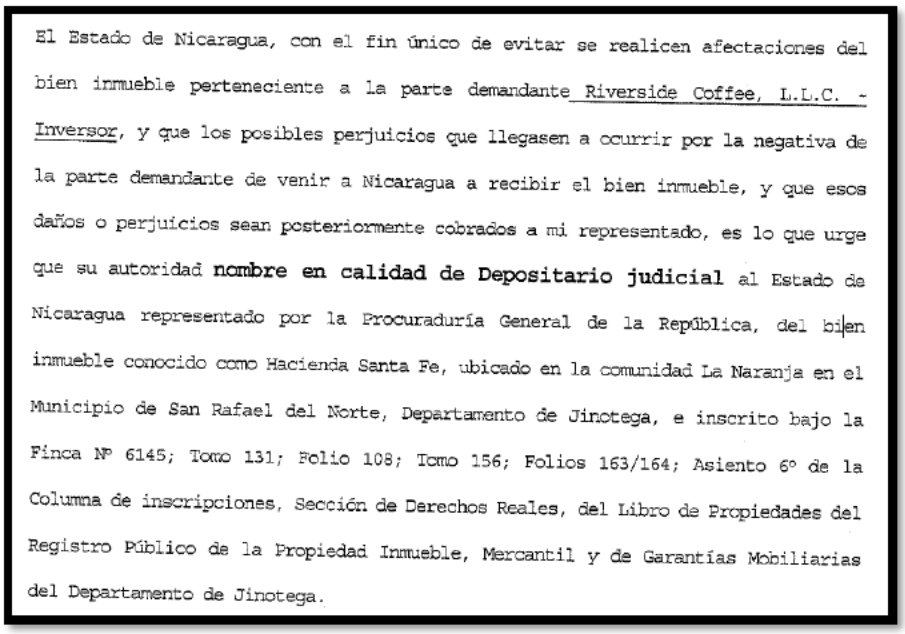
432. Based on the foregoing, Nicaragua explained in its application that it requested to be appointed the depositary of the property for "the sole purpose" of securing the property so as to "avoid[] [further] damages" to Riverside, as depicted in the below excerpt.[639]

[636] Application for Urgent Provisional Measure dated November 30, 2021 (**C-0253**).

[637] Application for Urgent Provisional Measure dated November 30, 2021 (**C-0253**).

[638] Application for Urgent Provisional Measure dated November 30, 2021 (**C-0253**).

[639] Application for Urgent Provisional Measure dated November 30, 2021, Section V (**C-0253**).



El Estado de Nicaragua, con el fin único de evitar se realicen afectaciones del bien inmueble perteneciente a la parte demandante Riverside Coffee, L.L.C. - Inversor, y que los posibles perjuicios que llegasen a ocurrir por la negativa de la parte demandante de venir a Nicaragua a recibir el bien inmueble, y que esos daños o perjuicios sean posteriormente cobrados a mi representado, es lo que urge que su autoridad **nombre en calidad de Depositario judicial** al Estado de Nicaragua representado por la Procuraduría General de la República, del bien inmueble conocido como Hacienda Santa Fe, ubicado en la comunidad La Naranja en el Municipio de San Rafael del Norte, Departamento de Jinotega, e inscrito bajo la Finca Nº 6145; Tomo 131; Folio 108; Tomo 156; Folios 163/164; Asiento 6º de la Columna de inscripciones, Sección de Derechos Reales, del Libro de Propiedades del Registro Público de la Propiedad Inmueble, Mercantil y de Garantías Mobiliarias del Departamento de Jinotega.

433. In so doing, Nicaragua expressly cited Rule 39 of the ICSID Rules, which allows parties to request provisional measures to maintain the *status quo* of a dispute.[640] In particular, sub-section (6) of that Rule expressly provides that said parties may seek such relief in a court after the investment arbitration is filed for the purpose of preserving rights and interests at issue in the arbitration, as is the case here.[641]

434. Based on the foregoing, the record is clear that the Protective Order was requested and, later, issued to provide Riverside and Nicaragua with interim relief to preserve the *status quo* of their dispute. For that reason, the only "parties" who are necessary for that matter were Riverside and Inagrosa, *i.e.*, the parties to the dispute in this arbitration.

435. There is no requirement that the owner of Hacienda Santa Fé—Inagrosa—needed to be named as a party. Dr. Gutiérrez's conclusion that such requirement exists "[a]s a matter of

[640] Application for Urgent Provisional Measure dated November 30, 2021 (**C-0253**); ICSID Rule 39.

[641] ICSID Rule 39(6).

Nicaraguan law"[642] is unfounded. Notably, Dr. Gutiérrez does not cite to a legal authority for this conclusion.

436. Dr. Gutiérrez further opines—again, without citing to any legal authority—that it was important to name Inagrosa as a party to the court proceeding to ensure that Inagrosa would have had an opportunity to oppose Nicaragua's application for the provisional measure.[643] But, as explained in the section immediately above, Nicaragua applied for an ***urgent*** provisional measure and, thus, the application was properly considered on an *ex parte* basis. Hence, Dr. Gutiérrez's opinion that Inagrosa—or anyone else—had a legal right to oppose the application is misguided.

437. Further, to the extent Claimant suggests that Nicaragua's (correct) decision not to name Inagrosa as a party to the Nicaraguan court proceeding was part of an improper attempt to cast doubt on Inagrosa's title over Hacienda Santa Fé, such suggestion is refuted by the plain text of Nicaragua's application, which states that Nicaragua recognized Inagrosa as the Hacienda's sole owner.[644] This fact is further reflected in the text of the Protective Order[645] and in the January 2022 order that led to the imposition of the preventive filing (*anotación preventiva*) in the public registry file corresponding to Hacienda Santa Fé.[646]

438. For all these reasons, Claimant's attempt to invalidate the Protective Order, on the basis that Inagrosa was not a named party to that Order, must be rejected.

c. *Claimant's Other Notice Arguments Are Baseless and Red Herrings*

[642] Renaldy Gutiérrez I, ¶ 45 (**CES-06**).

[643] Renaldy Gutiérrez I, ¶ 46 (**CES-06**).

[644] Application for Urgent Provisional Measure dated November 30, 2021 (**C-0253**).

[645] Court Order issued by the Second Oral Civil District Court of Jinotega, December 15, 2021(**C-0251**).

[646] Order from Judge Julio Cesar Blandon Villagra of the Second Oral Civil District Court of Jinotega to the Real Property Registry of Jinotega (**R-0187**).

439. In its Reply, Claimant also contends there was a violation of due process because neither Inagrosa or Riverside received notice of the Protective Order and, thus, neither had any ability to take steps to lift the Protective Order and the imposition of Nicaragua as the depositary of Hacienda Santa Fé. In particular, Claimant points to the Protective Order, which, among other things, requires that the parties affected by the measure be given notice of the imposition of the urgent provisional measure with respect to that property.[647] Claimant argues that Nicaragua failed to provide such notice and that this Tribunal has already deemed such failure as amounting to a violation of the protections under the Treaty. None of this is true.

440. As an initial matter, it is false that the Tribunal found that Nicaragua had breached any Treaty provision in relation to this matter. The Tribunal merely noted, in *dicta*, its belief that Nicaragua's failure to "formally serve[]" the Protective Order on Claimant "is not in accordance with due process."[648] Notably, the Tribunal never indicated, much less held, that this omission is a material violation of any Treaty protection.

441. Further, while it is true Nicaragua did not serve Inagrosa or Claimant with a copy of the Protective Order immediately following the entry of the Protective Order, failure to do so is not an indication that notice was not given to Claimant, much less that there was a violation of due process. Article 144 of the Nicaraguan Civil Procedural Code governs the concept of notice.[649] As Dr. Sequeira explains, that Article provides that notice of a judicial order can occur when the party in question becomes aware of that order.[650]

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[647] Reply ¶ 595 (citing Court Order issued by the Second Oral Civil District Court of Jinotega, December 15, 2021, ¶ 1.4 (**C-0251**)).

[648] Procedural Order No. 4, ¶ 37.

[649] Nicaraguan Civil Procedural Code, Art. 144 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[650] Sequeira I, ¶¶ 16.1-16.5 (**RER-05**).

442. Claimant and Inagrosa had constructive notice of the Protective Order as of January 2022, when the preventive filing that referenced the order was added to the public registry file for Hacienda Santa Fé.[651] And Dr. Sequeira concludes that Claimant and Inagrosa had actual notice of the Protective Order as early as July 2022, when their authorized representatives obtained a related certificate from Nicaragua that expressly notified them of said Order.[652]

443. In any event, it is undisputed that Claimant and Inagrosa became "aware" of the Protective Order – in accordance with Article 144 of the Nicaraguan Civil Procedural Code – ***no later than*** November 11, 2022. That is the date that Nicaragua sent Claimant and Inagrosa an official copy of the court file, which included a copy of the Protective Order.[653]

444. That date matters because the Protective Order provides that Claimant and Inagrosa had ***three days*** upon receiving notice of the Order to challenge it, as seen in the below excerpt.[654]

> **4.-** Al ejecutarse la medida cautelar, entréguesele copia del escrito de solicitud, a la persona afectada con la medida, para que ejerza su derecho de oposición, si así lo desea, dentro de tercero día contado desde la notificación, pudiendo el afectado proponer las pruebas de las que pretenda valerse para fundamentar su oposición.

445. The Protective Order's three-day window is consistent with the timeline set out in the Nicaraguan Civil Procedural Code. Specifically, Article 381 confirms that parties who wish to challenge the implementation of an urgent provisional measure have to do so within three days of receiving notice of this measure, as evident below:

**Article 381 Opposition by the defendant**

[651] Order from Judge Julio Cesar Blandon Villagra of the Second Oral Civil District Court of Jinotega to the Real Property Registry of Jinotega (**R-0187**).

[652] Literal Certificate of Hacienda Santa Fe issued by the Property Registry of Jinotega (**C-0268**).

[653] Literal Certificate of Hacienda Santa Fe issued by the Property Registry of Jinotega (**C-0268**).

[654] Court Order issued by the Second Oral Civil District Court of Jinotega, December 15, 2021(**C-0251**).

> Where the interim measure is adopted without prior summons to the defendant, the latter may lodge an objection within three days of service of the order granting it.
>
> In the statement of opposition, the defendant must justify the inadmissibility of the measure, proposing the evidence on which it intends to rely in support of its opposition.[655]

446. Further, as Dr. Sequeira explains in his expert report, if Riverside or Inagrosa are of the opinion that notice was not properly effected by Nicaragua, ***they had the ability to seek the annulment of the Protective Order*** under Nicaraguan law.[656]

447. It is undisputed that neither Claimant nor Inagrosa made any challenge within the three-day window after obtaining notice of the Protective Order on November 11, 2022, or at ***any time*** since that date. And it is undisputed that neither Claimant nor Inagrosa filed a motion to annul the Protective Order, as was their right if they thought notification was improperly given.

448. Nor has Inagrosa moved the Nicaraguan court to remove Nicaragua as the judicial depositary of Hacienda Santa Fé, as it is free to do under Article 359 of the Nicaraguan Civil Procedural Code. That Article provides the following:

> ***Article 359 Removal of the depositary***
>
> *The parties may request the removal of the depositary, which shall be processed in the manner established for written incidents, without suspension of the main proceedings, and shall proceed when, in the opinion of the judicial authority, the responsibility of the appointed depositary is not known, or for the reasons established in the Civil Code and other laws.*[657]

449. In other words, if Claimant truly believed Nicaragua's appointment as judicial depositary of Hacienda Santa Fé is part of some ruse to expropriate the property, then Claimant or

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[655] Nicaraguan Civil Procedural Code, Art. 381 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[656] Sequeira I, ¶¶ 15.1-15.13 (**RER-05**).

[657] Nicaraguan Civil Procedural Code, Art. 357 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

Inagrosa should have moved the Court to remove Nicaragua as depositary as allowed under Article 359. But that has not happened.

450. It should be noted that, on February 2, 2024, the provisional relief put in place by the Protective Order and the related January 2022 order (that placed the preventive annotation on the registry records for Hacienda Santa Fé) expired. In advance of that expiration date, Nicaragua's arbitration counsel invited Riverside and/or Inagrosa to retake the property and noted that failure to do so would leave Nicaragua with no choice but to renew the Protective Order and any related relief, to maintain the *status quo*.[658] Riverside and Inagrosa refused to repossess Hacienda Santa Fé.[659] Accordingly, in February 2024, Nicaragua sought, and obtained, a 2-year renewal of the Protective Order.[660] Nicaragua provided Inagrosa with the relevant notice, in accordance with the renewal order, and, as a courtesy, Nicaragua's counsel provided Riverside's counsel with a copy of all the relevant pleadings.[661]

451. Notwithstanding that Riverside and Inagrosa were given timely notice of the order that renewed the provisional relief in dispute here, neither party has brought any of the three (3) types of legal challenges that it has under Nicaraguan law to challenge this provisional relief (as outlined in this section). This failure to take action, despite having clear and timely notice of the renewal (both before and after it occurred) further demonstrates that ***Riverside's umbrage about the Protective Order is just theater***.

3. Claimant and Inagrosa Repeatedly Refuse to Repossess Hacienda Santa Fé Throughout This Arbitration

[658] Nicaragua's Letter to Appleton, dated January 19, 2024 (**R-0219**).

[659] Appleton response to Gonzalez January 19, 2024 letter re Protective Order status dated January 26, 2024 (**R-0220**)

[660] Judicial file of the application for renewal of the provisional measure by the Attorney General's Office of Nicaragua (**R-0199**)]

[661] Email from A. Gonzalez to B. Appleton dated March 2, 2024 (**R-0234**)

452. Claimant's and Inagrosa's choice to not challenge the Protective Order (or the renewal of that order) underscores another reality: neither Claimant nor Inagrosa want Hacienda Santa Fé back.

453. This conclusion is evident from the fact that Nicaragua has repeatedly tried, over three years, to return Hacienda Santa Fé to Claimant and Inagrosa, to no avail. Indeed, during this period, Nicaragua invited Claimant and Inagrosa on ***four separate occasions*** to retake their property. Each time, Claimant and Inagrosa have refused.

454. Nicaragua's first invitation occurred on September 9, 2021, when former counsel for Nicaragua, Foley Hoag LLP, confirmed to Claimant's counsel that "after a considerable and costly effort, Nicaragua has managed to clear the property of all unauthorized occupants in a peaceful and lawful manner. The property is thus in a position to be controlled, managed and developed by its legal owners."[662]

455. The letter concludes by inviting Claimant and Inagrosa to confirm they are still legal owners of Hacienda Santa Fé and, once confirmed, to repossess their property "as promptly as possible."[663] Neither Claimant nor Inagrosa accepted this invitation, leaving Nicaragua with no choice but to seek the provisional relief ultimately effected by the Protective Order.

456. A little more than a year later, in November 2022, Claimant asked this Tribunal for an order finding, *inter alia*, that the Protective Order was a "secret judicial seizure order" designed to expropriate Claimant's and Inagrosa's interests in Hacienda Santa Fé.[664] That claim was specious then, and remains specious, for the reasons this Tribunal found in its Procedural Order No. 4 as well as the reasons that Nicaragua has proven in this case – not the least of which is the

[662] Letter from Foley Hoag to Appleton & Associates regarding offer to return Hacienda Santa Fe (**C-0116**).

[663] Letter from Foley Hoag to Appleton & Associates regarding offer to return Hacienda Santa Fe (**C-0116**).

[664] Reply, ¶¶ 587-609.

fact that Nicaragua is paying a private security company to keep Claimant's and Inagrosa's property safe and secure.

457. Accordingly, in response to Claimant's motion, Nicaragua called Claimant's bluff and invited Claimant and Inagrosa to repossess the Hacienda for the second time, as seen below.[665]

> *To this day, Hacienda Santa Fé remains secured and free of unlawful, third-party occupants.* ***Just as it did more than one year ago, Nicaragua invites Claimant to re-take its property and thereby free Nicaragua of its ongoing financial burden of paying for around-the-clock security****. Notably, in its submissions Claimant has not indicated any willingness to re-take its property. It therefore appears that Claimant would rather disrupt this arbitration with baseless accusations of "expropriations" and "seizures" – thereby forcing Nicaragua to expend more* financial resources in refuting those allegations – than take back its own property, which it claims to have significant value.

458. Once again, neither Claimant nor Inagrosa accepted Nicaragua's invitation to take back their property. But Nicaragua's second invitation resulted in a round of discussions in early 2023, by videoconference, between the parties in which counsel for Claimant indicated to counsel for Nicaragua that Inagrosa was willing to repossess Hacienda Santa Fé and that it just needed to understand the steps that were needed to remove Nicaragua as the property's judicial depositary. Based on this representation, in April 2023, counsel for Nicaragua e-mailed counsel for Claimant to explain the steps that needed to be taken for the Hacienda to be returned and the judicial deposit to be undone:

> *The Government of Nicaragua is pleased that Riverside has accepted its offer of September 9th, 2021 to reassume control of Hacienda Santa Fé. In order to ensure an orderly transfer, we suggest the following steps be completed.*
>
> *1. The Parties will sign a document titled "Agreement for the Handover of the Hacienda Santa Fe" ("Agreement") laying out the*

[665] Nicaragua's Second Response to Claimant's Motion, dated December 12, 2022, p. 3 (**R-0222**).

> *steps that will be followed to complete the handover, described below.*
>
> *2. In its capacity as judicial depositary of Hacienda Santa Fé, the Government of Nicaragua will carry out an inspection of the state of the Hacienda and an Inventory of its Assets. Your client is welcome to appear at the inspection on a mutually convenient date.*
>
> *3. Within 60 days of the signature of the Agreement, the Government of Nicaragua shall process and obtain the lifting of the precautionary measure from the Second District Court Department of Jinotega, requesting such court that the lifting shall materialize the date of the actual handing over of the Hacienda.*
>
> *4. Within 30 days of decision that approves the lifting of the precautionary measure, the formal handover of the Hacienda Santa Fe shall take place. The Parties shall sign a "Handover Certificate" (Acta de Entrega) which shall enclose a Certificado Unico showing that the Hacienda is free of any encumbrances.*
>
> *Once we receive your response regarding the procedure to follow, we will send you a draft of the "Agreement" and coordinate with you the date for the Inspection.*

459. In its Reply, Claimant argues Nicaragua's April 2023 correspondence confirms that Nicaragua is not sincere about returning Hacienda Santa Fé. Specifically, Claimant avers that there is no reason for the parties to inspect the property or for the court to be involved.[666] According to Claimant, Nicaragua should simply hand over the property to Claimant without any formalities and Nicaragua's insistence on said formalities confirms Nicaragua has no intention of returning the property.[667] Claimant also asserts that any return of the Hacienda must include payment for any damages caused by the invasions.[668] All of that is nonsense.

460. As an initial matter, Claimant's representation that it will only take back Hacienda Santa Fé if Nicaragua pays for damages caused by the invasions puts the proverbial cart before the

[666] Reply, ¶¶ 530-534.

[667] Reply, ¶¶ 530-534.

[668] Reply, ¶¶ 530-534.

proverbial horse. At the conclusion of this arbitration, the Tribunal will decide whether Nicaragua is financially responsible for damages caused by the invasions and, if so, the quantum of damages that must be paid. There is nothing preventing Claimant to take back Hacienda Santa Fé while the parties await those determinations. In actuality, as explained in Section V, *infra*, Claimant has a legal ***duty*** to take back the Hacienda to mitigate its alleged damages. Claimant's continued refusal to do so has caused Nicaragua to incur significant costs to ensure the property is secure and to maintain the *status quo* throughout the pendency of this arbitration.[669]

461. Moreover, the formalities identified in the April 2023 correspondence are not trivial – they are required by Nicaraguan law. Dr. Sequeira explains that, because Hacienda Santa Fé is under judicial deposit, certain formalities must occur before the Nicaraguan can lift the deposit and allow Nicaragua to turn over the property.[670] In other words, the parties, by themselves, cannot undo the judicial deposit; by definition the judicial deposit can only be undone by judicial order.

> *Las partes per se no pueden simplemente acordar la forma en que se hará la entrega, pues el depósito judicial no fue en virtud de contrato, sino más bien debe seguir el mismo cauce que originó la medida cautelar. Bien conocido es el principio general del Derecho referente a que "las cosas en Derecho como se hacen, se deshacen". En otras palabras, si la medida cautelar, de depositario judicial y anotación preventiva surge en virtud de una decisión judicial, es por medio del mismo cauce jurídico que debe procederse.*
>
> *The parties per se cannot simply agree on the manner in which the delivery will be made, since the judicial deposit was not by virtue of a contract, but rather must follow the same channel that originated the provisional measure. It is well known that "things in law are undone the way they are made". In other words, if the provisional measure, judicial depositary and preventive annotation arises by*

[669] Invoice No. 10840 issued by Empresa de Servicios de Seguridad Privada (CYB) for security services for the month of April 2023, April 23, 2023 (**C-0705**); Receipt No. 12119 from CYB security company acknowledging receipt of ₡1,486,588.80 for services rendered between September 2023 and January 2024 (**R-0200**); Receipt No. 11615 from CYB security company acknowledging receipt of ₡3,567,5813.12 as annual payment for services rendered (**R-0201**).

[670] Sequeira I, ¶¶ 34.1-34.18 (**RER-05**).

> *virtue of a judicial decision, it is through the same legal channel that it must proceed.* [671]

462. Dr. Sequeira explains that, under Nicaraguan law, there are two ways that the court can undo the judicial deposit. ***First***, the parties can move the court to remove Nicaragua as judicial depositary of Hacienda Santa Fé under Article 359 of the Nicaraguan Civil Procedural Code, which is described earlier in this section. ***Second***, the parties could wait until the judicial deposit expires and seek a court order, pursuant to Article 387 of the Nicaraguan Civil Procedural Code, that states that this provisional measure has expired as a matter of course.[672] Under either option, a court order is necessary to conclude the judicial deposit.

463. Also under either option, Nicaragua would have to conduct an inspection as well as an inventory of the property. As Dr. Sequeira notes, this formality is required by Article 356 of the Nicaraguan Civil Procedural Code, which requires the depositary to return the asset in the same condition as when the judicial deposit began.[673] The only way that Nicaragua can comply with this edict is by memorializing the condition of the Hacienda at the conclusion of the deposit. For this reason, counsel for Nicaragua explained in its April 2023 correspondence that, before turning over the property to Claimant or Inagrosa, Nicaragua had to conduct an inspection and inventory of the property "***[i]n its capacity as judicial depositary of Hacienda Santa Fé***."[674]

464. And, under either option, there would have to be a "Handover Certificate" or "*Acta de Entrega*," as described in the April 2023 correspondence.[675] The point of this certificate should

[671] Sequeira I, ¶ 34.4 (**RER-05**).

[672] Sequeira I, ¶¶ 34.1-34.18 (**RER-05**).

[673] Sequeira I, ¶¶ 25.1-25.4 (**RER-05**); Nicaraguan Civil Procedural Code, Art. 357 (**C-0254**); English translation of excerpts of Nicaraguan Civil Procedural Code (**RL-0191**).

[674] Email from A. González to B. Appleton regarding handover of Hacienda Santa Fe dated April 3, 2023 (**C-0429**).

[675] Email from A. González to B. Appleton regarding handover of Hacienda Santa Fe dated April 3, 2023 (**C-0429**).

be self-evident. The parties are embroiled in a dispute over the contents in, value of, and damages to Hacienda Santa Fé. The Handover Certificate would allow the parties to agree on the state of the property as of the date of the handover, thus preventing the aggravation of the parties' existing dispute about the property. There is nothing atypical or in any way prejudicial about this type of certificate and nothing Claimant includes in its Reply is to the contrary.

465. The April 2023 correspondence proposed the first option identified by Dr. Sequeira – joint motion to lift the judicial deposit under Article 359 – given that, as of that correspondence, the judicial deposit was not yet to expire for another year. Notably, however, the parties recently had an opportunity to lift the judicial deposit through the second option identified by Dr. Sequeira in his report, *i.e.*, upon its expiration in accordance with Article 387. Because the judicial deposit was set to expire in February 2024, Nicaragua invited Claimant in January 2024, for a ***fourth*** time, to repossess the property upon expiration of the judicial deposit.[676] As seen in the below excerpt, this correspondence: (i) identifies the relevant procedure that will need to occur before the property can be returned; (ii) explains that Nicaragua would have no choice but to seek the renewal of the judicial deposit if Claimant and Inagrosa refused to take back their property; and (iii) confirms that Nicaragua will seek reimbursement from Claimant for the costs Nicaragua has incurred regarding this ordeal.[677]

[676] Nicaragua's Letter to B. Appleton, dated January 19, 2024 (**R-0219**).

[677] Nicaragua's Letter to B. Appleton, dated January 19, 2024 (**R-0219**).

> Please be advised that in the absence of a timely reply from Claimant before February 2, 2024 or if Inagrosa and/or Claimant refuses to resume possession of the Hacienda, the Attorney General of Nicaragua will make the corresponding application to the Jinotega District Court to renew the Protective Order for the duration of this arbitration proceeding.[2]
>
> As you know, Nicaragua has explicitly invited Claimant to resume possession of the Hacienda on at least three previous occasions.[3] Then, as now, Nicaragua stands ready to coordinate all necessary administrative steps as we have previously described[4] to ensure an orderly transfer and facilitate Inagrosa's prompt return to the site.
>
> For the avoidance of doubt, this letter is not a settlement offer. Nicaragua anticipates that the arbitration will continue regardless of which course is selected. Nicaragua will also in any case seek to recover the costs incurred in defending this arbitration and safeguarding the Hacienda in the absence of Claimant and Inagrosa from the site.

466. Yet again Claimant refused this invitation, citing the same conspiracy theory that it includes with its Reply, which stands for the proposition that Nicaragua's standing offer to return the Hacienda to Claimant and Inagrosa is some sort of ruse.[678] But, as explained in this section, this theory is devoid of legal or factual support. And it is refuted by the simple fact that Nicaragua has paid hundreds of thousands of dollars to a private entity to secure this property, which it would have no reason to do if it wanted to convert the property for its own benefit, as Claimant suggests.

467. Then, after Nicaragua's arbitration counsel notified Claimant's arbitration counsel that the Protective Order had been renewed (because Riverside and Inagrosa refused to take back their property), Nicaragua invited Claimant and Inagrosa ***for a fifth time*** to take repossess their long-abandoned property.[679] Again, Claimant and Inagrosa refused.

468. The reality is that Claimant knows that there is no ruse. Claimant and Inagrosa do not want their property back because it is not the valuable asset that Claimant claims it to be in this arbitration. This conclusion is supported by the record which confirms that: (i) the property was

[678] Appleton response to Gonzalez January 19, 2024 letter re Protective Order status dated January 26, 2024 (**R-0220**).

[679] Email from A. González to B. Appleton dated March 2, 2024 (**R-0234**).

effectively in a state of abandon in 2017; (ii) Inagrosa and Claimant had not invested in the property since 2014 and refused to pay property taxes years before the invasions began; and (iii) almost all the Hacienda workers were fired after the property's coffee plantation was destroyed by the Roya fungus in or around 2012.[680] And this conclusion is evident from the mental gymnastics that Claimant employs to try to explain to this Tribunal why it refuses to take back a property that, by its own account, is uniquely capable of housing Hass avocado and forestry businesses worth hundreds of millions of dollars. ***Claimant's story just does not add up***.

469. In conclusion, the record confirms that Nicaragua has offered Claimant and Inagrosa, on several occasions, to repossess Hacienda Santa Fé and that, each time, Claimant and Inagrosa have refused, citing reasons that are unmoored from Nicaraguan law or common sense.

470. For avoidance of doubt, Nicaragua's offer to Claimant and Inagrosa remains. At any time during the pendency of this arbitration, Claimant and Inagrosa are free to possess their property, provided they work with Nicaragua to dismantle the judicial deposit (that Nicaragua was forced to seek once Claimant and Inagrosa refused to secure their property) consistent with Nicaraguan law.

[680] Counter-Memorial, ¶¶ 9, 382, 423, 475.

## III. JURISDICTION

### A. Considering Riverside's Withdrawal of Its Claims Brought on Behalf of Inagrosa Under DR-CAFTA Article 10.16.1(b), the Tribunal Need Not Address Any Further Jurisdictional Objections

471. DR-CAFTA Article 10.16.1(a) allows a foreign investor to submit a claim to arbitration "on its own behalf" and under DR-CAFTA Article 10.16.1(b) on "behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly."[681] One critical distinction between these two provisions is the mechanisms for which recovery under DR-CAFTA operates. While section (a) only allows a claim where "the *claimant* has incurred loss or damage by reason of, or arising out of, that breach,"[682] recovering the ***direct injury it sustained***, section (b) allows a claim that "the *enterprise* has incurred loss or damage by reason of, or arising out of, that breach,"[683] recovering ***on behalf of a local enterprise***, *i.e.*, the damage that enterprise sustained.

472. Claimant brought this arbitration under DR-CAFTA Article 10.16.1(a), that is, on its own behalf, for the damages directly sustained by Riverside.[684] By the time Claimant submitted its Memorial, Riverside became aware that a claim for damages under DR-CAFTA Article 10.16.1(b) was the only avenue that would allow Riverside—assuming it could demonstrate it was a controlling shareholder—to seek 100% of the alleged damages suffered by the local company, Inagrosa, and not only the harm done to the shareholder's interest in the company, which at the time of the measures was 25.5%. Therefore, in its Memorial, Claimant belatedly attempted to

[681] DR-CAFTA, Article 10.16.1(a) and (b) (**CL-0001**).

[682] DR-CAFTA, Art. 10.16.1(a) (**CL-0001**).

[683] DR-CAFTA, Art. 10.16.1(b) (**CL-0001**).

[684] *See* Notice of Intent, ¶ 36 (**C-0006**); Notice of Arbitration, March 19, 2021, ¶ 301; *see also* Counter-Memorial, ¶ 233.

broaden its claim in this arbitration, seeking damages *also* under Article 10.16.1(b), that is, for the alleged harm caused to the local enterprise, Inagrosa.[685]

473. In its Counter-Memorial, Nicaragua successfully demonstrated that Riverside's attempt to bring claims on behalf of Inagrosa under Article 10.16.1(b) for the first time in its Memorial were outside's the Tribunal's jurisdiction and failed for at least four reasons: (i) Riverside failed to comply with the Notice Requirement under DR-CAFTA Article 10.16.2 with respect to the claims it attempted to bring on behalf of Inagrosa;[686] (ii) Riverside failed to comply with the Waiver Requirement under DR-CAFTA Article 10.18.2(b)(ii) with respect to those claims;[687] (iii) Riverside was a minority shareholder at the time of the alleged breaches and had not demonstrated that it controlled Inagrosa[688]; and (iv) the Tribunal lacked jurisdiction *Ratione Personae* over any claims brought on behalf of Inagrosa under Article 25(2) of the ICSID Convention because Nicaragua never agreed that Inagrosa should be treated as a "National of another Contracting State".[689]

474. Claimant's fatal errors in its unsuccessful attempt to bring claims for the damages on behalf of and caused to Inagrosa were so egregious that Claimant itself decided to withdraw its CAFTA Article 10.16(1)(b) claim even before its Reply Memorial was due, therefore renouncing Riverside's ability to assert those claims and seek recovery for damages on behalf of and caused to Inagrosa.[690]

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[685] Memorial, ¶ 770. "Riverside raises this claim for damages ***under DR-CAFTA Articles 10.16.1(a) and 10.16.1.(b).*** The claims are for the harm done to the shareholder's interest in the investment ***and*** to the harm done to the investment itself."

[686] Counter-Memorial, ¶¶ 212-220.

[687] Counter-Memorial, ¶¶ 221-228.

[688] Counter Memorial, ¶¶ 229-254.

[689] Counter-Memorial, ¶¶ 255-262.

[690] Correspondence from Mr. Appleton to the Arbitral Tribunal, 16 March 2023.

475. In its Reply, Claimant reaffirmed the withdrawal of any claim under DR-CAFTA Article 10.16.1(b).[691] Claimant also asserted that because of its removal of claims on behalf of Inagrosa, "there is no cognizable jurisdictional issue" that the Tribunal needs to address.[692]

476. Nicaragua agrees with this statement. Riverside's decision to scale back on the claims and damages it asserts in this arbitration to conform to the requirements under DR-CAFTA disposed of Nicaragua's jurisdictional objections. Nicaragua remains committed to comply all its obligations under DR-CAFTA and recognizes the Tribunal's jurisdiction to decide this arbitration.

477. However, as explained below, Riverside's claim for damages under DR-CAFTA 10.16.1(a) should be inadmissible as an improper attempt to bring a claim for damages suffered by the local company, Inagrosa, instead of a claim for direct damages suffered by Claimant.

### B. Claimant's Interpretation of DR-CAFTA Article 10.16.1(a) Is Incorrect

#### 1. Riverside May Only Claim Direct Losses It Sustained Under DR-CAFTA Article 10.16.1(a)

478. Claimant misconstrues the flexibility offered by DR-CAFTA, particularly under Article 10.16.1, as a carte blanche to choose between filing claims for direct or indirect losses without considering the treaty's broader objectives and mechanisms.

479. DR-CAFTA Article 10.16.1(a) allows a claimant to submit a claim to arbitration *on its own behalf*, seeking the loss or damage that the *claimant* as incurred.[693] The clear text of DR-CAFTA Article 10.16.1(a) allows a claimant to proceed for its sole benefit for any claims that *it* has "incurred loss or damage."

[691] Reply, ¶¶ 203, 2100-2103.

[692] Reply, ¶ 2098.

[693] DR-CAFTA, Art. 10.16.1(a) (**CL-0001**).

480. This article stands in stark contrast with DR-CAFTA Article 10.16.1(b), which allows "the claimant" to submit a claim "on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly," to seek the loss or damage the ***local enterprise*** has incurred.[694] But Riverside voluntarily foreclosed its ability to do so.

481. Claimant's sole remedy in this arbitration is under DR-CAFTA Article 10.16.1(a) for the losses and damages that that Riverside suffered directly, since its belated attempt to bring a claim under DR-CAFTA Article 10.16.1(b) failed. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, to share in the residual assets of the enterprise upon dissolution or claims for damages suffered State action aimed at Claimant's shareholding itself.

482. Claimant has the burden of proving its injury. It is not sufficient for an investor to demonstrate only that a local enterprise in which it has an interest has incurred harm. In this arbitration, Claimant has made no attempt to demonstrate the damages that Riverside sustained directly. The reason is simple. The evidence submitted by Claimant shows that Riverside did not suffer any direct damage as a result of the invasion.[695] Riverside's 2018 tax returns, which were prepared in 2019, show a value of USD $2,379,973.00 for Inagrosa—***an amount that is unchanged*** from Riverside's 2017 tax returns. In other words, Riverside contemporaneously—after the alleged measures—did not consider that the alleged damage to Inagrosa resulted in direct

[694] DR-CAFTA, Art. 10.16.1(b) (**CL-0001**).

[695] *Compare* Riverside IRS Form 1065, 2018, at 5 (**R-0111**) *with* Riverside IRS Form 1065, 2017, at 6 (**R-0118**).

damages to itself. Claimant thus improperly seeks to recover the losses allegedly suffered by Inagrosa, rather than any losses it, itself, suffered.

483. Claimant cannot have it both ways. Its deliberate decision to submit a claim under DR-CAFTA Article 10.16.1(a) only entitles Claimant to seek redress for the damages Riverside suffered directly. Because Claimant is seeking to recover damages arising out of purported injuries to Inagrosa, Riverside's claims are inadmissible and should be dismissed.

### 2. Claimant Cannot Seek "Reflective Loss" or "Indirect" Damages Under DR-CAFTA Article 10.16.1(a)

484. In its Counter-Memorial, Claimant alleges that shareholders can suffer two types of damages: direct loss and indirect or reflective loss.[696] According to Claimant, "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."[697] Claimant is incorrect, as it is not possible to bring a "reflective loss" or indirect claim under DR-CAFTA Article 10.16.1(a).

485. The distinctions between the two subsections of DR-CAFTA Article 10.16.1 have been extensively addressed in arbitral jurisprudence. Some arbitral tribunals have pointed to the similarity between the DR-CAFTA language with NAFTA Articles 1116 and 1117, which contain the same requirements as DR-CAFTA Article 10.16.1(a) and Article 10.16.1(b) respectively, as correctly identified by Claimant.[698]

[696] Reply, ¶¶ 2113-2114.

[697] Reply, ¶¶ 2113-2114.

[698] Reply, ¶¶ 2113-2114.

486. In this vein, the NAFTA contracting parties agree that Article 1116, which is substantially the same as DR-CAFTA Article 10.16.1(a), does not allow a shareholder to recover reflective loss. In *Clayton v. Canada*, the Tribunal found that:

> Both the Respondent and the United States in their submissions argue that the inclusion of separate provisions in Article 1116 and Article 1117 was deliberate. Article 1116 gave effect to the traditional rule of customary international law that a party can sue for its losses arising out of the breach of an international obligation. Article 1117 was designed to permit claims by an investor on behalf of its investment, thus permitting a claim for reflective loss. In the absence of that provision a claim for reflective loss would otherwise be barred under customary international law by virtue of the ICJ judgment in Barcelona Traction, which rejected the right of shareholders to bring claims in place of the corporation.
>
> The Tribunal finds this to be a plausible explanation for the existence of the two separate provisions in NAFTA Chapter Eleven, which would argue against overlap between them and would mean that reflective loss could not be recovered under Article 1116.
>
> . . .
>
> […] To allow an investor to recover damages under Article 1116 damages that belong to its investment could have an impact on other stakeholders, including other investors in the investment. That is the reason why recovery of monetary damages in respect of claims made under Article 1117 are to be paid to the investment vehicle and not to the investor pursuant to Article 1135(2)(b). The lack of any equivalent provision in relation to Article 1116 carries the implication that ***reflective loss was not contemplated under Article 1116***.[699]

487. Claimant relies on the *Kappes v. Guatemala* tribunal's Decision on Preliminary Objections to allege that reflective loss claims are permissible under DR-CAFTA Article 10.16.1(a).[700] Even though the *Kappes* tribunal admitted a reflective loss claim by the controlling shareholders under the specific facts of that case, that analysis has been strongly criticized and discouraged by DR-CAFTA and NAFTA tribunals, including in a strong dissenting opinion issued by Professor Zachary Douglas in the *Kappes* case.

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[699] *Clayton/Bilcon v. Canada*, PCA Case No. 2009-04, Award on Damages, January 10, 2019, ¶¶ 371-374, 388 (**RL-0103**).

[700] Reply, ¶¶ 2107, 2116.

488. Professor Douglas's dissenting opinion critically addresses the tribunal majority's acceptance of claims for indirect losses under DR-CAFTA Article 10.16.1(a), cautioning against the expansion of tribunal jurisdiction beyond the explicit terms of the treaty. Professor Douglas argues that allowing claims for reflective losses without clear and direct causation from state action to the investor's losses could lead to speculative claims and dilute the accountability mechanisms intended by CAFTA.[701] Additionally, Professor Douglas's analysis brings to light the significance of integrating Article 10.16.1 with other treaty provisions, notably Articles 10.18 and 10.26.[702] There articles collectively establish a sophisticated framework to prevent multiple proceedings, ensure no double recovery, and protect creditors' rights, which could be undermined if controlling shareholders were allowed to pursue reflective loss claims indiscriminately.

489. In any case, *Kappes* case does not help Claimant's damages case. As explained below and in detail by the *Kappes* Tribunal, under DR-CAFTA Article 10.16.1(a), Claimant cannot recover damages beyond the percentage of its shareholding in Inagrosa.

### 3. Riverside's Attempt to Recover Losses Suffered by Inagrosa Beyond Its *Pro Rata* Shareholding Is Improper

490. In its Counter-Memorial, Nicaragua established that the scope of compensation of shareholders is limited to the value of their equity participation in the company or direct assets.[703]

491. In its Reply, Claimant argued that this statement was incorrect.[704] But Claimant does not offer a single legal authority to support this argument. The few legal authorities that Claimant relies on are only to support Riverside's argument that a claim for reflective loss is

[701] *Daniel W. Kappes and Kappes, Cassiday & Associates v Republic of Guatemala,* ICSID Case No ARB/18/43, Partial Dissenting Opinion of Prof. Zachary Douglas QC, March 13, 2020 (**RL-0177**).

[702] *Daniel W. Kappes and Kappes, Cassiday & Associates v Republic of Guatemala,* ICSID Case No ARB/18/43, Partial Dissenting Opinion of Prof. Zachary Douglas QC, March 13, 2020 (**RL-0177**).

[703] Counter-Memorial, ¶ 235.

[704] Reply, ¶ 2104.

admissible under DR-CAFTA Article 10.16.1(a). Riverside has been unable to show how DR-CAFTA allows it to recover damages beyond the extent of its own shareholding. Claimant is simply wrong. DR-CAFTA Article 10.16.1(a) does not allow a Claimant to bring a claim for the damages that the Claimant suffered directly beyond the proportion of its own shareholding.

492. To pursue compensation for 100% of the damages allegedly caused to Inagrosa, Riverside had two options: (i) bring a claim under DR-CAFTA Article 10.16.1(a) along with Inagrosa's other shareholders from that timeframe—*e.g.*, Mr. Winger, Mr. Rondón, and Mr. Nairn—as claimants in this arbitration; or (ii) bring a claim under DR-CAFTA Article 10.16.1(b) on behalf of Inagrosa—assuming Claimant could demonstrate that it controlled Inagrosa—which it has been unable to prove.

493. Claimant chose not to exercise the first option, namely, filing a claim under DR-CAFTA Article 10.16.1(a) along with Mr. Winger, Mr. Rondón, and Mr. Nairn, in their personal capacities, as claimants. The reasons for excluding Riverside's shareholders as named claimants in these proceedings, even though some are participating as fact witnesses in the arbitration, can be easily inferred. Riverside's 2018 financial disclosures reveal it as a shell entity with negligible liquidity, holding no cash at year-end and starting with a mere USD $52,832.[705] Its main "asset," Inagrosa, is illiquid and insufficient for covering liabilities like an adverse cost award. Riverside's apparent assets, based on its U.S. tax returns, are essentially the partners' capital accounts, which Kansas law protects from creditors due to Riverside LLC's corporate structure.[706] This setup underscores Riverside's role as a façade, with the real financial substance residing with its partners,

[705] *See* Riverside IRS Form 1065, 2018, p. 5 (**R-0111**). Riverside produced this return without including any of the accompanying schedules that *inter alia* itemize partner capital accounts, deductions, investments, and liabilities. *Compare* Riverside IRS Form 1065, 2018 (**R-0111**) *with* Riverside IRS Form 1065, 2017 (**R-0118**).

[706] *See* Nicaragua's Application for Security for Costs, October 4, 2023, ¶¶ 47-48.

including the late Mr. Melvin Winger and Ms. Mona Winger, who hold significant personal wealth.[707] The company's deliberate draining of liquid assets by the end of 2018 further illustrates a strategy to shield these substantial partner assets from any potential costs award.[708]

494. Claimant *did* attempt to bring a claim under DR-CAFTA Article 10.16.1(b) on behalf of Inagrosa, when it realized that this approach was the sole means to seek full compensation for the damages Inagrosa purportedly incurred. That attempt failed for many reasons explained above, including the fact that Riverside is not a controlling shareholder of Inagrosa. Ultimately, Claimant withdraw its claim under DR-CAFTA Article 10.16.1(b), as explained above.

495. The decisions made by Claimant resulted in a claim where Riverside, a minority shareholder of Inagrosa at the time of the alleged breaches, brought ***on its own behalf***, for the damages allegedly sustained ***directly by Riverside***, under DR-CAFTA Article 10.16.1(a).

496. The amount of damages that could be recovered by a controlling shareholder under the different DR-CAFTA provisions is notable. As explained by the Tribunal in *Kappes v. Guatemala:*

> By pursuing the Article 10.16.1(b) path, the controlling shareholder could provide the going-concern enterprise with a potential route to far greater damages recovery, and therefore greater restored health, precisely because the claim could be brought for the enterprise's full injury regardless of its upstream shareholding structure. Thus, for the hypothetical 51%-49% joint venture discussed above, the 51% shareholder could bring a claim "on behalf of" the joint venture under Article 10.16.1(b), seeking damages payable to the enterprise for 100% of the enterprise's losses, regardless of the nationality of the minority shareholder. By contrast, the same shareholder proceeding on "its own behalf" under Article 10.16.1(a) ***at best*** could seek only 51% of the damages.[709]

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[707] *See* Riverside IRS Form 1065, 2017, at 15 (**R-0118**). *See* Nicaragua's Application for Security for Costs, October 4, 2023, ¶¶ 47-48.

[708] *See* Nicaragua's Application for Security for Costs, October 4, 2023, ¶ 48.

[709] *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, ¶ 147 (**CL-0258**) (emphasis added).

497. The Tribunal further explained that:

> [U]nder this provision [Article 10.16.1(b)], a claim may be brought for the ***full*** measure of 'loss or damage' the enterprise incurred, without restriction based on the upstream division of shareholding interests. Under this provision, a hypothetical 51% shareholder could assert ethe same claim under Article 16.10.1(b), on behalf of the enterprise it controls, as it could if it had owned 100% of the shares, seemingly without regard to the identity of the actual holders of the other 49% of the shares. This is because it is asserting the ***enterprise's*** injury and not its own."[710]

498. It therefore follows that Riverside is not entitled to recover the full extent of the damages it claims in this arbitration. Claimant has not met the burden of proving the damages Riverside as a result of the alleged measures. Because Claimant submitted a claim under DR-CAFTA Article 10.16.1(a) ***on its own behalf***, any amount of damages potentially granted by the Tribunal shall be reduced by 74.5%, as Riverside shall only recover 25.5% of any damages awarded, which corresponds with the percentage of its shareholding at the time of the alleged breaches.

### 4. Claimant Has Been Unable to Demonstrate that It Controlled Inagrosa in June 2018

499. It is undisputed that, at the time of the alleged breaches, Claimant only owned 25.5% of the shares in Inagrosa. Riverside was a minority shareholder. In the words of Claimant, "[a]t the time of the Invasion, Riverside owned 25.5 percent of Inagrosa shares directly. Melvin Winger owned 25.5 percent of Inagrosa shares, Carlos Rondón owned 25 percent of Inagrosa shares, and Ward Nairn – a close friend of Melvin Winger, owned the remaining 24 percent minority of Inagrosa shares."[711]

[710] *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, ¶ 133 (**CL-0258**) (emphasis added).

[711] Memorial, ¶ 84.

500. In its Reply, Claimant devotes an entire chapter on the ownership and control of Inagrosa by Riverside.[712] It is not clear why Claimant found it relevant to explain that it was a controlling shareholder of Inagrosa at the time of the alleged measures, considering that it chose to bring this arbitration exclusively under DR-CAFTA Article 10.16.1(a), and not under DR-CAFTA Article 10.16.1(b) on behalf of an enterprise that "claimant owns or controls directly or indirectly." As explained above, DR-CAFTA Article 10.16.1(a) Riverside can bring a claim, on its own behalf, for the damages that it sustained directly. Naturally, the extent of damages Riverside is eligible to recover ***will be limited by its shareholding percentage in Inagrosa*** - 25.5%, regardless of any claimed "control" over Inagrosa. The alleged "control" will not expand or broaden the amount of damages Riverside might be entitled to recover. Control is irrelevant for purposes of calculating damages when a claim is submitted under DR-CAFTA Article 10.16.1(a) because such claim is not brought on behalf of the local company.

501. In any case, for the sake of responding to Claimant, Nicaragua asserts that the evidence submitted by Riverside shows that it did not control Inagrosa when the alleged breaches occurred in June 2018.

502. The Claimant's claims of "control" over Inagrosa have shifted unpredictably during this arbitration, mirroring the instability of the purported "control bloc" percentages.

503. ***First***, Claimant alleges that:

> Riverside Coffee was able to exercise effective control over Inagrosa ***through a voting bloc agreement between Riverside Coffee, LLC, Carlos Rondon (CEO of Inagrosa) and his father in Law, Melvin Wigner***. As a result, Riverside Coffee ***controlled 80% of the voting shares of Inagrosa since August 31, 2004***.[713]

[712] Reply, Section IV.

[713] Notice of Intent, ¶ 75 (emphasis added).

504. During the document production phase of this arbitration, Nicaragua requested a copy of the voting bloc agreement.[714] In response to this request, Claimant stated that "[t]here are no responsive documents in its possession."[715] The Tribunal may therefore draw an adverse inference that no such voting bloc agreement exists.

505. ***Second***, Claimant asserts that:

> Melvin Winger's Revocable Trust voted his Inagrosa shares with Riverside. They and Riverside ***consistently voted*** a combined total of 51% of Inagrosa shares, sufficient to allow Riverside to control Inagrosa. 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***.[716]
>
> Riverside's ***voting bloc*** ensured that Riverside controlled board decisions from 2013 onwards.[717]

506. These assertions were backed solely by the testimonies of Ms. Melva Jo Winger de Rondón and Mr. Melvin Winger. There is no documentary proof in the records of any agreement regarding a "voting bloc" or of Riverside exercising control over the voting actions of the majority of Inagrosa's shareholders.

507. The evidence submitted by Claimant in its Memorial, consisting of eleven sets of minutes from the Board of Directors' meetings of Inagrosa, spanning January 2013 to April 2017,[718] does not show that Riverside "controlled" Inagrosa in any way. In fact, in all those Minutes all four shareholders of Inagrosa made decisions "by unanimous vote." None of those Board of Director's meetings include a reference to a "voting bloc" or "voting agreement". There is no reference to a proxy granting authority to Riverside to vote on behalf of the other three

[714] *See* Procedural Order No. 6, Annex B, Nicaragua's Document Request No. 9, p. 42.

[715] Procedural Order No. 6, Annex B, Nicaragua's Document Request No. 9, p. 42.

[716] Memorial, ¶ 85; Winger de Rondón I, ¶ 38 (**CWS-03**).

[717] Memorial, ¶ 88; Winger de Rondón I, ¶¶ 39-40 (**CWS-03**).

[718] Winger de Rondón I, ¶ 42 (**CWS-03**).

shareholders, Messrs. Winger, Rondón, and Nairn. All of them voted all decisions with equal authority. Indeed, the most natural inference that can be drawn from this evidence is that Riverside, with a mere 25.5 percent stake, ***did not control Inagrosa***.

508. Despite still being unable to produce any voting agreement in its Reply—in fact, Riverside now claims that "Riverside voting bloc was not recorded in a written document but was followed in every vote"[719]—the only new evidence submitted by Claimant to prove that it "controlled" Inagrosa in June 2018 are Riverside's US Federal Tax Returns before the IRS from 2015 through 2018 where Riverside "confirmed its voting control over Inagrosa."[720] However, the that assertion is not conclusive evidence of the existence of a voting agreement. Claimant has still failed to produce any agreement and therefore, there is no evidence of legal capacity to control Inagrosa.

509. In this regard, the reasoning of the tribunal in *Aguas del Tunari S.A. v. Bolivia*, is instructive:

> The Tribunal, by majority, 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 agreements such as the articles of incorporation or shareholders' agreements, or a combination of these***.[721]

510. Claimant has simply not provided any evidence of its "legal capacity to control" Inagrosa, whether by "the percentage of shares held, legal rights conveyed in instruments or

[719] Reply, ¶ 701.

[720] Reply, ¶ 2150(g).

[721] *Aguas del Tunari S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, ¶ 265 (**RL-0092**) (emphasis added).

agreements such as the articles of incorporation or shareholders' agreements, or a combination of these."[722]

511. Some tribunals have found that in the absence of legal control, *de facto* control must be established beyond any reasonable doubt.[723] The Minutes of the Board of Directors, which would show the existence of any *de facto* control over Inagrosa, as explained above, failed to show such control, and even less, beyond any reasonable doubt.

512. While irrelevant for the purposes of Article 10.16.1(a), Claimant has nonetheless failed to establish that it controlled Inagrosa at the time of the alleged treaty breaches.

[722] *Aguas del Tunari S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, ¶ 265 (**RL-0092**).

[723] *International Thunderbird Gaming Corporation v. United Mexican States,* Award, January 26, 2006, ¶ 106 (**CL-0267**).

## IV. RIVERSIDE'S CLAIMS ON THE MERITS FAIL

514. Riverside's case most fundamentally fails because the unlawful invasion of Hacienda Santa Fe was the work of non-state actors. Nicaragua neither directed, encouraged, nor adopted the illegal invasion of the Hacienda by armed non-state actors. Rather, Nicaragua has always recognized Inagrosa's lawful ownership of the property and took effective measures peacefully to restore the Hacienda to Inagrosa and Riverside's control.[724]

515. This reality upends the premise of Riverside's Memorial. In its Reply, Riverside mostly appears to recognize that the only State measures it can conceivably challenge are those that formed Nicaragua's law enforcement response to that unlawful invasion. Where Riverside's Request for Arbitration and Memorial wove a wild tale of a "paramilitary" invasion from layers of hearsay, Riverside's Reply has largely shifted to challenging the sufficiency of Nicaragua's law enforcement response to the unlawful occupation of Hacienda Santa Fe or attempting to conjure an expropriation out of the Protective Order that Nicaragua put in place precisely to preserve the Hacienda secure for Inagrosa's eventual repossession.[725] As further detailed below in Section IV.D Riverside's retooled case fails to establish that Nicaragua's response to the illegal invasion of Hacienda Santa Fe breached any of its DR-CAFTA obligations.

### A. The Illegal Invasion of Hacienda Santa Fé by Armed Private Actors Is Not Attributable to Nicaragua

516. Yet Riverside is not quite willing entirely to abandon its original (and inconsistent) theory that the Nicaraguan State somehow "sent" the invaders to Hacienda Santa Fe completely.

[724] *See generally* Gutiérrez II, ¶¶ 14-15 (**CWS-10**) (discussing how Nicaragua always upheld and recognized Inagrosa as the sole owner of Hacienda Santa Fe and assisted Inagrosa in 2003-2004 to evict all illegal occupiers); Protective Order issued by the Second Oral Court of the Civil District Court of Jinotega on December 15, 2021 (**C-0251**) (recognizing Inagrosa as the sole owner of Hacienda Santa Fe); Protective Order issued by the Second Oral Civil District Court of Jinotega (**R-0187**) (recognizing Inagrosa as the sole owner of Hacienda Santa Fe).

[725] Request for Arbitration, ¶¶ 71, 100-101; Memorial, ¶¶ 56-71; Reply ¶ 81-119.

To that end, in its Reply, Riverside relies on tortured logic to attribute the actions of the land invaders to the State. Riverside does so mainly through the same layered hearsay evidence that Nicaragua has already rebutted in its Counter-Memorial[726]

517. That said, Riverside purports to attribute the land invaders' conduct to Nicaragua on two other specious grounds, insisting that the "occupiers themselves" admitted that they were "acting in the name of the State," and alleging that State officials—in particular a member of Nicaragua's National Assembly—"gave direction" to the invaders of Hacienda Santa Fe and encouraged them to continue their unlawful occupation of property.[727] Neither argument withstands scrutiny nor provides a basis for engaging Nicaragua's international responsibility.

1. Riverside's Reliance on Self-Serving Hearsay Testimony About What the Invaders Supposedly Said Is Unavailing

518. Riverside's State attribution argument based on the "admissions" of the "occupiers" themselves does not withstand serious scrutiny.[728] Most of Riverside's support for the supposed admissions of the land invaders that they were sent by the State depends upon second and third-hand hearsay evidence which Nicaragua has already rebutted and to which the Tribunal should assign no probative weight.[729] This is all the more so when one of the individuals previously quoted

[726] *See* Memorial, Section II.B.

[727] Reply, ¶¶ 104-107; 321-323.

[728] Reply, ¶¶ 104-107; 321-323. *See also* Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065**); 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**).

[729] *See* Section II.A.1. s*upra*. *See also EDF (Servs.) Ltd. v. Republic of Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, ¶ 224 (**RL-0029**) (ruling that a statement by a witness was inadmissible hearsay because it was based, not on his own knowledge, but rather on information purportedly imparted to him by a third-party); *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶ 347 (**RL-0030**) (declining to admit hearsay evidence when no other evidence is submitted to support statements); *Methanex Corp. v. United States*, UNCITRAL, Final Award, August 3, 2005, ¶¶ 49, 56 (**RL-0031**) (refusing to admit "double hearsay" offered by a party); Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), ICJ Rep. 1984, ¶ 68 (**CL-0022**) (rejecting "testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay").

at third-hand by Riverside, Mr. Dario Enriquez Gomez, has since submitted a witness statement in which he gives *direct* testimony that he never said the things Riverside's witnesses allege. Mr. Enriquez specifically declares that he never told Mr. Gutiérrez that Hacienda Santa Fé was being expropriated by the government or that the government was targeting companies with foreign capital, thus refuting Claimant's allegations about him.[730]

519. Riverside otherwise leans heavily upon a letter sent by the illegal occupiers of Hacienda Santa Fe to the Attorney General of Nicaragua on September 4, 2018.[731] However, this document contradicts Riverside's characterizations of that letter.

520. Read in full and in context, the September 4, 2018 letter is in fact anything but an "admission" of government orders. It is instead a petition for the government's support of the illegal occupants' putative claim to Hacienda Santa Fe.[732] The letter also makes the stakes for the Nicaraguan government in its handling of the situation unmistakably clear.

521. Its authors begin by introducing themselves as "members of the former Nicaraguan Resistance" and claiming that the property that they have occupied by armed force "was granted to us" by the Nicaraguan Institute for Agrarian Reform as part of the resettlement of demobilized resistance fighters at the end of Nicaragua's civil war.[733] While acknowledging the Rondón family's connection to the property, they continue to assert that "[t]o this date, the property is

[730] Enríquez, ¶ 14 (**RWS-21**) ("it is false that I made any kind of comment to him about the invasions of the Hacienda Santa Fe. I never went to Hacienda Santa Fe nor was I aware of the circumstances under which the Hacienda was invaded in 2018").

[731] Reply, ¶¶ 104-107. *See also* Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 (**R-0065**).

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

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

possessed by the members of the former Nicaraguan Resistance affiliated with the El Pavón Farming and Services Cooperative Association."[734]

> To this date, the property is possessed and controlled by the members of the former Nicaraguan Resistance affiliated with the **EL PAVON** Farming and Services Cooperative Association, which was acknowledged and authorized by the Management of the Labor Department's National Register of Cooperative Associations and Farming Industries as evidenced in Resolution No. 612-

522. Having identified their two organizational affiliations with the former Nicaraguan Resistance and the El Pavón Cooperative, the September 4, 2018 letter's authors next ask the Attorney General that they "be granted a hearing for the purpose of discussing the terms of the agreement reached by the Nicaraguan Institute for Agrarian Reform."[735] They also warn that "regard should be had" to the fact "that the property is still held by the cooperative association."[736] Given the undisputed conditions of unrest in Nicaragua at the time and the fact that the authors had just been part of an armed takeover of the Hacienda, this line can only be read as an implicit threat of violence.

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

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

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

17 of 1997 (copy of the certificate issued by Ms. Alba Taboada de Hernández attached). Note that we are requesting to be granted a hearing for the purpose of discussing the terms of the agreement reached by the Nicaraguan Institute for Agrarian Reform (INRA), but regard should be had that the property is still held by the members affiliated with such Cooperative Association (find attached a list of names and ID numbers), and additionally the undersigned appear as representatives of the members of such Cooperative Association.

523. None of this is evidence for attributing the armed invasion of Hacienda Santa Fe to the Nicaraguan State. To the contrary, in attempting to justify their armed occupation of the Hacienda Santa Fe and asking for "hearing"—underscored by the implied threat of violence—the September 4, 2018 letter is powerful evidence of the precise opposite of government control.[737] That they were petitioning the Attorney General for a hearing in itself shows that the illegal occupiers of the property did not understand their armed invasion of the property to have been directed or ratified by the State.

524. The authors of the September 4, 2018 letter never once claim to be part of any State entity or acting at State instructions. Riverside, however, ignores almost the entire content of the September 4, 2018 letter, focusing instead on the closing paragraph in isolation where the authors note that while they were all once "members of the Former Nicaraguan Resistance" they are now members of the "Sandinista National Liberation Front" and "under the leadership of our Comrade the President of the Republic."[738]

525. Read in the context of a petition to the attorney general of Nicaragua advocating for a hearing on the authors' illegal and armed occupation of the land at issue, this language cannot

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

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

be mistaken for an "admission" of governmental control or direction.[739] It is most naturally read as a profession of political *party* loyalty. Whether that message was intended to curry favor or as a veiled threat (party loyalties can change) or both is open to debate.[740] But this language, placed in the full context of the September 14, 2008 letter, simply does not suggest that the conduct that was consistently rejected as unlawful by the State and that culminated in the armed occupiers' peaceful removal from the property attributable to Nicaragua under any basis recognized in customary international law.[741] To be sure, the invaders of the property wanted the State's support and they asked for it. But they did not get it. Instead, as detailed above, the only conduct attributable to Nicaragua is that peacefully relocated the illegal occupants and then secured it for Inagrosa and Riverside to reoccupy at any time.

### 2. Riverside Cannot Attribute the Illegal Armed Invasion of Hacienda Santa Fé to the State on the Basis of the Alleged Conduct of a Single Member of the National Assembly

526. Besides the September 4, 2018 letter, Riverside attempts to tie the illegal invasion of Hacienda Santa Fe to the State on the basis of a July 13, 2018 report from Commissioner Marvin Castro to Deputy Chief of the National Police. This report, Riverside alleges, reveals that a member of Nicaragua's National Assembly, Edwin Castro (no relation to Commissioner Marvin Castro) advised the invaders to remain in occupation of Hacienda Santa Fé in hopes that Nicaragua might

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

[740] That some among the occupiers may have been longer-term "Sandinista supporters" is immaterial. Party affiliation—even strong party affiliation—does not make an individual a State actor. Professor Wolfe's view that political parties aligned with the former Resistance have reached a postwar accommodation with the Sandinistas is likewise immaterial to the question of whether the illegal invasion of Hacienda Santa Fe engaged Nicaragua's State Responsibility towards a foreign investor. Professor Wolfe's theories about high-level politics in Managua are not competent evidence of the motivations of the members of the El Pavón Cooperative in Jinotega or of their reasons for staging an armed invasion of a specific property. Wolfe II, ¶¶ 9-18, 52-53, 113-135 (**CES-05**).

[741] History and current events provide no shortage of examples of actors professing to be loyal to the State or its leaders but acting unlawfully and in manners that are not attributable to it.

buy it.[742] On this basis, Riverside argues that the State directed or adopted the conduct of the illegal armed invaders of Hacienda Santa Fe. This argument also fails.

527. As a preliminary matter, Riverside offers absolutely no direct evidence of what Congressman Castro may have said or done. Riverside's argument hinges on a report's characterization of a conversation, in other words, third-hand hearsay. The Jinotega Police Commissioner reports to the Deputy Director General of the National Police to the effect that unidentified members of the group occupying the property told him that they had "communicated" with Deputy Castro and that he had allegedly "mentioned to them to stay in that property since the government is looking for a way to buy it." This third-hand hearsay is not reliable evidence of what Congressman Castro said or did. And, indeed, in his second witness statement, Commissioner Marvin Castro confirms that he has no firsthand knowledge of any discussions between the illegal occupiers of Hacienda Santa Fe and Congressman Castro. He simply reported to his superior what the invaders had told him—including that they, a band of heavily-armed ex-Resistance members, were prepared "to fight" to maintain their grip on the property.[743]

528. But even assuming that Congressman Castro had wholeheartedly supported the land invaders' unlawful armed occupation of Hacienda Santa Fe and done his utmost to encourage their continued unlawful occupation, such alleged actions could not engage Nicaragua's State Responsibility under international law.

529. This is the case, whether the Tribunal considers the putative theories of State direction or adoption suggested in Riverside's Reply Memorial, attribution is impossible on either

[742] Reply, ¶ 321.c). Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding the Invasion of Hacienda Santa Fé, July 31, 2018 (**C-0284**).

[743] Castro II (**RWS-011**); 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**).

ground because ***Assemblyman Castro is not the State***. More precisely, Congressman Castro is not a "state organ," within the meaning of Article 4 of the ARSIWA and can thus neither direct nor ratify conduct on behalf of the State. Article 4 recognizes that a state organ may exercise "legislative, executive, judicial or any other functions" and further provides that state organs are to be defined "in accordance with the internal law of the State" concerned. The Constitution of Nicaragua does not make Congressman Castro a "state organ." He is simply a member of Nicaragua's National Assembly, and it is the Assembly, acting as a body pursuant to Nicaragua's constitution, that is a state organ. Thus Article 132 of Nicaragua's Constitution provides that "[l]egislative Power is exercised by the National Assembly . . . composed of ninety members (diputados) and their alternates elected by universal, equal, direct, free, and secret suffrage through the system of proportional representation."[744] The Assembly exercises its powers through majority voting subject to a requirement of a quorum, as well as other, constitutionally prescribed oversight functions.[745] The actions of Nicaragua's National Assembly, acting pursuant to its powers under Nicaragua's internal law are unquestionably attributable to Nicaragua. But customary international law as collected in the restated ARSIWA simply does not attribute individual members' political agendas or advocacy to the State. Riverside, moreover, makes no argument that the National Assembly took ***any*** measures adverse to its investment pursuant to its powers under Nicaragua's internal law.

530. Illustrating these principles, investment tribunals have repeatedly been at pains to avoid so much as suggesting that the individual conduct of members of legislative bodies can engage state responsibility under international law. For example, in *Burlington v. Ecuador*, the

[744] Nicaraguan Political Constitution, Art. 132 (**RL-0169**).

[745] Nicaraguan Political Constitution, Art. 132 (**RL-0169**).

Tribunal considered the legislative history of Ecuador's windfall profits law "Law 42" in order to "shed light" on how Ecuadorean legislators "understood the context" in which the challenged measures arose. At the same time, however, the *Burlington* tribunal emphasized that "[b]y calling attention to this congressional debate, the Tribunal does not intend to attribute responsibility to Ecuador for the statements of individual congressmen."[746]

531. The tribunal in *Lidercon v. Peru* likewise sharply distinguished the conduct of the legislature – as a constitutional state organ – from the statements of individual legislators. As the *Lidercon* tribunal explained in rejecting the claimant's efforts to assign liability to the State on the basis of on-the-record statements by legislators, "[w]hile the actions of a legislature may deprive a foreign investor of its entitlements under international law, the State cannot be liable simply because the investor believes that Congressional debates demonstrate xenophobia or clientelism. Legislators are entitled to express their opinions robustly, even if they espouse protectionism. For liability to be engaged under the Treaty, there must have been unjustifiable effects attributable to the State itself." Making the point even more explicit, the *Lidercon* tribunal affirmed that "[a] State cannot be held liable under international law for the fact" that "representatives elected from the ranks of a variety of political movements frequently, as a function of the democratic process, raise harsh criticisms of the actions of executive and administrative officials, and by ricochet of private parties who contract with the public sector." While *Lidercon* foreclosed State liability on the basis of remarks that were nevertheless made in the context of legislative debate, the connection between Congressman Castro's alleged remarks and the constitutional function of the Nicaraguan congress is even more attenuated here. Indeed, Riverside seeks to hold Nicaragua liable on the

[746] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, December 14, 2012, ¶ 305 (**RL-0181**).

basis of a single congressmember's (alleged) support and sympathy for private illegal conduct. Even if Riverside's vague hearsay evidence were enough to prove its allegations (and it is not), they would simply not suffice to engage Nicaragua's international responsibility. It follows that Congressman Castro cannot individually direct or adopt anything for Nicaragua, except as part of the Nicaraguan legislature acting pursuant to Nicaragua's internal law. Nor does Riverside allege that Congressman Castro exercised any public authority in his alleged conversations with the occupiers of the Hacienda, an omission in respect of which Congressman Castro's alleged influence within a particular political party makes no difference.[747]

532. Thus, and as explained in Nicaragua's Counter-Memorial, Riverside cannot attribute the unlawful invasion of Hacienda Santa Fe to the State. Nicaragua could be responsible only for its own measures in response to that episode. As set out below, however, no liability attaches to Nicaragua under the DR-CAFTA for its response to the illegal invasion of Hacienda Santa Fe and its subsequent efforts to safeguard the property for Riverside and Inagrosa.

### B. The Non-Precluded Measures Clause in DR-CAFTA Article 21.2(b) Preempts Riverside's Claims

533. To the extent they actually relate to measures attributable to Nicaragua, Riverside's claims are barred by Article 21.2(b) of the DR-CAFTA because they challenge non-precluded measures that Nicaragua considered necessary to protect its essential security interests. Here, those measures consisted of Nicaragua's decision to remove armed illegal occupiers from the Hacienda

[747] In an effort to overcome this difficulty Riverside's Reply misstates Article 4 of ARSIWA. To be clear, Article 4 ***does not*** make a State "responsible for all measures from persons who are part of any of the branches of its government." Reply, ¶ 1051. This is not the law. If it were, chaos would result. If a State were "responsible" under public international law for everything an individual member of its legislature did, advocated for or encouraged, a government that acted unimpeachably with respect to foreign investors or other international obligations could be subjected to liability by rogue legislators pursuing policies that a State even affirmatively opposed. Under such a standard, indeed, it is doubtful where members of a State's legislature could even debate the meaning and means of performance of their international obligations without fear of liability, with a serious chilling effect on legislative debate. In any case, this is not the law.

Santa Fe in a gradual and de-escalatory manner rather than through the immediate use of military levels of force against armed members of its own population at an acutely volatile time that Riverside argues was required. Because Nicaragua reasonably considered this approach necessary to prevent violent escalation of a land dispute rooted in the settlement of its bloody civil war—by any measure an "essential security interest" of Nicaragua—Article 21.2(b) is a complete defense precludes any liability for Nicaragua's measures under the DR-CAFTA.

534. In its Reply, Riverside derides Nicaragua's position as "absurd" and advances several arguments against Nicaragua's reliance on Article 21.2(b). Each of Riverside's arguments fails, for the reasons set out below.

1. The DR-CAFTA's Most-Favored Nation Clause Does Not Allow Riverside To Delete Article 21.2(b)'s Non-Precluded Measures Clause

535. According to Riverside, because the Russian-Nicaraguan BIT does not contain a self-judging essential security interest clause like that found in Article 21.2(b), Nicaragua is unable to rely on Article 21.2(b) since to do so would treat Russian investors more favorably.[748] Riverside notably does not even argue that the MFN clause should allow it to benefit from a more favorable essential security or non-precluded measures clause, but that the MFN clause should allow it to delete Article 21.2(b) altogether. Riverside is wrong.

536. ***First***, contrary to Riverside's argument, the Most-Favored Nation ("MFN") clause at Article 10.4 of the DR-CAFTA does not displace Article 21.2(b)'s exception for non-precluded measures that a State considers necessary to its essential security. This follows directly from the text of Article 21.2(b), which provides that:

[748] *See* Reply, ¶ 1183 ("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.").

> Nothing **in this Agreement** shall be construed . . . 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.[749]

537. Article 21.2(b) means what it says. If "[n]othing in this Agreement" shall preclude measures that a party considers necessary to assure its own essential security interests, then Article 21.2(b)'s effect must extend to every provision of the DR-CAFTA, including Article 10.4's MFN clause. That is what Article 21.2(b) says, and the Tribunal should read the Treaty at face value.[750] In his expert report, Prof. William Burke-White likewise explains that "an ordinary meaning interpretation of the text of the treaty makes clear that the NPM clause is not within the scope of most favored nation treatment," which means "*all* of the provisions of the treaty, including article 10.4, are subject to the limitations of the NPM clause."[751]

538. ***Second***, Riverside cannot cite a single legal authority that supports an investor's ability to invoke an MFN provision in order to strike an entire clause in the base treaty. This is unsurprising because it is such a result is illogical on its face: non-existent treatment cannot be more favorable treatment. Only once, to Respondent's knowledge, has a tribunal considered such an argument and swiftly rejected it. In *CMS Gas v. Argentina* the tribunal stated:

> Although the MFNC contained in the Treaty has also been invoked by the Claimant because other treaties done by Argentina do not contain a provision similar to that of Article XI [state of emergency], the Tribunal is not convinced that the clause has any role to play in this case. Thus, had other Article XI [state of emergency] type clauses envisioned in those treaties a treatment more favorable to the investor, the argument about the operation of the MFNC might have been made. However, the mere absence of such provision in other treaties does not lend support to this

[749] DR-CAFTA, Art. 21.2(b) (**CL-0001**) (emphasis added).

[750] *See* Vienna Convention on the Law of Treaties (1969), May 23, 1969, Art. 31(1) (**RL-0113**) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[751] Burke-White I, ¶¶ 70-71 (**RER-06**).

argument, which would in any event fail under the *ejusdem generis* rule, as rightly argued by the Respondent.[752]

539. It follows that Riverside cannot rely on the absence of an essential security clause in the Russian BIT as the basis to strike clauses that find no parallel in the Russian BIT.[753] Riverside elsewhere concedes this point and undermines its own attempt to strike Article 21.2(b) when it elsewhere observes that "an MFN commitment applies ***only to treatment that is in the same category as the treatment granted to the third State*** ("ejusdem generis")."[754]

540. ***Third***, as set out in greater detail in Section IV.B, *infra*, Riverside cannot rely on DR-CAFTA's MFN provision in Article 10.4 to displace Article 21.2(b) in this case because the relevant measures were law enforcement measures and Nicaragua expressly excluded measures related to the "provision of law enforcement" from the operation of the MFN clause pursuant to its express reservation contain in Annex II of DR-CAFTA.[755]

541. ***Fourth***, that Article 21.2(b)'s exception for non-precluded measures considered necessary to a host State's essential security should prevail over Article 10.4's MFN clause also follows from the logic of both clauses. Article 10.4 governs the standards of protection available under the DR-CAFTA and, more specifically, works to ensure that a DR-CAFTA investor enjoys access to no less favorable treatment than other foreign investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[756]

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[752] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 377 (**RL-0147-ENG**).

[753] *See also* ILC Final Report of the Study Group on the Most-Favored Nation Clause (2015), ¶ 72 (**CL-0126**) ("Under the *ejusdem generis* principle a claim to MFN can in any event only be applied in respect of the same subject matter and in respect of those in the same relationship with the comparator.").

[754] Memorial, ¶ 404.

[755] *See* Section IV.B *infra*.

[756] DR-CAFTA, Art. 10.4 (**CL-0001**).

542. By contrast, Article 21.2(b) is not part of the DR-CAFTA's investment chapter at all but found in a separate chapter that identifies "exceptions" to the treaty's application. Rather than define or enhance standards of treatment under the DR-CAFTA, Article 21.2(b) defines circumstances upon the occurrence of which the DR-CAFTA's provisions (whatever their content) do not apply to the State's conduct. As Prof. Burke-White explains in his expert report:

> If the exceptions chapter of DR-CAFTA could be easily overwritten through the operation of an MFN clause they would not be exceptions at all, but rather mere provisions conditionally applicable based on a party's other treaty commitments. That approach would nullify essential predicate conditions to the consent of the parties.[757]

543. For this reason, as well, the DR-CAFTA's MFN clause cannot displace its exception for non-precluded measures considered necessary to a DR-CAFTA State's "essential security."

544. ***Fifth***, for the MFN clause to operate to essentially delete Article 21.2(b) would be to eliminate a provision essential to the parties' consent to enter into the DR-CAFTA. Prof. Burke-White also discusses the historical context of US-concluded NPM clauses and the genesis of the crucial self-judging "it considers necessary" language included in Article 21.2(b).[758] According to Prof. Burke-White, the President of the United States' transmittal to Congress of the Summary of CAFTA confirms that the Article 21 "exceptions for essential security 'allows each Party to take actions it considers necessary to protect its essential security interests.'"[759] Prof. Burke-White further explains "no other treaty clause has consistently received this level of attention from the US Senate, indicating the weight the United States attaches to the clause and its centrality to US consent" and concludes that "has consistently received this level of attention from the US Senate,

[757] Burke-White I, ¶ 73 (**RER-06**).

[758] Burke-White I, § V.B (**RER-06**).

[759] Burke-White I, ¶ 33 (**RER-06**).

indicating the weight the United States attaches to the clause and its centrality to US consent."[760] Such a provision, of course, applies equally to all parties to the DR-CAFTA.

545. The drafters of the DR-CAFTA cannot reasonably be thought to have intended so powerful a protection of their continued freedom of action to be rendered illusory by operation of the MFN clause.[761] To the contrary, international tribunals have repeatedly recognized that while MFN clauses may upgrade the content of the protections available under a given treaty, they presumptively do not cover the terms of access to those protections. In *Tecmed*, for example, the tribunal observed that "[r]equirements relating to the substantive admissibility of claims by the foreign investor, i.e., its access to the substantive protection regime contemplated under the Agreement . . . are necessarily a part of the essential core of negotiations of the Contracting Parties," such that "it should therefore be presumed that they would not have entered into the Agreement in the absence of such provisions," with the result that "[s]uch provisions, in the opinion of the Arbitral Tribunal, therefore fall outside the scope of the most favored nation clause."[762] As the reference to "essential security interests" makes clear, Article 21.2(b) is precisely the kind of "core" provision in the absence of which the DR-CAFTA parties would not have concluded the treaty.

[760] Burke-White I, ¶ 74 (**RER-06**).

[761] *See* Burke-White I, § IV (**RER-06**).

[762] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 para 74. Similarly, in *Maffezini*, the tribunal warned that "[a]s a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight." *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000 [English Translation] para 62. *See also Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 para 109 ("The Tribunal concurs with *Maffezini* that the beneficiary of the MFN clause may not override public policy considerations judged by the parties to a treaty essential to their agreement.").

546. The history of the DR-CAFTA and more particularly of treaty relations between the United States and Nicaragua offers still further support to this argument. It is common knowledge that the United States took the lead in drafting the DR-CAFTA and was by the far the largest economy amongst the treaty parties. The Tribunal should also be mindful that U.S. investment treaty practice with regard to non-precluded "essential security" clauses changed markedly after the decision of the ICJ in the US v. Nicaragua case, as explained by Prof. Burke-White.[763] There, United States military actions against Nicaragua were held not to fall within the protections of a non-self-judging essential security clause in the U.S.-Nicaragua treaty of Friendship, Commerce and Navigation.[764] U.S. treaty practice evolved in response to the ICJ's finding of liability: to avoid a repeat of that result. Accordingly, subsequent iterations of the U.S. Model BIT contained an explicitly self-judging essential security clause, with wording nearly identical to that found in Article 21.2(b).[765] The U.S. Government has since that time consistently maintained the position that despite the risks of diminished investment protection, the inclusion of a self-judging clause governing non-precluded measures necessary to "essential security interests" is in the national interest and part of its standard treaty negotiation package.[766]

547. Especially where the genesis of the relevant treaty language lies in a dispute between the United States and Nicaragua, it is appropriate for the Tribunal to construe Article 21.2(b) in light of this history and the repeatedly expressed position of the investor's home State (with which Nicaragua agrees) as to the meaning of Article 21.2(b). For these reasons, as well as those explained in greater detail in Section IV.B, reference to the Russian BIT by operation of DR-

[763] Burke-White I, ¶¶ 14-17 (**RER-06**).

[764] Burke-White I, ¶ 14 (**RER-06**).

[765] Burke-White I, ¶ 34 (**RER-06**).

[766] Burke-White I, ¶ 14 (**RER-06**).

CAFTA Article 10.4 cannot negate a clause so fundamental to the basis of consenting to DR-CAFTA.

2. Article 21.2(b) does not restate the customary international law defense of necessity but defines an exception to the applicability of the DR-CAFTA

548. Riverside's argument that Article 21.2(b) should be "equated" to the necessity defense under customary international law also fails.[767] There would be no reason to negotiate and draft an "exception" to the DR-CAFTA that simply restated customary international law. After all, the defense of "necessity" under customary international law was already available to all of the DR-CAFTA parties before they entered into the treaty and remains so—independently of the DR-CAFTA. An effective reading of Article 21.2(b) instead recognizes that the provision establishes a necessity standard independent of customary international law.[768]

549. Riverside's citations to cases decided under the U.S.-Argentina BIT are not to the contrary. *CMS*, *Enron* and *Sempra* were all decided under a treaty whose non-precluded measures clause was not self-judging.[769] The tribunals in those cases thus had to decide whether the measures at issue were "necessary" and looked to customary international law in doing so.[770] Article 21.2(b) of the DR-CAFTA, however, preempts that kind of analysis. Because the clause is self-judging, measures are "necessary" for purposes of Article 21.2(b) whenever the DR-CAFTA host State considers them so in good faith.[771]

[767] Reply ¶ 1241.

[768] For the avoidance of doubt, Nicaragua has amply demonstrated the necessity of its measures, even under the customary international law standard. It is not obliged to do so, however, because what is "necessary" for purposes of Article 21.2(b) of the DR-CAFTA is a matter of Nicaragua's good faith judgment and not subject to a customary international law test.

[769] Burke-White I, ¶ 69 (**RER-06**).

[770] Reply ¶ 1215.

[771] Riverside protests but this is the bargain that the parties struck under the ECT.

550. As Prof. Burke-White explains, "the Tribunal retains a residual good faith review, which offers a meaningful—though circumscribed—opportunity to ensure a party has invoked the treaty's NPM clause in good faith."[772] According to Prof. Burke-White, the first prong of the good faith review "is to determine whether the state invoking the NPM clause has acted honestly and dealt fairly with its treaty commitments" and, under the second prong, "a tribunal must determine the state had a reasonable basis for invoking the clause, based on its own understanding of the situation it was facing."[773]

551. Prof. Burke-White explains that, "in light of the historical context" in Nicaragua, the events occurring during the episode of civil strife in 2018, which included the invasion at Hacienda Santa Fé, "imperiled its essential security"; and Nicaragua "appropriately respected its human rights and related obligations by not forcibly removing individuals from Hacienda Santa Fé.[774] Nicaragua's "honesty and fair dealing" is further evidenced, Prof. Burke-White opines, "by the fact that it has never disputed—in fact, continues to reaffirm" Claimant's "legal ownership of Hacienda Santa Fé.[775] According to Prof. Burke-White, Nicaragua passes both prongs of the good faith review as "the Nicaraguan government had every reason to believe the country's essential security was at risk as civil unrest spread across the country in the summer of 2018."[776]

3. Article 21.2(b) Precludes Liability Under the Treaty

552. Riverside insists that Article 21.2(b) "only precludes the Tribunal from ordering Nicaragua to withdraw its measures" (para 1201) and is "irrelevant" to the question of liability.[777]

[772] Burke-White I, ¶ 35 (**RER-06**).

[773] Burke-White I, ¶¶ 39-40 (**RER-06**).

[774] Burke-White I, ¶¶ 43-46 (**RER-06**).

[775] Burke-White I, ¶ 47 (**RER-06**).

[776] Burke-White I, ¶ 48 (**RER-06**).

[777] Reply, ¶ 1201.

It also argues that "[s]ince Riverside is not asking for restitution, CAFTA Article 21.2(b) has no impact on these proceedings."[778] Once again, Riverside's account of Article 21.2(b) is incorrect and would read Article 21.2(b) into ineffectiveness.

553. Riverside's interpretation of Article 21.2(b) is contrary to the principle of effective interpretation by which each treaty provision should be read to have effect and not rendered redundant.[779] However, if a non-precluded measures exception clause like Article 21.2(b) were interpreted as something other than a bar to bar liability, it would be a legal nullity.[780] Even without such a clause, a State can always breach a treaty and face the consequences of liability.[781] Riverside's suggestion that "all CAFTA Article 21.2(b) does is ensure Nicaragua can maintain its measures of its unlawful possession of HSF" is wrong for this reason.[782] Even if Nicaragua's holding the Hacienda in trust for its acknowledged owners amounted to expropriation, it is settled law that a State can expropriate and pay compensation without any "exception" defined in the relevant treaty.[783]

554. The principle of effectiveness thus requires reading Article 21.2(b) to mean that a State cannot be held liable under the DR-CAFTA for measures falling within its scope.[784] This is because actions covered by a non-precluded measures exception are not breaches of the treaty. But to give rise to an obligation of compensation, there must be an internationally wrongful act that

[778] Reply, ¶ 1201.

[779] Burke-White I, ¶ 68 (**RER-06**).

[780] Burke-White I, ¶ 68 (**RER-06**).

[781] There has been and is no unlawful possession of HSF, but if there were, the expropriation provision would suffice to allow Nicaragua to keep it upon payment of compensation.

[782] Reply, ¶ 1214.

[783] Burke-White I, ¶¶ 67-68 (**RER-06**).

[784] Burke-White I, ¶ 68 (**RER-06**).

constitutes a breach of an international obligation of the State.[785] No liability under the DR-CAFTA can attach and no compensation can be owed if covered measures are, by operation of Article 21.2(b), ***not internationally wrongful***.[786] The LG&E tribunal recognized this, which held that where Argentina was "exempted from liability" where its measures were covered by the non-self-judging non-precluded measures clause of the U.S.-Argentina BIT.[787]

555. Prof. Burke-White explains that "[t]he principle of effectiveness of treaty interpretation further confirms that an NPM provision must absolve the state of any liability."[788]

556. Riverside's suggestion that the self-judging nature of a clause creating an exception to a treaty's coverage for certain non-precluded measures has "no impact at all on the consequences of the State's invocation" is similarly irreconcilable with the principle of effectiveness.[789] To this, Prof. Burke-White states that "Claimant fundamentally misunderstands the implications of the NPM provisions contained in Article 21.2."[790] Subject to the undisputed obligation to exercise that discretion in good faith, the self-judging aspect of the clause otherwise serves to remove the determination of "necessity" from the competence of a DR-CAFTA tribunal. The self-judging aspect of the clause also has an important consequence for damages. Absent such a clause, it would be open to a tribunal to consider whether measures had lasted longer than the period of necessity during which no treaty liability could attach. Where a clause is self-judging, by contrast, a host State's good faith determination that a measure is necessary precludes liability.

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[785] Burke-White I, ¶¶ 67-68 (**RER-06**).

[786] Burke-White I, ¶¶ 67-68 (**RER-06**).

[787] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶ 261 (**RL-0035**).

[788] Burke-White I, ¶ 68 (**RER-06**).

[789] Reply, ¶ 1216.

[790] Burke-White I, ¶ 65 (**RER-06**).

557. Riverside's ostensibly contrary citations are likewise unpersuasive.

558. To the extent it found compensation owed for measures covered by a properly-invoked exception, the majority decision in *Eco Oro* made precisely the error described above—such an exception was effectively symbolic and not given an effective interpretation. Put another way, *Eco Oro* found circumstances precluding wrongfulness but nevertheless assessed liability. If that were a correct reading of the relevant exception, the environmental exception in the applicable Canada-Colombian BIT could serve no purpose in guaranteeing greater freedom of action to the States to protect the environment than a treaty without such a clause. The decision in *Eco Oro* was contrary to the principle of effectiveness, as well as to the investor's home state's interpretation of the relevant treaty provisions. Canada in fact made a non-disputing party submission observing that "[i]f the general exception applies, then there is no violation of the Agreement and no State liability" and that "[p]ayment of compensation would therefore not be required."[791] Because it rendered an exception to the treaty effectively meaningless, *Eco Oro* should be regarded as wrongly decided and rejected on account of the principle of effectiveness: if the DR-CAFTA's application to a measure is precluded, so too must be liability under the DR-CAFTA.[792]

559. Riverside's citation to CECA also misses the mark. The US and Nicaragua can draft their treaties differently from India and Singapore to achieve similar ends. There is not one magical formula that can alone except application of the DR-CAFTA.

560. For these reasons, and as set out in Nicaragua's Counter-Memorial, Article 21.2(b) establishes a complete defense to liability and damages. Article 21.2(b) of the DR-CAFTA

[791] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada, 27 Feb. 2020, ¶ 16 (**RL-0193**).

[792] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶ 261 (**RL-0035**).

therefore precludes liability for Nicaragua's choice to peacefully defuse a volatile land dispute stemming from the demobilization of armed groups at the end of Nicaragua's civil war.

### C. Riverside's Attempts to Displace DR-CAFTA Article 10.6 Are Unavailing

561. In its Counter-Memorial, Nicaragua established that Article 10.6(1) provides a second complete defense to Riverside's claims under circumstances where an episode of violent civil strife engulfed Nicaragua during 2018 in which hundreds of people, including dozens of police, were killed and injured.[793] Article 10.6(1) provides that: "[E]ach 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."[794]

562. Nicaragua also demonstrated that, pursuant to Article 10.6(1), Nicaragua can be held liable for measures related to the invasion of Hacienda Santa Fé ***only if*** Riverside can prove that the State's response to such conditions compensated or otherwise treated the investments of nationals or investors from third countries more favorably than it did Claimant's investment.[795] In other words, when a protected investor's loss is the result of civil strife within a DR-CAFTA host State, Article 10.6's narrowed liability regime applies: compensation is owed only where a State discriminatorily compensates *some* investors for damages caused in an armed conflict (*i.e.*, only national investors or foreign investors from third countries) but not others.

563. Riverside cannot make that showing because (i) no other investor was affected by the specific invasion of Hacienda Santa Fe and also because (ii) Nicaragua did not discriminatorily compensate other investors for losses due to the civil strife convulsing Nicaragua in 2018.

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[793] *See* Counter-Memorial, Section II.

[794] DR-CAFTA, Art. 10.6(1) (**CL-0001**).

[795] *See* Counter-Memorial, Section IV.C.

564. Riverside appears to understand that Article 10.6 of DR-CAFTA is fatal to its claims. Accordingly, in its Reply, Riverside attempts to cast aside Article 10.6 by arguing that: (1) "[d]ue to the application of the Russian BIT" as well as the Swiss BIT "Nicaragua had to comply with its treaty obligations during periods of civil strife" and thus Article 10.6 does not apply;[796] and (2) "Nicaragua's interpretation simply would convert the civil strife clause into a broad-based exception from government protections under the CAFTA."[797] Both of these arguments fail.

565. ***First***, Riverside at no point, disputes that Nicaragua experienced a violent episode of civil strife at the time of the invasion.[798] Absent any such argument, Riverside impliedly concedes that a period of civil strife was occurring during the alleged occupation of Hacienda Santa Fé and thus that Article 10.6 is applicable. Indeed, contemporaneous evidence demonstrates that, during the 2018 period of civil strife, severe economic damage was inflicted. In particular:

> 252 buildings were vandalized, 209 kilometres of streets and roads were destroyed, 278 pieces of heavy machinery were vandalized and burned and 389 vehicles were destroyed. In monetary terms, the damage done to the economy was US$ 205.4 million worth of destruction in the public sector, US$ 231 million in losses in the tourism sector and US$ 525 million in the transport sector. This had a direct impact on the population, leading to 119,567 job losses and a reduction of 7 million Nicaraguan córdobas (C$) in the general national budget.[799]

566. ***Second***, Riverside's attempt to displace Article 10.6 on the theory that "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" fails on a simple good faith reading of the text of the Russian BIT."[800] Riverside essentially argues that because the exact words "civil strife" does not appear in Article

[796] Reply, ¶¶ 1246-1254.

[797] Reply, ¶ 1274.

[798] *See* Reply, ¶¶ 1244-1276.

[799] *See* Nicaraguan National Report submitted in accordance with paragraph 5 of the Annex to Human Rights Council resolution 16/21 of January 28, 2019, ¶ 12 (**R-0019**).

[800] Reply, ¶ 1187.

5 of the Russian BIT, Russian investors were conferred more favorable treatment. In reality, Article 5 of the Russian BIT covers "damages or losses owing to war, armed conflict, insurrection, revolution, riot, civil disturbance, a state of national emergency or any other similar event."[801] To suggest that this provision does not encompass "civil strife," especially in light of the catch-all phrase "or any other similar event" does not pass the slightest scrutiny. Riverside's attempt to strike Article 10.6 also fails.[802]

567. ***Third***, contrary to Claimant's contention, Nicaragua does not argue that Article 10.6 is a broad-based exception to ***any*** liability under DR-CAFTA. Rather, Nicaragua interprets Article 10.6 to mean that that with respect to losses resulting from periods of civil strife, a DR-CAFTA host State may not discriminatorily compensate some investors for damages caused by civil strife but not others. By implication, however, once a period of civil strife is established, Nicaragua's only obligation is to ensure that the foreign investor is treated no less favorably than other Nicaraguan citizens or other foreign investors. It is undisputed, however, that Nicaragua did not provide any compensation to domestic or foreign investors following the 2018 civil upheaval. Simply put, Article 10.6 narrowed Nicaragua's DR-CAFTA obligations with respect to damages to protected investments caused by a period of civil strife—and Nicaragua undisputedly complied with those obligations.

568. Cases cited by Claimant support this point. For instance, in *Cengiz v. Syria*, the tribunal found that the respondent did not breach the so-called war clause where, as here, claimant

[801] Reply, ¶ 1186.

[802] Nicaragua demonstrates in Section IV.B *infra*, that Riverside cannot rely on DR-CAFTA's MFN provision in Article 10.4 to displace Article 10.6 because Nicaragua expressly excluded MFN treatment from measures related to the "provision of law enforcement" pursuant to its express reservation contain in Annex II of DR-CAFTA.[802] Furthermore, as also established in Section IV.B, *infra*, Claimant cannot rely on the Swiss BIT because Nicaragua's reservation in Annex II prohibits reliance on other treaties that entered into force prior to DR-CAFTA.

had not proven that any investor in a comparable situation was accorded treatment more favorable for losses resulting from the armed conflict.[803]

569. Claimant has failed to show that any Nicaraguan national or foreign investor was provided any compensation as a result of those losses during the period of civil strife. As a consequence, Article 10.6 serves as a narrowed source of obligation during a period of civil strife—and one which Nicaragua undisputedly complied.

### D. Even if DR-CAFTA Articles 21.2 and 10.6 Did Not Displace the Other Treaty Provisions, Nicaragua Is Still Not Liable for a Breach of the Treaty

570. Even if the Articles 21.2(b) and 10.6 did not apply, Riverside's case would still fail on the merits. Riverside claims that Nicaragua has implemented "a litany" of internationally unlawful measures that include an alleged expropriation, as well as violations of fair and equitable treatment ("FET") and full protection and security ("FPS") obligations under DR-CAFTA.[804] Riverside also claims that more favorable treatment was provided to similar investments in Nicaragua, thus breaching obligations under national treatment ("NT") and most favored nation ("MFN") DR-CAFTA provisions.[805]

571. As will be demonstrated below, Claimant's entire case has steadily diminished. Having begun this arbitration with a Memorial alleging "armed land invasions" by paramilitary State forces, Riverside in its Reply has largely abandoned State-sponsored invasion theory in favor of the more modest but equally false and unsupported theories of: (i) a deficient law enforcement

[803] In *Cengiz v. Syria*, the tribunal found that the respondent did not breach the so-called war clause where, as here, claimant had not proven that any investor in a comparable situation was accorded treatment more favorable for losses resulting from the armed conflict. See *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, ¶ 470 (**CL-0192**).

[804] Reply, ¶ 2.

[805] Reply, ¶ 2.

response to Hacienda Santa Fe; and (ii) a judicial expropriation stemming from a Protective Order instituted to preserve Inagrosa's and Riverside's rights in Hacienda Santa Fe.

572. For the reasons set forth below, Claimant's original and replacement theories of all equally fail to establish any breach of Nicaragua's DR-CAFTA obligations.

1. There Has Been No Expropriation and Nicaragua's Consistent Policy Has Been to Ensure Hacienda Santa Fé's Peaceful Return to Inagrosa

573. Nicaragua established in its Counter-Memorial that no expropriation could have occurred because Claimant failed to show the slightest inference of a measure attributable to the State that constituted a taking.[806] As Claimant acknowledged, "the act of expropriation requires an adverse taking of property by the government" and "***only*** a taking by the government can result in an expropriation."[807] Riverside's Reply still fails to pass the very threshold inquiry Riverside has posited, and, further, has made no attempt to establish that each element of an unlawful taking under DR-CAFTA is present.[808] Riverside's Reply continues to base its expropriation claim on a false premise: that the State engaged in a taking ***at all***. That premise unravels in light of the evidence and Riverside's effective concession, through its other claims, that its case is now actually about the State's allegedly deficient law enforcement response at Hacienda Santa Fé during the period of civil strife that engulfed Nicaragua during June 2018.[809]

574. Riverside's Reply confuses its already inconsistent expropriation theories still further. In particular, Riverside alleges for the first time in its Reply that: (1) Riverside is entitled to invoke the allegedly more favorable expropriation provision in the Russia-Nicaragua BIT ("**Russian BIT**"); and (2) that the Protective Order put in place for the specific purpose of

[806] Counter-Memorial, Section IV.A, IV.D.3

[807] Memorial, ¶ 474.

[808] *See* DR-CAFTA, Art. 10.7, Annexes 10-B, 10-C (**CL-0001**).

[809] *See* Reply, ¶ 68, b); 1363; 1747; 1751; 1763, c).

protecting Riverside's investment and Inagrosa's undisputed property, somehow resulted in an additional expropriation of Hacienda Santa Fé, ***four years after*** the alleged invasion. Both of these arguments are meritless.

a. *Riverside's Reliance on Article 4 of the Russia-Nicaragua BIT Is Irrelevant*

575. Riverside provides nothing more than conclusory statements in order to establish that more preferential treatment vis-à-vis expropriation exists in the Russian BIT ("**Russian BIT**"). According to Riverside, it is entitled to invoke Article 4 of the Russian BIT because it confers: (1) a broader, and therefore more favorable, definition of expropriation that is not subject to interpretive annexes (like Annexes 10-B and 10-C under DR-CAFTA); and (2) a more favorable standard of compensation for expropriation.[810] But Riverside completely fails to explain how Article 4 of the Russian BIT confers a different standard of treatment, and, puzzlingly only applies—albeit sparingly—Article 10.7 of DR-CAFTA as the basis for the alleged expropriation.

576. The standards for expropriation in DR-CAFTA, Article 10.7(1) and the Russian BIT, Article 4(1) are virtually identical and confer the same substantive protection.[811] Rather than explaining how Article 4(1) of the Russian BIT is more favorable, Riverside offers nothing but an unsupported conclusory statement that Article 4(1) "has an autonomous meaning for

[810] *See* Reply, ¶¶ 1431.

[811] *Compare* DR-CAFTA, Art. 10.7(1) (**CL-0001**) ("No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and (d) in accordance with due process of law and Article 10.5.") *with* Russia-Nicaragua BIT, Art. 4.1 (**CL-0033**) ("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 Pa1ty, when they are not discriminatory and entail payment of prompt, adequate and effective compensation.").

expropriation."[812] Claimant cites to no legal authority supporting its theory about an "autonomous meaning" for expropriation. That DR-CAFTA contains interpretive Annexes 10-B and 10-C for Article 10.7 does not render its expropriation standard less favorable, as those annexes clarify unlawful direct and indirect expropriations fall under the scope of Article 10.7. Article 4(1) of the Russian BIT similarly addresses measures "equivalent to expropriation or nationalization."[813] Similarly, the Russian BIT and DR-CAFTA both call for compensation that corresponds to the fair market value of the expropriated investment; but the Russian BIT calls for interest at a "market-defined commercial rate" and DR-CAFTA calls for a "commercially reasonable" rate of interest. There too is a distinction without a difference.

b. *Riverside has not demonstrated that the alleged expropriation is attributable to Nicaragua*

577. Although it told a very different story in its Memorial, to the extent that Riverside now tacitly concedes throughout its Reply that Nicaragua's alleged international wrongdoing relates to its law enforcement response to the armed invasion of Hacienda Santa Fé in June 2018, Claimant's expropriation claim must fail because Nicaragua's National Police were responding to third-party non-state actors.[814] It is illogical that Claimant assails to Nicaragua's law enforcement response in its FET, FPS, and relative standards of treatment claims; but, in the expropriation context, conveniently continues to argue that "[t]he invasions led by the occupiers, the National Police, and the other government officials resulted in the outright seizure of HSF."[815] Riverside might prefer to base different arguments on different sets of facts, but Nicaragua has demonstrated

[812] Reply, ¶ 1430.

[813] Russia-Nicaragua BIT, Art. 4(1) (**CL-0033**).

[814] In its Memorial, Riverside told a very different story.

[815] *See* Reply, ¶ 1498.

that only one version of this narrative is true: Hacienda Santa Fé was, in fact, occupied by non-state actors and Nicaragua repeatedly protected Inagrosa's rights in Hacienda Santa Fé.[816]

578. Furthermore, the Protective Order could not have resulted in a taking, whether direct, indirect, or part of a composite act. For years, Hacienda Santa Fé has been rid of invaders, yet Inagrosa and Riverside have repeatedly refused to retake possession of their supposedly valuable investment.[817] In attempt to excuse its refusal to re-take possession of its asset, Claimant insists—falsely—that the Protective Order somehow transferred title of Hacienda Santa Fé to the State, resulting in an alleged *de jure* and *de facto* taking.[818] This is not true.

579. ***First***, it should be noted that Claimant alleges a complete taking occurred as a result of the alleged June 2018 occupation. Assuming Claimant were correct, which it is not, the Protective Order could not have resulted in a further taking, as it is legally impossible to expropriate the same property twice.[819]

580. ***Second***, Nicaragua has demonstrated in this Rejoinder that Claimant's arguments do not pass the slightest scrutiny.[820] By way of summary, Claimant's Nicaraguan legal expert, Dr. Gutierrez, merely cites to an October 24, 2022 literal certificate of Hacienda Santa Fé for the proposition that this certificate demonstrates that the "*de jure* title to Hacienda Santa Fé no longer is exclusively owned by INAGROSA [as a result of the Protective Order]. Now, the title formally

[816] *See* Section II.B.1. *supra*.

[817] *See* Section, II.E. *supra.*

[818] *See* Reply, ¶ 1484.

[819] *See Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, May 8, 2008, ¶ 622 (**RL-0198**) ("[I]t is impossible to expropriate the same assets two consecutive times") (translation from Spanish; the original Spanish version reads as follows: *"[E]s imposible expropiar dos veces seguidas los mismos bienes"*).

[820] *See* Section, II.E. *supra.*

includes the Republic of Nicaragua as a full co-owner on title."[821] Dr. Gutierrez's analysis is baseless.

581. As an initial matter, this claim has already been reviewed, vetted, and rejected by this Tribunal. Indeed, as detailed fully in Section II.E, *supra*, in its Procedural Order No. 4 this Tribunal held that the Protective Order, by its plain text, recognizes that Inagrosa is the owner of Hacienda Santa Fé and appoints Nicaragua as the property's judicial depositary for the purpose of ensuring that the property is not invaded, given its vulnerability to future invasions now that its owner has all but abandoned it.

582. Nothing in the Reply, or in Dr. Gutiérrez's expert report converts the Protective Order into an expropriatory measure. As argued fully in Section II.E, *supra*, Dr. Gutiérrez's analysis is flawed because he principally basis his conclusion that the Protective Order is expropriatory on two flawed assumptions.

583. ***First***, he assumes that the Nicaraguan Civil Code and Civil Procedural Code are "silent" on the limitations of a judicial depositary and, therefore, the court's failure to expressly set those limitations in the Protective Order means that Nicaragua can use or dispose of the asset in whichever way it pleases. But as Nicaragua's legal expert, Dr. Sequeira, confirmed, Nicaragua's Civil Code and Civil Procedural Code do, in fact, set limitations that directly apply to Nicaragua in its roles as judicial depositary of Hacienda Santa Fé. These limitations, which are fully analyzed in Section II, *supra*, require Nicaragua to maintain the property in its original condition and prohibit Nicaragua from using or disposing of that property without prior judicial approval. To be sure, Nicaragua has not attempted to use or dispose of the asset. The unrebutted evidence in this

[821] Renaldi Gutiérrez, ¶ 75 (**CES-06**).

record shows that it has instead paid significant sums to preserve it. Dr. Gutiérrez's analysis is, therefore, unfounded and wrong.

584. ***Second***, Dr. Gutiérrez also assumes that Inagrosa should have been notified of the application that Nicaragua submitted in 2021 to be appointed as judicial depositary and its failure to do so means that it was trying to conduct a "secret judicial seizure" of the property. But as set out fully in Section II.E, *supra*, this assumption is unfounded because the procedure followed by Nicaragua is consistent with Article 380 of the Nicaraguan Civil Procedural Code, which provides that applications for urgent provisional relief (as was the case here) can be done on an *ex parte* basis. Accordingly, notice need not have been given to Inagrosa or to anyone else.

585. Notably, just because Inagrosa and Riverside were not notified of the application that does not mean that they could not challenge the judicial deposit if they believed it was in any way harmful to their property interests. Indeed, as set out in Section II.E and as confirmed by Dr. Sequeira, *supra*, Riverside and Inagrosa could have sought to annul the Protective Order or to have it vacated after receiving notice of the Protective Order in this arbitration. They did not. They had another chance to do so after they were told that the Protective Order was renewed in February 2024. They did not. And they could, ***at any time since the imposition of the judicial deposit***, have sought the removal of Nicaragua as judicial depositary. They have not. In sum, Riverside's notice arguments are unfounded and red herrings that Riverside raises to try to create an expropriation where none exists.

586. ***Third***, the evidence on which Dr. Gutiérrez relies does not support his conclusions. He principally relies on a literal certificate concerning Hacienda Santa Fé to contend that the Protective Order has resulted in a title change in favor of Nicaragua. But the first section in that certificate, titled "Actual Owner" (*Propietario Actual*), unambiguously states that ***Inagrosa*** is the

"100" percent owner of Hacienda Santa Fé, as shown below.[822] Dr. Gutiérrez fails to address, much less reference, this section in his report.

C-0268-SPA

REGISTRO PÚBLICO DE LA PROPIEDAD DE JINOTEGA
CERTIFICADO LITERAL FOTOCOPIA

| PROPIETARIO ACTUAL | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| PERTENECE A | | INVERSIONES AGROPECUARIA S.A | | Tipo Derecho: | Propiedad | | Porcentaje Derecho: | 100 | | | |
| Finca N°: | 6145 | Tomo(s): | 131, 156 | Folio(s): | 108, 163, 164 | | Asiento(s): | | 6 | | |
| Número NAP: | | BI-9AG0EX7 | | Asiento Folio Electrónico: | | | 1 | | | | |

587. That Inagrosa has been, and continues to be, the sole owner of Hacienda Santa Fé is further confirmed by the "related certificate" (*certificado relacionado*) produced earlier in this arbitration. Just as with the literal certificate cited by Dr. Gutierrez, that related certificate, which is dated June 30, 2022 (*i.e.*, ***after*** the entry of the Protective Order), demonstrates that Inagrosa is the 100 percent owner of Hacienda Santa Fé, as depicted in the below excerpt.[823]

R-0005-SPA
C-0060-SPA

REGISTRO PÚBLICO DE LA PROPIEDAD DE JINOTEGA
CERTIFICADO RELACIONADO

| PROPIETARIO ACTUAL | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| PERTENECE A | | INVERSIONES AGROPECUARIA S.A | | Tipo Derecho: | Propiedad | | Porcentaje Derecho: | 100 | | | |
| Finca N°: | 6145 | Tomo(s): | 131, 156 | Folio(s): | 108, 163, 164 | | Asiento(s): | | 6 | | |
| Número NAP: | | BI-9AG0EX7 | | Asiento Folio Electrónico: | | | 1 | | | | |

[822] Renaldi Gutiérrez, ¶ 75 (**CES-06**).

[823] Related Certificate issued by Jinotega's Land Registry delivered to Riverside on July 13, 2022 (Spanish version submitted by Claimant as exhibit C-0060-SPA) (**R-0005**).

588. In summary, the Protective Order did not result in the *de jure* transfer of title over Hacienda Santa Fé, as Claimant and Dr. Gutierrez claim. The registry records confirm Inagrosa is, and has at all relevant times been, the sole owner of Inagrosa.

589. Nor did the Protective Order constitute the *de facto* transfer of title over Hacienda Santa Fé, as Dr. Gutierrez also concludes.[824] The Protective Order has not removed Inagrosa's right to possession of Hacienda Santa Fé. Inagrosa can resume possession over the property at any time, as evidenced by the series of correspondences from Nicaragua to Riverside, which invite Inagrosa to repossess the property.[825] Further, this Tribunal has already held in Procedural Order No. 4 that "by its terms, the Court Order does not preclude the Claimant from seeking repossession of the property at any time."[826] Unable to rebut this fact, Dr. Gutierrez neither cites to the Protective Order itself nor a single provision of the Nicaraguan Code to support his naked assumption that Inagrosa cannot retake possession or has been unable to alienate Hacienda Santa Fé. As this Tribunal has already held, and as now confirmed by Dr. Sequeira and the plain text of the Order and registry certificates, the Order unequivocally ***protects*** Inagrosa's property rights by preventing further invasions.

590. ***Fourth***, Riverside's bluster about the Protective Order is completely refuted by the fact that ***Nicaragua has invited Riverside and Inagrosa on five separate occasions, in writing, to take back their property***. This invitation was first raised in September 2021 and most recently in March 2024. Such facts simply cannot be reconciled with any legal theory of expropriation. In

[824] Renaldy Gutiérrrez I, ¶¶ 80-84 (**CES-06**).

[825] Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe of September 9, 2021 (**C-0116**); Nicaragua's Second Response to Claimant's Motion, dated December 12, 2021, p. 3; Email from Analia Gonzalez to Barry Appleton regarding handover of Hacienda Santa Fe of April 3, 2023 (**C-0429**); Nicaragua's Letter to Appleton, dated January 19, 2024 (**R-0146**).

[826] Procedural Order No. 4, ¶¶ 33-34.

fact, inviting a property's owner to take back its property time and time again, almost to the point of begging the property's owner to do so, disproves Riverside's expropriation claim.

### 2. Riverside Has Not Shown any Breach of Nicaragua's Article 10.5 Obligation to Provide Fair and Equitable Treatment and Full Protection and Security

591. Riverside alleges that Nicaragua breached Article 10.5 of DR-CAFTA, which establishes the obligation to accord FET and FPS to covered investments in accordance with customary international law.[827]

592. In its Reply, Riverside alleges the same five separate FET breaches claimed in its Memorial.[828] According to Riverside, Nicaragua (i) failed to act in good faith; (ii) failed to provide due process to Inagrosa; (iii) engaged in arbitrary, unfair, and capricious conduct; (iv) failed to respect the legitimate expectations of Inagrosa and its investor, Riverside; and (v) failed to provide full protection and security to Inagrosa.[829] Riverside has not been able to present any evidence that Nicaragua has breached any of these protections. Thus, all of Riverside's FET theories fail, both under customary international law and Claimants' imported version of the FET standard.

#### a. *Nicaragua Acted in Good Faith with Respect to the Land Invasion and Inagrosa's Property Rights in Hacienda Santa Fé*

593. In its Reply, Riverside makes again a general claim that Nicaragua acted contrary to a duty of good faith which it reads into Article 10.5's FET clause.[830] Riversides repeats much of the same arguments presented in the Memorial[831] to which Nicaragua has already refuted in its

[827] Memorial, ¶ 508 *et seq*.; Reply, ¶ 508 *et seq*.

[828] Reply, ¶ 1530; Memorial, ¶ 754.

[829] Reply, ¶ 1530.

[830] Reply, ¶ 1530.

[831] *See* Reply ¶¶ 1532-1535. Riverside claims that Nicaragua has acted in bad faith for i) the alleged actions and omissions of state officials during the first invasion of Hacienda Santa Fe on June 16, 2018; ii) the alleged decision from the Police not to evict the paramilitaries from the Hacienda Santa Fe and instead assisting in disarming the

Counter-Memorial.[832] Riverside also claims, based on alleged new evidence, that Nicaragua acted in bad faith: (i) when Deputy Commissioner Herrera allegedly fail to inform Inagrosa of the "advance intelligence" he had about the invasions in Hacienda Santa Fe;[833] (ii) when National Assembly Congressman Edwin Castro allegedly instructed the occupiers to remain in Hacienda Santa Fe in July 2019; (iii) shown in the written admission of the occupiers to the Attorney General in September 2018;[834] and (iv) by the alleged use of fabricated evidence before Nicaraguan courts by the Attorney General.[835] None of Riverside's new allegations have merit.

594. As a preliminary matter, Nicaragua maintains that the principle of "good faith" is not part of the FET standard under Article 10.5 of DR-CAFTA—a point of treaty interpretation on which Nicaragua and the United States are in complete agreement and which Riverside has not effectively rebutted.[836]

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security guards; iii) escorting paramilitaries into Hacienda Santa Fe; iv) allegedly taking steps to reduce the physical protection of the Investor's investments.

[832] *See* Counter Memorial, Section V. *See also Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Submission of the United States of America, Feb. 19, 2021, ¶ 25 (RL-0043) (observing that "good faith" is not an element of Fair and Equitable Treatment under customary international law and that "a claimant 'may not justifiably rely upon the principle of good faith' to support a claim, absent a specific treaty obligation, and the DR-CAFTA contains no such obligation"); *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015, ¶ 17-18 (RL-0044) ("Neither the concepts of 'good faith' nor 'legitimate expectations' are component elements of 'fair and equitable treatment' under customary international law that give rise to an independent host State obligation").

[833] Reply, ¶ 1603.

[834] Reply, ¶ 1603.

[835] Reply, ¶ 1607.

[836] Counter Memorial ¶¶ 328; *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Submission of the United States of America, Feb. 19, 2021, ¶ 25 (**RL-0043**) (observing that "good faith" is not an element of Fair and Equitable Treatment under customary international law and that "a claimant 'may not justifiably rely upon the principle of good faith' to support a claim, absent a specific treaty obligation, and the DR-CAFTA contains no such obligation"); *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015, ¶ 17-18 (**RL-0044**) ("Neither the concepts of 'good faith' nor 'legitimate expectations' are component elements of 'fair and equitable treatment' under customary international law that give rise to an independent host State obligation").

595. Yet even if the Tribunal were to find that good faith were part of the FET standard under Article 10.5 of DR-CAFTA, Riverside cannot meet its burden of showing that Nicaragua acted other than in good faith. To the contrary, the evidence is that the invasion of Hacienda Santa Fe did not occur at the instigation or with the encouragement of the State.[837] All government officials involved, especially the Police and the Attorney General's office promptly acted in the context of widespread and violent civil strife in 2018 to provide the needed help to protect Inagrosa's employees and the property.[838] Further evidence of Nicaragua's good faith is that it succeeded in peacefully relocating all of the unlawful occupiers and recovering Hacienda Santa Fe without violence. The property has been available to Riverside since August 2021.[839]

596. The standard of proof for allegations of bad faith or disingenuous behavior is a demanding one.[840] In *Bayindir v. Pakistan*, the tribunal especially noted that the standard for

[837] Castro II, ¶¶ 29 (**RWS-11**) ("I declare again that in my role as Chief Police of the Department of Jinotega, the invaders were never supported or given orders to take over the HSF and on the contrary, and in accordance with the guidelines of not tolerating illegal invasions, [Inagrosa was] given the necessary support until the property was effectively evicted and left free of invaders"); Herrera II, ¶¶ 27 (**RWS-12**) ("Finally, I declare that the Police in San Rafael del Norte at no time supported the invaders, on the contrary, to the best of our ability, during a time of conflict and high violence, the Police tried to protect the lives of the HSF workers and protect the property. The multiple attempts by both the police and the Attorney General's Office to evict the invaders show that the Plaintiff's account makes no sense."); Gutiérrez -Rizo II, ¶ 7 (**RWS-10**) ("As Attorney General of the Department of Jinotega, as I explained in my First Statement, I was in charge of studying the situation of HSF including the invasion of 2018, I can affirm that this is not true. The government did not send and was not involved in the takeover of the HSF"); López I, ¶ 41 (**RWS-04**) ("I conclude this statement by reaffirming that I have never heard that the government sent the people who took the HSF in 2018. My understanding is that the 2018 invasions are linked to a long-standing dispute and were motivated by land claims that date to the 1990s, when the government handed over a portion of the HSF to members of the Former Nicaraguan Resistance. In addition, I am aware that during the invasions, state institutions, including the Attorney General's Office, Mayors' Office and the National Police, convened meetings with the leaders of the occupiers to ask them to voluntarily vacate the property."); García, ¶ 7 (**RWS-20**) ("In this regard, I categorically reject Mr. Gutiérrez's assertions. I was not part of the group of peasants who occupied the HSF in 2018 or at any other time. I have never participated in the seizure of land, neither in Jinotega nor in any other department of Nicaragua."); Huerta, ¶ 15 (**RWS-19**) ("I am struck by the fact that the plaintiff indicates that this seizure was ordered by government officials, given that our mayor of Jinotega, Mr. Leonidas Centeno, has always stated that the illegal seizure of property would not be tolerated."); Enríquez, ¶ 14 (**RWS-21**) ("it is false that I made any kind of comment to him about the invasions of the Hacienda Santa Fe. I never went to Hacienda Santa Fe nor was I aware of the circumstances under which the Hacienda was invaded in 2018").

[838] Castro II, ¶ 20 (**RWS-11**); Herrera II, ¶ 24 (**RWS-12**); Gutiérrez-Rizo II, ¶¶ 22-34 (**RWS-10**).

[839] Castro II, ¶ 20 (**RWS-11**); Herrera II, ¶ 26 (**RWS-12**); Gutiérrez-Rizo II, ¶ 30 (**RWS-10**).

[840] *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, August 2, 2020, ¶ 137 (**RL-0050**).

proving bad faith is not only a demanding one, but especially "if bad faith is to be established on the basis of circumstantial evidence."[841]

597. In addition, to find a breach of good faith as part of the FET standard two elements must be demonstrated: (a) that the State did not act rationally and pursuant to its rules, but in an "unjustified" manner; and (ii) that the State acted "deliberately" and "consciously" to destroy or frustrate the investment.[842] This was the standard applied by the tribunal in *Waste Management II*, which is the FET standard that Riverside is asking to apply here.[843] As demonstrated below, none of these elements are met in this case.

598. ***First***, the Police did not act in an unjustified manner or deliberately frustrated Riverside's investment. Nicaragua has presented seven witnesses whose contemporaneous evidence that confirm that the State did not instigate or help the invaders to occupy Hacienda Santa Fe in June 2018.[844] The invasions of Hacienda Santa Fe were the result of a long-standing property

[841] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I), ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 143 **(RL-0065)**.

[842] Counter Memorial, ¶ 329; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 138. *See also SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, ¶ 740 (**CL-0005**) ("In any event, the Tribunal considers it important to emphasize that in order for bad faith or mala fide conduct to be established, the burden on the investor is high. In light of the overall high standard to establish a breach of the FET obligation alluded to above […], the Tribunal considers that for any course of action to qualify as bad faith or mala fide, a willfulness or omitting the unfair or inequitable action has to be established. Not every unfair or inequitable action automatically qualifies as an action in bad faith.").

[843] Reply, ¶ 1576 (" […] 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.").

[844] *See* Section II.A.1. *See also* Castro I, ¶ 30 ([…] I have not found in the documents submitted by Claimant any evidence linking the protestors and invaders to the Nicaraguan government, since such link is non- existent. In addition, I am not aware that President Ortega or the National Police have given orders to civil groups to organize in the government's name, let alone create disturbances and take land in the country's territory. The members of these groups acted independently and in violation of the law); Castro II, ¶¶ 29 (**RWS-11**); Herrera I, ¶ 40 (Had the Nicaraguan government been behind the invasion, under no circumstance would it have made every effort necessary to evict them and deliver the property to Inagrosa. This has always been the government's commitment, and this is evidenced by the fact that, back in 2003, the Police had also moved to evict the occupants of the property to ensure the owner could peacefully enjoy the property. The repeated attempts of both the Police and the Attorney General's Office to evict the invaders are evidence that the Claimant's account does not stand to reason and is baseless.); Herrera II, ¶¶ 27 (**RWS-12**) ("Finally, I declare that the Police in San Rafael del Norte at no time supported the invaders, on the contrary, to the best of our ability, during a time of conflict and high violence, the Police tried to protect the lives

dispute that began in 1990 when an abandoned portion of Hacienda Santa Fe was offered for resettlement to demobilized members of the *Resistencia Nicaragüense* by then President Violeta Barrios de Chamorro.[845] These individuals occupied these lands with their families from 1990 to 2003 under the belief that the property was going to be titled in their favor until their removal by the police at the request of the Rondon family in 2003.[846] Nicaragua has submitted extensive contemporaneous evidence of the existence of this dispute.[847] Riverside has decided to ignore this history,[848] but the evidence shows that Inagrosa and Mr. Rondón had complete knowledge of this dispute since the 1990s.[849]

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of the HSF workers and protect the property. The multiple attempts by both the police and the Attorney General's Office to evict the invaders show that the Plaintiff's account makes no sense."); Gutiérrez-Rizo I, ¶ 19 ("It is erroneous, then, to assert that the invasions of Hacienda Santa Fé were orchestrated by the Government of Nicaragua.); Gutiérrez -Rizo II, ¶ 7 (**RWS-10**) ("As Attorney General of the Department of Jinotega, as I explained in my First Statement, I was in charge of studying the situation of HSF including the invasion of 2018, I can affirm that this is not true. The government did not send and was not involved in the takeover of the HSF"). *See also* Section II.B *supra*.

[845] Lopez I, ¶ 6 ("In compliance with these agreements, in November 1990, Engineer Jaime Cuadra Somarriba, President of the Regional Agrarian Commission (Matagalpa – Jinotega) offered us, a group of demobilized members of the Nicaraguan Resistance, the option to be granted abandoned land in a sector of Hacienda Santa Fé, located in the Río Grande district (currently district of Santa Fé), in the San Rafael del Norte Municipality, department of Jinotega, in the understanding that the purchase of the land would be negotiated with the owners). *See also* Agreement of the Regional Agrarian Commission for the Sixth Region of November 22, 1990 (**R-0052**).

[846] Lopez I, ¶ 6 ("In compliance with these agreements, in November 1990, Engineer Jaime Cuadra Somarriba, President of the Regional Agrarian Commission (Matagalpa – Jinotega) offered us, a group of demobilized members of the Nicaraguan Resistance, the option to be granted abandoned land in a sector of Hacienda Santa Fé, located in the Río Grande district (currently district of Santa Fé), in the San Rafael del Norte Municipality, department of Jinotega, in the understanding that the purchase of the land would be negotiated with the owners); Lopez II, ¶ 8 (**RWS-12**) ("In compliance with these agreements, in November 1990, the President of the Regional Agrarian Commission at the time gave a group of demobilized members of the Nicaraguan Resistance the option of settling in a sector of the HSF called El Pavón, which was in a state of abandonment").

[847] *See* Section II.B.1 *supra*.

[848] Rondón I, ¶ 75 ("Once, more than fifteen years ago, in the early 1990s, there had been some prowlers who came into Hacienda Santa Fé. At that time, the security team called the local police, who immediately came and apprehended the prowlers."); Rondón II, ¶ 29 ("No invasion of Hacienda Santa Fe in 1990. My father, Carlos Rondón Voysest, allowed nearby farmers sometimes to plant crops for their sustenance at Hacienda Santa Fé"), ¶ 29 ("Over time, some of the people whom my father, Carlos Rondón Voysest, had allowed to plant crops for their sustenance at Hacienda Santa Fé began to "sell" land at Hacienda Santa Fé to other people for cash.").

[849] Letter from Carlos José Rondón Molina y Melva Jo Winger de Rondón to Marco Centeno Caffaena, General Director of OTR dated August 11, 2000 (**R-0177 Tab 8**); Letter from Carlos José Rondón Molina and Melva Jo Winger de Rondón to Marco Centeno Caffaena, Director General of the OTR, dated September 8, 2000 (**R-0177 Tab 9**); Letter from Mr. Carlos Rondón Molina, Inagrosa, to Mr. Francisco Chavarrría Jr., OTR Delegate of Jinotega, dated September 18, 2001 (**R-0177 Tab 10**).

599. The evidence also shows that in 2018, when Inagrosa requested help from the Police, Nicaragua was experiencing nationwide civil strife and violent unrest.[850] Especially in San Rafael del Norte, the police did not have the equipment nor the force to immediately remove all the occupiers from the land peacefully.[851] The police were also at the time confined to barracks as part of an effort do deescalate the violence pursuant to a shelter order given by President Ortega.[852]

600. Despite the shelter order, the Police visited the Hacienda Santa Fe to assess the situation and given the circumstances disarmed the security guards and advised Inagrosa's employees to leave the premises.[853] Disarming the security guards was done in part to prevent the invaders from obtaining more weapons, in part for the workers' own protection given the limited police resources available, and to avoid the escalation of violence if the Hacienda workers decided to take matters into their own hands.[854] It was not bad faith to prioritize the lives of the workers of Hacienda Santa Fe and preventing an escalation of violence given the conditions in the country.[855]

601. Nicaragua did not thereafter "deliberately" or "consciously" act to frustrate Claimant's investment. To the contrary, Nicaragua has submitted abundant evidence that once the situation calmed, the State took effective steps to remove the occupiers from the Property

[850] Castro I, ¶¶ 22-23; Castro II, ¶ 9 (**RWS-11**); Herrera II, ¶ 9 (**RWS-12**).

[851] Herrera II, ¶ 11 (**RWS-12**); Video Police Station of San Rafael del Norte today (**R-0195**).

[852] Castro II, ¶ 10 (**RWS-11**); Herrera II, ¶ 18 (**RWS-12**) ("Due to the high level of violence, President Daniel Ortega, in May 2018 and as a result of a negotiation between the government and civil society, ordered in dialogue with opponents of the government that all national police should shelter in their barracks ("Shelter Order"). In a police press release dated May 28, 2018, the police, through their website, reported [...]"). *See also* Press Release No. 25 – 2018 of the National Police, May 27, 2018 (**R-0180**); Press Release No. 26 – 2018 of the National Police, May 28, 2018 (**R-0181**). *See also* News, Citizen Security, a concern for all, National Police, May 28, 2018 **(R-0192**) ("the National Police has not acted against criminal groups because there are agreements in the National Dialogue, to keep the police forces barracked, guaranteeing the development of peaceful protests in the national territory and not having a presence in the surroundings of university campuses").

[853] Herrera II, ¶ 24, c) (**RWS-12**).

[854] Castro I, ¶¶ 25-26; Herrera I, ¶ 23 (**RWS-03**).

[855] Herrera I, ¶ 23 (**RWS-03**).

peacefully.[856] As of August 2021, the property has been free of unlawful occupiers and guarded by a security firm hired by the State to preserve the property free of further unlawful incursions until Riverside, through Inagrosa, resumes possession of its undisputed property.[857]

602. ***Second***, Deputy Commissioner Herrera did not have "police intelligence" regarding the invasions in Hacienda Santa Fe. Deputy Commissioner Herrera has confirmed that he did not have any intelligence about the invasions in Hacienda Santa Fe in June 2018.[858] The first time he heard about the potential invasions was when Mr. Gutierrez visited the police station and told him that there were rumors that some individuals were going to take the property.[859] In that conversation, Deputy Commissioner Herrera informed Mr. Gutierrez about the circumstances that the police were facing and that they could not immediately come to assist.[860] Riverside argues that none of the intelligence that Deputy Commissioner Herrera allegedly had was shared with Inagrosa and that this violated "long-established" international law obligations.[861] But even if an obligation to share police intelligence with private parties existed under international law – which Riverside argues without support,– such intelligence could not be shared when there was none. Thus, it cannot be concluded that Nicaragua acted in bad faith when Deputy Commissioner Herrera did not have any previous knowledge about the invasions.

603. ***Third***, there is no evidence that Assemblyman Edwin Castro instructed the invaders to remain in occupation in July 2018. The evidence shows, at most, that Commissioner Castro

[856] Memorial, ¶ 337; Gutiérrez I, ¶¶ 60-82. *See* section II.B.2 *supra*.

[857] Gutiérrez I, ¶ 82.

[858] Herrera II, ¶ 24, a) (**RWS-12**) ("I hereby clarify that prior to that conversation in which Mr. Gutiérrez himself told us what was happening at the Hacienda, no one in the police was aware that the invaders intended to go down to the lower part of the HSF and declared that we had no "police intelligence" on a possible invasion of the HSF").

[859] Herrera II, ¶ 24, a) (**RWS-12**).

[860] Herrera II, ¶ 24, a) (**RWS-12**).

[861] Reply, ¶ 1602.

reported to his superiors as to what he had been told by unidentified individuals about a conversation that they claimed to have had with Assemblyman Castro.[862]

604. Even if true, this letter would at most be evidence that the invaders believed that ***Assemblyman Castro*** was trying to help them to recover a portion of Hacienda Santa Fe. That would not necessarily be surprising. At the time, and in a desperate move, *Cooperativa El Pavón* was looking to reach out to members of the National Assembly with political power to request support to stop the imminent eviction and obtain a solution to their land petitions. Leonidas Centeno, who is now the mayor of Jinotega, was at the time a congressman for the department of Jinotega and a member of the Commission for Agrarian Reform and Agricultural Affairs, who was in charge of dealing with agrarian and land affairs. Assemblyman Castro was a member of the National Assembly and had political power within the FSNL. *Cooperativa El Pavón* believed that if they met with Congressman Centeno and Assemblyman Castro to express their concerns, they would have higher chances of getting their petitions resolved. Contemporaneous evidence shows that Cooperativa El Pavón met with the Agrarian Commission, who acknowledged their concerns.[863] Mr. López confirms that members of Cooperativa El Pavón believed that both Congressman Centeno and Assemblymen Castro were helping them to obtain title to the property, but the evidence shows that these efforts were ultimately unsuccessful as they were evicted in 2003-2004, as explained above.[864]

[862] Castro II, ¶ 27 (**RWS-11**).

[863] Minutes of the Commission for Agrarian Reform and Agricultural Affairs, November 26, 2003 (**R-0062**).

[864] Lopez II, ¶ 39 (**RWS-13**) ([…] we went to Congressman Leonidas Centeno to liaise with the National Assembly. Finally, we were able to have meetings with congressmen such as Mr. Edwin Castro, who had a lot of political influence in the FSLN at the time. Despite the meetings we had with these deputies, our efforts were not satisfactory, and we were evicted […]").

605. Thus, this does not constitute evidence that Assemblyman Castro was helping the occupiers to take Hacienda Santa Fe, and even less, that it their illegal invasion of the property is attributable to Nicaragua.

606. ***Fourth***, Riverside alleges that occupiers' letter to the Attorney General in September 2018 demonstrates Nicaragua's bad faith. But as explained in section IIA.2 *supra*, this letter in which the invaders ask the government for "a hearing," note their past affiliation with the resistance and profess loyalty to the political party currently in power, does not show State responsibility.[865] Rather, it is clear that this letter is soliciting—unsuccessfully—government support that never came. Here again, Riverside cannot show that the State's treatment of Riverside's investment was in bad faith. Any FET claim on this basis must fail.

b. *Nicaragua Has Not Denied Claimant "Due Process"*

607. Riverside also alleges that Nicaragua breached the FET standard by denying due process to Inagrosa.[866] In its Memorial, Riverside primarily alleged that that Nicaragua did not abide by its expropriation law in supposedly expropriating Hacienda Santa Fé.[867] Nicaragua demonstrated in its Counter Memorial that there cannot be a due process allegation regarding an expropriation claim as there has been no expropriation.[868] Nicaragua maintains its position.[869]

608. In its Reply, Riverside changes its strategy, focusing on the supposed "Judicial Seizure Order," as it styles the Protective Order that Nicaragua obtained specifically to preserve Hacienda Santa Fe for its undisputed owners after the illegal occupiers were peacefully removed.[870]

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[865] Reply, ¶¶ 304-307.

[866] Memorial, ¶ 754 *et seq*; Reply, ¶¶ 185, 200, 1428, 1448, 1530. Procedural Order No. 4, ¶ 23.

[867] *See* Memorial, ¶ 736.

[868] Counter Memorial, ¶ 341. *See also* Section VI.D.1 *supra*.

[869] *See* Section VI.D.1 *supra*.

[870] Reply, ¶ 1583.

609. Riverside claims that the Tribunal has allegedly already concluded in Procedural Order No. 4 that Nicaragua denied due process in handling the Protective Order.[871] Riverside also argues that there are additional elements of abuse of rights such as an alleged lack of notices of the application of the Protective Order and alleged fabricated evidence by Nicaragua's Attorney General which were not challenged because of the lack of a right of opposition on account of the lack of service and notice.[872] As explained below, none of these allegations have merit.

610. Article 10.5.2(a) of DR-CAFTA provides in relevant part that FET: "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process[.]"[873] As this provision reads, a failure to accord due process in criminal, civil, or administrative adjudicatory proceedings *can* lead to a violation of the FET standard. However, the threshold that a claimant is required to meet to demonstrate a lack of due process is a demanding one.[874] Not every process defect or imperfection will amount to a failure to provide fair and equitable treatment.[875] In the words of the tribunal in *AES v. Hungary*,

> **The standard is not one of perfection**. It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, **manifestly unfair or unreasonable** (such as would shock, or at least surprise a sense of juridical propriety) - to use the words of the *Tecmed* Tribunal - that the standard can be said to have been infringed.[876]

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[871] Reply, ¶¶ 1583.

[872] Reply, ¶¶ 1583-1584.

[873] DR-CAFTA, Art. 10.5.2(a) (**CL-0001**) (emphasis added).

[874] *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award (Excerpts), 24 November 2021, ¶ 574 (**RL-0200**).

[875] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II)*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.40 (**RL-0183**).

[876] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II)*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.40 (**RL-0184**) (emphasis added). *See also Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98 (**CL-0005**) ("[…] Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the 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

611. It has also been recognized that a failure to accord due process can only result in violation of the FET standard treatment if *unremedied* and if it is of *sufficient seriousness*.[877] Commentators have also noted that states are bound to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct.[878]

612. The tribunal in *ECE v. Czech Republic* reasoned that there can be no breach of the FET treatment from a flawed decision that is subsequently reversed on appeal, and the effects of which were therefore only temporary.[879] In that case, the claimants argued that the state deprived them of their right to be heard due to the decision of a ministry that one of the claimants' related parties was not part of a relevant administrative proceedings in the dispute.[880] The tribunal found that the decision to exclude the related party in the administrative proceeding did not have the effect of precluding it from filing submissions in appeal proceedings, finding that no due process

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 Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 522 (**RL-0184**) ("According to case-law, and consistent with the proper interpretation of the MST standard, procedural irregularities only amount to breaches of the MST when they are "grave enough to shock a sense of judicial propriety" and, when administrative procedures are involved, the threshold to establish a breach of due process is high.").

[877] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-05, Final Award, September 19, 2013, ¶ 4.805 (**RL-0186**).

[878] Paulsson J. *Denial of Justice in International Law*, Cambridge University Press; 2005, p. 100 (**CL-0240**). *See also* International Law Commission (Crawford), Second Report on State Responsibility, UN Doc. A/CN.4/498 (1999) at para. 75 (**RL-0187**) ("[…] an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act").

[879] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-05, Final Award, September 19, 2013, ¶ 4.805 (**RL-0186**).

[880] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-05, Final Award, September 19, 2013, ¶ 4.148 (**RL-0186**) ("The Claimants alleged a further violation of due process due to the alleged attempt to deprive them of their right to be heard due to the decision of the Ministry that Tschechien 7 was not a party to the proceedings preceding the First Ministry Decision").

was denied in breach of the standard of fair and equitable treatment.[881] Riverside likewise had the opportunity to challenge the judicial order but failed to do so.

613. Riverside largely bases its due process claim on Mr. Renaldy Gutiererz's expert report.[882] But as demonstrated in the accompanying expert report of Dr. Sequeira attached to this Rejoinder, Dr. Gutierrez's analysis and conclusions misstate Nicaraguan law, distort, or omit relevant facts, and offer nothing on which this Tribunal could find a breach of due process under DR-CAFTA's FET standard.[883]

614. ***First***, as an initial matter, it cannot be overstated that the Protective Order has not harmed Riverside or Inagrosa, to the extent either is legitimately concerned with being able to develop an investment in Hacienda Santa Fe. Nicaragua emphatically rejects any suggestion that hat the Protective Order was a "seizure" order. The evidence shows that the order has a temporary effect and was requested in order to protect the property from future invasions.[884] The Tribunal already rejected Riverside's argument that the Protective Order somehow transferred title over the property to Nicaragua:

> *615. On its face, the Court Order is therefore for the appointment, by way of a provisional measure, of a judicial depositary* ***for the purpose of protecting****, and* ***not for the purpose of seizing****, Hacienda Santa Fé. Both the Application and the Court Order specifically acknowledged that the property was registered in favor of Inagrosa, a Nicaraguan company in which the Claimant is a majority stakeholder.* ***Thus the***

[881] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-05, Final Award, September 19, 2013, ¶ 4.148 (**RL-0186**) ("The Tribunal notes in any event that the finding in the First Ministry Decision that Tschechien 7 was not a participant did not apparently have the effect of precluding Tschechien 7 from filing submissions in relation to Multi's appeal in the proceedings leading up to that Decision, which it duly did, and thereafter was able to appeal against that decision. The defects in the First Ministry Decision and the procedures leading up to it therefore seem to the Tribunal to be more formal than substantial. […] The Tribunal therefore sees no basis to conclude that Tschechien 7 was in fact denied due process in breach of the standard of fair and equitable treatment.").

[882] Reply, Section VIII.C.8; Gutiérrez Renaldy I (**CES-06**).

[883] Sequeira I ¶ 6.1.i-iv (**RER-05**).

[884] Sequeira, ¶ 22.5 (**RER-05**). *See also* Procedural Order, ¶¶ 22-23.

> ***Court Order did not purport to transfer ownership***. *The Court Order also is provisional and specifically provides that it "will have a duration of two years."*
>
> 616. *[…] Indeed, by its terms,* ***the Court Order does not preclude the Claimant from seeking repossession of the property at any time***.

617. Claimant argues that the Tribunal's findings on this matter are inaccurate because they were made "in the absence of specialized knowledge concerning Nicaraguan law" that Dr. Gutierrez supposedly provides in his expert report attached to the Reply.[885] However, as extensively described in section II.E above, Dr. Gutierrez's expert report grossly omits relevant provisions of Nicaraguan Civil Procedural Code that confirm that the judicial depositary requires judicial authorization to use, dispose, or add any grievances to the property.[886] The Nicaragua Civil Procedural Code ensures that Nicaragua must act in a manner that safeguards and protects the deposited asset, under penalty of civil and criminal liability, with the ultimate goal of preserving the value of the deposited asset so as to prevent any prejudice to the asset's owner over the duration of the deposit.[887]

618. Additionally, Hacienda Santa Fe's entry in the official registry clearly shows Inagrosa as the property's sole owner.[888] As explained in section II.E the literal certificate (*certificado literal*) cited by Dr. Gutierrez unambiguously states that ***Inagrosa*** is the *100 percent* owner of Hacienda Santa Fé.[889] This is further confirmed by the related certificate (*certificado relacionado*) that the parties analyzed in the pleadings that resulted in the Tribunal's Procedural

[885] Reply, ¶ 47.

[886] Sequeira I ¶ 6.1. (**RER-05**).

[887] Nicaragua Civil Procedural Code, Arts. 356-357 (**C-0254**).

[888] Sequeira I ¶ 6.1.iv (**RER-05**); Literal Certificate of Hacienda Santa Fé property title Issued by the Jinotega Property Registry (**C-0268**).

[889] Literal Certificate of Hacienda Santa Fé property title Issued by the Jinotega Property Registry (**C-0268**).

Order No. 4.[890] Thus, there is absolute no evidence that the Protective Order transferred the property over Nicaragua.

619. ***Second***, Nicaragua had no obligation to notify Inagrosa of its application. Riverside argues that Inagrosa should have been named as a party in the court proceeding that resulted in the Protective Order and notified accordingly.[891] This contention is wrong.

620. The Protective Order arises from an application that Nicaragua filed in a Nicaraguan court to obtain provisional relief in relation to ***this*** arbitration.[892] This is clear from the preamble to Nicaragua's application, which provides that the urgent provisional measure sought was in relation to a "*Proceso Arbitral Internacional*" or "*International Arbitration Case*" in which the "*Demandante*" or "Claimant" is Riverside and the "*Demandado*" or "Respondent" is Nicaragua.[893]

621. Dr. Gutierrez, without citing to any legal authority, opines that as a matter of Nicaraguan Law, Inagrosa should have been named as a party and therefore should have been notified.[894] However, Nicaraguan law provides that ***urgent provisional measures*** are granted on an *ex parte* basis.[895] Hence, Dr. Gutierrez's opinion that Inagrosa—or anyone else—had a legal right to oppose the application is wrong.

622. ***Third***, Riverside's other notice arguments are equally baseless. Specifically, Riverside contends that there was a violation of due process because neither Inagrosa nor Riverside

[890] Procedural Order 4.

[891] Reply, ¶ 500; Gutiérrez Renaldy I, ¶¶ 43-45 (**CES-06**).

[892] Application for Urgent Precautionary Measures for appointment of judicial depositary (**C-0253**).

[893] Application for Urgent Precautionary Measures for appointment of judicial depositary (**C-0253**).

[894] Gutiérrez Renaldy I, ¶¶ 17.b), i) (**CES-06**).

[895] Sequeira I ¶ 13.5 (**RER-05**).

received notice of the Protective Order, and thus, neither had the opportunity to oppose or lift the Protective Order.[896] This is not true.

623. As an initial point, it is false that the Tribunal already found that Nicaragua had breached its due process obligations under the Treaty. The tribunal simply noted that Nicaragua's failure to "formally serve[]" the Protective Order on Claimant "is not in accordance with due process."[897] As explained below, this does not amount to a breach of due process as part of the FET standard.

624. While it is true that Nicaragua did not serve Inagrosa or Riverside with a copy of the Protective Order immediately following the entry of the Protective Order in the registry, this oversight did not preclude Riverside's from challenging the Order. As Dr. Sequeira explains, Article 144 of the Nicaraguan Civil Procedural Code provides that notice of a judicial order can occur when the party in question becomes aware of the relevant order.[898] After receiving notice of an order, an affected party has three days to challenge it.[899] Whether by negligence of Riverside's attorneys—***or because the Protective Order does not actually prejudice Riverside in any way***—Riverside did not do so.

625. Claimant and Inagrosa had ***constructive notice*** of the Protective Order as of January 2022, when the preventive filing that referenced the order was added to the public registry file for Hacienda Santa Fé.[900] And Dr. Sequeira concludes that Claimant and Inagrosa had ***actual notice*** of the Protective Order as early as July 2022, when their authorized representatives obtained a

[896] Reply, ¶ 500.

[897] Procedural Order No. 4, ¶ 37.

[898] Sequeira I ¶ 15.5 (**RER-05**).

[899] Sequeira I ¶¶ 14.1-14.2 (**RER-05**).

[900] Sequeira I ¶¶ 16-1-16.5 (**RER-05**).

related certificate from Nicaragua that expressly notified them of the Protective Order.[901] Whether by negligence of Riverside's attorneys—***or because the Protective Order does not actually prejudice Riverside in any way***—Riverside did not do so.

626. Moreover, a failure to accord due process can only result in a breach of the FET standard treatment if *unremedied* and if it is of *sufficient seriousness*.[902] International law assigns state responsibility for judicial action only if it is shown that there was no reasonably available national mechanism to correct the challenged action.[903] Here, Riverside and Inagrosa had the opportunity to challenge the Protective Order but failed to do so. Based on this, the Tribunal should find that the defects in the failure to immediately notify Inagrosa of the Protective Order were formal and not substantial. They did not deprive Inagrosa or Riverside of due process in accordance with the FET standard under the Treaty.

c. *Nicaragua's Approach to the Land Invasion Was Consistent with Riverside's Legitimate Expectations*

627. Riverside alleges that Nicaragua's response to the invasion of Hacienda Santa Fé breached the FET standard in Article 10.5 of DR-CAFTA by failing to protect its "legitimate expectations."[904] In its Reply, Riverside only presents a general and circular argument that Nicaragua has failed to protect its legitimate expectations.[905]

628. Riverside does not establish how Nicaragua's actions breached its legitimate expectations nor it responds to any of the arguments presented by Nicaragua in its Counter

[901] Protective order issued by the Second Oral Court of the Civil District Court of Jinotega Northern District (**C-0251**).

[902] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-05, Final Award, September 19, 2013, ¶ 4.805 (**RL-0186**).

[903] Paulsson J. *Denial of Justice in International Law*. Cambridge University Press; 2005, p. 100 (**CL-0240**).

[904] Memorial ¶ 754, d).

[905] Reply, ¶ 1608, e).

Memorial.[906] In fact, "legitimate expectations" is only mentioned six times in Riverside's 497-long brief and in no instance, it is referred to establish any fact leading to such breach.

629. Based on the above, Nicaragua maintains the arguments presented in its Counter Memorial.[907] ***First***, Nicaragua does not accept that "legitimate expectations" form part of the Minimum Standard of Treatment under customary international law protected by the FET clause in Article 10.5.[908]

630. ***Second***, even if legitimate expectations formed part of the Minimum Standard of Treatment, Riverside has failed to show that (i) the relevant expectations were legitimate and reasonable; (ii) based on conditions offered or commitments assumed by the State; and (iii) relied upon by the investor when deciding whether to make the investment.[909] Certainly, Nicaragua rejects any suggestion that Riverside ever had a legitimate expectation that it would immediately employ military force against its own population where less escalatory alternatives were available—and still less that it would do so in the midst of a period of nationwide civil strife against a heavily armed group associated with the former Nicaraguan Resistance who had resettled on the Hacienda with their families.

631. Based on the above, Nicaragua has not breached Riverside's legitimate expectations under the Treaty.

### 3. Nicaragua Accorded Riverside's Investment Full Protection And Security Consistent With Article 10.5 Of DR-CAFTA

[906] Counter Memorial, ¶¶ 345-348.

[907] Counter Memorial, ¶¶ 345-348.

[908] Counter Memorial, ¶ 346.

[909] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, ¶¶ 340, 347 (**RL-0040**).

632. As explained in its Counter Memorial, Nicaragua fully complied with its obligation to accord FPS to Riverside's investment in the context of the unlawful invasion and occupation of Hacienda Santa Fe.[910] FPS in an obligation of means, not of results, and requires a State only to exercise due diligence appropriate to the circumstances.[911] The record is clear that Nicaragua took appropriate and ultimately successful measures that reasonably balanced the protection of Riverside's investment in Hacienda Santa Fé with the need to avoid precipitating a violent clash with the armed occupiers over the property in a context of limited police resources and nationwide unrest.[912] Riverside's arguments to the contrary are unavailing.

a. *Riverside Accepts That FPS Is Not An Absolute Standard, But Rather One Of Due Diligence*

633. In its Counter Memorial, Nicaragua provided abundant legal authorities to support that the FPS standard is not absolute, but rather one of due diligence, and that FPS does not imply any strict liability.

634. As the ICJ held in the *ELSI* case, "'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed."[913] Investment tribunals have repeatedly applied ELSI's reasoning in finding that an obligation of FPS requires a State to exercise "due diligence" in protecting an investment from physical damage in a manner that is ***reasonable under the circumstances***.[914]

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[910] Counter Memorial, ¶ 360.

[911] Counter Memorial, ¶ 363.

[912] Counter Memorial, ¶¶ 360-371.

[913] *Elettronica Sicula SpA (ELSI) (U.S v Italy)* [1989] ICJ Rep 15, July 20, 1989, ¶ 108 (**RL-0057**).

[914] These tribunals include *Ronald S. Lauder v. Czech Republic*, Award, September 3, 2001, ¶ 308 (**RL-0060**) ("[…] the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment **as reasonable under the circumstances**, but the Treaty does not oblige the parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would indeed amount to strict liability, which cannot be imposed to a State absent any specific provision in the Treaty.") (emphasis added); *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, March 15, 2016, ¶ 6.81 (**RL-0059**); *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award of 27 June 2016, ¶ 244 (**RL-**

635. In *Glencore v. Bolivia*, a group of workers and other activists violently seized control of a mine, some of whom were armed with dynamite.[915] With respect to the FPS obligation, the *Glencore* tribunal found that the host State had taken appropriate measures such as dispatching police, dispatching government officials, and attempting negotiations between the parties.[916] The Tribunal was clear, however, that the obligation of FPS did "not oblige the State to 'prevent each and every injury'" at all costs, and that the FPS standard was "'one of the fact and degree, responsive to the circumstances of the particular case.'"[917] In this regard, *Glencore* relied on the views of the tribunal in *Pantechniki v. Albania* that the standard of due diligence is "that of a host state ***in the circumstances and with the resources of the state in question***"[918] as well as the ICJ's warning in *ELSI* that "'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed".[919]

636. Formally, Riverside does not dispute that FPS is an obligation of means, actually conceding in its Reply that "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."[920]

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**0188**) ("The obligation is limited to reasonable action, and a host State is not required to take any specific steps that an investor asks of it.").

[915] *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Award, September 8, 2023 ¶ 247, 250 (**RL-0189**).

[916] *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Award, September 8, 2023 ¶ 247 (**RL-0189**).

[917] *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Award, September 8, 2023 ¶ 248 (**RL-0189**).

[918] Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia, PCA Case No. 2016-39, Award, September 8, 2023 ¶ 248 (**RL-0189**) citing to Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 81 (**RL-0051**).

[919] *Elettronica Sicula SpA (ELSI) (U.S v Italy)* [1989] ICJ Rep 15, July 20, 1989, ¶ 108 (**RL-0057**).

[920] Reply ¶ 1280.

637. But Riverside's complaints about Nicaragua's law enforcement response is utterly antithetical to these principles. While professing to maintain that "Nicaragua had many nuanced and graduated ways of addressing the invasion at HSF" Riverside quickly makes clear that what it means by this is that Nicaragua should have deployed "specialized police teams" or "the military if necessary" to drive the illegal occupants from the Hacienda by force faster than they were ultimately (peacefully) removed.[921]

638. Riverside's argument is chilling. By its reasoning, Nicaragua would have been obliged to deploy armed forces against its own population to clear the Hacienda more quickly. Such an approach would have been exceptionally dangerous, put many lives at risk, and been anything but appropriate to the circumstances confronting Nicaragua.

639. Fortunately, it is not the law. For example, in *South American Silver v. Bolivia* a violent uprising by local communities resulted in a blockade of claimant's mining operations, abductions of claimant's employees, and riots in La Paz.[922] Faced with similar arguments by claimant in that case, namely that Bolivia's refusal to escalate its response to "militarize the areas surrounding" the investment served as "proof that the Respondent did not act with due diligence," the *South American Silver* tribunal ultimately found no breach of FPS.[923] The *South American Silver* tribunal reasoned that:

> [T]he militarization of the area has not been shown to be an adequate measure conducive to resolving the social conflict and allowing for the continuation of the

[921] Reply, ¶ 1414.

[922] *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, November 22, 2018, ¶¶ 147-162 (**RL-0016**).

[923] *See South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, November 22, 2018, ¶¶ 691, 698 (**RL-0016**).

> Project. On the contrary, the experience of the State in this regard shows that the measure is not only ineffective, but that it may also have fatal consequences.[924]

640. The *South American Silver* tribunal also noted that mere "delays or inefficiencies regarding some specific actions are insufficient to qualify as actions in breach of the full protection and security standard,"[925] and thus Claimant's arguments about alleged, but unsupported, "delays" or lack of "immediate action" likewise miss the mark as a matter of arbitral practice.[926] In *South American Silver*, it took police nearly three months to intervene, whereas here, Nicaragua's first eviction took ***only three months*** and after Inagrosa failed to secure its property, causing the Hacienda to be re-invaded by hundreds of squatters, Nicaragua started a complex process and effectively evicted all illegal occupiers of Hacienda Santa Fe by August 2018.[927]

641. *South American Silver* is squarely on point here. The DR-CAFTA did not obligate Nicaragua to engage in an unnecessarily heavy-handed response that could have resulted in unnecessary violence and loss of life—especially given the history, lethality, and affiliation of the illegal invaders. Nicaragua's decision not to escalate tensions during a period of civil strife was eminently reasonable, and, as Nicaragua has demonstrated repeatedly, its de-escalation strategy was successful.

642. Claimant's repeated attempts to wish away the reality that Nicaragua had extremely limited law enforcement resources available in the immediate vicinity of Hacienda Santa Fé also do not advance its case. Indeed, an FPS analysis must consider the circumstances and the resources available to the State when anger to an investment arises. As the *Tekfen v. Libya* tribunal

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[924] *See South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, November 22, 2018, ¶ 690 (**RL-0016**).

[925] *See South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, November 22, 2018, ¶ 689 (**RL-0016**).

[926] Reply, ¶¶ 1374-1378.

[927] Gutiérrez-Rizo I, ¶¶ 66-82 (**RWS-01**).

recognized, the FPS standard involves "an element of subjectivity, [which] has been widely accepted by a variety of tribunals and scholars."[928] Thus, "in assessing the exercise of the obligation of due diligence, a tribunal is entitled to examine, *inter alia*, the availability of resources of the host State for preventing the harm complained of."[929] Ultimately, the *Tekfen* tribunal found no breach of FPS because it would have been unreasonable for the local military presence to devote troops, who were engulfed in an ongoing armed conflict, solely for the protection of claimant's operations.[930] Yet unlike Libya in *Tekfen*, where no breach of FPS was found, Nicaragua ***did respond*** to the illegal occupation of Hacienda Santa Fe—and successfully cleared the property.[931]

b. *Nicaragua Took all actions reasonable in the circumstances and did not discriminate against Riverside in its response to the illegal invasion of its investment.*

643. According to Riverside, the evidence shows that (a) Nicaragua egregiously failed to act in good faith when it comes to safeguarding the property of Inagrosa at HSF as it allegedly

[928] *Tekfen-TML Joint Venture, Tekfen İnşaat ve Tesisat A.Ş. and TML İnşaat A.Ş. v. State of Libya*, ICC Case No. 21371/MCP/DDA, Final Award, February 11, 2020, ¶ 7.7.7 (**RL-0190**).

[929] *Tekfen-TML Joint Venture, Tekfen İnşaat ve Tesisat A.Ş. and TML İnşaat A.Ş. v. State of Libya*, ICC Case No. 21371/MCP/DDA, Final Award, February 11, 2020, ¶ 7.7.135 (**RL-0190**).

[930] *See Tekfen-TML Joint Venture, Tekfen İnşaat ve Tesisat A.Ş. and TML İnşaat A.Ş. v. State of Libya*, ICC Case No. 21371/MCP/DDA, Final Award, February 11, 2020, ¶ 7.7.141 (**RL-0190**).

[931] Claimant's authorities are inapposite and do not advance its FPS arguments. In *Wena Hotels* v. Egypt, the claimant's hotel investment was illegally seized by a State-owned company and thus, as the tribunal noted, "Egypt could have directed EHC to return the hotels to Wena's control and make reparations." See *Wena Hotels v. Egypt*, ICSID Case No. ARB/203/98/4, Award, December 8, 2000, ¶ 90 (**CL-0039**). In *Cengiz v. Libya*, Libya did not respond at all to looting and attacks on the claimant's construction project after a Libyan government agency had urged the investor to continue the works despite having no protection during an armed conflict and the investor's repated pleas for protection. *See* Reply, ¶ 1310 ("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.'") (*quoting Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ , Final Award, ¶ 438 (**CL-0192**). This was after repeated pleas from the investor to protect its property, after.[931] Here, it is undisputed that Nicaraguan government officials evicted all of the invaders in a peaceful manner by August 11, 2018.[931] Finally, Riverside points to an *IAReporter* article describing the unpublished award in *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Madagascar* but even a high-quality journalistic summary of that tribunal's decision cannot be relied upon as a legal authority and *IAReporter*'s summary contains no excerpts from the award.

failed to communicate essential advance intelligence of threats to Inagrosa;[932] (b) Nicaragua's Police belatedly arrived; the Police did not act; and it prematurely departed;[933] and (c) Nicaragua extended preferential treatment to other landowners grappling with similar incursions.[934] The evidentiary record shows completely the opposite.

644. ***First***, Riverside's allegation that Nicaragua failed to communicate essential advance intelligence of threats to Inagrosa fails on the facts. Deputy Commissioner Herrera confirmed that the Police had no advance intelligence of any threats.[935] The only information that Deputy Commissioner Herrera had in June 2018 was the information that he received from Mr. Gutierrez, when on June 16, 2018, he stopped by the police station to request help from the Police.[936] This was the first time that the Police became aware of the invasion.[937] In that same conversation, Mr. Gutierrez was informed that the Police were overwhelmed, that they did not have enough resources to immediately assist with any potential eviction, and that the Police had been instructed to remain in barracks as part of an effort to deescalate a nationwide outbreak of political violence.[938] Deputy Commissioner Herrera nevertheless sent an inspector to evaluate the situation the next day.[939] Riverside's reliance on *Wena Hotels v. Egypt* to support its argument that Nicaragua breached its FPS obligations for allegedly "withholding advance information of wrongful actions"[940] accordingly fails. The facts simply do not assist Riverside's contention.

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[932] Reply, ¶ 1323.

[933] Reply, ¶ 1323.

[934] Reply, ¶ 1324.

[935] Herrera II, ¶ 24, a) (**RWS-12**).

[936] Herrera II, ¶ 24, a) (**RWS-12**).

[937] Herrera II, ¶ 24, a) (**RWS-12**).

[938] Herrera II, ¶ 24, a) (**RWS-12**).

[939] Herrera II, ¶ 24, c) (**RWS-12**).

[940] Reply, ¶ 1374.

645. ***Second***, Riverside's suggestion that Nicaragua's Police arrived belatedly, that the Police did not act, and that they prematurely departed is likewise baseless.

646. Again, Riverside's case is that Nicaragua breached its international obligations because it "could have augmented its National Police with support from its military forces"[941] and that these "could have been deployed under the direction of the National Police in a graduated manner that [Riverside spceculates] could have minimized or avoided bloodshed […]"[942]

647. But Nicaragua's FPS obligation under the Treaty is "limited to reasonable action"[943] and "is not required to take any specific steps that an investor asks of it."[944] Nicaragua's international obligation was to comply with a standard of due diligence "[…] in the circumstances and with the resources of the state in question,"[945] and the evidence shows that Nicaragua did so.

648. A day after Mr. Gutierrez requested help from the Police to assist with the invasions, Deputy Commissioner Herrera sent an inspector to Hacienda Santa Fe to monitor the situation.[946] Again, this happened at a time of widespread unrest[947] and in a town where the police force consisted of eight officers with one police car and one motorcycle responsible for policing a population of 23,000 inhabitants.[948] In addition to being understaffed, San Rafael del Norte police station is located in a rural area and does not have the same technological sophistication and police

[941] Reply, ¶ 1384.

[942] Reply, ¶ 1384.

[943] *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award of 27 June 2016, ¶ 244 (**RL-0188**).

[944] *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award of 27 June 2016, ¶ 244 (**RL-0188**).

[945] *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Award, September 8, 2023 ¶ 248 (**RL-0189**) citing to Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 81 (**RL-0051**).

[946] Herrera II, ¶ 24, c) (**RWS-12**).

[947] Herrera II, ¶¶ 18- 9 (**RWS-12**).

[948] Herrera II, ¶ 11 (**RWS-12**).

equipment that would be found in stations in urban areas like Managua. Deputy Commissioner Herrera attaches to his second statement a video that shows the limited conditions of San Rafael del Norte station.[949] At the same time, there was a national shelter order in place for all police officers; the nearest police station was overwhelmed with at least five barricades blocking the surroundings[950] and amid constant threats of arson to public buildings, including the police stations.[951] The contemporaneous nationwide unrest made reinforcement of the Police in San Rafael del Norte all the more unrealistic.

649. Despite these enormous challenges, Nicaragua initially succeeded in evicting all of the squatters from Hacienda Santa Fé in ***less than two months***.[952] And when Inagrosa failed to secure its property, causing the Hacienda to be re-invaded by hundreds of squatters,[953] Nicaragua was able to peacefully remove ***and*** relocate the armed invaders in less than three years, significantly less time than it took Nicaragua to remove members of the El Pavon community who illegally occupied the same property in 2004.[954] On that earlier occasion, moreover, Inagrosa and Mr. Rondón had initiated judicial proceedings to evict the squatters,[955] they did not do so n 2018.

[949] Herrera II, ¶ 11 (**RWS-12**); Video Police Station of San Rafael del Norte today (**R-0195**).

[950] Herrera II, ¶ 13 (**RWS-12**).

[951] Herrera II, ¶ 16 (**RWS-12**).

[952] Castro I, ¶ 38 (**RWS-02**) ("At the meeting of August 11, most of the families agreed to vacate the property. However, the owners or representatives of Hacienda Santa Fe did not show up to take possession. The property was free of illegal occupants for a few days, and when the invaders noted the owners were not there, they returned.")

[953] Castro I, ¶ 38 (**RWS-02**) ("At the meeting of August 11, most of the families agreed to vacate the property. However, the owners or representatives of Hacienda Santa Fe did not show up to take possession. The property was free of illegal occupants for a few days, and when the invaders noted the owners were not there, they returned.")

[954] Gutiérrez-Rizo II, ¶ 15 (**RWS-10**).

[955] Letter from Carlos José Rondón Molina and Melva Jo Winger de Rondón a Marco Centeno Caffaena, Director General de la OTR dated August 11, 2001 **(R-0170 Tab 8)**. *See also* Rondón II, ¶ 34 (**CWS-09**) ("INAGROSA later commenced judicial proceedings for the removal of the occupants after discussions with the police and the district prosecutors.").

650. While it is easy for Riverside to play armchair general, the eviction process was a complex one. Against the background of the risks inherent in the Hacienda's having been seized by a volatile and armed community, Nicaragua successfully relocated over 150 families to other state lands.[956] This required numerous meetings with stakeholders and the cooperation of the police and other agencies.[957] By August 2021, the property was completely free of illegal occupiers ready for its owner to take it back.[958]

651. Riverside's own admission that in 2003 the squatters were removed through a legal process and that the police carried out an eviction with armed guards[959] is additional evidence that Inagrosa knew that this was a complex process that could not happen overnight. What Riverside has omitted is that Inagrosa's requests to evict the squatters started as early as 2000[960] (if not earlier) and that it ultimately took ***four years*** to fully evict all illegal occupiers from the property.[961] Instead, Riverside comes to this arbitration proceeding to claim lack of immediate help when in 2003 it waited for four years for a similar eviction process to take place.

652. Ms. Gutierrez-Rizo recounts this process in her second witness statements and attaches over 40 letters where Mr. Rondón, state agencies, and members of Cooperativa El Pavón discuss their rights to the property and the eviction process from 2000 to 2004.[962] This

[956] Gutiérrez-Rizo I, ¶¶ 66-82 (**RWS-01**).

[957] Gutiérrez-Rizo I, ¶¶ 66-82 (**RWS-01**).

[958] Gutiérrez-Rizo I, ¶ 76 (**RWS-01**).

[959] Reply, ¶ 1383.

[960] Gutiérrez-Rizo II, ¶ 15, d) (**RWS-10**); Carta de Carlos José Rondón Molina y Melva Jo Winger de Rondón a Marco Centeno Caffaena, Director General de la OTR del 11 de agosto de 2000 solicitando apoyo en el desalojo de ocupantes de la HSF **(R-0170 Tab 8)**.

[961] Gutiérrez-Rizo II, ¶ 15, f) (**RWS-10**).

[962] Gutiérrez-Rizo II, ¶ 14 (**RWS-10**). *See also* OTR File (R-**0177 Tab 9-54**).

demonstrates that in 2018, the police took every reasonable measure possible to safeguard the rights of Inagrosa while avoiding violence.

653. ***Third***, and finally, Nicaragua did not provide any better or special treatment to any other landowner in 2018. Riverside presents a chart with examples of allegedly more diligent police measures taken by the Police to address unlawful invasions of private land in 2018.[963] This chart was prepared based on documents that Nicaragua produced during the document production phase. Riverside completely ignores the specific conditions of the locations and circumstances where those invasions took place.

654. None of the examples is comparable to the invasion that took place in Hacienda Santa Fé. Hacienda Santa Fé is located in San Rafael del Norte not in Managua or Leon where Riverside's examples too place. San Rafael del Norte is a town in the department of Jinotega, which is notably rural.[964] Commissioner Castro and Deputy Commissioner Herrera confirmed that the police station in San Rafael del Norte at the time of the invasions only had eight police officers including Deputy Commissioner Herrera.[965] Also, as mentioned earlier, their patrol vehicles consisted of one police car and a motorcycle in poor repair.[966]

655. By contrast, the examples cited by Riverside are of invasions that occurred in Managua and Leon, the two largest cities of Nicaragua. In 2018, the Managua police were divided in ten "Police Districts", each district had assigned approximately ***168 police agents***.[967] Similarly

[963] Reply, ¶ 1331.

[964] *See* Video Police Station of San Rafael del Norte today (**R-0195**); Video of Hacienda Santa Fé and San Rafael del Norte recorded on March 7, 2024 (**R-0231**); Images of Hacienda Santa Fé and San Rafael del Norte taken on March 7, 2024 (**R-0232**).

[965] Certificate issued by the National Police regarding officers located in San Rafael del Norte Year 2018 (**R-0028**).

[966] Herrera II, ¶ 11 (**RWS-12**).

[967] Certificate by the National Police informing the number of agents assigned to Managua and Leon, Nicaragua dated March 5, 2024 (**R-00227**).

in Leon, there was one police station per each municipality. Leon has ten municipalities. The city of Leon (where some of Riverside's examples took place) had assigned approximately ***335 police agents*** and each one of the subunits had approximately twelve police agents depending on the population of the municipality. In total, the department of Leon had ***443 police agents***. Nor did any of the examples cited by Riverside involve nearly 600 illegal occupiers, many of them armed.[968]

656. Moreover, out of the twenty-one cases in which Nicaragua allegedly gave better treatment to other landowners. fifteen were located in Managua (71% of the cases) and the other 29% in Leon. Below, Nicaragua presents Riverside's "Chart F"[969] distinguishing each of the cases in which Nicaragua allegedly provided better treatment to other investors.

| # | Entity | Exhibit | Location | Date | Nicaragua's considerations |
|---|---|---|---|---|---|
| 1. | Inversiones Nela S.A. | C-0326-SPA[970] | Managua, Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that occupiers in this property have been evicted four times and that on July 31, 2018, it was reinvaded. It does not say that the illegal occupiers were evicted on that date. In addition, in that location, there were 168 police agents assigned. |
| 2. | Inversiones Espanola S.A. | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before |

[968] Gutiérrez-Rizo I, ¶ 76 (**RWS-01**) ("In May 2021, the Attorney General's Office for Jinotega signed several agreements with representatives of El Pavón Group, who also acted on behalf of more than 150 families occupying Hacienda Santa Fé.") – Assuming families on average of four members.

[969] Riverside also presents "Chart C3" arguing that the Nicaraguan National Police proposed evictions in the cases referred to in the chart. These cases are included in Riverside's "Chart F" which are completely refuted by Nicaragua above.

[970] Exhibit C-326-SPA is a letter from Commissioner Cruz Alonso Sevilla, Chief of Police District No. 3, to Francisco Díaz Madriz, Deputy General Director of the National Police. For context, in this district, approximately 168 police agents were assigned in 2018 during the protests whereas in San Rafael del Norte there were only eight police agents assigned. *Compare* Certificate by the National Police informing the number of agents assigned to Managua and Leon, Nicaragua dated March 5, 2024 (**R-00227**). *with* Certificate issued by the National Police regarding officers located in San Rafael del Norte Year 2018 (**R-0028**).

| | | | | | |
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| | | | | | July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted with police backup***. In addition, in that location, there were 168 police agents assigned. |
| 3. | Desarrollos Xolotlan S.A. | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's comparison is misleading and inaccurate. While the police state that they were able to evict the illegal occupiers, they were only 50 and there is no information as to the level of violence or if the property was reinvaded after. In addition, in that location, there were 168 police agents assigned. |
| 4. | Mangos Sociedad Anonima (MANGOSA) SA | C-0328-SPA | Leon Department | C-0449-SPA | Riverside's comparison is misleading and inaccurate. The document says the eviction took place on October 24, 2018 and the property was occupied by only 30 individuals. In addition, in that location, there were 335 police agents assigned.<br><br>By October 2018, government officials in San Rafael del Norte had already started the eviction process of the more than 200 illegal occupiers in Hacienda Santa Fe. |
| 5. | Melones de Nicaragua S.A. (MELONICSA) | C-0328-SPA | Leon Department | C-0449-SPA | Riverside's comparison is misleading and inaccurate. The document says the eviction took place on October 24, 2018 and the property was occupied by only 30 individuals. In addition, in that location, there were 335 police agents assigned.<br><br>By October 2018, government officials in San Rafael del Norte had already started the eviction process of the more than 200 illegal occupiers in Hacienda Santa Fe. |

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| 6. | Productos Aliados S.A. | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted with police backup.*** In addition, in that location, there were 168 police agents assigned. |
| 7. | Sociedad Liza Interprise S.A. | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted.*** In addition, in that location, there were 168 police agents assigned. |
| 8. | Comercial Mantica S.A. | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted with police backup.*** In addition, in that location, there were 168 police agents assigned. |
| 9. | Burke Agro Nicaragua S.A. | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted with police backup.*** In addition, in that location, there were 168 police agents assigned. |
| 10. | Puma Energy Bahamas S.A. | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted.*** In addition, in that location, there were 168 police agents assigned. |
| 11. | McDonald's Sistemas de Nicaragua S. A | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted with*** |

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| | | | | | ***police backup.*** In addition, in that location, there were 168 police agents assigned. |
| 12. | Misión Adventista del Séptimo Día de Nicaragua, | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's comparison is misleading and inaccurate. While the document says that the occupiers were evicted, there were only four illegal occupiers. In addition, in that location, there were 168 police agents assigned. |
| 13. | Iglesia Cristiana Ministerio Leon de Judas | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted.*** In addition, in that location, there were 168 police agents assigned. |
| 14. | Ángel Rafael Chávez and Alejandro Chávez | C-0330-SPA | Leon Department | *Blank* | Riverside's comparison is misleading and inaccurate. The document says the eviction took place on October 16, 2018 In addition, in that location, there were 335 police agents assigned.<br><br>By October 2018, government officials in San Rafael del Norte had already started the eviction process of the more than 200 illegal occupiers in Hacienda Santa Fe. |
| 15. | Carlos Callejas Rodríguez, Raquel Torrez, Benita Garcia | C-0327-SPA | Leon Department | *Blank* | Riverside's comparison is misleading and inaccurate. The document says the eviction took place on October 12, 2018 and the property was occupied by only five individuals. In addition, in that location, there were 335 police agents assigned.<br><br>By October 2018, government officials in San Rafael del Norte had already started the eviction process of the more than 200 illegal occupiers in Hacienda Santa Fe. In addition, |

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| | | | | | in that location, there were 168 police agents assigned. |
| 16. | Mauricio Pallais and Jose Francisco Rodríguez | C-0332-SPA | Leon Department | *Blank* | Riverside's comparison is misleading and inaccurate. The document says the eviction took place on October 22, 2018 and the property was occupied by only fifteen families. In addition, in that location, there were 335 police agents assigned.<br><br>By October 2018, government officials in San Rafael del Norte had already started the eviction process of the more than 200 illegal occupiers in Hacienda Santa Fe. In addition, in that location, there were 168 police agents assigned. |
| 17. | DharmaLila Carrasquilla | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's comparison is misleading and inaccurate. While the document says that the occupiers were evicted, there were only four families illegally occupying. In addition, in that location, there were 168 police agents assigned. |
| 18. | Gonzalo German Duarte Bojorge | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted.*** In addition, in that location, there were 168 police agents assigned. |
| 19. | Jose Eduar Pastora Lopez | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted.*** In addition, in that location, there were 168 police agents assigned. |
| 20. | Julio Cesar Zapata Quiñones | C-0326-SPA | Managua Department | Before July 31, 2018 | Riverside's comparison is misleading and inaccurate. While the document says that the occupiers were evicted, |

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| | | | | | there were only three illegal occupiers. In addition, in that location, there were 168 police agents assigned. |
| 21. | Banco del Fomento a la Producción | C-0329-SPA | Leon Department | *Blank* | Riverside's allegation that the invaders were removed before July 31, 2018 is inaccurate and misleading. The report says that ***there is a possibility that the occupiers are evicted with police backup.*** In addition, in that location, there were 168 police agents assigned. |

c. *Riverside's Reference to the Russian BIT's FPS Clause Is Irrelevant and Otherwise Contrary to Nicaragua's Express Annex II Reservation in DR-CAFTA*

657. Riverside attempts to import Article 2(2) of the Russian BIT because, according to Riverside, that clause contains more favorable language "for full legal protection."[971] Claimant's attempt to supplant the FPS standard in Article 10.5 of DR-CAFTA must be rejected.

658. ***First***, Claimant's argument is a distraction. DR-CAFTA unequivocally states that "'full protection and security' requires each Party to provide the level of police protection required under customary international law."[972] Claimant's FPS claim narrowly and exclusively relies upon its unfounded allegations concerning Nicaragua's law enforcement response to Hacienda Santa Fé.[973] Claimant alleges no additional facts or categories of measures beyond the National Police's response to the alleged invasion. It therefore is irrelevant whether Article 10.5 of DR-CAFTA could be modified to include legal protection by importing Article 2(2) of the Russian BIT.[974]

[971] Reply, ¶ 1299.

[972] DR-CAFTA, Art. 10.5(2)(b) (**CL-0001**).

[973] *See* Reply, ¶¶ 1321-1418.

[974] Nicaragua nevertheless established in its Counter-Memorial that Nicaragua accorded Hacienda Santa Fe full legal security. *See* Counter-Memorial, ¶ 362.

659. ***Second***, as Nicaragua establishes in Section IV.D, *infra*, DR-CAFTA's MFN provision in Article 10.4 is inapplicable to a "measure with respect to the provision of law enforcement" pursuant to Nicaragua's express reservation in Annex II of DR-CAFTA.[975]

660. For all the reasons stated above, Nicaragua has complied with its FPS obligations under the Treaty by taking all reasonable measures and actions at its disposal hand to protect the rights of Inagrosa during one of the most violent episodes of civil unrest in post-civil war Nicaragua.

### 4. Nicaragua's Law Enforcement Measures Cannot Serve as a Basis for a Breach of DR-CAFTA's MFN and National Treatment Standards

661. Riverside's theories for why Nicaragua supposedly breached the DR-CAFTA's Most-Favored Nation ("MFN") and National Treatment ("NT") standards keep changing. The Tribunal may recall that, in its Memorial, Riverside baselessly claims that "[t]he private lands owned by supporters of the FSLN (the Sandinista Party) were not seized by the government or the paramilitaries."[976] Riverside's original theory of Nicaragua's supposed MFN and NT breaches began and ended with that single conclusory statement.

662. After Nicaragua's Counter-Memorial explained that the occupation of Hacienda Santa Fe was not orchestrated by the State, but rather another episode of a long-standing dispute over the property, involving armed non-governmental actors and resolved peacefully through the measured approach of the Nicaraguan authorities who have always recognized Riverside's subsidiary's ownership of the Hacienda, Riverside completely reformulated its case as to DR-CAFTA Articles 10.3 (National Treatment) and 10.4 (Most Favored Nation).

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[975] *See* Section IV.D.; DR-CAFTA, Annex II, at 472-473 (**CL-0001**)

[976] Memorial, ¶ 610.

663. Riverside's ***new theory*** is that Nicaragua breached the DR-CAFTA by providing a more favorable law enforcement response to the unlawful invasions by non-state actors of other Nicaraguan and foreign-owned properties during the period of nationwide civil strife in 2018.[977] This revision embodies an important concession: specifically, that Nicaragua's response to the unlawful invasion and occupation of Hacienda Santa Fe was a ***law enforcement response***.

664. While that recognition may be a rare point of agreement between the parties, it also means that Riverside's MFN and NT claims necessarily fail in light of Nicaragua's express Annex II reservation, which removes "any measure with respect to the provision of law enforcement" from the coverage of the DR-CAFTA's MFN and NT standards. Indeed, Article 10.13.2 of DR-CAFTA states that "Articles 10.3, 10.4…do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities as set out in its Schedule to Annex II."[978] Nicaragua's Schedule in Annex II contains an exception to Articles 10.3 and 10.4 whereby "***Nicaragua reserves the right to adopt or maintain any measure with respect to the provision of law enforcement***[.]"[979] The relevant portion of Nicaragua's Schedule in Annex II is reproduced below:[980]

[977] *See* Reply, ¶ 1673 ("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."), ¶ 1694 ("This section addresses MFN issues related to more favorable treatment provided by the police.").

[978] DR-CAFTA, Article 10.13.2 (**CL-0001**).

[979] DR-CAFTA, Annex II, at 472-473 (**CL-0001**).

[980] *See* DR-CAFTA, Annex II, at 472-473 (**CL-0001**) (emphasis added).

ANNEX II, Schedule of Nicaragua
Sector: Social Services
Obligations Concerned: National Treatment (Articles 10.3 and 11.2) Most-Favored Nation Treatment (Articles 10.4 and 11.3) Local Presence (Article 11.5) Performance Requirements (Article 10.9) Senior Management and Boards of Directors (Article 10.10)
Description: Cross-Border Services and Investment
Nicaragua reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and the following services to the extent they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

665. Nicaragua's express reservation places Riverside's MFN and NT claims based on "law enforcement measures" outside of the DR-CAFTA's scope such that they are not admissible here. As Newcombe and Paradell explain, [i]f there is an applicable exception or reservation, no IIA [international investment agreement] obligation exists with respect to a measure within the scope of the exception or reservation."[981] For example, in *Global Telecom Holding v. Canada*, the tribunal dismissed the claimant's national treatment claim because Canada's Annex II reservation in the Canada-Egypt BIT excepted MFN and national treatment obligations for measures related to "social services" and "services in any other sector."[982] The *Global Telecom* tribunal found that the claimant's "national treatment claim, which relates exclusively to the telecommunications sector, is excluded from the scope of the BIT's national treatment provisions" because it concerned the provision of "services."[983]

666. This is an easier case. Unlike in *Global Telecom*, this Tribunal need not interpret whether the investment fits within a broad category like "services." The Parties are agreed that

[981] Andrew Newcombe and Lluís Paradell Trius, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer Law International 2009), p. 483 (**RL-0146**).

[982] *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020, ¶¶ 377-380 (**RL-0144**).

[983] *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020, ¶ 380 (**RL-0144**); *see also id.* at ¶ 367 (noting that "it is not for the Tribunal to judge the extent to which a State chooses to guarantee investors national treatment (or not)" and that "[t]he Tribunal is neither expected nor empowered to rewrite the Treaty to make its substantive protections more efficient for the interests of a party.").

Nicaragua's challenged measures are the law enforcement response to the illegal occupation of Hacienda Santa Fe. And Nicaragua's Annex II reservation unequivocally and unambiguously provides that the DR-CAFTA's MFN and NT standards do not apply to Nicaragua's measures "with respect to the provision of law enforcement."[984]

667. Indeed, as the United States recently explained in its intervention in *Gramercy v. Peru*, to prove that a measure constitutes a violation of the MFN Clause, "a claimant must also establish that the alleged non-conforming measures that constituted 'less favorable' treatment are not subject to the reservations contained in Annex II of the U.S.-Peru TPA."[985] The U.S.-Peru TPA and DR-CAFTA contain identical Articles 10.3, 10.4, and 10.13.

668. A State party to a treaty must have its reservations given proper effect. As recently explained by the United States in its intervention in *Gramercy v. Peru*, to prove that a measure constitutes a violation of the MFN Clause, "a claimant must also establish that the alleged non-conforming measures that constituted 'less favorable' treatment are not subject to the reservations contained in Annex II of the U.S.-Peru TPA."[986] The U.S.-Peru TPA and DR-CAFTA contain identical Articles 10.3, 10.4, and 10.13. To entertain Claimant's allegations that Nicaragua's provision of law enforcement during a period of civil strife resulted in disparate treatment between property owners would derogate Nicaragua's sovereign right to include its express reservation in Annex II. It would likewise derogate from the sovereignty of other DR-CAFTA parties who have

[984] DR-CAFTA, Annex II, at 472-473 (**CL-0001**).

[985] *Gramercy Funds Management LLC, et al. v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, ¶ 56 (**RL-0151**).

[986] *Gramercy Funds Management LLC, et al. v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, ¶ 56 (**RL-0151**).

included identical reservations to exclude "the provision of law enforcement" from MFN and NT obligations, including Costa Rica,[987] Dominican Republic,[988] El Salvador,[989] and Honduras.[990]

669. It follows that Riverside's MFN and NT claims fail because Nicaragua's law enforcement measures are not subject to Articles 10.3 and 10.4 of the DR-CAFTA.

a. *Even if DR-CAFTA Articles 10.3 and 10.4 Applied to Nicaragua's Law Enforcement Measures in Response to the Illegal Occupation of Hacienda Santa Fe, Riverside's MFN and NT Claims Would Fail*

670. Claimant's allegations that Nicaragua is in breach of the MFN and NT standards in Articles 10.3 and 10.4 are wrong as to international law and unsubstantiated on the evidence. Claimant has failed to adduce sufficient evidence to show: (i) discrimination *vis-à-vis* other investors in like circumstances; or (ii) that the alleged differences in treatment were not justified by rational government policies during a dangerous period of civil strife. In its Reply, Riverside purports to show that the law enforcement response to the 2018 invasion of Hacienda Santa Fé was inferior to that to incursions onto other properties near Managua, which were not in like circumstances. In addition, Riverside asks the Tribunal to second guess, without any proper basis, Nicaragua's sovereign decision-making about law enforcement deployments during a period of social upheaval and violent riots affecting the entire country. As will be demonstrated below,

671. But Riverside cannot even show that Nicaragua has in fact accorded Inagrosa discriminatory treatment *in concreto*. As Nicaragua established, it is necessary to show

[987] *See* DR-CAFTA, Annex II, at 466 (**CL-0001**).

[988] *See* DR-CAFTA, Annex II, at 468 (**CL-0001**).

[989] *See* DR-CAFTA, Annex II, at 468 (**CL-0001**).

[990] *See* DR-CAFTA, Annex II, at 471 (**CL-0001**). By contrast, Guatemala made no such express reservation, which demonstrates that excising law enforcement measures from MFN and NT obligations was a carefully considered aspect of the parties' consent to DR-CAFTA.

discrimination *vis-à-vis* an investor in "like circumstances" through a fact specific inquiry.[991] National treatment and MFN are relative standards.[992] They are intended to ensure that similarly situated foreign investors and their investments are treated no less favorably than other domestic investors or those from third-party countries.[993] Therefore, a comparison between investors and their investments is inherent in the analysis.

672. Riverside's argument turns on an artificially limited "likeness" concept. Riverside claims that the comparison should be between all lawful possessors of private land in Nicaragua.[994] Nicaragua explained that possessors of private land in Nicaragua is an unbelievably broad category of investors and would apply to enterprises in countless sectors[995]—this flaw in comparative analysis is fatal to its MFN and NT claims, and Riverside's continued reliance on such a broad category adds nothing new.

673. Indeed, arbitrary demarcation of comparators does not change the inherently fact-specific inquiry of these relative standards. For instance, in *Parkerings v. Lithuania*, although the claimant's project was "almost identically located" and shared "obvious similarities" to that of its proposed comparator, the tribunal noted that the claimant's project was substantially larger in scope and located in a more geographically sensitive area and thus distinguishable.[996] Riverside

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[991] Counter-Memorial, ¶ 390; *see also Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, ¶ 8.4 (**RL-0072**) ("[E]stablishing a violation of [the MFN clause] involves an inherently fact-specific analysis").

[992] Anqi Wang, *Applying the MFN Clause for higher Substantive Treatment* in The Interpretation and Application of the Most-Favored Nation Clause in Investment Arbitration, 74, 92 (Brill, 2022) (**RL-0071**).

[993] *See* DR-CAFTA, Articles 10.3 and 10.4 (**CL-0001**).

[994] *See* Reply, ¶¶ 1639-1646.

[995] Counter-Memorial, ¶ 390.

[996] *See Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, ¶ 396 (**CL-0094**) ("[D]espite similarities in objective and venue, the Tribunal has concluded, on balance, that the differences of size of Pinus Proprius and BP's projects, as well as the significant extension of the latter into the Old Town near the Cathedral area, are important enough to determine that the two investors were not *in like circumstances*. Furthermore, the Municipality of Vilnius was faced with numerous and solid oppositions from various bodies that relied on archaeological and environmental concerns. In the record, nothing convincing would show that such concerns were

has made no attempt at that level of granularity with its category of investors and corresponding investments—"all persons possessing private land in the territory of Nicaragua"—which, presumably, covers nearly the entirety of Nicaragua, is unduly broad on its face.[997]

674. Even if Riverside identified investors in "like circumstances" and established nationality-based discrimination *in concreto*, Riverside's MFN and NT claims still fail because it has not demonstrated that Respondent's measures were further to an irrational policy.[998] Indeed, tribunals and international scholars alike have repeatedly recognized that governments cannot be expected to provide equal degrees of protection in every region of the country, and it is not the role of investor-state arbitration to second guess police or military deployments. As the tribunal in *Louis Dreyfus v. India* warned:

> The Tribunal considers such questions about the proper deployment of law enforcement resources to be generally judgment calls, to be made by a State acting in good faith to protect individuals and local businesses from intimidation and violence, and exercising the degree of due diligence required by international law, based on the foreseeability of unrest in a particular area, the extent of available resources, and competing demands for allocation of those resources among other areas potentially also in need of law enforcement protection. In general, tribunals should be wary of second-guessing these judgment calls, except where the evidence

not determinant or were built up to reject BP's project. Thus the City of Vilnius did have legitimate grounds to distinguish between the two projects.").

[997] Moreover, it is well-settled that the purpose of national and MFN treatment is to prevent nationality-based discrimination. Claimant has made ***no attempt*** in showing that Nicaragua's alleged measures discriminatorily targeted U.S. investors. *See, e.g.*, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 181 (**CL-0044**) ("It is clear that the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or 'by reason of nationality.'"); *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 220 (**RL-0073)** ("Moreover, the Tribunal also concludes that the discrimination was based on nationality both in intent and effect."); *GAMI Investments Inc. v. Mexico*, UNCITRAL, Final Award, November 15, 2004, ¶ 115 (**RL-0075**) ("It is not conceivable that a Mexican corporation becomes entitled to the anti-discrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it."); *The Loewen Group Inc. et al v. United States*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, ¶ 139 (**RL-0075**) ("Article 1102 [national treatment] is directed only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality […]").

[998] *See* Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standard of Treatment (Kluwer Law International 2009), p. 310 (" *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Final Award, September 11, 2018, ¶ 382 (**RL-0052**).

> suggests bad faith, improper intent, or a serious lack of due diligence in response to a reasonably foreseeable and otherwise manageable threat.[999]

675. In that case, the tribunal found that India's law enforcement response to widespread protests was not contrary to its international obligations.[1000] The principles underlying the *Louis Dreyfus* tribunal's analysis are not new. In a decision handed down by an *ad hoc* tribunal in *Spanish Zone of Morocco Claims* in 1925, the relevant *diligentia quam in suis* principle was expressed as follows:

> The vigilance that from the point of view of international law the State is required to guarantee can be characterized, by applying by analogy a term from Roman law, as a *diligenceia quam in suis*. This rule, consistent with the overarching principle of the independence of States in their internal affairs, in fact offers States, for their nationals, the degree of security that they can reasonably expect. …
>
> What has just been said about the vigilance due in relation to the general insecurity resulting from the activity of brigands, applies with even greater reason to the two other situations considered above, namely: criminality of law common and rebellion. In the first of these cases, vigilance pushed further than *diligenceia quam in suis* would impose on the State the obligation to organize a special security service for foreigners, which would certainly go beyond the framework of recognized international obligations (in except in cases where it concerns persons legally enjoying special protection). In the other hypothesis, that of rebellion, etc., responsibility is limited because the public authorities find themselves in the presence of exceptional resistance.[1001]

676. More generally, tribunals have recognized that their mandate is not to second guess discretionary policy decisions. In line with these principles, Nicaragua cannot properly be found to have breached any treaty obligations on the basis of discretionary decisions about the relative deployment of limited law enforcement personnel in the municipality of San Rafael del Norte.

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[999] *See Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Final Award, September 11, 2018, ¶ 382 (**RL-0052**).

[1000] Relevantly, the tribunal found that "it appears that the limited effectiveness of the law enforcement response was more attributable to the size, mobility, and reach of the protesting groups" and not part of a conspiracy to target the investment in withholding police forces. *See Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Final Award, September 11, 2018, ¶¶ 381-385 (**RL-0052**).

[1001] Spanish Zone of Morocco Claims (*Spain v. United Kingdom*), Award, May 1, 1925, p. 644 (**RL-0150**).

Riverside ignores the reality that the invasions occurred all over the country, in both cities and rural areas, where authorities faced different levels of violence and the authorities had different resources.

677. None of the cases or alleged evictions referenced by Riverside are comparable to the invasions taking place in Hacienda Santa Fe. As demonstrated in Section IV.D.3, *supra*, all the examples cited by Riverside are cases of invasions that occurred in Managua and León, the two largest cities of Nicaragua. In 2018, the police in Managua were divided in ten "Police Districts", each district had assigned approximately ***168 police agents***.[1002] Similarly in Leon, there was one police station per each municipality. Leon has ten municipalities. The city of Leon (where some of Riverside's examples took place) had assigned approximately ***335 police agents*** and each one of the subunits had approximately twelve police agents depending on the population of the municipality. In total, the department of Leon had ***443 police agents***. When comparing the resources available in Managua and Leon with San Rafael del Norte, it is virtually impossible to make a fair comparison.[1003] In addition, none of the examples of the invasions cited by Riverside had near to 600 illegal occupiers in a property at a time (as it was believed there were at some point in Hacienda Santa Fe),[1004] some of them had as few as three occupiers. Riverside comparison is simply absurd.

[1002] Certificate by the National Police informing the number of agents assigned to Managua and Leon, Nicaragua dated March 5, 2024 (**R-00227**).

[1003] Riverside claims that one of the landowners is incorporated in Costa Rica, and thus, Nicaragua gave better treatment to a Costa Rican investor as that offered to Riverside, an American investor. *See* Reply ¶¶ 1157-1158. To be clear, and as explained in Section IV.C.3, *supra*, none of the examples are comparable, of either foreign or national landowners.

[1004] Gutiérrez-Rizo I, ¶ 76 (**RWS-01**) ("In May 2021, the Attorney General's Office for Jinotega signed several agreements with representatives of El Pavón Group, who also acted on behalf of more than 150 families occupying Hacienda Santa Fé.") – Assuming families on average of four members.

678. Simply put, Riverside has no evidence that Nicaragua responded more appropriately to land invasions in rural areas that presented comparable dangers; nor that such discrimination was nationality based. In absence of any comparators, Claimant cannot meet its burden of showing a breach on these grounds.

5. The Provisions of the Russia-Nicaragua and Switzerland-Nicaragua BITs Are Irrelevant to this Dispute

679. Riverside spends thirty additional pages arguing that DR-CAFTA's MFN clause entitles it to rely on alleged "more favorable" provisions.[1005]

680. In its Memorial, Riverside argued that the Russia-Nicaragua BIT (2012) ("**Russian BIT**") granted more favorable treatment to Russian investments in Nicaragua.

681. Now, in its Reply, Riverside attempts to import additional provisions from the Switzerland-Nicaragua BIT (1998) ("**Swiss BIT**") grants more favorable treatment to additional foreign investors (i.e., Swiss investors).[1006] For the reasons discussed below, the Tribunal should dismiss Claimant's attempt to import provisions of either treaty.

a. *Claimant Is Barred from Invoking the Swiss BIT in Light of Annex II of DR-CAFTA*

682. For the first time in its Reply, Riverside attempts to import allegedly more favorable provisions from the Swiss BIT related to civil strife, fair and equitable treatment, and compensation standards.[1007] Riverside's invocation of the Swiss BIT, however, contravenes Nicaragua's express reservation under Annex II of DR-CAFTA, and therefore any reliance Claimant places on the Swiss BIT is inadmissible and must be rejected.

[1005] Reply, pp. 257-287.

[1006] Reply, ¶¶ 217-222, 1142-1144, 1188-1192, 1252-1257.

[1007] *See* Reply, ¶¶ 217-222, 1142-1144, 1188-1192, 1252-1257.

683. Article 10.13 of DR-CAFTA, entitled "Non-Conforming Measures" provides that Articles 10.3 (National Treatment) and 10.4 (Most Favored Nation) "do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II."[1008]

684. In the referred Annex II, Nicaragua, as well as the other Parties to DR-CAFTA, listed several Non-Conforming Measures to which the MFN clause (in Article 10.4) shall not apply. In that regard, Annex II establishes that, for investments in all sectors:

> Nicaragua reserves, vis-à-vis the United States and the Dominican Republic, the right to adopt or maintain any measure that accord differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.[1009]

685. Under such a reservation, a United States investor's MFN-based claim is inadmissible if it invokes a measure which (i) accords differential treatment to another country, (ii) in accordance with any international treaty, (iii) in force or signed prior to the date of entry into force of DR-CAFTA.[1010] The Swiss BIT was executed in 1998 and entered into force in 2000, i.e., six years before DR-CAFTA entered into force.

686. Riverside elsewhere acknowledges the effect of Nicaragua's reservation when it affirmatively relied upon Annex II in its Memorial and Reply. Riverside acknowledged that "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."[1011] Riverside makes no mention of Nicaragua's Annex II reservations in the context of the Swiss BIT.

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[1008] DR-CAFTA, Article 10.13.2 (**CL-0001**).

[1009] DR-CAFTA, Annex II (**CL-0001**).

[1010] DR-CAFTA, Annex II (**CL-0001**).

[1011] Memorial, ¶ 453; Reply, ¶ 1179.

687. In light of Nicaragua's express reservation barring the retroactive application of DR-CAFTA's MFN clause, Riverside is unable to invoke the allegedly more favorable provisions in the Swiss BIT related to civil strife, fair and equitable treatment, and compensation standards.[1012] The Tribunal should find inadmissible any claims or arguments arising under the Swiss Treaty in order to give Nicaragua's express reservation in Annex II proper legal effect.

b. *Claimant Cannot Import and Rely Upon Other Provisions of the Russian BIT to Establish Breaches of DR-CAFTA*

688. Riverside also claims that "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."[1013] In sum, Riverside argues that the MFN obligation was violated when Nicaragua allegedly offered better treatment to investors from foreign countries as compared to the treatment provided to Riverside's investment.[1014] According to Riverside, Nicaragua has allegedly extended broader treatment under international law to Russian investors and their investments under the Russian BIT by granting: (a) a better definition of investment;[1015] (b) better fair and equitable treatment obligations; (c) better national treatment obligations; and (d) better expropriation provisions.[1016]

689. However, a Claimant may only import a provision from another treaty pursuant to an MFN clause when the MFN clause applies. As the *Mesa Power v. Canada* tribunal explained:

[1012] *See* Reply, ¶¶ 217-222, 1142-1144, 1188-1192, 1252-1257.

[1013] Reply, ¶ 1147.

[1014] Reply, pp. 257-287.

[1015] *See* Reply, ¶¶ 1161-1163. Claimant alleges that the consents and waivers provisions in DR-CAFTA's "definition of investment" bestow upon it less favorable treatment than Russian investors under the Russian BIT. Claimant has in no way made an attempt to establish why this is at all relevant to this case; and indeed Nicaragua sees no need to respond but reserves the right to do so, if Claimant clarifies the relevance of its argument.

[1016] Claimant seeks to import Article 2(2) (constant legal protection), Article 3(1) (fair and equitable treatment), Article 3(2) (national treatment), and Article 4 (expropriation) of the Russian BIT. *See* Reply, ¶¶ 1297-1306; 1430-1431.

> For an MFN clause in a base treaty to allow the importation of a more favorable standard of protection from a third party treaty, the applicability of the MFN clause in the base treaty must first be established. Put differently, one must first be under the treaty to claim through the treaty. Thus, the Claimant must first establish that the MFN provision of the base treaty applies. Then, relying on that provision, it may be able to import a more favorable standard of protection from a third party treaty.[1017]

690. Under that standard, Riverside must prove that it: (i) satisfies the requirements in Article 10.4 of DR-CAFTA; and (ii) proves that the clause in the third party treaty, *i.e.*, Russian BIT, is more favorable. Article 10.4 of DR-CAFTA provides:

> 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.[1018]

691. Article 10.4(1) and (2) clearly provide that the MFN clause only applies to investors and investments in "like circumstances." Claimant, notably fails to identify a single Russian investor in Nicaragua under "like circumstances"; and, absent that analysis, Claimant cannot seek to import any provision of the Russian BIT.

692. Even if it could, Claimant has provided no meaningful explanation as to how the provisions it wishes to import from the Russian BIT are more favorable, and, further, Claimant completely fails to prove the content of the standards it wishes to apply. Indeed, NAFTA tribunals, analyzing an identical MFN clause as in DR-CAFTA have held that a claimant cannot import

[1017] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016, ¶ 401 (**RL-0192**).

[1018] DR-CAFTA, Art. 10.4 (**CL-0001**).

substantive clauses in other treaties when the claimant fails to prove that the clause in the third treaty "grants any additional measure of protection not afforded by" the base treaty, and, in addition has "not established that the Respondent's conduct was in breach of such hypothetical additional measure of protection allegedly afforded" by the clause in the third treaty.[1019]

693. It is therefore not enough for Riverside to simply characterize clauses in the Russian BIT as more favorable without proving that the Russian BIT clauses are, in fact, more favorable; and, further, that Nicaragua has breached those clauses of the Russian BIT. Riverside has engaged in no such analysis. Therefore, Claimant cannot import and rely upon Article 2(2) (constant legal protection), Article 3(1) (fair and equitable treatment), Article 3(2) (national treatment), and Article 4 (expropriation) of the Russian BIT.

* * *

694. For all the reasons stated above, Riverside has failed to show any breach of the DR-CAFTA's NT and MFN standards, whether as a breach of relative treatment or through a comparator treaty. Specifically, Riverside has failed to identify any other national or foreign investors or investments in like circumstances to which the State provided better treatment. And even if the Tribunal were to conclude that Riverside could otherwise articulate a claim for breach of the NT and MFN standards, such claims—together with Riverside's expropriation, FET, and FPS claims--would still fail because Nicaragua's actions were subject to the provisions of Articles 21.2(b) and 10.6 of DR-CAFTA.

[1019] *See Chemtura Corp. v. Government of Canada,* PCA Case No. 2008-01, Award, August 2, 2010, ¶ 236 (**RL-050**).

## V. RIVERSIDE IS NOT ENTITLED TO COMPENSATION

695. In its original Memorial, Claimant submitted a report from its quantum expert, Mr. Vimal Kotecha of Richter (the "**Kotecha First Report**") that concluded that, as of June 16, 2018, *i.e.*, the "**Valuation Date**," Claimant's investments in Inagrosa were worth a little ***more than USD $644 million***.[1020] The basis of that figure comes from a ("**DCF**") model prepared by Mr. Richter, which supposes that, as of the Valuation Date, Inagrosa owned an extremely profitable Hass avocado business—the first of its kind in Nicaragua—and a lucrative forestry business.[1021] As the First Kotecha Report readily concedes, however, those suppositions do not come from objective, independently verified evidence.[1022] Rather, they come from a letter, written by Claimant's representative (Carlos Rondón) ***after*** this arbitration began that is devoid of any exhibits or evidence in support of its conclusions or instructions to Mr. Kotecha (the "**Management Letter**").[1023]

696. In the Counter-Memorial, Nicaragua offered a report from Messrs. Timothy Hart and Kenneth Kratovil of Credibility International ("**Credibility**"), its quantum experts, that confirmed the DCF model in the First Kotecha Report is predicated on myriad factual assumptions that are completely unproven, such as: (i) Inagrosa had a viable 40-hectare Hass avocado plantation; (ii) that plantation had a successful first harvest in 2017; (iii) the plantation was on the cusp of producing a second successful harvest in 2018; (iv) a 200-hectare expansion of that plantation was underway as of the Valuation Date; (v) the plan was to expand this plantation to 1,000 hectares (*i.e.*, nearly all of the land in Hacienda Santa Fé); (v) Inagrosa would have been

[1020] Kotecha I, ¶ 3.1 (**CES-01**).

[1021] Kotecha I, ¶ 3.2 (**CES-01**).

[1022] *See* Kotecha I, Appendix 3 (**CES-01**).

[1023] *See* Kotecha I, Appendix 3 (**CES-01**).

able to commercialize their product as soon as 2018, despite having absolutely no permits, let alone buyers; (vi) Inagrosa had a lucrative forestry business, despite having no permits and despite Inagrosa having requested that Hacienda Santa Fé be classified as a private wildlife reserve (where cutting down trees would be completely prohibited). As Credibility explained in its first report ("**Credibility First Report**") these unsupported assumptions mean Mr. Kotecha's DCF model is completely unreliable because, as the adage goes, "when you put garbage in, you get garbage out."[1024]

697. Claimant already proved this adage true in its Reply. Mr. Kotecha's second report ("**Kotecha Second Report**") concedes that Mr. Kotecha's initial assumptions were too optimistic.[1025] Mr. Kotecha's DCF model now projects Claimant's damages to be USD $240,995,140, *i.e.*, ***37 percent of the quantum that Mr. Kotecha's model previously projected***.[1026] These are the kinds of volatile swings that result from even just a few unreliable assumptions in a DCF model.

698. Many faulty assumptions ***remain*** in Mr. Kotecha's updated DCF model, ensuring that its outputs continue to be wildly speculative. Indeed, Mr. Kotecha's model still relies on a series of assumptions about the Hass avocado business that are unsupported. For instance, Mr. Kotecha still takes as true a series of assumptions from the Management Letter[1027] that Nicaragua has disproven, as detailed in Section II, *supra*, such as the assumptions that:

a. Inagrosa had the financial means to run and operate an avocado business, despite objective evidence showing Inagrosa was broke, in hundreds of

[1024] Credibility I, ¶ 117 (**RER-02**).

[1025] Kotecha II, ¶¶ 2.5-2.6 (**CES-04**).

[1026] Kotecha II, ¶ 2.6, Appendix VI, Schedule 1 (**CES-04**).

[1027] Credibility II, ¶ 29 (**RER-04**).

thousands of dollars in debt, without debt financing, and with only one investor (Riverside) that had not invested in Inagrosa since 2014 (and was trying, but failed, to secure outside capital instead of investing more money);

b. Inagrosa had the know-how to cultivate Hass avocados, despite objective evidence confirming no one at Inagrosa had prior experience in this highly technical business to grow this highly finicky crop, as reflected by the comedy of technical errors that Inagrosa made as identified by Nicaragua's avocado expert, Dr. Duarte;

c. Hacienda Santa Fé had the right climatological, topographic, biological, and soil conditions to be able to grow Hass avocados at a commercial scale, particularly given that no one has ever done so in Nicaragua and given that Hass avocados are not endemic to Nicaragua.

d. Inagrosa had the legal authority to run the business, despite the undisputed fact that Inagrosa had no permits of any kind for this business as well as the fact that Hacienda Santa Fé had been designated a private wildlife reserve and, thus, it would have been illegal to exploit the land for commercial use;

e. Inagrosa's experimental Hass avocado plantation had a performance track record that supported the estimates in the Management Letter and that could be extrapolated to predict future performance, despite there being no proof that the inaugural 2017 harvest was in any way successful;

f. Inagrosa had the ability to commercialize avocados from the 2018 harvest, despite the undisputed facts that Inagrosa had no permits to commercialize

this product and no means to keep the avocados from rotting while Inagrosa spent months, if not years, obtaining such permits;

g. Inagrosa had the ability to export Hass avocados to the U.S. by 2022, despite there being a longstanding U.S. ban on avocados from Nicaragua and no evidence in this record that the ban is likely to be lifted by 2022 (or ever), as explained by Dr. Duarte and Mr. Rosales; and

h. Inagrosa had the ability to export Hass avocados to Canada from 2019 to 2021, despite the fact Nicaragua has never exported fruit to Canada and, therefore, there need to be myriad analyses by Canada and Nicaragua before this type of exportation could be deemed to be possible (particularly given that Canada's neighbor, the U.S., has banned Nicaraguan avocados);

i. Inagrosa had the ability to export Hass avocados to Costa Rica starting in 2018, despite the fact that Inagrosa had not cleared any of the phytosanitary inspections and given the evidence in the record demonstrating that Inagrosa's seeds and fruit were plague-stricken and prone to rot (and thus unlikely to clear those inspections);

j. Inagrosa had the ability to export Hass avocados to any country, despite the fact that Inagrosa had no infrastructure to package, process, or ship its crop;

k. Inagrosa had the ability to carry on as an agricultural business in Nicaragua despite the reality that Inagrosa violated many environmental, hydrological, and phytosanitary laws and regulations for several years and is therefore vulnerable to criminal and civil liability as well as administrative penalties such as suspension and closure; and

l. Riverside should receive 100 percent of Inagrosa's projected profits despite only owning 25.5 percent of Inagrosa.

699. Mr. Kotecha's DCF model also assumes that Inagrosa had a forestry business based on the Management Letter's instructions and a one-page, handwritten document that includes basic information about certain hardwood trees at Hacienda Santa Fé.[1028] There is no formal business plan, feasibility study, permits, or objective evidence that supports the notion that this business existed. And, as detailed in Section II.D, *supra*, all objective evidence confirms this business did not exist, ***such as Inagrosa's admissions in contemporaneous filings that it had no intention to log the forests and instead wanted to protect them***. Nor is there evidence supporting the Management Letter's instruction that the value of the trees were worth USD $5.1 million. Nor is there evidence that the hardwood trees were destroyed by the invaders. Yet, these are assumptions Mr. Kotecha takes at face value, without any independent review.

700. In the Kotecha Second Report, Mr. Kotecha says that accusations that he has taken instructions at face value and without meaningful independent review "are not well taken."[1029] And Riverside insists that Mr. Kotecha "carefully and independently evaluated the information in the Management Representation Letter before the information was considered for use" in his original report.[1030] But, if that were the case, then Mr. Kotecha would not have fed his DCF model such wild and unsupported assumptions that, by his own admission, forced him in his Second Report to reduce his total quantum by 63 percent, which also accounts for a 70 percent reduction

[1028] *See* Kotecha II, ¶¶ 7.2-7.6 (**CES-04**); Tree Census at Hacienda Santa Fe prepared by Luis Gutierrez, January 20, 2018 (**C-0084**).

[1029] Kotecha II, ¶ 7.6 (**CES-04**).

[1030] Reply, ¶ 1871.

in Inagrosa's enterprise value.[1031] As Credibility explains, "[a]lthough Mr. Kotecha's new calculations are unsupported and riddled with errors, the fact that there is such a significant difference between his reports is clear evidence that Mr. Kotecha did not independently verify the Representation Letter as he now asserts."[1032]

701. Mr. Kotecha continues his contradictions when he claims, "[i]n preparing the First Expert Damages Report, I reviewed historical financial statements of INAGROSA[.]"[1033] But that is not possible. The statements that he says he reviewed[1034] were created in 2023 (as seen from the below excerpt),[1035] and Mr. Kotecha's first report was submitted in 2022.

C-0473

**INVERSIONES AGROPECUARIAS, SOCIEDAD ANONIMA**
**PROFIT & LOSS STATEMENT**
***EXPRESSED IN DOLLARS***

| *Year* | *2010* |
|---|---|
| *As of* | *June 30th* |
| *SALES INCOME* | *$1,094,188.74* |
| *(-) PRODUCTION SALES EXPENSES* | *$837,375.49* |
| ***GROSS PROFIT*** | ***$256,813.25*** |
| *(-) ADMINISTRATIVE EXPENSES* | *$94,053.16* |
| *(-) FINANTIAL EXPENSES* | *$28,106.76* |
| ***OPERATING PROFIT*** | ***$134,653.33*** |
| *(-) OTHER EXPENSES* | *$0.00* |
| *(+) NON OPERATING INCOMES* | *$0.00* |
| ***NET INCOME BEFORE TAXES*** | ***$134,653.33*** |
| *(-) INCOME TAX* | *$0.00* |
| ***NET INCOME FOR THE PERIOD*** | ***$134,653.33*** |

**PREPARED BY: VICTOR LOPEZ ON DATE OF : 09-01-2023**

[1031] Credibility II, ¶ 29 (**RER-04**) ("Instead Mr. Kotecha relied upon every assertion in the Representation Letter in his first report, resulting in a calculated avocado experiment enterprise value of $431.95 million. In his second report, Mr. Kotecha calculates an enterprise value of $130.5 million, a reduction of 70%.").

[1032] Credibility II, ¶ 29 (**RER-04**).

[1033] Kotecha II, ¶ 4.17, fn. 87 (**CES-04**).

[1034] *See* 2010 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0473**), 2011 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0474**), 2012 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0475**), 2013 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0476**), 2014 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0477**), 2015 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0478**), 2016 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0479**), 2017 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0480**), 2018 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0481**), 2010-2020 INAGROSA Profit & Loss Statement Summary, September 1, 2023 (**C-0504**), 2019 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0505**), 2020 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0506**).

[1035] *See* 2010 INAGROSA Profit & Loss Statement, September 1, 2023 (**C-0473**).

702. In another contradiction, Riverside now changes its alleged target export markets for avocados. In its Memorial, Riverside alleged that Inagrosa would have sold its Hass avocados to Costa Rica from 2018-2019 and then to the U.S. starting in 2020.[1036] In its Reply, Riverside now says that Inagrosa would sell avocados to Costa Rica in 2018, Canada from 2019-2021, then the U.S. starting in 2022.[1037] The export target is a ***major*** input that can cause significant fluctuations in any DCF model. Yet, Mr. Kotecha just accepted this moving of the goalposts at face value, almost as if Riverside's original export story never existed.

703. In addition to improperly excusing the dearth of evidence that supports the myriad instructions from Riverside, Mr. Kotecha also excuses the unbelievable reasons given by Riverside as to why all the typical documents one would see with a business are missing here. According to Riverside, Inagrosa's business records are missing because: (i) its "laptop"[1038] or "computers"[1039] (Riverside changes its story on this point) were stolen; (ii) its paper records were destroyed;[1040] (iii) its backup tapes were destroyed;[1041] (iv) its email was hacked and, subsequently, lost;[1042] (v) third-party professionals lost Inagrosa records;[1043] and (vi) Inagrosa—a company that Riverside and Mr. Kotecha value at hundreds of millions of dollars—preferred to run its business orally and without paper.[1044] But none of these explanations appears to trouble Mr. Kotecha, who seems to

[1036] *See* Memorial, ¶¶ 361-362, 370; *see also* Kotecha I, ¶ A3.7 (**CES-01**).

[1037] *See* Reply, ¶¶ 1978-1981; *see also* Kotecha II, Chart 6 (**CES-04**).

[1038] Memorial, ¶ 231.

[1039] Reply, ¶ 1861.

[1040] Reply, ¶ 1860.

[1041] Reply, ¶¶ 1860, 1864.

[1042] Reply, ¶ 1865.

[1043] Reply, ¶ 1862.

[1044] Reply, ¶ 1913.

accept all these excuses and, worse, to accept the selective and often-changing "memor[ies]" of Messrs. Rondón, Gutiérrez, and Welty in lieu of verifiable and objective evidence.[1045]

704. In sum, because Riverside has not come close to meeting its burden of proof, and, because the objective evidence in this record has been debunked, disproven, or refuted, the assumptions on which Mr. Kotecha relies in his DCF model continue to result in unreliable projections.

### A. Riverside's DCF Valuation for Inagrosa Remains Wholly Inappropriate

705. Because the DCF model is completely unreliable, it cannot serve as a barometer for the fair market value of Riverside's investments.

706. In its Reply, Riverside attempts to cast the DCF model as a reliable approach for pre-operational ventures, which implicitly concedes that Inagrosa was, in fact, pre-operational.[1046] In doing so, Riverside invokes select arbitral awards to justify its use of the DCF method.[1047]

707. Riverside principally relies upon the standard set forth in *Rusoro v. Venezuela*, which involved a pre-operational gold mine.[1048] Under that standard, a tribunal ***could*** apply a DCF methodology "if all, or at least a significant part, of the following criteria are met": (1) established historical record of financial performance; (2) reliable projections of its future cash flow, in the form of a detailed contemporaneous business plan prepared by the company's officers and verified by an impartial expert; (3) the price of the product to be sold can be determined with reasonable certainty; (4) business plan can be financed with self-generated cash, or, alternatively, no uncertainty with availability of other financing; (5) a meaningful WACC calculation is possible;

[1045] Kotecha II, pp. 13-14 (**CES-04**).

[1046] Reply, ¶¶ 1809-1814.

[1047] *See* Reply, ¶¶ 1815-1846.

[1048] *See* Reply, ¶¶ 1814-1815.

and (6) the enterprise is active in a sector with low regulatory pressure, or, if regulatory pressure is high, the impact on future cash flows can be established with a minimum of certainty.[1049] Riverside then proceeds to contort its scant evidence to satisfy the *Rusoro* standard.[1050]

708. In this section, Nicaragua will establish that Riverside's Counter-Memorial does nothing to advance its DCF-based damages request. ***First***, the select authorities on which Claimant relies to justify its application of the DCF method are inapt, and it remains the case, as Nicaragua established in its Counter-Memorial, that the DCF method is still inapplicable to Inagrosa. ***Second***, even if the Tribunal were to apply the *Rusoro* test, the DCF method would still be inappropriate in light of the scant and unreliable evidence Claimant has produced to support its inputs.

### 1. Application of the DCF Model to This Case Is Contrary to International Arbitral Practice and Economic Principles

709. In its Memorial, Claimant alleged that "Inagrosa was an established business with a successful and established Hass avocado orchard" and "[g]enerally, the valuation of established businesses follows a Discounted Cash Flow ("**DCF**") analysis."[1051] Nicaragua demonstrated in its Counter-Memorial that the DCF method was inapplicable in accordance with prior investment arbitration practice and given the speculative and unproven assumptions in Mr. Kotecha's DCF analysis.[1052] In support, Nicaragua relied upon several decisions demonstrating the inapplicability of the DCF method where the investment lacks a proven financial track record, such as *PSEG v.*

[1049] *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, ¶ 759 (**CL-0206**).

[1050] Reply, ¶¶ 1856-1893.

[1051] Memorial, ¶ 787; *see also id.* at ¶¶ 788, 831-833 (Riverside citing to *CMS v. Argentina* (**CL-0053**) and *S.D. Myers v. Canada* (**CL-0064**) in conclusory fashion to give the appearance that Inagrosa's businesses were established and therefore a DCF valuation could be applied as a matter of fact).

[1052] Counter-Memorial, §§ V.B.-V.C.

*Turkey*, *Metalclad v. Mexico*, *Wena Hotels v. Egypt*, *Arif v. Moldova*, *Vivendi v. Argentina*, and *Siemens v. Argentina*.[1053] Riverside failed to rebut any of these authorities.[1054]

710. Instead, Riverside has now fundamentally changed its position, claiming that its pre-operational businesses can still be valued under the DCF approach. This argument is notable because Riverside, in other parts of its Reply, claims Inagrosa's avocado and hardwood lumber businesses were operational, yet, when it needs to skirt around a strict application of the DCF method, it concedes that Inagrosa was pre-operational. In any event, Riverside still has not gotten close to establishing a colorable legal or economic basis for applying a DCF valuation here, and thus any consideration of the DCF approach must be disregarded at the outset.

a. *Established Investment Jurisprudence Confirms that the DCF Methodology Is Inapplicable Here*

711. Applying a DCF methodology here would be contrary to established international practice and economic principles because, under the circumstances, the inputs to arrive at a DCF valuation are speculative and unreliable as Inagrosa's avocado and hardwood timber operations were hardly in an embryonic state. And, as detailed extensively in Section II, *supra*, all of the contemporaneous evidence confirms that Inagrosa was ***not*** pursuing those businesses, given its real-time representations that it wanted Hacienda Santa Fé to be classified as a private wildlife reserve (where it is illegal to exploit the land for agricultural use and, certainly, to log the forest) and also given the undisputed fact that Inagrosa never secured even just ***one*** permit for these businesses (and likely never would given Inagrosa's numerous violations of Nicaragua's phytosanitary, water, and environmental laws).

[1053] Counter-Memorial, ¶¶ 443-448.

[1054] Riverside only offered vague and conclusory statements related to *PSEG*, *Metalclad*, and *Wena Hotels* in a brief footnote. *See* Reply, fn. 1962.

712. Indeed, it is well-settled in investment arbitration that using a DCF methodology for a pre-operational business is "the exception rather than the rule, since in most of such cases no sufficient objective criteria can be ascertained to reduce the speculative element in the DCF method."[1055]

713. Nicaragua's damages experts reaffirm that application of the DCF methodology here remains contrary to established valuation principles. According to Credibility, "including but not limited to the lack of historical operations, lack of profitability, lack of proper feasibility study and lack of funding, the DCF method is speculative and unreliable."[1056]

714. This Tribunal need look no further than what has already transpired in ***this*** case, in which from one pleading to another Mr. Kotecha has changed significant inputs in his model that, in turn, caused a ***70 percent*** swing in that model's projections.

715. The complete lack of objective historical financial information thus renders the DCF method completely inapplicable under accepted valuation principles. At its very basic level, "[t]he DCF methodology determines the business value as the present value of expected future net cash flows discounted at a rate reflecting the time value of money and the risks attributable to these cash flows."[1057] In particular, *The Guide to Damages in International Arbitration* treatise explains:

> The identification of the relevant cash flows attributable to the valuation object will typically involve a review of the existing internal and external financial reporting; for example, annual, quarterly or monthly financial statements, (monthly) management reporting, profit or cost centre reporting, or reporting on cost units such as products or projects.[1058]

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[1055] *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶ 442 (**CL-0184**).

[1056] Credibility II, ¶ 166; *see also* Credibility II, Appendix K: Use of the DCF Method.

[1057] A. Demuth, "Income Approach and the Discounted Cash Flow Methodology," *Global Arbitration Review*, December 19, 2022 (**RL-0145**).

[1058] A. Demuth, "Income Approach and the Discounted Cash Flow Methodology," *Global Arbitration Review*, December 19, 2022 (**RL-0145**).

716. Credibility demonstrated in its First Report that Riverside wholly failed to produce the typical suite of financial information necessary to support a reliable DCF assessment.[1059] Although Riverside produced few additional documents in its Reply, Credibility explains that "the Second Kotecha Report fails to rectify this problem and in fact often presents either no new information or information that contradicts Mr. Kotecha's original claims" and "although the Second Kotecha Report continuously attempts to 'move the goal posts,' resulting in a 70% reduction in Inagrosa's projected enterprise value, these new calculations are baseless at their foundation, meaning they remain a fictitious construction of numbers unsupported by documents and unconnected to the actual alleged investment."[1060] Credibility also reaffirmed its opinion that "Inagrosa was a small, distressed company with very limited operations and low liquidity" and "would not be considered a going concern."[1061]

717. The World Bank defines a "going concern" as:

> [A]n enterprise consisting of income-producing assets which has been in operation for a ***sufficient period of time to generate the data required for the calculation of future income*** and ***which could have been expected with reasonable certainty***, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State[.][1062]

718. It is undisputed that Inagrosa ***never*** sold an avocado or hardwood timber product prior to the alleged measures in 2018. The circumstances here are not that Inagrosa consisted of "income-producing assets" that have "been in operation for a sufficient period of time to generate

[1059] *See* Credibility I, ¶ 14, Table 2.1 (**RER-02**).

[1060] Credibility II, ¶ 20 (**RER-04**).

[1061] Credibility II, ¶ 30 (**RER-04**).

[1062] The World Bank Group, *Legal Framework for the Treatment of Foreign Investments*, Vol. II, Guidelines on the Treatment of Foreign Direct Investment, September 1992, § IV.6 (**RL-0149**) (emphasis added).

data requires for the calculation of future income"[1063]—rather, Inagrosa has not recorded any avocado or hardwood timber revenues at any time. In other words, there is no historical data upon which to project future income, which is exactly why Mr. Kotecha relies on self-serving subjective evidence from Riverside's witnesses rather than contemporaneous corporate records.

719. Nor can it be "expected with reasonable certainty" that Inagrosa will generate future income from its alleged avocado and forestry businesses.[1064] As detailed in Section II.C.3, *supra*, it is undisputed that Inagrosa had none of the permits needed to run either business; and its continuous non-compliance with Nicaragua's environmental, phytosanitary, and water laws made it possible, if not certain, that Inagrosa would be subjected to significant criminal, civil, and administrative penalties, such as closure. Beyond that, it is also undisputed in this case that, as of the Valuation Date, Inagrosa was pursuing, and in fact received, a ministerial resolution declaring that Hacienda Santa Fé is a private wildlife reserve,[1065] which prohibited Inagrosa from running either the avocado or forestry businesses, as confirmed by Nicaragua's fact witnesses, independent Nicaraguan legal expert Dr. Sequeira, and Mr. Rondón, himself, who noted in his applications for this designation that he intended to "conserve" the Hacienda as it is (without any mention of running an avocado or forestry business).[1066]

720. Furthermore, even if Inagrosa were treated as a going concern—which it was not in 2018—that fact alone would be insufficient for justifying application of a DCF model. Tribunals have confirmed that the investment in question must establish a history of profitability. For

[1063] The World Bank Group, *Legal Framework for the Treatment of Foreign Investments*, Vol. II, Guidelines on the Treatment of Foreign Direct Investment, September 1992, § IV.6 (**RL-0149**).

[1064] The World Bank Group, *Legal Framework for the Treatment of Foreign Investments*, Vol. II, Guidelines on the Treatment of Foreign Direct Investment, September 1992, § IV.6 (**RL-0149**) (emphasis added).

[1065] *See* Section II.C.4, *supra*.

[1066] *See* Section II.C.4, *supra*; *see also* Credibility II, ¶¶ 110-111 (**RER-04**); Credibility I, ¶ 177 (**RER-04**).

instance, in *Caratube v. Kazakhstan*, in rejecting the DCF approach, the tribunal considered that claimant's oil exploration and extraction investment was not deemed a going concern when it had operated under the concession contract for five years but had operated with negative cash flows and never became profitable.[1067] The *Caratube* tribunal proceeded to note that "the sufficient certainty standard is usually quite difficult to meet in the absence of a going concern and a proven record of profitability."[1068] As the *NextEra v. Spain* decision establishes, even some history of profitability can be insufficient for a DCF valuation because "a critical element in the application of the DCF method is finding an appropriate base for the forecast of future earnings."[1069] In *NextEra* claimant "was relying on less than a year of profits in order to project long-term earnings for the next 30 years," which the tribunal found was "not a sufficient basis for the application of the DCF method in this case."[1070]

721. Riverside gives this Tribunal a more speculative task than those in *Caratube* and *NextEra*. In *Caratube* and *NextEra*, both investments had been generating revenues and NextEra's investment had turned a profit for several months. Riverside, by contrast, cannot even pretend that Inagrosa ever sold a single avocado. According to Riverside, "[c]onsidering 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."[1071] That single statement gives the lie

[1067] *See Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, September 27, 2017, ¶¶ 1097-1099, 1131 (**RL-0182**).

[1068] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, September 27, 2017, ¶ 1099 (**RL-0182**) (*citing Micula v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, December 11, 2013, ¶ 1010 (**CL-0235**)).

[1069] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, March 12, 2019, ¶ 643 (**RL-0183**).

[1070] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, March 12, 2019, ¶¶ 643, 647 (**RL-0183**).

[1071] Reply, ¶ 1990.

to Riverside's DCF argument. The number of logical leaps to equate mere cultivation to a going concern are incalculable. By Riverside's tortured logic, a hobbyist without an established track record of commercializing its product would be enough for the DCF method to apply. The use of the DCF methodology must therefore be dismissed as a matter of principle.

722. Even the decision in *Rusoro*, upon which Riverside relies significantly, the tribunal explained the DCF method should allow an expert "to estimate with reasonable certainty a number of future parameters (income, expenses, investments)," but, the tribunal added, "[i]f the estimation of those parameters is incorrect, the results will not represent the actual fair market value of the enterprise. Small adjustments in the estimation can yield significant divergences in the results."

723. As Credibility explains, Mr. Kotecha revised a mere few inputs—such as avocado prices, projected kilograms of avocados per tree, and estimated costs—and those minor variations resulted in a 70% reduction in Inagrosa's enterprise value under Mr. Kotecha's model.[1072] This ***is exactly the type of scenario*** that *Rusoro* and other arbitral decisions have identified as a hallmark of an unreliable damages model.

724. The damages treatise authored by Ripinsky and Williams also explains:

> The review of case law shows that the ***key factor*** in whether the DCF method will be accepted by a tribunal in a specific dispute ***is the amount of evidence demonstrating the likelihood of projected cash flows actually being realized***. The ***standard of proof in this respect appears to be rather high***. So far, the tribunals have treated the ***historic data*** of enterprise's profitable operations as the best support for future projections.[1073]

725. Claimant has not met its "high" burden. As noted earlier, there is no historic data of performance but, worse, there is no objective evidence that Inagrosa would have been able to

[1072] *See* Credibility II, ¶ 13 (**RER-04**).

[1073] S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008), p. 211 (**CL-0203**) (emphasis added).

sell one avocado, let alone become the first-ever Hass avocado exporter from Nicaragua with the ability to seize a significant market share in the U.S., Canada, and Costa Rican markets. Everything Riverside says to the contrary comes from ***subjective sources of evidence from individuals who have every reason to overstate Inagrosa's projected performance***. Indeed, Mr. Kotecha's model is almost entirely reliant on testimony from Messrs. Rondón and Gutiérrez. Even the "business plans" on which Mr. Kotecha relies extensively come from Mr. Welty—Riverside's executive—who in his own correspondences admitted that the story he was pitching to investors through these barebones plans were "too good to be true."[1074]

726. Notably missing from this record, let alone Mr. Kotecha's report, is objective data, *i.e.*, information from sources outside of Riverside and Inagrosa who corroborate what Riverside is alleging here. Indeed Inagrosa's businesses never received permits, which is an objective marker for the existence of a legitimate business. Inagrosa never received investments from third parties, in fact on fifteen occasions third-party investors refused to invest in Inagrosa.[1075] Inagrosa never received loans from commercial or development banks, which should in and of itself be a red flag. No outside consultants ever declared Inagrosa's businesses to be feasible.

727. The lack of supporting financial information for Inagrosa raises fundamental uncertainties about the viability of its avocado or hardwood businesses. As the *Tethyan Copper v. Pakistan* tribunal explained, "[i]f the Tribunal reaches the conclusion that there are 'fundamental uncertainties' due to which it is not convinced that the project would have reached the operational stage and would have been able to generate profits, it cannot apply the DCF method."[1076]

[1074] Email from Russ Welty re: RVHA Business Plan, June 26, 2017 (**C-0647**).

[1075] *See* Credibility II, § 3.4 (**RER-04**).

[1076] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 12, 2019, ¶ 330 (**CL-0205**).

b. *The Arbitral Decisions on Which Claimant Relies Are Totally Inapposite Here*

728. Riverside attempts to get around the warning in *Tethyan* by introducing cases where a DCF was allegedly applied to pre-operational ventures.[1077] In particular, Claimant points to *Rusoro Mining v. Venezuela*, *Crystallex v. Venezuela*, *Gold Reserve v. Venezuela*, *Tethyan Copper v. Pakistan*, *Hydro and others v. Albania*, and *Rumeli Telekom v. Kazakhstan*.[1078] What is common to these cases, however, is that there were ***objective*** factors that allowed a positive assessment of the hypothetical profitability of the companies concerned. That is not the case in this arbitration, where there were no feasibility studies, outside investors, or any objective hallmark of a viable business.

729. Indeed, *Rusoro*, *Crystallex*, *Gold Reserve*, and *Tethyan Copper* involved mining ventures where the quantity and price of minerals were reasonably certain due to detailed business plans and feasibility studies; and each of the ventures were adequately capitalized. In *Hydro and others v. Albania* and *Rumeli v. Kazakhstan* both investments had proven and documented periods of operating and generating revenue. Again, none of these objective markers is present in this case.

730. Claimant principally relies upon the *Rusoro Mining v. Venezuela* decision to set forth the relevant factors for a tribunal to decide whether a DCF method ought to be applied at the outset.[1079] Respondent will demonstrate later in this section why none of those factors have been established here. It should, however, be noted that *Rusoro Mining* does not support Claimant's application of the DCF method. The *Rusoro* tribunal ultimately rejected the DCF model because "75% of the cash flows to be valued derive not from existing facilities, but rather from the yet to

[1077] *See* Reply, ¶¶ 1815-1846.

[1078] *See* Reply, ¶¶ 1815-1846.

[1079] *See* Reply, ¶ 815.

be built expansion" and therefore "lack[ed] a proven record of financial performance[.]"[1080] Inagrosa's claimed avocado expansion far exceeds the 75% threshold in *Rusoro*. Credibility has determined that "Mr. Kotecha projects that Inagrosa will plant a total 691,812 avocado trees, of which 17,900 were allegedly planted prior to June 2018. Accordingly, approximately 97% of the production and resulting cash flows to be valued are derived from the expansion and not from existing avocado trees."[1081]

731. In *Crystallex v. Venezuela*, the claimant held a concession for a pre-operational gold mine that was expropriated by Venezuela.[1082] Riverside alleges the *Crystallex* tribunal "conclude[d] that was DCF method was appropriate."[1083] But the tribunal never considered the DCF approach and instead calculated the average of the stock market and market multiples valuations provided by the claimant.[1084] The *Crystallex* Award, however, emphasizes a contrast to the unreliable information Riverside has presented to this Tribunal. The *Crystallex* tribunal noted that the claimant had "feasibility studies" completed by "well-known consultants" over several years that showed the precise quantity of gold deposits and costs associated with extraction.[1085] The tribunal also noted that "gold, unlike most consumer products or even other commodities, is less subject to ordinary supply-demand dynamics or market fluctuations" and thus accepted "that predicting future income from ascertained reserves" with "the use of traditional mining

[1080] *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, ¶ 785 (**CL-0206**).

[1081] Credibility II, ¶ 180.

[1082] *Crystallex International Corporation v. Venezuela*, Award, ICSID Case No. ARB (AF) 11/2, April 4, 2016, ¶ 7 (**CL-0204**).

[1083] Reply, ¶ 1822; *see also* Kotecha II, ¶ 3.24.

[1084] *Crystallex International Corporation v. Venezuela*, Award, ICSID Case No. ARB (AF) 11/2, April 4, 2016, ¶¶ 887, 916-917 (**CL-0204**).

[1085] *Crystallex International Corporation v. Venezuela*, Award, ICSID Case No. ARB (AF) 11/2, April 4, 2016, ¶ 878 (**CL-0204**).

techniques…can be done with a significant degree of certainty, even without a record of past production."[1086] None of these markers is present in this case.

732. Claimant also cites to one vague passage in the *Gold Reserve v. Venezuela* decision to support its assertion that DCF is appropriate because "INAGROSA was producing commodity nature products, and a detailed cashflow analysis was developed as part of its business plans."[1087] But comparing mining to commercial agriculture is an apples-to-oranges comparison. And the investment at issue in *Gold Reserve* is materially different than the investment at issue here because Inagrosa never had detailed feasibility studies or any other objective marker of viability. Indeed, the *Gold Reserve* tribunal justified its use of the DCF model given:

> …the effort and expense to which Gold Reserve had committed to get the mine operational. The detailed feasibility study and various impact studies all demonstrated that the level of analysis that had gone into the mine was significant. Moreover, Claimant demonstrated that its valuation was consistent with other independent valuations in 2006 and 2007 by Trevor Ellis, JP Morgan and RBC Capital.[1088]

733. The *Tethyan Copper v. Pakistan* case involved a gold and copper mine, Reko Diq, that was pre-operational but had undergone extensive pre-feasibility, feasibility, and exploration studies to determine the precise quantity of deposits.[1089] In its earlier Decision on Jurisdiction and Liability, the *Tethyan* tribunal determined that two of the world's largest mining companies, Antofagasta and Barrick Gold, "were willing to contribute large amounts of equity to the project."[1090] Furthermore, another of world's largest mining companies, BHP, was the initial joint

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[1086] *Crystallex International Corporation v. Venezuela*, Award, ICSID Case No. ARB (AF) 11/2, April 4, 2016, ¶ 879 (**CL-0204**).

[1087] Reply, ¶ 826.

[1088] *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶ 833.

[1089] *See Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶¶ 332-392 (**RL-0152**).

[1090] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶ 1245 (**RL-0152**).

venture partner in the project and succeeded by Tethyan.[1091] The experience of the mining companies and financiers, as well as the proven deposits—which minimized speculation—convinced the tribunal to apply a modern DCF methodology.[1092] Again, none of those objective markers of viability is present here.

734. Claimant's non-mining cases likewise fail to support its DCF arguments. In *Hydro and others v. Albania*, the claimants had investments in hydropower, wind power, and media companies. The tribunal ultimately found that claimants were entitled to damages for expropriation of the media company, Agonset. The *Hydro* tribunal found that the DCF method was reasonable for valuing Agonset because the enterprise was operational and claimants established a reasonable basis to project future cash flows given ascertainable inputs unique to valuing a media company, such as the power ratio and audience share.[1093]

735. Credibility explains that Inagrosa, in contrast to Agonset, "was never commercially operational" because its avocado harvest (1) is unproven; (2) "does not indicate the ability to expand the cultivation of avocados to the planned hectares; (3) does not represent cultivation of avocados at the scale envisioned in the business plan; (4) was not sold on the market; and (5) speculates on estimated per-tree quantities which are described as impossible to achieve."[1094]

736. In *Rumeli Telekom v. Kazakhstan*, the local investment—KaR-Tel—held a license to develop and operate a mobile telecommunications network for a period of ten years under an investment contract concluded with the government. The claimant alleged that within a few years

[1091] *See Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶¶ 217-218 (**RL-0152**).

[1092] *See Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 12, 2019, ¶ 281 (**CL-0205**).

[1093] *See Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, April 24, 2019, ¶¶ 848-863 (**CL-0202**).

[1094] Credibility II, ¶ 177.

into the contract, Kar-Tel had 193 employees, 160,000 subscribers, and USD $60 million in revenue.[1095] KaR-Tel also secured a loan from Motorola to develop its network.[1096] The *Rumeli* tribunal adopted claimant's DCF valuation with hesitation as a "starting point" because there was not "a more reliable method of valuation" available.[1097] Ultimately, the tribunal awarded claimant a USD $125 million, a heavily reduced sum from its claimed USD $458 million in damages, due to the investment's operational difficulties.[1098] In contrast to KaR-Tel, Inagrosa had never generated revenue from its avocado or hardwood timber enterprises nor had it secured external financing.

737. Accordingly, none of the cases cited by Riverside in its Reply can be used to prop up Mr. Kotecha's DCF model because, unlike all the models in all those other cases, the inputs in Mr. Kotecha's model are not based on objective markers of viability and profitability. Instead, the inputs in Mr. Kotecha's DCF model are based on self-serving estimations from Riverside's agents. Those estimations have already been proven to be wrong, as evident by Mr. Kotecha's downward revision of his damages projection by 63 percent. For these reasons, the DCF method should not be used here.

### 2. Even if *Rusoro* Served as Guidance, Riverside Has Failed to Demonstrate That It Meets the *Rusoro* Criteria for Applying DCF

[1095] *See Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 110 (**CL-0096**).

[1096] *See Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 93 (**CL-0096**).

[1097] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 813 (**CL-0096**).

[1098] *See Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶¶ 758, 814 (**CL-0096**).

738. As mentioned above, Riverside principally relies on the criteria set forth in *Rusoro* to assert that the DCF method ought to apply here. According to the *Rusoro* tribunal, "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 flows with a minimum of certainty."[1099]

739. Riverside claims that "[w]hile 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."[1100] But as shown below, Riverside and its investment fail the *Rusoro* test.

a. *Inagrosa Had No Established Historical Record of Financial Performance for Either Enterprise*

740. As an initial matter, and as has already been addressed in this section, Inagrosa had no established historical record of financial performance for its alleged Hass avocado business or for its alleged forestry business.

[1099] *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, ¶ 759 (**CL-0206**).

[1100] Reply, ¶ 1817.

741. Riverside does not—and cannot—allege that Inagrosa has any record of financial performance with respect to either business. It is undisputed that Inagrosa never sold one avocado or one unit of lumber.

742. Riverside, however, attempts to gloss over this undisputed fact by contending that Inagrosa has an established historical record of financial performance as to its avocado business because Inagrosa "completed the riskiest portion of its business operation: producing a high-quality commercial Hass avocado crop."[1101] But this argument fails for the following reasons.

743. ***First***, this *Rusoro* test calls for a historical record of ***financial*** performance. Having a fruit growing on your property is not evidence of financial performance. To satisfy this element, Inagrosa would have to demonstrate that it could reliably pick, process, ship, and sell this fruit for profit. That would require showing that: (i) Inagrosa had funding to pay for labor, supplies, etc. (it did not); (ii) Inagrosa had permits to commercialize its product (it did not); (iii) Inagrosa's business model was feasible (no feasibility studies or financial models); (iv) Inagrosa had a market to sell its fruit (no ability to export to the U.S. because of a longstanding ban and, as Mr. Rosales states in his witness statement, it was uncertain that Inagrosa would reach Canada or Costa Rica);[1102] and (v) Inagrosa could expand its 40-hectare plot to 1,000 hectares (it could not because the property was designated as a wildlife reserve and because half of its 1,142 hectares is in a "prohibited area" where Inagrosa could not expand its plantation).

744. ***Second***, as explained in Section II.C.2(c), *supra*, there is no evidence that Inagrosa had a "high-quality" avocado crop growing in its plantation because there is no evidence from the 2017 harvest that leads to this conclusion.

[1101] Reply, ¶ 1847.

[1102] Rosales I, § IV (**RWS-18**).

745. ***Third***, as explained in Section II.C, *supra*, all objective evidence demonstrates that Inagrosa's avocado experiment was a bust. Indeed, rather than expand its plantation, Inagrosa was in the process of converting its Hacienda into a wildlife reserve from 2016-2018, demonstrating that it had all but given up on its avocado experiment.[1103]

746. Accordingly, Claimant fails to satisfy the first *Rusoro* criterion.

b. *Inagrosa lacks reliable projections of future cash flows evidenced in detailed contemporaneous business plans verified by an impartial expert*

747. Nor can Riverside establish reliable projections of future cash flows because there has been no impartial verification of Inagrosa's business plans.

748. In its Reply, under a section titled "The Historical Financial Records," Riverside's only statement, other than quoting Nicaragua's Counter-Memorial, says "Richter set out clearly the sufficiency of the documentary evidence it reviewed, including the new evidence that it was able to review."[1104] Nicaragua presumes that this point primarily relates to the Rio Verde Hass Avocado ("**RVHA**") business plans discussed in Mr. Welty's witness statement. Claimant alleges these business plans were "reviewed by more than ten different private equity enterprises[.]"[1105] And Mr. Welty likewise contends "[t]hese business plans were sent out to institutional equity investors for commentary and evaluation of participatory interest."[1106]

749. ***First***, merely sending a business plan to a potential equity investor for its "review" cannot be equated with, as this *Rusoro* criterion requires, engaging an independent expert to review the enterprise's projected cash flows.

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[1103] *See* Section II.C.3, *supra*.

[1104] Reply, ¶ 2009 (*citing* Richter II, ¶¶ 2.1, 2.5 (**CES-04**)).

[1105] Reply, ¶ 1965.

[1106] Welty I, ¶ 43 (**CWS-11**).

750. ***Second***, every time these business plans were sent to potential third-party investors they ***refused to invest***.[1107] That fact is undisputed. In no objective world can such refusal be deemed to be a "verification" of the business plan. It is actually the opposite.

751. ***Third***, it is self-evident why these business plans were rejected: they are devoid of the information and details that would convince a third party to invest. Credibility thoroughly explains in their Second Report why these business plans lack sufficient detail and cannot be used as accurate inputs for a DCF analysis.[1108] But this Tribunal need look no further than Mr. Welty's contemporaneous description of these business plans as being: "too good to be true."[1109]

752. ***Fourth***, the lack of detail in Mr. Welty's business plans explain—but by no means justify—Mr. Kotecha's continued reliance on Riverside's witnesses' testimony for his cost assumptions. Credibility demonstrates in Table 4.4 that Mr. Kotecha relies purely on subjective evidence, as well as instruction from counsel:[1110]

[1107] *See* Credibility II, Appendix N: RVHA Business Plans (**RER-04**).

[1108] Credibility II, Appendix N: RVHA Business Plans (**RER-04**).

[1109] Email from Russ Welty re: RVHA Business Plan, June 26, 2017 (**C-0647**).

[1110] Credibility II, Table 4.4 (**RER-04**).

**Table 4.4: Kotecha DCF Model Cost Assumptions**[213]

| Cost | Amount | Source | Mr. Kotecha Check |
|---|---|---|---|
| **Cost of Goods Sold** | | | |
| Land preparation costs | $200.40/hectare | Mr. Rondón | - |
| Irrigation system | $3,000/hectare | Representation Letter | California costs [C-166] |
| Tree planting | $6.25/tree | Mr. Gutierrez | California costs [C-176] |
| Pruning | $382/hectare | Mr. Rondón | California costs [C-174] |
| Clearing | $2.61/hectare | Mr. Rondón | - |
| Weed cutting | $2.09/hectare | Mr. Rondón | - |
| Weed whipping | $0.04/tree | Mr. Rondón | - |
| Salaries - workers | C$ 300-400/day | Mr. Rondón | - |
| | | | |
| **Operating Costs** | | | |
| Salaries - management | 4% of revenue | Representation Letter | - |
| SG&A | 6% of revenue | - | Comparable public companies |
| Haulage | $5,000 - $10,000/container | - | MoverDB.com [C-184] |
| Land transport | $1,000/truck | Mr. Rondón | - |
| Property taxes | $4,000/year | Claimant Counsel | - |
| Insurance | $0/hectare | Management | - |
| Marketing | $0/year | - | - |
| Repairs & maintenance | 2% of irrigation investment | - | - |

c. *Prices of Avocados Cannot Be Determined with Reasonable Certainty*

753. Riverside fails the *Rusoro* test for the additional reason that it cannot be determined with reasonable certainty at what price Inagrosa would be able to sell its avocados.

754. In its Reply, Claimant alleges that "[b]ecause 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 …As a result, the Tribunal can rely on revenue projections that are based on historic production and thus not speculative."[1111] But this position is meritless for the following reasons.

755. ***First***, these statements underscore the core reason why a DCF valuation is inapplicable here. Riverside claims its avocado harvest "could be predicted," and, based on that prediction, one could project revenue "based on historic production." These two statements are irreconcilable. One cannot have reliable historical production if the harvest is predicted.

[1111] Reply, ¶ 1990.

756. ***Second***, Credibility confirms that a set "world market" price for avocados does not exist and that Mr. Kotecha's assumption that one exists is belied by his own calculations:

> Mr. Kotecha's assumptions regarding a world market price are not supported by his calculations. Between 2019 and 2021, Mr. Kotecha assumes Inagrosa will export avocados to Canada or Europe. However, Mr. Kotecha's own calculations using a "world price" are different than the avocado prices in the US during the same period. Accordingly, there is no "world price," as the price of avocados depends on many factors including, but not limited to, the: (1) country; (2) currency; (3) shipping costs; and (4) marketing expenses, which Mr. Kotecha completely ignores.[1112]

757. ***Third***, Riverside shifts its narrative about target export markets for avocados once Nicaragua established that exporting to the United States was a pipedream in light of the U.S. agricultural authorities' prohibition on importing Nicaragua avocados due to an endemic species of fruit fly. In Mr. Kotecha's First Report, he assumed Inagrosa would sell to Costa Rica from 2018-2019 and then the U.S. starting in 2020.[1113] In Mr. Kotecha's Second Report, he now assumes that Inagrosa would sell avocados to Costa Rica in 2018, Canada or Europe from 2019-2021, then the U.S. starting in 2022.[1114] Claimant's moving target for export markets results in unreliable avocado prices. Credibility demonstrates this by setting out Mr. Kotecha's shifting assumptions in Table 4.3 of their Second Report:[1115]

[1112] Credibility II, ¶ 86 (**RER-04**).

[1113] Kotecha I, ¶ A3.7 (**CES-01**).

[1114] Kotecha II, ¶ 8.3 (**CES-04**).

[1115] Credibility II, Table 4.3 (**RER-04**).

**Table 4.3: Kotecha Projected Avocado Price**[190]

| | First Kotecha DCF Model | | Second Kotecha Report | | Second Kotecha DCF Model | |
|---|---|---|---|---|---|---|
| | Export Country | Avocado Price/kg | Export Country | Avocado Price/kg | Export Country | Avocado Price/kg |
| **2018** | Costa Rica | $2.03 | Costa Rica | $2.03 | Costa Rica | $2.03 |
| **2019** | Costa Rica | $1.43 | Canada | $1.43 | Canada | $2.50 |
| **2020** | USA | $3.24 | Canada | $3.24 | Canada | $2.20 |
| **2021** | USA | $3.77 | Canada | $3.77 | Canada | $2.30 |
| **2022** | USA | $5.44 | USA | $4.03 | USA | $4.03 |
| **2023** | USA | $5.77 | USA | $3.02 | USA | $3.02 |
| **2024** | USA | $6.12 | USA | $3.53 | USA | $3.53 |
| **2025** | USA | $6.48 | USA | $3.71 | USA | $3.71 |
| **2026** | USA | $6.87 | USA | $3.91 | USA | $3.91 |
| **2027** | USA | $7.28 | USA | $4.12 | USA | $4.12 |

758. The above table demonstrates that Mr. Kotecha not only shifted his target export markets per instruction from Claimant, but, as Credibility notes, "Mr. Kotecha states in his second report that he assumes Inagrosa would export to Canada instead of the US, but the prices listed in his second report are unchanged."[1116] Further, Credibility explains that "[t]he prices listed in Mr. Kotecha's second report also do not tie to the Second Kotecha DCF model[.]"[1117]

759. ***Fourth***, and further underscoring the unreliability of Mr. Kotecha's avocado price assumptions, Credibility observes that Mr. Kotecha "calculates his projected avocado price as the average of organic and non-organic avocado prices in each month, even though there is no evidence Inagrosa was planning to cultivate organic avocados."[1118] The series of errors for avocado prices and quantities in Mr. Kotecha's First and Second Reports result in gross speculation best demonstrated in Credibility's Figure 4.3 in their Second Report:[1119]

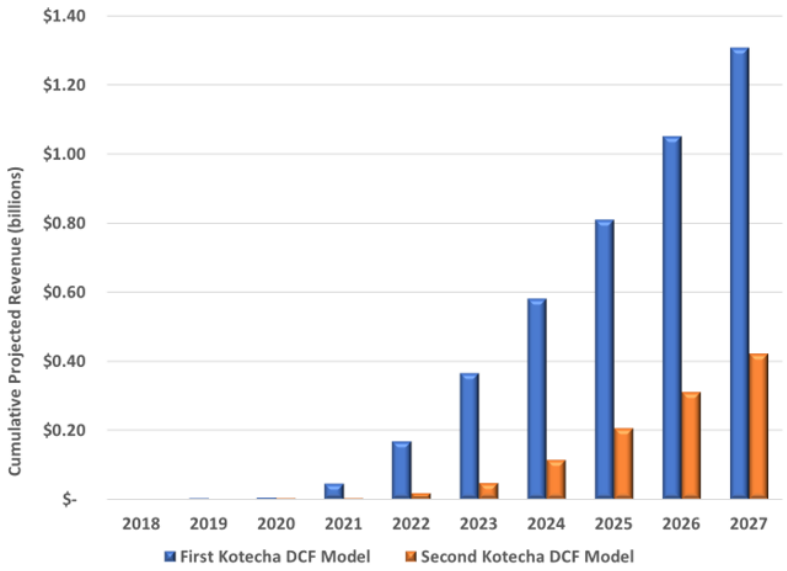
[1116] Credibility II, ¶ 83 (**RER-04**).

[1117] Credibility II, ¶ 83 (**RER-04**).

[1118] Credibility II, ¶ 84 (**RER-04**).

[1119] Credibility II, Figure 4.3 (**RER-04**).

**Figure 4.3: Projected Inagrosa Cumulative Revenue**[202]




760. As demonstrated in Figure 4.3, despite the errors that remain riddled throughout Mr. Kotecha's Second Report, Mr. Kotecha still voluntarily cut Inagrosa's revenue projections by nearly 70%. Such a drastic reduction between reports highlights Mr. Kotecha's wild speculation in constructing his DCF model. His Second Report perpetuates such speculation.

761. ***Fifth***, and as fully detailed in Section II.C, *supra*, there is no reliable evidence that Inagrosa's plantation produced the high-quality Hass avocados and, therefore, no certainty that its crop would sell at the price of a high-quality Hass avocado. To summarize here, although there is almost no contemporaneous records of what was growing at that plantation, the few reports show that there were different varieties of avocados grown, not just Hass avocados. And there is also a substantial amount of evidence that the Hass avocados that Inagrosa tried to grow suffered from root rot and other conditions, that would not allow this Tribunal to ascribe the prices Mr. Kotecha is espousing "with reasonable certainty" to Inagrosa's avocados.

d. *Inagrosa Could Not Be Financed with Self-Generated Cash Nor Had It Secured External Third-Party Financing*

762. It cannot be seriously argued that Inagrosa could be financed with self-generated cash or that it had secured external third-party funding. Inagrosa was destitute, with less than $1,1000 in its bank account from 2015 through the Valuation Date.[1120] And it had absolutely no external third-party financing. Its only investor—Riverside—is run by Mr. Rondón, the same individual who runs Inagrosa.

763. Yet, Riverside and Mr. Kotecha contend that an alleged resolution from Riverside's members that purportedly "pledged" up to USD $16 million to finance Inagrosa's operations, satisfies this element. This contention is incorrect for the reasons below.

764. ***First***, this "pledge" is nothing but a piece of paper.[1121] It is not an investment agreement nor anything that is binding on Riverside. So in no way can this "pledge" be considered "securing funding."

765. ***Second***, to illustrate the first point, Riverside ***did not invest any money in Inagrosa since 2014***, thereby confirming this pledge was meaningless. According to Credibility, "although $16 million of funding from Riverside to Inagrosa was allegedly committed as of June 2016, Riverside did not make good on this commitment as it did not provide any funding to Inagrosa in 2016, 2017 or 2018."[1122] In other words, from 2016 to 2018, the years in which Inagrosa was supposedly in the middle of formulating its avocado business, it was unable to count on Riverside for one dollar of investment.

[1120] Credibility I, ¶ 57.

[1121] *See* Riverside Members Resolution - Financial Support for INAGROSA Expansion Plan, June 10, 2016 (**C-0286**); Riverside Members Resolution- Continued Financial Support for INAGROSA Expansion, March 7, 2018 (**C-0287**).

[1122] Credibility II, ¶ 64 (**RER-04**).

766. ***Third***, Riverside's position that its members had "pledged" up to USD $16 million to fund Inagrosa cannot be reconciled with the undisputed fact that from 2016 to 2018 Riverside tried desperately to secure outside funding from 15 different groups of investors.[1123]

e. *A Meaningful WACC Calculation Is Not Possible*

767. The *Rusoro* tribunal held that a DCF model must contain a meaningful calculation of the weighted average cost of capital ("**WACC**"). As explained in the Counter-Memorial, Mr. Kotecha presented a flawed calculation of the WACC.[1124]

768. In its Second Report, Credibility shows that Riverside and Mr. Kotecha did nothing to correct his flawed WACC calculation. Instead, by way of summary and as fully detailed in Credibility's Second Report, Mr. Kotecha doubles down on the following flaws: (1) a blended beta using companies from different countries; (2) an unsupported country risk premium; (3) an unsupported range of company-specific risk; (4) lacking explanation for why U.S. Corporate BBB bonds have similar risk to the debt of Inagrosa; and (5) an inexplicable use of Riverside's optimal capital structure for Inagrosa.[1125] Mr. Kotecha's WACC calculation thus comprises several components that are completely unsubstantiated, further compounding the speculative nature of a DCF valuation here.

f. *Inagrosa's Chosen Commodities Were Subject to Domestic and International Regulatory Pressure and Strict Export-Import Approvals*

769. Nicaragua demonstrated in its Counter-Memorial, and again in Sections II.C-II.D, *supra*, that Inagrosa's alleged avocado and hardwood timber enterprises faced insurmountable

[1123] *See* Welty I, § 3 (**CWS-11**).

[1124] Counter-Memorial, § V.C.5.

[1125] Credibility II, ¶¶ 96-103 (**RER-04**); *see id.*, ¶ 103 ("Overall, Mr. Kotecha has not addressed or rectified the errors in his WACC. Accordingly, although the DCF method should not be used in this Arbitration, we maintain our opinion that Mr. Kotecha's discount rate is unsupported and not reasonably reliable.").

regulatory hurdles both within Nicaragua and in the export context. 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.

770. Further, this fact means that Mr. Kotecha's assumption that Inagrosa would have exported avocados and timber to Costa Rica, Canada (or Europe), and the U.S. is unfounded, since Inagrosa never registered as an exporter of those goods in Nicaragua,[1126] much less completed the rigorous phytosanitary process to be able to export those goods.[1127]

771. This is not just a technicality that Inagrosa could have easily overcome. Rather, the permitting processes that Inagrosa needed to complete for its businesses are uncertain and cannot be assumed. This is especially the case here given that the United States has a policy currently in place that ***prohibits the importation of avocados from Nicaragua*** as well as the fact that Nicaragua classified Hacienda Santa Fé as a private wildlife reserve, meaning that Inagrosa was ***legally prohibited*** from cutting down trees from its private forest to sell the timber or to use the land for avocado cultivation,[1128] as the Kotecha Reports assume that Inagrosa would do. Again, this analysis is fully set out in Section II, *supra*.

* * *

772. In conclusion, Riverside's DCF approach for calculating economic damages, as set forth in the First and Second Kotecha Reports, must be rejected in light of Riverside's abject failure to provide any historical sales records, reliable cost inputs, independently verified business plans,

[1126] Certificate issued by CETREX No. 4 (**R-0023**).

[1127] Certificate issued by IPSA No. 3 (**R-0067**).

[1128] González I, ¶¶ 65-68 (**CWS-009**).

feasibility studies, logistics contracts, or permits that would support a DCF approach. A DCF analysis is wholly inapplicable and entirely speculative in the context of a mere experiment, like Inagrosa's avocado business; and, in the context of its forestry business, a completely unexplored venture. If the Tribunal does find that Riverside has proven liability, causation, and entitlement to damages based on sufficient contemporaneous evidence (which it still has yet to produce) and is thus inclined to award damages—which it should not—it should adopt a far less speculative approach, as Credibility puts forth in its alternative valuation methodology.[1129]

### B. As the Least Speculative Approaches, An Alternative Valuation Based on the Historic Costs or Change in Value Method Should Be Applied, if Damages Are Awarded

773. As established above, any claim for damages under a DCF analysis remains completely unsupported. In the unlikely event that the Tribunal awards damages in this case, Credibility's alternative historic costs or asset-based change in value method remain the only reliable valuations. Nicaragua refers the Tribunal to Credibility's Second Report in this regard.[1130]

774. By way of summary, Claimant's historical costs can be readily determined in Riverside's tax filings, where, as of 2018, Claimant had invested USD $136,190 in the avocado experiment.[1131]

775. The Tribunal may also choose to apply an asset-based valuation that accounts for the change in value of Hacienda Santa Fé between the valuation date (June 16, 2018) and four end dates from which the Tribunal may select based on its factual determinations. Section 5.2.2 of the Credibility Second Report thoroughly discusses its underlying assumptions for each of the four

[1129] *See* Credibility I, Appendix I.3: Alternative Damages - Scenario 3 (**RER-02**).

[1130] *See* Credibility II, § 5.2 (**RER-04**).

[1131] *See* Credibility II, ¶ 123 (**RER-04**); 2018 Riverside US Federal IRS Tax Return - Form 1065 (**C-0323**).

scenarios, and thus need not be repeated here.[1132] The four scenarios are summarized in Table 2.1 and expanded further in Tables 5.2, 5.3, 5.4, and 5.5 in the Second Report. As detailed in Table 2.1, depending on the factual determinations of the Tribunal, Riverside's damages, if any are due, range from USD $ 643,701 to USD $9,305.[1133]

**Table 2.1: Damage Analysis Summary**[14]

| Scenario 1 | |
|---|---|
| **Land** | |
| Jun-18 | 910,110 |
| Mar-24 | 474,840 |
| **Difference** | **435,270** |
| **Infrastructure** | |
| Jun-18 | 1,767,948 |
| Mar-24 | - |
| **Difference** | **1,767,948** |
| | |
| **Total** | 2,203,218 |
| Claimant Ownership | 25.50% |
| **Claimant Total** | **561,821** |
| Prejudgment Interest | 81,880 |
| **Total** | **643,701** |

| Scenario 2 | |
|---|---|
| **Land** | |
| Jun-18 | 910,110 |
| Mar-24 | 474,840 |
| **Difference** | **435,270** |
| **Infrastructure** | |
| Jun-18 | 1,767,948 |
| Mar-24 | 1,009,245 |
| **Difference** | **758,703** |
| | |
| **Total** | 1,193,973 |
| Claimant Ownership | 25.50% |
| **Claimant Total** | **304,463** |
| Prejudgment Interest | 44,373 |
| **Total** | **348,836** |

| Scenario 3 | |
|---|---|
| **Land** | |
| Jun-18 | 910,110 |
| Sep-21 | 666,300 |
| **Difference** | **243,810** |
| **Infrastructure** | |
| Jun-18 | 1,767,948 |
| Sep-21 | 1,342,971 |
| **Difference** | **424,977** |
| | |
| **Total** | 668,787 |
| Claimant Ownership | 25.50% |
| **Claimant Total** | **170,541** |
| Prejudgment Interest | 24,855 |
| **Total** | **195,396** |

| Scenario 4 | |
|---|---|
| **Land** | |
| Jun-18 | 910,110 |
| Aug-18 | 898,500 |
| **Difference** | **11,610** |
| **Infrastructure** | |
| Jun-18 | 1,767,948 |
| Aug-18 | 1,747,711 |
| **Difference** | **20,237** |
| | |
| **Total** | 31,847 |
| Claimant Ownership | 25.50% |
| **Claimant Total** | **8,121** |
| Prejudgment Interest | 1,184 |
| **Total** | **9,305** |

776. In Mr. Kotecha's Second Report, he agrees that an alternative asset-based valuation may be used to assess Riverside's damages.[1134] As summarized in Chart 5 of his Second Report, Mr. Kotecha calculates a change in value of USD $166,085,418.

[1132] *See* Credibility II, § 5.2.2 (**RER-04**).

[1133] *See* Credibility II, ¶ 19, Table 2.1 (**RER-04**).

[1134] *See* Kotecha II, ¶ 6.9 (**CES-04**).

777. Credibility highlights the flaws in Mr. Kotecha's asset-based valuation and how he artificially inflates his calculation. In particular, Mr. Kotecha: (1) assumes an unplanted additional 200 hectares was planted (which contradicts Claimant's Reply submission); (2) arbitrarily adopts the most valuable comparator property to arrive at his FMV/Ha calculation simply because of Luis Gutierrez's subjective belief that the comparison is adequate; (3) does not account for an end date for his valuation because Nicaragua's letter asking Claimant to re-take possession "was addressed to Riverside, not INAGROSA";[1135] and (4) neglects the fact that Riverside only owned 25.5% of Inagrosa as of June 2018.[1136]

778. Nicaragua emphasizes, and Riverside does not dispute that Riverside only owned 25.5% of Inagrosa during June 2018. As Nicaragua established in Section II.B., *supra*, Claimant only submitted a claim under DR-CAFTA Article 10.16.1(a) ***on its own behalf***. Any damages potentially awarded therefore must be reduced by 74.5%, to account for Riverside's 25.5% shareholding at the time of the alleged breaches. Therefore, Riverside would only be entitled to 25.5% of the damages awarded.[1137]

779. The Tribunal should thus adopt one of the scenarios put forth by Credibility, as those scenarios remain the least speculative valuations that incorporate assumptions that are most closely aligned with the facts of this case.

### C. Any Damages Awarded Must Be Reduced Because Inagrosa Contributed to the Alleged Damages, Failed to Mitigate Its Damages, and Has Outstanding Debts to Nicaragua

780. Nicaragua established in its Counter-Memorial that any compensation awarded must account for Riverside's and Inagrosa's contributory negligence, failure to mitigate damages,

[1135] *See* Kotecha II, ¶ 6.4 (**CES-04**).

[1136] *See* Credibility II, § 5.2.2 (**RER-04**).

[1137] *See* Section III.B., *supra*.

the sums expended by Nicaragua to secure HSF after Claimant refused to take back possession, and the tax amounts Inagrosa owes to Nicaragua. In response, Riverside offers little more than vague and unsubstantiated assertions.

781. ***First***, Nicaragua cited to several decisions where an investor's own negligence or lack of due diligence contributed to the harm alleged.[1138] Riverside did nothing to rebut the relevance of those decisions.[1139] Indeed, contributory fault is well-established under international law "deriving from a consistent line of international legal materials,"[1140] including Article 39 of the ILC Articles, which expressly states:

> In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[1141]

782. In response, Claimant raises only a straw man argument that Article 39 of the ILC Articles does not apply in the context of protecting human rights.[1142] This is not a human rights case, and any suggestion otherwise is deliberately misleading.

783. What Claimant failed to address, much less rebut, is that: (i) Inagrosa and Riverside each knew that Hacienda Santa Fé was invaded continuously from 1990 to 2004 by members of a farming cooperative—*Cooperativa El Pavón*—and that there existed the risk that the Hacienda would be re-invaded by those members yet neither Riverside nor Inagrosa secured their property; (ii) Inagrosa and Riverside failed to secure their property again after Nicaragua evicted all invaders from the property on August 11, 2018—that failure resulted in those invaders returning a week

[1138] *See* Counter-Memorial, ¶¶ 495-498.

[1139] *See* Reply, ¶¶ 1768-1776.

[1140] *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016, ¶ 6.97 (**RL-0053**).

[1141] ARSIWA, Art. 39 (**CL-0017**).

[1142] Reply, ¶ 1770.

later to re-invade the Hacienda; and (iii) Riverside and Inagrosa had all but abandoned Hacienda Santa Fé as of June 2017, which allowed invaders to take the upper part of the Hacienda without even being seen.[1143]

784. ***Second***, Nicaragua established in its Counter-Memorial that Claimant failed to mitigate its damages when it chose to let Hacienda Santa Fé sit in completely abandonment and refused to re-take possession when Nicaragua offered it in September 2021. In response, Claimant resorts to mental gymnastics when it argues that the September 2021 offer "was pretextual and bad faith" without citing ***any evidence*** to support that conclusion.[1144] But as fully detailed in Section II, *supra*, Nicaragua has always recognized Riverside's property rights in Hacienda Santa Fé and has invited Riverside and Inagrosa in writing to take back their property no fewer than five times. Each time, Riverside and Inagrosa have refused, which demonstrates just how little those entities value Hacienda Santa Fé. Indeed, if this property had the perfect conditions to sustain an avocado business worth hundreds of millions of dollars and premium lumber worth millions of dollars more than one would think that its owners would want that property back as soon as possible. But that has not been the case here.

785. ***Third***, Nicaragua explained that any damages must be offset by Nicaragua's hiring of private security to protect Hacienda Santa Fé, as well as the property taxes owed by Inagrosa. Riverside is silent with respect to the security expenses but claims that Nicaragua's property tax assessment is "suspiciously in connection with this arbitration."[1145] Riverside, in typical fashion, reaches that conclusion with no justification. Particularly where, as here, the tax issue pre-dated

[1143] Counter-Memorial, ¶¶ 499-501.

[1144] Reply, ¶ 1764.

[1145] Reply, ¶ 1764.

this arbitration, as evident by evidence in this record showing that Inagrosa was trying (but failed) to pay these property taxes in the months before the invasion occurred.

### D. Riverside's Other Damages Arguments Fail

#### 1. Riverside Is Not Entitled to a "Tax Gross Up"

786. Claimant and Mr. Kotecha, for the first time in Riverside's Reply, allege that the Tribunal must assess a "30% tax gross-up to the pre-interest DCF values."[1146] Claimant's request for this tax gross-up is completely unsupported, and, in any event, applied improperly by Mr. Kotecha.

787. ***First***, Claimant or Mr. Kotecha cite to no legal basis—whether under DR-CAFTA or in investment arbitration practice—for the use of a tax gross-up. This is unsurprising because tribunals have specifically rejected such gross-ups in prior cases. In *Antin v. Spain*, the tribunal dismissed claimant's request for a tax gross-up of 29.22% and explained that "it is for Claimants to prove whether or in what amount any tax on compensation determined on a future award may be due."[1147] The tribunal explained that it "is not in a position to determine whether there would be a specific tax impact."[1148] Other tribunals have held similarly and refused to engage in the hypothetical and therefore speculative exercise of determining whether taxes would apply to any compensation.[1149] As the *Les Laboratoires Servier v. Poland* opined, "[t]he ultimate tax treatment of an award representing the 'real value' of an investment must be addressed by the fiscal

[1146] Reply, ¶ 2067; Kotecha II, ¶ 8.29 (**CES-04**).

[1147] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018, ¶ 673 (**RL-0195**).

[1148] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018, ¶ 673 (**RL-0195**).

[1149] *See Les Laboratoires Servier, S.A.S., Biofarma, S.A.S. and Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award, February 14, 2012, ¶ 666 (**RL-0196**); *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award, December 18, 2020, ¶¶ 125-126 (**RL-0190**).

authorities in the investor's home jurisdiction as well as the host state."[1150] Claimant has provided no proof that Nicaragua would assess a 30% tax on any award of compensation, and therefore any tax gross-up as a matter of principle remains entirely speculative and must be rejected. To hold otherwise might grant Claimant sums to which it may not be entitled, if no tax, or a rate less than 30%, is assessed by either Nicaragua or the United States.

788. ***Second***, even if a tax gross-up is conferred, Credibility explains that Mr. Kotecha's tax gross-up "does not reflect the reality of operations at Inagrosa."[1151] According to Credibility, Inagrosa only paid income tax one year between 2010-2016 (when Inagrosa was a coffee cultivator) and that its effective tax rate was 21.9%.[1152] This is yet another example of Mr. Kotecha blindly accepting "instruction" from Claimant without proper review of Inagrosa's financial information.

789. ***Third***, Mr. Kotecha claims that the 30% tax gross-up was assessed for any "pre-interest DCF values."[1153] Credibility demonstrates that Mr. Kotecha did the opposite and applied the tax gross-up to post-interest values resulting in an inflated damages assessment under his 1,000 hectare scenario.

2. Riverside's Request for Post-Award Interest Must Be Rejected

790. Riverside alleges that it is "entitled to compound interest accruing on such an Award from the date of the award until payment is made in full."[1154] Riverside claims that the "threat of post-award interest removes any incentive on the part of the Respondent to further delay

[1150] *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S. and Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award, February 14, 2012, ¶ 666 (**RL-0196**).

[1151] Credibility II, ¶ 117 (**RER-04**).

[1152] Credibility II, ¶ 117 (**RER-04**).

[1153] Kotecha II, ¶ 8.29 (**CES-04**).

[1154] Reply, ¶ 2062.

the compensation to which Riverside is entitled."[1155] Its justification for this "threat" is the Protective Order and alleged "erosion judicial independence" in Nicaragua. This argument is ludicrous and must be rejected.

791. ***First***, Nicaragua proved in Section II, *supra*, that, rather than harming Inagrosa's interests in Hacienda Santa Fé, the Protective Order protects those interests.[1156]

792. ***Second***, Riverside's vague references to "erosion of judicial independence" are not only unsubstantiated but also irrelevant to Nicaragua's adherence to its international obligations, which includes compliance with arbitral awards. Casting unfounded aspersions on a sovereign State's domestic legal system is not only reprehensible but not the basis to assume non-compliance with its obligations under DR-CAFTA and the ICSID Convention.

793. ***Third***, Riverside's plea for post-award compound interest is a thinly veiled request for punitive damages—a principle expressly prohibited under DR-CAFTA Article 10.26.3 and otherwise soundly rejected in international investment law. DR-CAFTA Article 10.26.3 states that "[a] tribunal is not authorized to award punitive damages."[1157] Further, the *Venezuela US S.R.L. v. Venezuela* tribunal soundly rejected an investor's attempt to impose a punitive interest rate.[1158] It is telling that Claimant cites to no arbitral award where punitive damages, or, more discretely, punitive interest was awarded. Riverside instead relies in passing on an excerpt of Ripinsky and Williams, which is taken completely out of context, to justify its punitive interest request.[1159]

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[1155] Reply, ¶ 2062.

[1156] *See* Section II, *supra*.

[1157] DR-CAFTA, Article 10.26.3 (**CL-0001**).

[1158] *See Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Final Award (Quantum), November 4, 2022, ¶ 80 (**RL-0197**) ("The Tribunal agrees with the Respondent that interest must be compensatory, not punitive.").

[1159] *See* Reply, ¶ 2062, fn. 2025 (*citing* S. Ripinsky and K. Williams, Damages in International Investment Law (2008), p. 389 (**CL-0203**) (hypothesizing that such "changes can be explained by the desire of some tribunals to ensure prompt

Following the excerpt Claimant cites, Ripinsky and Williams explain that "[i]t is not clear whether international law permits the use of post-award interest to punish the respondent for non-compliance with the award."[1160]

794. ***Fourth***, wielding compound interest as a "threat" to encourage compliance with an award is not only inconsistent with Article 10.26.3, which prohibits punitive damages, but also Article 10.26.8 of DR-CAFTA. Article 10.26.8 is *lex specialis* setting forth an entire procedure when a respondent-State fails to comply with an award.[1161] Awarding compound interest is not a remedy under that procedure. Accordingly, Claimant's attempt to secure punitive post-award compound interest must be dismissed.

### 3. Riverside's Pre-Award Interest Rate Remains Incompatible with the Express Terms of DR-CAFTA

795. In its Memorial, Riverside argued that the Nicaraguan domestic court statutory rate of 9% should be used to calculate pre-award interest.[1162] But Nicaragua established that the rate selected by Riverside is incompatible with DR-CAFTA Article 10.7(3) because the statutory rate is denominated in Nicaraguan Córdobas ("**NIO**") whereas Claimant's damages are denominated in U.S. dollars.[1163] In response, Riverside doubles down on its request for an NIO-denominated pre-award interest rate and does not address its invalidity under DR-CAFTA. Nicaragua therefore relies on its Counter-Memorial in this regard and reaffirms its request that the Tribunal apply the

compliance with the award by adding a punitive interest and thereby turning the post-award interest from a purely compensatory instrument into a sanction.")

[1160] S. Ripinsky and K. Williams, Damages in International Investment Law (2008), p. 390 (**CL-0203**).

[1161] *See* DR-CAFTA, Article 10.26.8 (**CL-0001**).

[1162] *See* Memorial, ¶ 807.

[1163] *See* Counter-Memorial, ¶¶ 520-521.

only rate pled by either Party that is compatible with DR-CAFTA: the 10-year U.S. Treasury bond rate.

796. Nicaragua notes Riverside's argument that it may rely on the MFN clause in DR-CAFTA to import the "more favorable" interest provision in the Russian BIT.[1164] But that argument must be dismissed out of hand because Claimant makes no effort to demonstrate how a "a market-defined commercial rate" (under the Russian BIT) is more favorable than "a commercially reasonable rate" (under DR-CAFTA).

797. Claimant and Mr. Richter also fail to apply an alternative rate of interest in line with the alleged more favorable rate under the Russian BIT, thus rendering Claimant's entire argument moot. Whilst arguing for a more favorable rate, however, Claimant and Mr. Richter both concede that a "treasury bill rate" can be applied.[1165] That is what Nicaragua proposes here, and Credibility confirms that the 10-year U.S. Treasury bond rate is appropriate because the currency of the damages "calculation, and not the location of the investment, is determinative."[1166]

#### 4. Riverside's Request for Moral Damages Is Baseless and Brought in Bad Faith

798. In its Memorial, Riverside described alleged, but unproven, experiences by Messrs. Gutiérrez and Vivas during the invasions at Hacienda Santa Fé.[1167] Based on these allegations, it is Riverside's position that moral damages should be awarded in this case.

799. In its Counter-Memorial, Nicaragua established that Riverside's request for moral damages is legally unfounded and factually unsupported for the following reasons: (1) Riverside has no standing to claim moral damages because those persons present during the invasion were

[1164] *See* Reply, ¶¶ 238-241.

[1165] *See* Reply, ¶ 240; Richter II, ¶ 8.12 (**CES-04**).

[1166] Credibility I, ¶ 164 (**RER-02**); Credibility II, ¶ 138 (**RER-04**).

[1167] Memorial, ¶¶ 911-915.

only Inagrosa employees; and (2) Riverside has not even attempted to overcome its burden of proving moral damages, which are only available under exceptional circumstances.[1168]

800. Nicaragua also noted that Riverside's claim for moral damages made no sense because Riverside asks the Tribunal to award ***Riverside*** moral damages for moral grievances allegedly suffered by ***Inagrosa***.[1169] And while these companies share a common employee—Mr. Rondón—there was no allegation that he was at the property during the invasion. In fact, he was not even in Nicaragua.

801. Because its original story did not make any sense, Riverside has now changed it. In its Reply—and for the first time in this arbitration—Riverside now claims that this moral damage "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."[1170] To be sure, Riverside does not allege that Mrs. Winger de Rondón or Melvin Winger were at the Hacienda or even in Nicaragua during the invasion. Riverside's theory instead is that these individuals somehow were indirectly attacked, thousands of miles away in the U.S., by the invasion. But this does not work for the following reasons.

802. ***First***, tribunals have rejected attempts to seek moral damages for natural persons who did not experience firsthand the measures alleged.[1171]

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[1168] *See* Counter-Memorial, ¶¶ 524-540; *see also Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, December 17, 2015, ¶ 895 (**RL-0107**) (explaining that the "bar for recovery of [moral] damages has been set high" and will only be awarded in "exceptional circumstances");

[1169] Counter-Memorial, § V.G.1.

[1170] Reply, ¶ 2075.

[1171] *See Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 922 (**RL-0061**); *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, July 28, 2015, ¶ 917 (**RL-0108**).

803. ***Second***, assuming those individuals did suffer mental anguish and that Nicaragua could have been responsible—both of which Nicaragua vehemently disputes—those individuals are ***not named claimants*** and have no standing to claim for alleged personal injury.

804. ***Third***, that Riverside's new narrative is supported by nothing but a few self-serving passages in Melva Jo Winger de Rondón and Carlos Rondón's witness statements does not come close to satisfying the exceptional circumstances standard required for finding moral damages.[1172] It also demonstrates that Riverside now considers moral damages an afterthought.

805. Riverside's conclusory statements without any corroborating objective evidence of the harm they suffered coupled by the fact that Riverside cannot keep its own narrative straight as to whom or what suffered moral damages shows that this entire claim is brought in bad faith. The Tribunal must consider the recklessness with which Riverside has alleged moral damages when it apportions costs and legal fees. The fact that Riverside has taken it upon itself to publicly denigrate Nicaragua for acts that it did not commit and for alleged anguish suffered by individuals that ***were in the U.S.*** in 2018 must be taken into consideration in the Tribunal's eventual costs award.

[1172] Winger de Rondón II, ¶¶ 87-93 (**CWS-08**); Rondón II, ¶¶ 165-166 (**CWS-09**).

## VI. PRAYER FOR RELIEF

806. For the reasons set out in this Rejoinder, the Republic of Nicaragua respectfully requests that the Tribunal:

a. DECLARE that Claimant's claim for damages under DR-CAFTA Article 10.16.1(a) is inadmissible;

b. DISMISS Claimant's claims brought under Articles 10.3, 10.4, 10.5, and 10.7 of DR-CAFTA as meritless;

c. DISMISS Claimant's request for compensation in its entirety, including its request for moral damages;[1173]

d. ORDER Claimant to pay Nicaragua the costs of providing security to preserve the abandoned Hacienda Santa Fé, as well as the amount of outstanding tax debt owed by Inagrosa S.A. or debt with the government of any other nature; and

e. ORDER Claimant to pay all costs and expenses related to this arbitration, including but not limited to the fees and expenses of the Tribunal, the administrative fees and expenses of ICSID, and all costs of Nicaragua's legal representation and expert assistance, plus pre-award and post-award compound interest accrued thereon until the date of payment estimated at a rate determined by the Tribunal.

f. GRANT any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

[1173] In the event the Tribunal does find Nicaragua liable under DR-CAFTA and that Riverside is entitled to damages, Nicaragua requests that the Tribunal award damages according to Riverside's *pro rata* shareholding in Inagrosa of 25.5% at the time of the alleged measures.

March 8, 2024

Respectfully submitted,

[Signed]

Analia González
Nahila Cortés
James J. East, Jr.
Fabián Zetina
Diego Zúñiga
**Baker & Hostetler LLP**
1050 Connecticut Avenue NW
Suite 1100
Washington, DC 20036

Marco Molina
Carlos Ramos-Mrosovsky
**Baker & Hostetler LLP**
45 Rockefeller Plaza
Suite 1400
New York, NY 10111

***Counsel for Republic of Nicaragua***